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

2019 NY Slip Op 30577(U)

March 7, 2019

Supreme Court, New York County

Docket Number: 650112/2018

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

---X

HFZ BRYANT PARK OWNER LLC

Petitioner,

- v -

SOUTH BP ASSOCIATES, LLC,

Respondent.

---X

INDEX NO. 650112/2018

MOTION DATE 09/24/2018

MOTION SEQ. NO. 001 002 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 163, 216

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 164, 166, 167, 217

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 165, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 218, 219, 220

were read on this motion to/for DISMISS.

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 partial final arbitration award issued on September 3, 2015 (the "Arbitration Award"). Respondent South BP Associates, LLC (“South BP”) moves, pursuant to CPLR § 3211(a)(1), (a)(5) and (a)(7), to dismiss HFZ’s petition. South BP also moves, pursuant

to CPLR § 7510, or FAA § 9, to confirm the Award. In addition, South BP seeks judgment against HFZ and costs.

On November 7, 2014, HFZ and South BP entered a joint venture agreement (the "JVA") for the purpose of developing and owning a mixed-use condominium and hotel tower (the "Building") located at 20 West 40th Street, New York, New York (the "Property"). The JVA required the parties to contribute certain funds by September 15, 2015 (the "Extended Funding Date"). Prior to that date, a dispute arose concerning the allocation of the cost of the Building's façade.

Under the JVA, section 14.9, the parties agreed to

> use reasonable efforts and endeavor in good faith to resolve any disputes in connection with this Agreement. If either Member believes an impasse has been reached, unless as otherwise expressly provided in this Agreement … the Members hereby agree that such dispute shall be exclusively submitted to final and binding arbitration in New York, New York, administered by JAMS in accordance with JAMS Streamlined Arbitration Rules and Procedures in effect at that time. The Members shall cooperate with JAMS and with each other in scheduling the arbitration proceedings so that a final non-appealable award is rendered within forty-five (45) calendar days after submission to arbitration… The JAMS arbitrator shall be bound by the provisions of this Agreement and shall not have the power to add to, subtract from, or otherwise modify such provisions.

The parties further agreed, in section 14.8, that "[a]ll actions or proceedings arising in connection with this Agreement to enforce any arbitration award or judgment shall be tried and litigated in state or federal court located in New York City."

The Property's prior owner commissioned architectural plans by Morris Adjmi Architects (the "Adjmi Design"). Schedule 3 of the JVA provided that

> If different from the executive architect, the Members will jointly appoint an exterior architect to design exterior aesthetics, but shall retain the

> massing approved in the special zoning permit received from the City Planning Commission and as presented in Morris Adjmi Architects progress plans dated September 10, 2008 and, in no case without the agreement of both Members shall the new design exceed the cost of the exterior façade in the previously approved plan except in the case with the desiring Member bearing incremental costs. …If the two Members cannot agree on changes to the façade, [and]…a compromise is not achieved, an arbitrator/expert will decide whether or not the change should be made, taking into account primarily cost and potential time delays, as well as other business objectives of the two Members including as the primary objective, but not the only objective, commencing construction as soon as reasonably practicable and otherwise consistent with the joint venture term sheet but, so long as MDC Member does not raise a serious and reasonable objection, the arbitrator/expert will generally follow the choice of HFZ Member but will seek to balance the interests of the two Members as the façade impacts the interior layouts of the Members. The cost of the exterior architect will be allocated among the Members in accordance with the Project Cost Split Schedule.

As per the petition, the Joint Venture hired David Chipperfield Associates ("Chipperfield") as the architect to design a facade for the Building to replace the facade in the Adjmi Design. Chipperfield designed a precast system for the Building's facade (the "Chipperfield Design").

