Matter of Matthews v Altsetter
2017 NY Slip Op 31411(U)
June 30, 2017
Supreme Court, New York County
Docket Number: 654285/2016
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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In the Matter of the Application of

JOHN S. MATTHEWS,

Petitioner,

-against-

MARK ALTSETTER,

Respondent.

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Index No. 654285/2016

Motion seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, JSC:

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Petitioner, former chief executive officer (CEO) of Global Arena Capital Corp. (Global Arena), which is now in liquidation, moves pursuant to CPLR articles 4 and 75, and the Federal Arbitration Act (FAA), for vacatur of a Financial Industry Regulatory Authority (FINRA) arbitration award which imposed on him joint and several liability for securities violations allegedly committed by Englebert Sarmiento (Sarmiento), a former broker at Global Arena's Melville, New York, branch. Respondent opposes.

I. RELEVANT BACKGROUND AND CONTENTIONS

In the underlying arbitration, which was decided on submission by a single arbitrator pursuant to FINRA rules, respondent accused Sarmiento of, *inter alia*, recommending risky, unsuitable investments, and churning his accounts. Respondent also alleged, *inter alia*, that as petitioner was the CEO of Global Arena at that time, he is jointly and severally liable to

respondent for Sarmiento's actions, pursuant to Oregon Securities Law (ORS) 59.115(3). (NYSCEF 3).

In his petition, petitioner argues that the arbitration award must be vacated as it reflects a manifest disregard of the law and the arbitrator did not explain his decision. He contends that he did not work in Sarmiento's office, and knew nothing about Sarmiento's conduct, which he proved by submitting to the arbitrator a copy of the contract by which the Melville branch of Global Arena was established. This contract, he asserts, demonstrates that the branch at which Sarmiento worked operated independently, and that Sarmiento was not under his supervision. (NYSCEF 1, 6).

He argues that respondent, in contrast, relied on conclusory assertions that he had control over Sarmiento by virtue of his status as Global Arena's CEO, and observes that respondent offered no evidence that he knew or should have known about Sarmiento's conduct. Moreover, he argues, although he presented the arbitrator with dispositive legal authority exonerating him from liability, the arbitrator must have disregarded it. (*Id.*).

In opposition, respondent argues that it was petitioner's burden to demonstrate lack of knowledge, meaning that petitioner must affirmatively show that he did not know and, in the exercise of reasonable care, could not have known, about the subject investments. He asserts that, as CEO, petitioner controlled everything at Global Arena and created the climate that led Sarmiento to enter into the subject investments. He also contends that the arbitrator ruled in accordance with applicable law. (NYSCEF 11).

II. ANALYSIS

A. The FAA

Where the subject matter of an arbitration affects interstate commerce, the FAA applies. (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 478 [2006]). Here, the parties do not dispute that both CPLR article 75 and the FAA apply. In any event, as the parties in the underlying arbitration are a New York securities brokerage, its New York broker, and an Oregon investor, and the dispute concerns the propriety of investments in, *inter alia*, Delaware corporations, the matter affects interstate commerce and the FAA applies. (*See McMahan Sec. Co. L.P. v Aviator Master Fund, Ltd.*, 20 Misc 3d 386, 391 [Sup Ct, New York County 2008], *affd*, 57 AD3d 326 [1st Dept 2008], *appeal denied* 12 NY3d 707 [2009] [securities transactions for investments in Canadian real estate affected interstate commerce since brokered by Delaware corporation with principal place of business in Connecticut, pursuant to contract with subsidiary of Texas company]).

B. Manifest disregard of law

Under New York law, an arbitration award may be vacated only if it has no plausible basis. (*Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 372 [1st Dept 2004]). The FAA permits vacatur of an award if, *inter alia*, it reflects a "manifest disregard of law." (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 480–81 [2006]). A manifest disregard of law is found in "exceedingly rare instances where some egregious impropriety" on the part of the arbitrator is apparent. (*Roffler v Spear, Leeds & Kellogg*, 13 AD3d 308, 310 [1st Dept 2004]). The party seeking vacatur on the ground of manifest disregard must demonstrate that (1) the arbitrator refused to apply or ignored a governing legal principle, and (2) the governing principle is "well defined, explicit, and clearly applicable." (*Id.*). An arbitrator's

misunderstanding of the law or an error in its application is insufficient to warrant vacatur under this standard. (*Id.*).

Although an arbitrator's failure to explain an award may constitute manifest disregard (*Matter of Spear, Leeds & Kellog v Bullseye Sec.*, 291 AD2d 255, 256 [1st Dept 2002]), absent a requirement that an arbitrator disclose the basis for the award, the award will not be disturbed, as long as some basis for it may be inferred from the facts (*ConnTech Dev. Co. v Univ. of Connecticut Educ. Properties, Inc.*, 102 F3d 677, 686 [2d Cir 1996]; *Sawtelle v Waddell & Reed, Inc.*, 304 AD2d 103, 108 [1st Dept 2003]; *Bear Stearns & Co. v Fulco*, 21 Misc 3d 823, 832, [Sup Ct, New York County 2008]).

The question here is whether it may be inferred from the facts that the arbitrator had some basis for imposing joint and several liability under ORS 59.115(3) and, as neither party disputed the application of Oregon law to the underlying dispute, that question is properly before me. Pursuant to ORS 59.115(3), the officers at a securities brokerage firm are jointly and severally liable for claims arising from their brokers' transactions unless they establish that they did not know and, in the exercise of reasonable care, could not have known, about the conduct giving rise to liability. (*Castle v Ritacco*, 142 Or App 89, 96 [1996]; *Foelker v Kwake*, 279 Or 379, 386 [1977] [en banc]).

Respondent, in his claim, alleged that, at the time of the ORS violations, petitioner was one of Global Arena's officers, and Sarmiento was a broker at a Global Arena branch. Although petitioner submitted to the arbitrator a contract purportedly demonstrating that others were responsible for supervising Sarmiento, he offered no evidence establishing that he could not, in the exercise of reasonable care, have known about Sarmiento's conduct. From these facts, it is reasonably inferred that the arbitrator appropriately imposed joint and several liability (*see*

Gardner v Donovan, 47 Or App 97, 102 [1980] [alleging lack of knowledge in pleading was, alone, insufficient to establish lack of knowledge]; *Foelker*, 279 Or at 386 [officer of corporate seller jointly liable with seller where she testified that she did not participate, but offered no evidence that she did not know or could not have reasonably known]), and absent any indication that the arbitrator committed an egregious impropriety or disregarded the law, there is no basis to vacate the award (*see ConnTech Dev. Co.*, 102 F3d at 686 [university's assertion that arbitrator erred in finding in development company's favor insufficient, as university failed to identify a manifest disregard of law, and basis for award was inferable from facts]

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioner's petition to vacate the arbitration award is denied. the proceeding is dismissed, and the arbitration award is hereby confirmed.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE

DATED: June 30, 2017
New York, New York.