

**Zacky v Savile Opportunity Fund, L.P.**

2019 NY Slip Op 31272(U)

April 16, 2019

Supreme Court, New York County

Docket Number: 656298/2018

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

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Application of RICHARD ZACKY AND KATHLEEN  
ZACKY, as co-trustees of the Richard Zacky and Kathleen  
Zacky Family Trust Dated July 28, 2006,

Index No.  
656298/2018

Petitioners,

**DECISION  
and ORDER**

For an Order Pursuant to Article 75 of the CPLR  
Confirming an Arbitration Award

Mot. Seq. 1

- against -

SAVILE OPPORTUNITY FUND, L.P.,

Respondent.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

Petitioners Richard Zacky and Kathleen Zacky, as co-trustees of the Richard Zacky and Kathleen Zacky Family Trust Dated July 28, 2006 (“Petitioners”) have commenced a special proceeding, pursuant to CPLR § 7510, to confirm the Arbitration Consent Award in *Richard Zacky and Kathleen Zacky, as co-trustees of the Richard Zacky and Kathleen Zacky Family Trust Dated July 28, 2006 v. Savile Opportunity Fund, L.P.* AAA Case No. 01-18-0001-0625 (the “Consent Award”). Petitioners also seek judgment in the total amount of \$220,000.00 plus interest. Respondent Savile Opportunity Fund, L.P. (“Respondent”) submits partial opposition.

Background/Factual Allegations

In the beginning of 2014, Petitioners executed an Agreement of Limited Partnership (“Partnership Agreement”), invested capital contributions in Respondent and the Richard Zacky and Kathleen Zacky Family Trust dated July 28, 2006 (“Trust”) became a limited partner of Respondent.

The Partnership Agreement states that:

“limited partners could voluntarily withdraw some or all of their capital accounts, provided certain requirements

were followed including, but not limited to, the requirement that the limited partner provide ninety (90) days of written notice of the withdrawal to the general partner. Under the Partnership Agreement, a partner who withdraws completely is no longer to be considered a partner for any purpose after the Effective Time of the withdrawal, which is defined under the agreement as ‘if proper Notice of such withdrawal is received by the General Partner at least 90 days prior to the end of a Period. the end of that Period[.]’”

(Petitioners’ Petition at 2-3).

On June 18, 2015, Petitioners requested from Respondent redemption for 100% of the Trust’s balance, effective September 30, 2015. Respondent’s representative Pablo Marino signed and accepted the redemption. Petitioners contend that they did not receive redemption of 100% of the Trust’s balance.

On September 11, 2017, Petitioners filed an action to recover the money owed to the Trust in the Superior Court of California, County of San Luis Obispo (the “California Action”). Respondent filed a motion to compel arbitration in the California Action pursuant to the Partnership Agreement, which allows the parties to submit to arbitration in New York, New York. On February 7, 2018, the Court granted Respondent’s motion.

Pursuant to the terms of the Partnership Agreement, Petitioners filed a Demand for Arbitration and Statement of Claim against the Respondent with the American Arbitration Association (“AAA”). Petitioners alleged that they are owed \$233,525.00 plus interest from September 30, 2015 until June 18, 2015. The parties engaged in settlement negotiations and on December 3, 2018, Michael Einbinder, Esq. (“Arbitrator Einbinder”) signed the parties Consent Award.

The Consent Award awarded Petitioners \$220,000.00 against Respondent “in full and complete settlement and satisfaction of any and all claims, counterclaim, or application not specifically granted herein is nonetheless deemed DENIED.” Petitioners contend that Respondent has not satisfied the Consent Award.

Petitioner commenced this action on December 18, 2018 by filing a petition as a special proceeding seeking the Court to confirm the Consent Award; to award Petitioner pre-judgment interest at the statutory nine (9%) percent rate running from the date of the December 3, 2018 Consent Award; and to award post-judgment interest.

### Parties' Contentions

In partial opposition, Respondent argues that the Consent Award does not specifically order it to pay the \$220,000.00 and does not set forth a specified time it shall be paid. Respondent argues that pursuant to Section 10.3.4 of the Partnership Agreement (“Section 10.3.4”), Respondent (as the General Partner) has “extremely broad powers and discretion” to manage the assets and liquidation. Respondent contends that the Consent Award does not contradict or override Section 10.3.4. Respondent states that Section 10.3.4 states in relevant part,

“The General Partner shall have discretion to manage the Partnership’s assets after receipt of a Limited Partner’s withdrawal request in a manner intended to result in cash being available for distribution to such Limited Partner in connection with such withdrawal, but the General Partner shall not be obligated to liquidate Partnership assets if the General Partner, in its sole discretion, determines not to do so, either because such liquidation might, in the General Partner’s judgment, be detrimental to the interests of the remaining Partners or for other reasons. [Emphasis added.]”

