

Passaretta v UBS Sec. LLC

2017 NY Slip Op 32262(U)

October 20, 2017

Supreme Court, New York County

Docket Number: 653340/2016

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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GIANLUCA PASSARETTA

Petitioner,

Index No: 653340/2016

- v -

Motion Seq. No: 001

Motion Date: 12/21/2016

UBS SECURITIES LLC,

Respondent.

DECISION AND ORDER

-----X

BRANSTEN, J:

Motion sequence 001 comes before the Court on Petition by Gianluca Passaretta seeking to confirm an arbitration award. Respondent UBS Securities LLC (“UBS”) opposes, and files a cross-petition seeking to vacate the award.

For reasons set forth below, the Petition to confirm the arbitration award is granted. Accordingly, Respondent’s cross-motion to vacate the award is denied.

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I. Background¹

A. *Passaretta's Employment*

Petitioner, Gianluca Passaretta (“Passaretta”), is a former UBS employee. *Cross-Petition*, ¶19. His employment was governed by his September 8, 2009 offer letter (“Offer Letter”) which indicated that Passaretta’s employment was “at-will” and that “any dispute, controversy or claim (including but not limited to those arising out of or relating to this Agreement, the employment relationship between [him] and the Firm or the termination thereof) will be settled by final and binding arbitration.” *Id.*, ¶20. The parties also entered into a pre-dispute arbitration agreement (also known as a Form U-4) which directed any arbitrations were to be conducted pursuant to the rules of the Financial Industry Regulatory Authority (FINRA). *Id.*, ¶21; *Petitioners Memo of Law in Opp. to Cross-Petition* at 6. Additionally, and most relevant to this discussion, the UBS Employee Handbook (“Handbook”) stipulated the terms under which former employees would be eligible for severance and entitled to unvested deferred compensation. *Id.*, ¶32; *Exhibit “4” to Cross-Petition*.

B. *Passaretta's Termination*

On the afternoon of May 2, 2013 an employee working on Passaretta’s desk executed an \$18 billion trade without obtaining the required pre-approval from UBS’s

¹ Unless otherwise noted, all facts are obtained from the Petitioner’s Petition and/or Respondent’s Cross-Petition.

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Market Risk team. *Cross-Petition*, ¶3. Over the course of approximately an hour and a half, Passaretta attempted to obtain post hoc approval for the trade without advising it had already occurred. *Id.*, ¶49-50. When approval was denied, Passaretta informed Market Risk that the trade had been executed. *Id.*

On June 25, 2013, UBS terminated Passaretta's employment. *Id.*, ¶62. Because his termination was "for cause" as result of his conduct surrounding the trade, UBS asserted he forfeited his deferred compensation. Shortly thereafter, UBS filed a Form U-5 detailing the circumstances of Passaretta's termination from the company. *Id.*, ¶66-70. On the U-5, UBS stated the reason for termination was Passaretta's failure to comply with an internal trade pre-approval policy. *Id.*, ¶70.

C. Passaretta and UBS' underlying Arbitration

Following his termination, Passaretta commenced an arbitration against UBS on March 5, 2014. In his Statement of Claims, Passaretta sought payment of his deferred compensation, attorney's fees and expungement of his U-5 form. Additional claims initially sought damages for defamation, 2013 incentive bonuses, and unpaid wages under the Connecticut Unfair Trade Practices Act, *inter alia*, but these claims were later discontinued. Significantly, an explicit claim for severance benefits was not included in the initial statement of the claim, however, in the prayer for relief concerning his alleged wrongful termination, Passaretta sought "additional benefits that he would have earned at UBS had his employment not been terminated." *Exhibit "1" to Petition at 10.*

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What was not expressly mentioned in Passaretta's Statement of Claim was ERISA. In fact, ERISA was not mentioned until the final day of hearings, where its sudden appearance notably surprised members of the arbitration panel. *Fischer Affirmation, Exhibit "3", at 5191.*

After 17 full, non-consecutive days of hearings, the arbitration panel awarded Passaretta \$1,369,949.00 in unvested deferred compensation and ordered UBS to edit Passaretta's U-5 to indicate that his termination was "unjustified." Additionally, Passaretta was awarded \$69,231.00 in severance pay and \$868,264.00 in attorney's fees "pursuant to the ERISA statute" as a result. *Fischer Affirmation, "Exhibit 1".*

D. Instant Litigation

Petitioner filed this petition to confirm his award on June 23, 2016 and Respondent filed a cross-petition opposing confirmation and arguing for vacatur of the award on or about July 13, 2016.

