SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

ROBERT E. LOFTUS,

Petitioner,

Index No. 151522/2014

DECISION/ORDER

-against-

CITIGROUP GLOBAL MARKETS, INC.,

Respondent.

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In the Matter of the Application of

CITIGROUP GLOBAL MARKETS INC.,

Petitioner,

Index No. 650911/2014

-against-

ROBERT E. LOFTUS,

Respondent.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmation in Opposition	2
Replying Affidavits.....	3
Exhibits.....	4

Robert E. Loftus ("Loftus") commenced the instant proceeding seeking an Order pursuant to 9 U.S.C. §§ 10 and 11 vacating and/or modifying the December 12, 2013 arbitration award

issued by the Financial Industry Regulatory Authority ("FINRA"). Thereafter, Citigroup Global Markets Inc. ("CGMI") commenced a separate action seeking an Order pursuant to CPLR § 7510 confirming the arbitration award and directing that judgment be entered thereon. By stipulation dated April 29, 2014, these proceedings were consolidated for disposition purposes. For the reasons set forth below, Loftus's petition to vacate is denied and CGMI's petition to confirm is granted.

The relevant facts are as follows. On or about May 29, 2003, CGMI hired Loftus as a Financial Advisor. Upon the commencement of his employment with CGMI, Loftus executed a promissory Note (the "Note") in favor of CGMI in the amount of $1,122,359.00. Pursuant to the terms of the Note, Loftus agreed, *inter alia*, to repay the Loan in seven equal annual installments of $160,337.00. Loftus concurrently entered into a Special Compensation Agreement (the "Agreement") with CGMI, which provided that CGMI would provide Loftus with an annual payment equal to the annual installment payment that Loftus owed on the Note each year as long as he remained employed by CGMI. Thus, the net effect was that Loftus's annual repayment obligation pursuant to the Note was effectively forgiven each year as long as Loftus remained employed by CGMI.

On March 27, 2009, Loftus voluntarily resigned from his employment with CGMI. At that time, the outstanding balance of the Note was $320,674.00, which, pursuant to the terms of the Note, became due and payable together with interest accruing from the date of termination at the rate of prime plus 6% per annum. Loftus failed to pay this amount and on August 27, 2009, CGMI filed a statement of claim with FINRA Dispute Resolution seeking repayment of the outstanding Note balance. On November 19, 2010, Loftus answer and asserted a counterclaim

seeking payment of a Back-End-Bonus, which he claims he was entitled to under the terms of his employment.

On or about April 8, 2013, while awaiting the arbitration hearing, Loftus filed a motion for an order of production of documents and information. On May 7, 2013, the FINRA panel granted the motion and ordered CGMI to produce the following five documents: (1) "The Smith Barney 'FC New Hire/Compensation Information Form' (May, 2003) for Jeffrey S. Schoenfeld, CRD #2023242""; (2) "The Smith Barney 'FC New Hire/Compensation Information Form' (May, 2003) for Robert M. Walters, CRD #838290"; (3) "The Smith Barney internal asset summary report, known as the 'May 2005 Focus Report'"; (4) "A Copy of Smith Barney's 2009 Retention offer to Robert E. Loftus"; and (5) "A Schedule of all referral bonus requests that were made for the 399 Park Avenue Office from 2003 to 2005 for recruitment of financial commitments by [Edward] Jamess Mulcahy" (the "Discovery Order"). On or about May 17, 2013, CGMI produced the FC New Hire/Compensation Information Form for both Mr. Schoenfeld and Mr. Walters but failed to produce any further documents. Thereafter, by letter dated November 22, 2013, CGMI affirmed that it had produced "all documents in [its] possession that [were] responsive to Items 1 and 2 of the Discovery Order" and noted that "after conducting a comprehensive search, [CGMI] is not in possession of any documents responsive to Items 3 and 4 of the Discovery Order, and there are no documents that exist that are responsive to Item 5 of the Discovery Order."

