

Intrepid Invs, LLC v Selling Source, LLC

2015 NY Slip Op 30245(U)

February 18, 2015

Supreme Court, New York County

Docket Number: 654309/2013

Judge: Jeffrey K. Oing

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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INTREPID INVESTMENTS, LLC,

Plaintiff,

-against-

SELLING SOURCE, LLC,

Defendant.

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DECISION AND ORDER

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JEFFREY K. OING, J.:

Familiarity with the underlying facts is presumed. Defendant/Cross-Petitioner, Selling Source, LLC ("Selling Source"), filed a petition, deemed a motion herein, dated August 1, 2014 to affirm in full an arbitration award issued by Jonathan Vanderveen of the firm Alvarez & Marsal dated November 25, 2013 (the "original award") and further clarified in a letter decision dated July 17, 2014 (the "award clarification") (the original award and award clarification collectively referred to as the "Award") (Petition, NYSCEF Doc. No. 100; Hatch-Miller Affirm., Exs. 1-2).

Selling Source seeks an order confirming the Award. Plaintiff/Cross-Respondent Intrepid Investments, LLC ("Intrepid") opposes on the ground that the arbitrator did not address fourteen of the sixty disputed items submitted to him (the "breach of contract claims").

The award clarification set forth the arbitrator's responses to certain questions submitted to him by Selling Source and Intrepid with respect to the original award. With respect to the "14 Disputed Items in question," the award clarification provided that the original award "did decide, on the merits, the adjustment (if any) required to the Contingent Value Calculations ('CVC') pursuant to Section 2.6 of the [parties'] Purchase Agreement" (Hatch-Miller Affirm., Ex. 2, p. 2 [emphasis in original]). The arbitrator explained:

The Independent Accounting Firm [engaged by the parties] decided [that] certain issues raised by the Parties have no impact with respect to the calculation of the CVC. Specifically, for each of the 14 Disputed Items in question, a determination (regarding whether or not a breach occurred) does not alter the actual value of any CVC Component calculated pursuant to Section 2.6 of the Purchase Agreement.

(Id., pp. 3-4).

In a footnote, the arbitrator further explained "for the avoidance of doubt," that although a breach of "any of the 14 Disputed Items in question could have impacted a CVC Component," even if it did, "the existence of a breach does not alter the Purchase Agreement's CVC mechanism, which requires the CVC to be based on the CVC Components (regardless of whether the CVC Components include the impact of a breach)" (Id., p.4, ft. 4). As a result, the Award was not adjusted to account for any alleged contractual breaches because such an adjustment was

simply not required by the parties' purchase agreement as interpreted by the arbitrator.

It is well-established that judicial review of arbitration awards is extremely limited (Wien & Malkin, LLP v Helmsly-Spear, Inc., 6 NY3d 471, 479 [2006]). An arbitration award "should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice" (Id. at 479-480). Pursuant to CPLR 7511(b)(1)(iii), an award will be vacated only when the arbitrator 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."

Here, contrary to Intrepid's contention, the Award was final and definite within the meaning of CPLR 7511(b)(1)(iii). To the extent that any doubt existed, the award clarification confirms that the arbitrator fully considered and resolved all the issues submitted to him, and simply rejected Intrepid's proposed CVC modifications based on the alleged breaches of contract. As the award clarification explains in detail by going through each of the fourteen disputed items, in reaching his award the arbitrator simply concluded that there could be no impact on the CVC based on Intrepid's breach of contract claims, even if a breach were to be ultimately established. As such, to second-guess the arbitrator's decision under these circumstances would not be

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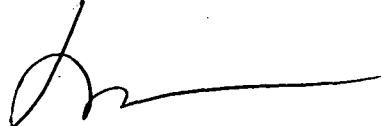
proper. Indeed, as Selling Source concedes, Intrepid may seek to pursue its breach of contract claims in a plenary action. Based on this Award, however, Intrepid's breach of contract claims simply do not affect the calculation of damages submitted to the Arbitrator.

Accordingly, Selling Source, LLC's motion is granted, and the Award rendered in its favor and against Intrepid Investments, LLC is confirmed.

Submit Proposed Order and Judgment on Notice to Part 48.

Dated:

2/18/15


HON. JEFFREY K. OING, J.S.C.