Prior to the Extended Funding Date, a dispute arose concerning the allocation of the cost of the Building's façade using the Chipperfield Design. The parties agreed to arbitrate this dispute under Section 2.9.2.2(b) of the JV Agreement so that an arbitral award would be rendered by September 3, 2015. HFZ and South BP jointly designated John P. Madden, Esq. to serve as arbitrator (the "Arbitrator"). According to the petition, the arbitration "was by necessity set on an extremely expedited schedule" with South BP filing its statement of claim on July 22, 2015 and HFZ filing its response on July 29, 2015. Expert reports were exchanged on August 14, 2015 and witness lists, exhibits and

prehearing briefs were exchanged on August 19, 2015. The hearing dates were set for August 24, 25, and 31, 2015.

HFZ states that during the prehearing proceedings, South BP maintained that a tower crane would not have been required for any part of the construction if the parties constructed the Adjmi Design façade, because that design only required spider cranes.[1] The Friday night before the hearing was to commence, South BP sent an email to the Arbitrator in which it allegedly changed its position regarding tower crane usage and said that if the Joint Venture had chosen the Adjmi Design, a tower crane would have been utilized for the Building's superstructure and spider cranes would have been used for the façade. On the next day, HFZ sent a responsive email to the Arbitrator stating that South BP's email represented the latter's yielding on the "single largest component of its supposed damages, namely the tower crane costs, making HFZ the prevailing party." HFZ concluded its email by stating that the new information contained in South BP's email could be discussed "in greater detail at the opening of the hearing." HFZ did not request an adjournment of the arbitration hearing.

Following three days of hearings, on September 3, 2015, the Arbitrator rendered the Arbitration Award. Among other things, the Arbitration Award determined that "there was no basis for using value engineering principles in determining the cost of the Adjmi Design" and that the cost of the Adjmi Design was "$13,434,865 in total trade

[1] A tower crane is a large crane with a fixed vertical mast, topped by a rotating boom and equipped with a winch for hoisting and lowering loads, and is often used in ground up construction of NYC high rise buildings. A spider crane is a smaller crane that can be placed on a building's slabs.

costs excluding mark-up, with [South BP's] contribution being 40% of that which amounts to $5,373,946." The Arbitration Award also determined that the total crane cost was $3,543,400 with 48% of the first $1,800,000 of crane costs to be paid by South BP and HFZ should pay 52% of the first $1,800,000 as well as the remaining amount of $1,743,400 of crane costs.

HFZ now moves to vacate the Arbitration Award while South BP 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."

The scope of a court's review of an arbitration award is extremely limited. *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). An arbitration award will be vacated "only where it is totally irrational or exceeds a specifically enumerated limitation on the

arbitrator's power." *Elul Diamonds Co. Ltd.*, 50 A.D.3d at 293 (internal citations omitted).

HFZ argues that the Arbitration Award here should be vacated because: 1) the Arbitrator refused to hear evidence pertinent and material to the controversy; 2) the Arbitrator exceeded a specifically enumerated limitation on his power; and 3) the award is irrational.

1. Whether the Arbitrator's Exclusion of HFZ's Witness Testimony Was Fundamentally Unfair

HFZ argues that the Arbitrator should have permitted Tony Marrone ("Marrone"), the Managing Director of Construction for HFZ, to testify as an expert in light of South BP's "material change of its case theory" on the "eve of the hearing." Marrone testified as a fact witness at the arbitration and, during his testimony, HFZ sought to have him qualified as an expert but acknowledged that Marrone "can probably testify to offer the exact same testimony as a fact witness." After hearing from both parties on their positions about Marrone being permitted to testify as an expert, the Arbitrator concluded that Marrone could not do so but that he could answer questions "drawing on his experience."

HFZ also asserts that its fact witness, Douglas Renna ("Renna"), was unable to testify on the final day of the arbitration due to illness and HFZ then sought to have Paul Caradonna ("Caradonna") testify in Renna's place as a rebuttal witness. Caradonna was not on HFZ's witness list and South BP objected to the testimony on that basis. After HFZ's proffer as to the substance of what Caradonna's testimony would be on the tower

versus spider crane issue, the Arbitrator asked, "[d]idn't we have that same testimony already from Mr. Marrone?" HFZ's response was "yes." The Arbitrator then stated that he felt that Caradonna's testimony would be repetitive and decided not to hear it.

