Merkin v Berman
2014 NY Slip Op 31773(U)
July 7, 2014
Sup Ct, NY County
Docket Number: 652415/12
Judge: Richard B. Lowe III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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J. EZRA MERKIN,

Petitioner,

Index No. 652415/12

-against-

JOSHUA M. BERMAN, on behalf of JOSHUA M. BERMAN Individual Retirement Accounts,

Respondents.

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HON. RICHARD B. LOWE, III:

This is a special proceeding brought pursuant to Section 7510 of the New York Civil Practice Law And Rules and the Federal Arbitration Act, 9 U.S.C. §§ 1-16, to confirm an arbitration award (the "Award") in the arbitration captioned *In the Matter of the Arbitration between Joshua M. Berman on behalf of the Joshua M. Berman Individual Retirement Accounts, Claimant, against J. Ezra Merkin, Respondent,* American Arbitration Association Case No. 13 512 00103 11 (the "Arbitration"). As part of the Petition, Petitioner J. Ezra Merkin ("Merkin") seeks indemnification.

Respondent, Joshua M. Berman, on behalf of Joshua M. Berman Individual Retirement Accounts ("Berman") brings a cross petition seeking an order dismissing Petitioner's claim for indemnification and seeking vacateur of the Award. In the alternative Berman consents to confirming the Award on condition that he be allowed to participate in a settlement between Petitioner and the New York Attorney General (the "Settlement").

Background

The background of this special proceeding, the underlying arbitration, and the Settlement is discussed in this Court's order dated January 22, 2014 and reference is made herein. Generally, Respondent is an investor in Ascot Partners, L.P. ("Ascot"), a fund which lost the value of its investments as a result of the massive Ponzi scheme perpetrated Bernard L. Madoff. Rather than participating in the action brought under the Martin Act, on behalf of Ascot investors by the New York Attorney General ("NYAG"), Berman chose to file an arbitration proceeding pursuant to the Ascot Subscription Agreement (the "Subscription Agreement"). The arbitration panel unanimously denied Respondent's claims in their entirety in an award dated June 28, 2012 (the "Award").

In this instant motion, Petitioner seeks to confirm the Award and seeks indemnification costs pursuant to the Subscription Agreement. Berman cross petitions seeking to dismiss the claims for indemnification costs. Respondent also seeks a rejection of the arbitrators' finding alleging they refused to hear "pertinent and material evidence" in the form of certain deposition testimony by a non-party. In the alternative, Berman seeks leave to participate in the Settlement.

Discussion

Arbitration awards in New York are subject to very limited review (*Tullett Prebon Fin. Servs. v BGC Fin., LP*, 111 AD 3d 480 [1st Dept 2013]). To achieve the goals of efficient settlement of disputes and the avoidance of long and expensive litigation, courts are loath to deny confirmation of an arbitration award (*Folkways Music Publishers, Inc v Weiss*, 989 F 2d 108 [2d Cir 1993]).

It is only when arbitrators exceed their powers and "manifestly disregard" the law that an

[* 3]

arbitration award should be vacated (*Id).* "Specifically, a court may not vacate an arbitration award unless it finds that: '(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case'" (*McDaniel v Bear Stearns & Co., Inc.* 196 F Supp 2d 343, 351 [US Dist Ct, SDNY 2002]) (quoting *Greenberg v Bear, Stearns & Co.*, 220 F 3d 22, 28 [2d Cir 2000]).

Unless an arbitrator's determination is rendered totally irrational, his refusal or failure to pass upon an arguably relevant issue or item of evidence is a matter of arbitral judgment that is not judicially reviewable (*See Maross Constr, Inc. v Central New York Reg'l Transp. Auth.*, 66 NY2d 341, 348 [1985]) "Because arbitrators are not required to give reasons for their decision, an award cannot be attacked on the basis of . . .evidence that the panel refused to consider or failed to appreciate particular evidence or arguments" (*Solow Bldg. Co. v Morgan Guar. Trust Co. of New York* 6 AD3d 356, 356-57 [1 st Dept 2004]*).*