II. Legal Standard

This action is governed by the Federal Arbitration Act ("FAA") and Article 75 of the CPLR.

It is public policy in New York to encourage arbitration as a means of conserving judicial resources and expediting resolution of disputes. *Rio Algom Inc. v. Sammi Steel Co., Ltd.*, 168 A.D.2d 250, 251 (1st Dept 1990); app. denied, 78 N.Y.2d 853 (1991). Judicial review of an arbitrator's award is extremely limited. Generally, once an issue has

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been decided by an arbitrator, questions of law and fact are not within the power of the judiciary to review, as they are merged in the award. *Pearlman v. Pearlman*, 169 A.D.2d 825, 826 (2d Dep't 1991) (internal citation omitted). Courts are not tasked with determining whether the outcome of an arbitration is the same as the outcome that would have been reached by the court. See *Matter of Sprinzen*, 46 N.Y.2d 623, 629 (1979) ("An arbitrator's paramount responsibility is to reach an equitable result, and the courts will not assume the role of overseers to mold the award to conform to their sense of justice.") This is because "[w]here the parties have chosen arbitration as their forum, they are precluded from using the courts as a vehicle to protract litigation." *Rio Algom*, 168 A.D.2d at 251.

However, under Section 10(a)(4) of the FAA, an award may be vacated by the Court, "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made." An award will also be vacated where it is "violative of a strong public policy, is totally irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power." *Town of Callicoon v. Civ. Serv. Emps. Ass'n*, 70 N.Y.2d 907, 909 (1987).

Section 10(a)(2) of the FAA also provides that an award may be vacated when there exists "evident partiality or corruption in the arbitrators, or either of them." CPLR 7511(b)(1) also allows for vacatur when there is found to exist:

"(i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) an arbitrator, or agency or person making the award exceeded his power or so

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imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of this article.”

Both Federal and New York courts have found arbitrators exceed their authority “when (an) arbitrator strays from interpretation and application of the agreement and effectively ‘dispense(s) his own brand of industrial justice.’” *Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp.*, 559 U.S. 662, 671, (US 2010). In the State of New York, courts have also found that an arbitrator exceeded her powers, “if the arbitrator’s interpretation of the contract essentially makes a new contract for the parties.” *Soma Partners, LLC v. Northwest Biotherapeutics Inc.*, Index No 111745/2005, Slip Op. 30372 (U) (Edmead, J., Sup. Ct. N.Y. Co. Dec 30, 2005).

III. Discussion

A. Exceeded Authority and Manifest Disregard:

i. The Arbitration Panel’s Award of Passaretta’s Deferred Compensation

The first issue this Court must analyze is whether the Arbitration Panel properly awarded Passaretta deferred compensation or whether the Panel exceeded their vested authority.

Respondent argues the award of Passaretta’s deferred compensation should be vacated because the arbitration panel exceeded its authority when interpreting the employment agreement. The Court of Appeals has determined that “such an excess of power occurs only where the arbitrator’s award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator’s

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power.” *New York City Transit Authority v. Transport Workers’ Union of America, Local 100, AFL-CIO*, 6 N.Y.3d 332, 336 (2005). New York courts have found an arbitrator to be acting in excess of her power “if the arbitrator’s interpretation of the contract essentially makes a new contract for the parties.” *Soma Partners, LLC v. Northwest Biotherapeutics Inc.*, No 111745/2005, slip op. 30372 (U) (Sup. Ct. N.Y. Co. Dec 30, 2005).

Respondent argues that the arbitration panel exceeded its authority by granting Passaretta his deferred compensation despite the limited circumstances in which he would be entitled to them under the terms of the contract between the parties. Under the terms of Passaretta’s employment, deferred compensation would be available to former employees only if the termination of employment was, “due to Death, Disability, Retirement (without joining a Financial Services Organization), Redundancy, or written mutual agreement.” *Fischer Affirmation, “Exhibits 5 to 22”*. Respondent argues that because none of those circumstances are present in the instant case, the arbitration panel exceeded its authority by distorting the original meaning of the terms of the employment agreement between Passaretta and UBS in such a way that the panel “dispensed (its) own brand of industrial justice” and rewrote the contract between the parties. *Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp.*, 559 U.S. 662, 671, (2010).