HFZ argues that the Arbitrator's refusal to hear Caradonna's testimony or to permit Marrone to testify as an expert constituted a refusal to hear evidence pertinent and material to the controversy and thus is a basis for vacating the Arbitration Award. "Arbitrators 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).

Here, the Arbitrator's proffered reasons for the decision to limit testimony had a sound basis. The Arbitrator explained his decisions on the record and where, as here, there is a "colorable" explanation for evidentiary decisions, the arbitration award must be confirmed. *Rai v. Barclays Capital, Inc.*, 739 F.Supp.2d 364, 373 (S.D.N.Y. 2010) (holding that arbitration panel's decision to exclude an affidavit was within the panel's discretion and certainly did not "rise to the level of affirmative misconduct.").

Further, HFZ has not shown that the Arbitrator's evidentiary decisions amounted to misconduct by preventing HFZ from giving evidence pertinent and material to the controversy. *See Kaminsky*, 26 A.D.3d at 189 (holding that petitioners did not meet their burden of showing "that the arbitrators' refusal to hear the rebuttal expert witness constituted misconduct by preventing them from eliciting pertinent and material testimony"); *Flotill Products, Inc. v. Buitoni Foods Corp.*, 14 A.D.2d 328, 335-336 (1st Dept. 1961).

2. Whether the Arbitrator Exceeded his Power

HFZ argues that the Arbitration Award should be vacated because the Arbitrator erroneously interpreted the JVA. Specifically, HFZ states that the JVA required a determination of the cost to construct the Adjmi façade as drawn, rather than a value engineered version of it, and the Arbitrator disregarded this fact and utilized a modified version of the Adjmi Design in reaching the Arbitration Award. HFZ also contends that because the JVA identified a tower crane for use in construction but did not reference a spider crane, the Arbitrator was bound by the former construction method in its determination of incremental costs in switching the façade design. Lastly, HFZ argues that the Arbitrator disregarded this limitation and then failed to allocate any crane cost to the Adjmi façade. In opposition, South BP states that the Arbitrator "considered the JVA, evaluated the evidence, and made a determination on that basis" which is entitled to deference.

As "arbitration is a creature of contract, the question of whether the [arbitrators] exceeded [their] authority 'focuses on whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue.'" *Frankel v. Sardis*, 76 A.D.3d 136, 139 (1st Dept. 2010) (citations omitted) (rejecting contention that the arbitration award should be overturned because the arbitration panel exceeded its authority). Further, "[e]ven if the arbitrator misapplies substantive rules of law or makes an error of fact, unless one of the

three narrow grounds applies in the particular case, the award will not be vacated pursuant to CPLR 7511 (b) (1) (iii) as exceeding the arbitrator's power." *Matter of New York Cent. Lines, LLC v. Vitale*, 82 A.D.3d 1244, 1244 (2d Dept. 2011).

HFZ's argument that the Arbitrator disregarded the JVA's provision pertaining to cost-determination of the Adjmi Design is belied by the language in the Arbitration Award. The Arbitrator concluded "that there should be no adjustment for [value engineering] of the cost of the Adjmi system, as the baseline for cost assessment is the Adjmi Design as set forth in the September 10, 2008 drawings and not something else." In fact, the Arbitrator's cost estimate for the Adjmi Design façade was $13,434,865 and was based on the Triton amount "adjusted upward to 'undo' the value engineering."