Berman argues that the arbitration panel erred in failing to hear portions of deposition testimony of a non party. His request of the panel to hear the testimony was made after the record was closed. An arbitrator's decision that a party was afforded ample opportunity to present all claims fully and therefore will not be permitted to reopen their direct case by submitting additional testimony does not constitute grounds for setting aside the arbitrator's award (*See In the Matter of Big-W Construction Corp.*, 24 Misc 2d 145 [Sup Ct. Queens Cty Oct. 5, 2959]). Accordingly, the refusal of the arbitrators to hear the particular testimony which the record shows was attempted to be submitted after the hearing proceedings were closed is not review able by this court. "Such errors are not subject to judicial review for parties who desire

and submit to arbitration waive and forego provisions of law ordinarily applicable to judicial actions and proceedings and leave all questions of law and fact, including rulings on questions propounded for decision by the arbitrators" (*Id*)(citing *Penco Fabrics, Inc. v Louis Bogupulsky, Inc.* 1 AD2d 659 [1st Dept 1955]).

The court has reviewed the record and finds the Respondents claims without merit. The arbitrators did not manifestly disregard the law and there are no grounds for vacating the award. Accordingly, the award is confirmed.

Berman argues that despite his loss in the arbitration, he should be permitted to participate in the NYAG action and the Settlement. After choosing arbitration rather than participating in the NYAG's case and having his claims rejected by the arbitrators, Berman seeks to alternatively participate in the Settlement.

The Settlement agreement expressly provides that investors who opted to bring separate claims against Merkin and litigated those claims to a final arbitration award could not thereafter choose to participate in and receive a distribution from the Settlement . Berman has pursued all claims against Merkin that belonged to him. He cannot now make another attempt to revive these claims through the Settlement agreement. Berman argues that his claims before the arbitrators were different from the NYAG's claims. However, there is no private right of action under the Martin Act which could have been brought by Berman (*See CPC Int'l v McKesson Corp.* 70 NY2d 268, 275 [1987]) and he has pursued all claims against Merkin that belong to him. Further, under the doctrine of res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy (*O'Brien v City of Syracuse* 54

[* 5]

NY2d 353, 357 [1981]). Therefore, that part of the cross motion seeking to allow Berman to participate in the Settlement Agreement is denied.

Lastly, Petitioner seeks indemnification for his costs pursuant to the Subscription Agreement. Berman claims that Merkin does not have personal jurisdiction over him with respect to the indemnification claim. The indemnification claim arises from Merkin's defense of the arbitration brought by Berman in New York. Therefore Berman's argument that there is no personal jurisdiction over him is without merit (*See Kreutter v McFadden Oil Corp.* 71 NY2d 460 [1988]).

The terms of the Subscription Agreement states

> The Investor agrees to indemnify and hold harmless the Partnership, the General Partner, the Management Company and each of their respective partners, members, directors, officers and agents, and each other person, if any, who controls, is controlled by, or is under common control with, any of the foregoing, within the meaning of Section 15 of the Securities Act, against any and all loss, liability, claim, damage and expense whatsoever (including all expenses reasonably incurred in investigating, preparing or defending against any claim whatsoever (including all expenses reasonably incurred in investigating, preparing, or defending against any claim whatsoever) arising out of or based upon . . .(ii) any action for securities law violations instituted by the Investor which is finally resolved by judgment against the Investor.

(Ascot Subscription Agreement [Exs W, X, & Y to Resp. Verified Answer] at 8).

The Agreement between Merkin and Ascot clearly requires him to indemnify Merkin for all damages and expenses in successfully defending any claim for a securities law violation. This includes all costs associated with arbitration proceedings, including attorneys fees. Therefore, the motion for indemnification is granted.

Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED that the Petition to confirm the Arbitration Award is granted and it is further

ORDERED that the application for indemnification is granted.

This shall constitute the Order and Decision of the Court.

Dated: July 7, 2014

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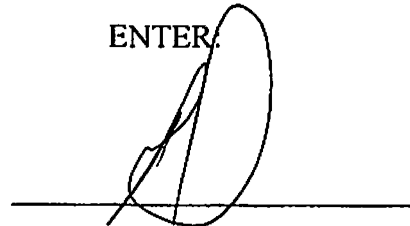

J.S.C.

HON. RICHARD B. LOWE III