In response, Passaretta argues by executing a U-4, his employment was no longer considered “at-will” and, therefore, termination from his position required justification. *See, e.g., PaineWebber v. Agron*, 49 F.3d 347, 352 (8th Cir. 1995) (“some standard of

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discernable cause is inherently required in this context where an arbitration panel is called to interpret the employment relationships. [The arbitration] process necessarily alters the employment relationship from at-will to something else —some standard of discernable cause is inherently required..."). It is uncontested the arbitration panel declared Passaretta was terminated "without cause". *See, Exhibit "1" to Petition*. The question now before the Court is whether the panel reached beyond its authority in finding Passaretta was entitled to his deferred compensation as a result of the Panels' determination Passaretta was "unjustly terminated".

The Court finds the Arbitration Panel was vested with the authority to review the evidence, listen to testimony and arguments and to decide whether Passaretta was entitled to his deferred compensation. Indeed, the Panel waded through hundreds of pages of documents, listened to 17 days of testimony, and reviewed briefs in order to reach its decision. This Court finds the Panel was well-within its rights to declare Passaretta's termination unjust and, understood the conditions with which Passaretta could be awarded his deferred compensation, and then, subsequently awarded it. While the Panel may not have stated it outright, it is clear to this Court the Panel agreed with Passaretta's arguments inasmuch as his unjust termination warranted payment of his deferred compensation.

The case heavily relied on by Respondents, *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 559 U.S. 662, 671, (2010), is factually distinguishable from the instant matter. *Stolt-Nielsen S.A.* addresses the ability for an arbitration panel to make a policy choice

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and compel a group of various shipping customers to submit to binding class arbitration and does not address the validity and enforceability of a mutually-agreed to binding arbitration between two parties as in the case *sub judice*. To analogize the two cases threatens the validity of a vast array of arbitrated contractual disputes and calls into question the efficacy of the notion of arbitration. This Court finds the law mandates that this Court give broad leeway to the arbitrators' determinations of the meanings and remedies provided for under a particular contract.

This deference is evidenced when the Court of Appeals ruled "where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined." *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y. 3d 471, 483 (2006) quoting *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

As it is clear from Passaretta's employment agreement, the remedies for contractual violations were contemplated by both parties when the initial arbitration agreement was signed, so this Court has little room to oppose the arbitration panel's ultimate determination on this matter. Accordingly, Respondent has failed to meet its burden showing that the panel exceeded its authority and rewrote the terms of the contract between the parties when such an arbitration was so clearly contemplated from

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the outset. Accordingly, Passaretta's petition to confirm the award is granted as to his claim for deferred compensation.

ii. *Arbitration Panel's Award of Severance and Attorney's Fees*

The next question before the Court is whether the Arbitration Panel exceeded its authority by awarding Passaretta Severance and Attorney's Fees in accordance with applicable ERISA laws.

The First Department has ruled that an arbitration panel, "exceed(s) its authority by granting relief on claims not asserted in (the) statement of the claim." *Goldberg v. Nugent*, 85 A.D.3d 459, 459 (1st Dep't 2002). Additionally, "(t)here is a general requirement under New York law that arbitration procedures comport with due process of law by providing a party with notice and an opportunity to be heard." *Yonir Techs, Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp. 2d 195, 208 (S.D.N.Y. 2002) (applying New York law).

Respondent argues a claim for severance and the resulting ERISA attorney's fees was not explicitly raised by Petitioner in his Notice of Claim. As such, Respondent asserts the arbitration panel exceeded its power in awarding damages for these claims because the issues were not properly before it. In support of this argument, Respondent argues severance was not raised in the opening statement (*Transcript 25-46*), or in the bulk of the testimony presented by Petitioner while making his case (*Chinn Affirmation ¶ 7*).

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In opposition, Petitioner argues the term “*additional benefits*” was contained within his initial Statement of Claim. Included with “additional benefits”, Petition argues, was “severance”. Petitioner also highlights that in response to his Statement of Claim, Respondent asserted an Affirmative Defense of “failure to exhaust administrative remedies” which directly relates to a claim for severance or other plan benefit. *See, UBS Answer at 19*. Additionally, a review of the hearing transcript confirms in his opening statements Petitioner did, indeed, state he was entitled to additional benefits, including “at a minimum some severance...”. *Transcript, 38*. Petitioner also referenced UBS’ Severance Policy in his opening statements. *Id, 44*. Petitioner correctly notes despite the above references, Respondent elected not to address “severance” in its opening statements.