Contrary to HFZ's argument, the Arbitrator did not exceed his powers when he interpreted the contract to allow for construction of the Adjmi Design façade without use of a tower crane. The JVA's sole reference to a tower crane appears in a table entitled "Project Development Budget" which stated the allocation scheme for hard costs and included entries for "Superstructure - Concrete & Steel," "Hoisting", and "Tower Crane." The JVA noted that tower crane costs were to be allocated according to method "D" which is "based on actual cost allocation – expert divides." It does not explain whether the tower crane was to be utilized for the superstructure, façade or both.

In sum, review of the JVA, the Arbitration Award and the hearing transcripts fails to show that the Arbitrator exceeded his authority in interpreting the JVA and making the Arbitration Award.

3. Whether the Award Was Irrational

HFZ's final argument for vacating the Arbitration Award is that it was irrational because the Arbitrator concluded that the Adjmi façade could be built without use of a tower crane, even though the evidence showed that it was impossible to build the Adjmi façade using spider cranes and a hoist.

An arbitration award is deemed irrational when there is "no proof whatever to justify the award." *Peckerman v. D & D Assocs.*, 165 A.D.2d 289, 296 (1st Dept. 1991); *see also Matter of Roberts v. City of New York*, 118 A.D.3d 615, 617 (1st Dept. 2014). Here, the evidence that HFZ claims shows the impossibility of building a façade with the spider crane is the testimony of its expert Daniel Figert ("Figert").

The Arbitrator found that Figert was "entirely unreliable to provide evidence for consideration" and rejected his testimony in its entirety. HFZ's argument then is simply a challenge to the Arbitrator's credibility and factual determinations, which are not reviewable by the Court. *See Tasch v. Board of Educ. of city of New York*, 3 A.D.3d 502, 503 (2d Dept. 2004) (stating that the lower court correctly accepted the arbitrator's credibility determinations due to "the degree of deference accorded the arbitrator in matters of credibility").

Moreover, based on the evidence before him, the Arbitrator concluded that "Mr. McDonnell and Mr. Weiss convincingly demonstrated that a tower crane was unnecessary for the construction of the Adjmi facade, leaving the total cost of crane

usage on the prospective Adjmi project at $1,800,000 (solely for the superstructure). The Arbitrator accepts this conclusion that no tower crane is needed for the Adjmi facade…."

I find that the Arbitration Award was not irrational because the Arbitrator cited proof to justify the award. *See Matter of Roberts*, 118 A.D.3d at 617. It is not the role of a court to second-guess the Arbitrator's findings of fact, so long as the Arbitrator's findings have support in the record. *See Liberty Mut. Ins. Co. v. Sedgewick of New York,* 43 A.D.3d 1062, 1063 (2d Dept. 2007) ("a reviewing court may not second-guess the fact-findings of the arbitrator").

In sum, HFZ has failed to show that the Arbitration Award should be vacated. I therefore deny the petition to vacate the Arbitration Award and grant South BP's motion to confirm the Arbitration Award.

4. Costs and Attorneys' fees

South BP requests costs and attorneys' fees incurred in connection with this motion to confirm the Arbitration Award, pursuant to the JVA. Generally, "a party must pay his or her own attorney's fees unless an award is authorized by an agreement between the parties, or by statute or court rule." *Degregorio v. Richmond Italian Pavillion, Inc.,* 90 A.D.3d 807, 808 (2d Dept. 2011)*; City of New York v. Zuckerman,* 234 A.D.2d 160, 161 (1st Dept. 1996). Further, attorneys' fees awards are within the sound discretion of the trial court. *Mastrandrea v. Mastrandrea*, 268 A.D.2d 293, 293 (1st Dept. 2000).

Here, the JVA provides that

> In the event of any litigation, arbitration or other dispute arising as a result of or by reason of this Agreement, the prevailing party in any such litigation, arbitration or other dispute shall be entitled to, in addition to any other damages assessed, its reasonable attorneys' fees, and all other out-of-pocket costs and expenses incurred in connection with settling or resolving such dispute. The attorneys' fees, which the prevailing party is entitled to recover, shall include fees for prosecuting or defending any appeal and shall be awarded for any supplemental proceedings until the final judgment is satisfied in full. In addition to the foregoing award of attorneys' fees to the prevailing party, **the prevailing party in any lawsuit or arbitration procedure on this Agreement shall be entitled to its reasonable attorneys' fees incurred in any post judgment proceedings to collect or enforce the judgment.** (emphasis added).

To determine if a party has prevailed "for the purpose of awarding attorneys' fees, the court must consider the 'true scope' of the dispute litigated and what was achieved within that scope." *Sykes v. RFD Third Ave. I Assoc., LLC*, 39 A.D.3d 279, 279 (1st Dept. 2007). The prevailing party is the party that was successful "on the central claims advanced." *Board of Mgrs. of 55 Walker St. Condominium v. Walker St.*, 6 A.D.3d 279, 280 (1st Dept. 2004); *see also 25 East 83 Corp. v. 83rd Street Associates*, 213 A.D.2d 269, 269 (1st Dept. 1995).

South BP is the prevailing party in this action as it succeeded in having the Arbitration Award confirmed. And, pursuant to the JVA, South BP is thus entitled to its reasonable attorneys' fees and costs. Therefore, I order a hearing before a Special Referee to determine only the amount of attorneys' fees and costs that South BP expended in its motion to confirm the Arbitration Award.

In accordance with the foregoing, it is

ORDERED that the petition by HFZ Bryant Park Owner LLC to vacate the arbitration award is denied; and it is further

ORDERED that respondent South BP Associates, LLC's motion to confirm the arbitration award is granted in its entirety; and it is further

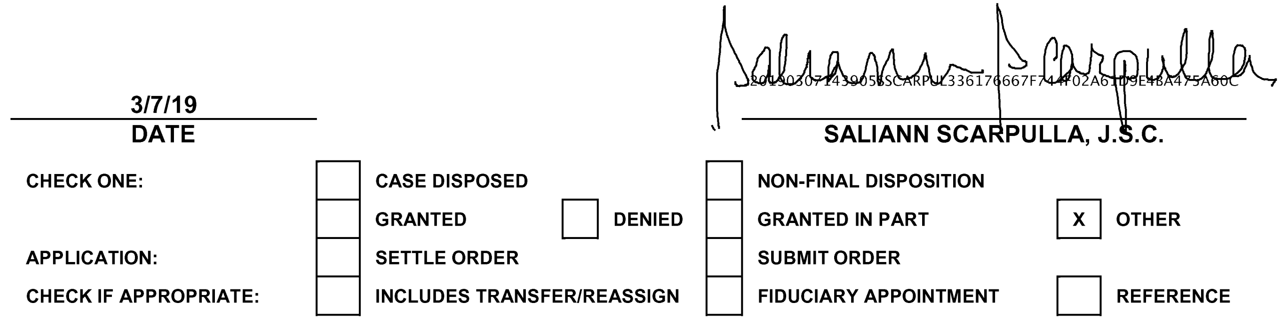
ORDERED that respondent South BP Associates, LLC's motion to dismiss HFZ's petition is denied as moot; and it is further

ORDERED that a hearing shall be conducted before a Special Referee on the amount of reasonable attorneys' fees and costs to be awarded to South BP Associates, LLC in connection with its motion to confirm the arbitration award issued on September 3, 2015. The Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the attorneys' fees issue; and it is further

ORDERED that counsel for South BP Associates, LLC shall, within 30 days from the date of this order, serve a copy of the order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part SOR) for the earliest convenient date; and it is further

ORDERED that, upon receipt of the Special Referee's report and South BP Associates, LLC's motion to confirm the Special Referee's report, I will enter judgment on the arbitration award and the attorneys' fees.

This constitutes the decision and order of the Court.



CHECK ONE:	☐ CASE DISPOSED		☐ NON-FINAL DISPOSITION			
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APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER			
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