

**HFZ Bryant Park Owner LLC v South BP Assoc.,
LLC**

2019 NY Slip Op 30511(U)

February 28, 2019

Supreme Court, New York County

Docket Number: 654386/2018

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SALIANN SCARPULLA **PART** **IAS MOTION 39EFM**

Justice

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HFZ BRYANT PARK OWNER LLC

Petitioner,

- v -

SOUTH BP ASSOCIATES, LLC,

Respondent.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

VACATE -

were read on this motion to/for DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

Petitioner HFZ Bryant Park Owner LLC (“HFZ”) petitions, pursuant to Section 10(a) of the Federal Arbitration Act (the “FAA”) and CPLR § 7511(b)(1), to vacate the final arbitration award by Arbitrator John P. Madden, Esq. (the “Arbitrator”) dated June 6, 2018 (the “Fees Award”). Respondent South BP Associates, LLC (“South BP”) cross-moves, pursuant to CPLR § 3211(a)(1), (a)(5) and (a)(7), to dismiss HFZ’s petition and to confirm the Fees Award pursuant to CPLR § 7511(e), or FAA § 9. In addition, South BP seeks judgment against HFZ and costs.

The facts of this case were explained in detail in a related action, Index No. 650112/2018, and therefore will only be summarized here as necessary for the present petition.

On September 3, 2015, the Arbitrator rendered the partial final award (the “Merits Award”) which stated that South BP “is the Prevailing Party and is entitled to relief under

Section 14.17 of the JVA as to the cost of attorneys' [sic] fees, expert fees, and other arbitration costs."

South BP, on September 24, 2015, submitted its application for attorney's fees, expert fees and other costs to the Arbitrator ("Fees Submission"). Among other things, South BP sought recovery of \$1,472,241.17 in attorneys' fees.

As stated in the Arbitrator's Decision Regarding Request for a Hearing on Attorney's Fees (the "Hearing Request Decision"), following South BP's Fees Submission, HFZ sought an extension of time to submit its opposition approximately every two weeks for over two years, with South BP's consent. Then, on January 9, 2018, HFZ submitted its opposition to the Fees Submission and, for the first time, requested that the Arbitrator grant it an evidentiary hearing on the subject of fees/costs. In the conclusion section of its opposition, HFZ "object[ed] to the issuance of any award before HFZ has had the opportunity to cross-examine witnesses about the purported fees and expenses." In response to HFZ's opposition, South BP submitted a Reply, on February 20, 2018, which included an attorney affirmation with a schedule of comparative law firm rates.

The Hearing Request Decision, issued April 17, 2018, denied HFZ's request for a hearing stating, *inter alia*, that: 1) HFZ raised its "right" to an evidentiary hearing for the first time on January 9, 2018 and none of its numerous time extension requests for its opposition papers, from September 2015 until January 9, 2018, included such a request; 2) granting an evidentiary hearing would cause an additional delay of 2-3 months at minimum; 3) HFZ "provided no procedural "JAMS Rules" or substantive law to

demonstrate entitlement to such a hearing;” and 4) “there is ample case law to support the proposition that no such hearing is required.”

The Arbitrator concluded that although the arbitration was “extremely accelerated” and the fees submitted by South BP were comparable to that of similar New York City law firms, there were an enormous number of attorney hours and thus some needed to be cut. As a result, the Arbitrator awarded South BP \$1,177,792.94 in attorneys’ fees, 80% of the amount it requested.¹ The Fees Award also stated that HFZ’s “elaborate benefit analysis” pertaining to attorneys’ fees, expert fees and costs was “unreliable as presented.”

HFZ now petitions to vacate the Fees Award while South BP opposes the petition and cross-moves to confirm the Arbitration Award and to dismiss HFZ’s petition.

Discussion

Pursuant to CPLR 7511(b), an arbitration award may be vacated upon the application of a party only if the court determines that “the rights of that party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or ... (iii) an arbitrator . . . exceeded his power or so 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, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.”

¹ The Fees Award also granted South BP’s request for \$52,836.28 in expert witness fees and \$29,133.25 in costs bringing the total amount of the award to \$1,259,762.47.