At the conclusion of a two day hearing, occurring on December 2 and 3, 2013, the FINRA arbitration panel issued an Award in favor of CGMI (the "Award"). Specifically, the Award stated as follows:

After considering the pleadings, the testimony and evidence presented at the hearing, decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent [Loftus] is liable for and shall pay to Claimant [CGMI] compensatory damages in the amount of $320,674.00 plus interest in the amount of $139,209.85.

2. Respondent is liable for and shall pay to Claimant interest on the award at the rate of 9.5% per annum from the date of the award until paid in full.

3. Respondent is liable for and shall pay to Claimant attorneys' fees in the amount of $10,000.00. The Panel awarded attorneys' fees pursuant to the terms of the parties' agreement.

4. Respondent's Counterclaim is denied in its entirety.

Loftus now brings the instant petition pursuant to 9 U.S.C. §§ 10 and 11 to vacate and/or modify the Award on the grounds that the arbitration panel exceeded its authority by awarding interest beyond that explicitly called for in the Note and imperfectly executed its function by refusing to enforce its own Discovery Order. While Loftus moves pursuant to 9 U.S.C. §§ 10 and 11, such statutes only govern federal district courts and are not applicable here. Thus, in deciding the instant petitions, the court will apply applicable New York State law.

Pursuant to CPLR § 7510, "[t]he court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." CPLR § 7511(b)(1) provides, in relevant part, that: "[t]he Award shall be vacated on the application of a party . . . if the court finds that the rights of that party were prejudiced by: (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made." A petition to vacate an award pursuant to CPLR § 7511(b)(1)(iii) on the ground that the arbitrator exceeded his power will be granted only when one of the following

circumstances is shown: (1) the arbitrator has exceeded a specifically enumerated limitation on his authority; (2) the decision is totally irrational; or (3) the award is violative of a strong public policy. *See Board of Education of the Dover Union Free School District v. Dover-Wingdale Tachers' Ass'n,* 61 N.Y.2d 913 (1984). Further, it is well settled that the determinations of an arbitration panel are not to be lightly set aside and "judicial review of an arbitration proceeding is extremely limited." *Frankel v. Sardis*, 76 A.D.3d 136, 139 (1st Dept 2010). Indeed, "[e]ven in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice." *Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 N.Y.2d 321, 326 (1999). "Nor will the court concern itself with the form or sufficiency of the evidence before the arbitrators or some departure from formal technicalities in the absence of a clear showing that statutory grounds exist for vacatur of the award." *Korein v. Rabin*, 29 A.D.2d 351, 357 (1st Dept 1968).

In the instant action, the petition to vacate and/or modify the arbitration award is denied and the petition to confirm is granted. As an initial matter, Loftus's assertion that the arbitration panel exceeded its authority by awarding interest on the Award at the rate of 9.5% annum is without merit. Loftus has failed to identify any limit on the arbitration panel's authority to award interest, at a rate set by the panel, on the Award. Thus, such act was not in violation of a clear limitation on the arbitration panel's authority. Further, contrary to Loftus's assertion, awarding interest on the Award at 9.5% does not conflict with the terms of the Note. While the Note provides that interest on the Note should accrue at 9.25%, the 9.5% interest awarded by the arbitration panel was not for interest on the Note's outstanding balance but the rate of interest for the Award itself. Thus, there is no conflict between the Award and the terms of the Note and,

contrary to Loftus's assertion, the arbitration panel did not re-write the agreement between the parties.

Additionally, Loftus's assertion that the arbitration panel imperfectly executed its function by refusing to enforce its own Discovery Order is without merit and is not a proper ground to vacate the Award. Contrary to Lofuts's assertion, it is not incumbent upon the arbitration panel to secure the discovery sought by Loftus. If Loftus felt that CGMI's discovery response was insufficient or that he needed more time to pursue further discovery, he had ample time to move during the hearing for sanctions against CGMI or seek an adjournment in an attempt to subpoena the allegedly missing documents. However, an arbitration panel does not imperfectly execute its function by allowing a hearing to go forward after giving a party a chance to exchange discovery, nor has Loftus provided any authority to support such an argument.

Accordingly, as Loftus has failed to identify a sufficient ground to vacate the Award, CGMI's petition to confirm the Award is granted. Settle Order and Judgment.

Dated: 7/16/14

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.