During the hearing, the UBS Severance Plan was entered into evidence and relevant testimony on severance was elicited from UBS’ Human Resources witness, Aidan Mara. Mr. Mara testified Petitioner would have received a severance payment if Passaretta’s job had been made “redundant”. He also testified to the specifics of what Passaretta’s severance package would have been under the Plan. *Id, 4138-4146, 4175-76*.

Despite this, at the close of Passaretta’s case, UBS made a motion to dismiss Passaretta’s claims set forth in the Statement of the Claim and presented during initial testimony. *Transcript, 2850-2851, 2856-68*.

During closing arguments, the Court notes the arbitration panel seemed surprised when the issue of ERISA attorney’s fees were raised. *Transcript 5191*. To alleviate the

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Panel's concern, the parties were directed to submit five-page post-hearing briefs dedicated to the issue. *Transcript 5191-5195*.

As argued in the parties post-hearing briefs, Petitioner maintained entitlement to fees under ERISA. Respondent countered by arguing Petitioner failed to meet the requirements to recover under ERISA, namely, exhausting administrative remedies. In response, Petitioner successfully argued to the Panel exhausting administrative remedies is not required where "pursuing available administrative remedies would be futile". *Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588, 594 (2d Cir. 1993). When futility applies, "the purposes behind the requirement of exhaustion are no longer served, and thus a court will release the claimant from the requirements". *Id.* Here, as set forth by the testimony from Aidan Mara, UBS conceded that Passaretta would never be offered any severance in light of his termination. *Transcript, 4308*.

Based on the arguments, briefing and overall evidence provided, the Arbitration Panel declared Petitioner was indeed entitled to severance and attorney's fees pursuant to ERISA. This Court declines to find the Panel overreached its authority or decided claims which were not in front of it. The issue of severance was clearly raised in the hearing and, to the extent ERISA was not initially raised fully, the parties were directed to brief the issue thereby certainly putting it before the Panel.

While Respondent may not agree with the Panel's decision, this Court finds the Panel acted within its authority to make such decisions and, therefore, Respondent's

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request to vacate Petitioner's award for severance and attorney's fees on the grounds they were not properly brought before the Panel is Denied.

B. Partiality or Bias on the Part of the Arbitrators

As a final argument, UBS seeks a vacatur of the Panel's arbitration award on the grounds the Panel was not impartial and demonstrated bias. This Court finds such arguments unavailing. Under CPLR 7511, an award may be vacated if the court finds "partiality on the part of an arbitrator appointed as neutral." CPLR 7511(b)(ii). Demonstrating this partiality is a heavy burden. *North Syracuse Central School District v. North Syracuse Education Association*, 45 N.Y.2d 195, 200 (1978). Here, Respondent has failed to meet that burden. The "mere inference of partiality, ... is not sufficient to warrant interference with the arbitrator's award". *Rose v. J.J. Lowrey & Co.*, 181 A.D.2d 418, 419 (1st Dep't 1992).

In order to demonstrate partiality, the party seeking vacatur must show the interest or bias is "direct, definite and capable of demonstration rather than remote, uncertain, or speculative." *U.S. Electronics, Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912, 915 (2011) quoting *Transports Coal Sea de Venezuela C.A. v. SMT Ship Management & Transp. Lt.*, 2007 WL 62715, *3 (S.D.N.Y. Jan 9, 2007) (Court declined to find partiality where the arbitrator's son had a close political relationship with a competitor of the appellant, ruling that such a relationship was too tenuous to indicate partiality).

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The Respondent has offered several instances where the arbitrators expressed sympathy towards the petitioner in stray remarks during the hearings, arguing such comments are indicative of inappropriate bias. These statements include an instance where Arbitrator Caracciolo remarked to the Petitioner that it had been “difficult” for him to “listen to all the testimony, this testimony about you personally.” (*Transcript 5203*). Also, later characterizing UBS’ reaction to the unauthorized trade as out of proportion. (*Transcript 4596*). Though these comments may give rise to an inference of empathy, without more solid evidence of a concrete personal or business link between the arbitrator and Passaretta, they do not meet the heavy burden on a party attempting to prove partiality. *North Syracuse Central School District*, 45 N.Y.2d 195 at 200 (1978).


Conclusion

In summary, Respondent has failed to demonstrate that the Arbitration Panel exceeded its authority in awarding Passaretta his unvested deferred compensation, attorney’s fees, severance and an expungement of his Form U-5. Consequently, the Petition to confirm the award is Granted and Respondent’s Cross-Petition to vacate the award is Denied.

This constitutes the order and judgment of this court.

October 20, 2017

ENTER



J.S.C