Respondent further contends that the Consent Award expressly “[d]enied” Petitioners’ request to compel Respondent to liquidate assets to pay Petitioners’ capital account upon its withdrawal. Respondent argues that entry of judgment allowing Petitioners to execute the amount of the Consent Award would expressly violate Section 10.3.4. Respondent asserts that it does not have liquid assets currently, or in the foreseeable future, to pay the amount of the awarded to Petitioner in the Consent Award. Moreover, Respondent contends that the Consent Award does not entitle Petitioners to interest on the amount awarded.

Aurelio Almonte, Manager of Savile Partners, LLC, the General Partner of Respondent (“Mr. Almonte”), submits his Affidavit in Partial Opposition to the Petition. Mr. Almonte contends that in the fourth quarter of 2016, Respondent gave formal notice to all partners, including Petitioner, to preclude any partner from further withdrawal of capital and to treat all partners equally by winding down Respondent’s operation and allocating the net proceeds when available on a pro rata basis. Mr. Almonte contends that 90% of Petitioner’s capital account had been repaid. Mr. Almonte asserts that the Consent Award does not provide the manner or timing of payment to Petitioners. Mr. Almonte contends that Section 10.3.4 gives Respondent as the General Partner the “broad authority and sole discretion” to determine the manner and timing of payment of the Consent Award.

In their reply, Petitioners contend the Consent Award should not be vacated or modified because Respondent has failed to set forth a basis pursuant to CPLR §§ 7511(b) and (c). Petitioners argue that Respondent agreed to the Consent Award and cannot now argue that there is a miscalculation, that Arbitrator Einbinder exceeded his authority or acted improperly, or that the form is deficient. Petitioners argue that the Court lacks jurisdiction to grant Respondent's modification. Petitioners contend that Respondent should appeal to the arbitrator to modify or clarify the Consent Award based on one of the factors listed in CPLR § 7511.

### Legal Standard

"It is well settled that judicial review of arbitration awards is extremely limited." *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479 [2006]. "An arbitration award must be upheld when the arbitrator 'offers even a barely colorable justification for the outcome reached.'" *Wien*, 6 N.Y.3d at 470-480 (internal citations omitted). CPLR §7510 states, "[t]he court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511."

Pursuant to CPLR § 7511(c), an award can only be modified where:

1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or
2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

### Discussion

This Court confirms the Consent Award that was agreed to by the parties and was signed by Arbitrator Einbinder on December 3, 2018. The Consent Award stated "Claimant is awarded the sum of Two Hundred and Twenty Thousand (\$220,000.00) Dollars against Respondent" and it "is in full and complete settlement and satisfaction of any and all claims, [or] counterclaim[s]". Both sides request that the Court include additional terms when confirming the Consent Award. Specifically,

Petitioners request pre-judgment interest and Respondent requests that conditions be imposed on payment including that the General Partner determine “whether, how, and when to liquidate fund assets to make payment to Petitioner and the Fund’s other withdrawn partner/creditors”. The Court notes that neither party has made a motion to modify the Consent Award. Therefore, this Court will confirm the Consent Award only as written.

Wherefore, it is hereby,

ORDERED that the Petition is granted only to the following extent; and it is further

ORDERED that the Petition to confirm the Consent Award signed by Michael Einbinder, Esq. on December 3, 2018 is granted; and it is further

ORDERED and ADJUDGED that (1) Petitioners Richard Zacky and Kathleen Zacky, as co-trustees of the Richard Zacky and Kathleen Zacky Family Trust Dated July 28, 2006 are awarded the sum of \$220,000.00 against Respondent Savile Opportunity Fund, L.P.; (2) the administrative fees of the American Arbitration Association and the compensation of the Arbitrator shall be borne equally by the parties; and (3) this CONSENT AWARD is in full and complete settlement and satisfaction of any and all claims, counterclaims, or application not specifically granted herein is nonetheless deemed DENIED.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: April 16, 2019



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Eileen A. Rakower, J.S.C.