A court's review of an arbitration award is extremely limited in scope. *Elul Diamonds Co. Ltd. v. Z Kor Diamonds, Inc.*, 50 A.D.3d 293 (1st Dept. 2008). Generally, a court must uphold an arbitration award so long as “the arbitrator ‘offer[s] even a barely colorable justification for the outcome reached.’” *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471 (2006) (citation omitted). Further, “[a]rbitrators need only receive evidence that is ‘pertinent and material,’ and such determination will only be set aside if it deprives a party of a fundamentally fair hearing.” *Kaminsky v. Segura*, 26 A.D.3d 188, 189 (1st Dept. 2006) (citation omitted).

HFZ argues that the Fees Award here should be vacated because the Arbitrator refused to hear evidence pertinent and material to the controversy by denying its request for an evidentiary hearing on the matter of attorneys' fees. HFZ's argument about the Fees Award is not that its evidence was refused, but rather that the Arbitrator failed to take testimony in connection with the evidence submitted.

I have been unable to find any case stating that an Arbitrator's decision must be based upon testimonial evidence, rather than written evidence. Nor did HFZ submit any caselaw that supports its contention.²

² Only one case cited by HFZ pertained to attorneys' fees, *Inyx, Inc. v. Bartke*, 2008 WL 4819600 (Sup. Ct., N.Y. Cty. Oct. 21, 2008). Although the court in *Inyx* – a decision which is not binding on this Court – vacated an arbitration award after finding that the arbitrator refused to hear evidence pertinent and material to the issue of attorneys' fees, the facts of that case are distinguishable. In *Inyx*, the arbitrator's decision on attorneys' fees was based on respondent's post-hearing un-sworn submission of a schedule for fees that were for a larger amount than previously requested and petitioner did not have an opportunity to oppose or respond. Significantly, *Inyx*, did not state that evidentiary hearings are always required for attorneys' fees awards in arbitration. Here, in contrast, the amount requested by South BP remained unchanged from its initial Fees Submission

Here, both parties submitted ample documentary evidence in connection with the Fees Award. Moreover, the Arbitrator was intimately familiar with the underlying arbitration and with the time and expenses of the parties in conducting the underlying arbitration. Under these circumstances, HFZ has failed to meet its heavy burden of showing Arbitrator “misconduct” based on the Arbitrator’s decision not to take oral testimony in connection with the Fees Award. I therefore deny HFZ’s petition to vacate the Fees Award.

In accordance with the foregoing, it is

ORDERED that HFZ Bryant Park Owner LLC’s petition to vacate the final arbitration award dated June 6, 2018 is denied in its entirety; and it is further

ORDERED that South BP Associates, LLC’s motion to confirm the final arbitration award dated June 6, 2018 is granted in its entirety; and it is further

ORDERED and ADJUDGED that the award made on June 6, 2018 for attorneys’ fees and costs is hereby confirmed; and it is further

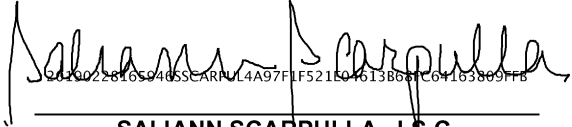
ORDERED that the Clerk of this Court is directed to enter judgment in favor of respondent and cross-petitioner, South BP Associates, LLC and against the petitioner HFZ Bryant Park Owner LLC in the sum of \$1,259,762.47 plus interest at the rate of 9%

in September 2015. Moreover, HFZ was not deprived of its right to question the legitimacy of the requested fees but rather waited until January 2018 to oppose it. Nor does South BP’s Reply, which included an attorney affirmation and schedules in further support of its Fees Submission, constitute such a deprivation especially in light of the fact that South BP did not alter the amount it sought and HFZ did not seek to submit a sur-reply. The remainder of the cases cited by HFZ do not relate to attorneys’ fees and fail to support its position.

per annum from the date of the award, June 6, 2018, together with costs and disbursements as taxed by the Clerk.

This constitutes the decision and order of the Court.

2/28/2019
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE