Werner Worldwide Holding Co., LP v Werner US Sub Holding, Inc.
2019 NY Slip Op 31691(U)
June 12, 2019
Supreme Court, New York County
Docket Number: 653655/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOEL M. COHEN** **PART** **IAS MOTION 3EFM**

Justice

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WERNER WORLDWIDE HOLDING COMPANY, LP,

Plaintiff,

- v -

WERNER US SUB HOLDING, INC., WERNER EUROPEAN HOLDING LIMITED, TRITON IV LUXCO NO. 34 S.A.R.L.

Defendants.

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INDEX NO. 653655/2018

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 63, 70, 72

were read on this motion to VACATE ARBITRATION AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 71

were read on this motion to DISMISS.

This is a dispute regarding the calculation of a post-closing adjustment of the purchase price under a Stock Purchase Agreement ("SPA"). Per the terms of the SPA, the dispute was referred to arbitration before an independent accounting firm. The arbitrator determined that certain "Transaction Bonuses" paid by the Seller constituted a reduction in Net Working Capital that, in turn, warranted a reduction of the purchase price under the SPA. The Seller (Plaintiff) asserts that the arbitrator's decision was "manifest[ly]" incorrect and that it was beyond the arbitrator's authority to decide an issue of contract interpretation (though it did not raise that concern until after it lost).

Plaintiff seeks to vacate or modify the arbitrator's decision, and Defendants (the Buyer) cross-move to confirm the arbitration award. (Motion Seq. No. 001).

Defendants also move to dismiss the Complaint on the grounds that Plaintiff's breach of contract claim is barred by the arbitration award and that Plaintiff has not stated a viable claim of fraudulent inducement. (Motion Seq. No. 002).

For the reasons described below, Plaintiff's motion to vacate the arbitration award is Denied, Defendants' cross-motion to confirm the arbitration award is Granted, and Defendants' motion to dismiss the Complaint is Granted.

Background

Plaintiff Werner Worldwide Holding Company ("Werner") entered into a Stock Purchase Agreement ("SPA") whereby Defendants Werner US Sub Holding Inc., Werner European Holding Limited and Triton IV Luxco (together, "Defendants") purchased two of Plaintiff's subsidiary companies. The transaction closed on July 24, 2017.

The SPA contains a "Post-Closing Adjustment" provision (Section 2.07) that sets forth the procedure for calculating a Final Purchase Price. Specifically, within sixty days after the Closing Date, the Buyer was required to prepare Final Closing Documents, including a Final Closing Balance Sheet and Final Closing Statement. The Final Closing Statement was to include a calculation of Final Net Working Capital, Closing Date Cash, Closing Date Indebtedness and Company Transaction Expenses. To the extent those amounts differed from the corresponding numbers in the Preliminary Closing Statement (upon which the Preliminary Purchase Price was based), an adjustment would be made in calculating the Final Purchase Price. In preparing those documents and calculations, the Buyer was required to apply a set of agreed upon Calculation Principles, which are set forth in Exhibit A to the SPA. The Calculation

Principles contained, among other things, detailed definitions of key terms such as Net Working Capital.

Section 2.07(c) of the SPA provides that Seller has forty-five days to dispute Buyer's calculations of the Final Closing Documents. After a Notice of Objection is delivered, the parties have sixty days to use commercially reasonable efforts to resolve the dispute. If the parties are unable to resolve the dispute they are to appoint an independent accounting firm "as an arbitrator, to resolve any items that remain in dispute [at the end of the sixty-day period]." In turn, "Buyer and Seller shall instruct the Independent Firm to determine as promptly as practicable... whether and to what extent (if any) the calculations set forth in the Final Closing Documents require adjustment." Finally, the agreement states that "[t]he determination of the Independent Firm shall be... ***final, conclusive and binding on the Parties, absent fraud or manifest error***." (emphasis added).

Consistent with the process set forth above, on September 15, 2017, Defendants submitted to Seller an Estimated Final Purchase Price that was $7.2 million lower than the Preliminary Purchase Price, based mainly on a determination that an accrued expense of $6,854,000 for the payment of Transaction Bonuses reduced Net Working Capital, which in turn led to a reduction of the purchase price. On October 29, 2017, Plaintiff sent a notice of objection to Defendants, contending that Defendants agreed in the SPA to absorb the cost of Transaction Bonuses and therefore that expense could not be taken into account to lower the purchase price which would, in effect, impose that cost on the Seller. (NYSCEF 32). The parties were unable to resolve the dispute.

In accordance with Section 2.07, the parties engaged BDO USA, LLP, ("BDO") to arbitrate the dispute. During the arbitration process, the parties submitted position papers to BDO with respect to the issues in dispute, including whether Transaction Bonuses properly were included in determining Net Working Capital. Neither party suggested at the time that the issues were beyond BDO's remit as arbitrator under Section 2.07 of the SPA.

On May 24, 2018, BDO issued its determination, in favor of Defendants. It concluded that the SPA requires that Net Working Capital be calculated in a manner consistent with GAAP, and that under GAAP the Transaction Bonuses were an accrued liability that was incurred and related to the period prior to the closing date. Accordingly, BDO found, the Buyer correctly included the Transaction Bonuses as an accrued liability, and therefore no change was required to the Buyer's calculation of Final Net Working Capital, which in turn impacted the Final Purchase Price. (NYSCEF 22).

The Parties' Arguments

In support of its motion to vacate the arbitration award, Plaintiff argues that BDO's determination constituted "manifest error" because it contradicted provisions of the SPA indicating that Defendants agreed to fund the Transaction Bonuses. For example, the SPA defines Company Transaction Expenses and Indebtedness, which were to be deducted from the purchase price, to expressly *exclude* Transaction Bonuses. (NYSCEF 18, SPA at 3, 8). Plaintiff argues that the parties could not have intended to include those same Transaction Bonuses in the meaning of Net Working Capital, which would have the effect of imposing those costs on the Seller via a reduction in the purchase price.

Plaintiff further argues that BDO exceeded the authority granted by the SPA by making a legal interpretation of the SPA, instead of resolving disputes concerning calculations only. It argues that Section 2.07 of the SPA states that the independent accounting firm was to determine only whether the calculations set forth in the Final Closing Documents required adjustment. Instead, so the argument goes, BDO made a legal interpretation of the SPA that contradicted the plain terms of the agreement.

In response, Defendants argue that Plaintiff has not and cannot show that BDO's decision was "manifest error," only that Plaintiff disagrees with the result. Defendants also argue that BDO acted within its contractual remit because the SPA grants the independent firm authority to resolve "any items that remain in dispute" related to the post closing statements. There were no enumerated limitations put upon BDO that would preclude it from making its determination, nothing that would limit BDO's responsibilities to a simple math exercise, and BDO's application of GAAP principles was contemplated by the SPA in the Calculation Principles. Finally, Defendants argue that Plaintiff waived its ability to contest the arbitrator's authority because it fully participated in the arbitration process on the very issue it now contends was outside BDO's contractual remit.

Analysis

Motion to Vacate and Cross-Motion to Confirm

Under CPLR § 7511(b)(1)(iii), an arbitration award may be vacated when "an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made." "It is well settled that a court may vacate an arbitration award only if it violates a

strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power." *In re Falzone (New York Cent. Mut. Fire Ins. Co.)*, 15 N.Y.3d 530, 534 (2010) (citations omitted). "Moreover, courts are obligated to give deference to the decision of the arbitrator. This is true even if the arbitrator misapplied the substantive law in the area of the contract." *New York City Transit Auth. v. Transp. Workers' Union of Am., Local 100, AFL-CIO*, 6 N.Y.3d 332, 336 (2005) (citations and quotations omitted). "[A]n arbitrator's rulings, unlike a trial court's, are largely unreviewable." *Falzone*, 15 N.Y.3d at 534.

Under federal law, an arbitration award may be vacated in the event of fraud, corruption, or misconduct of the arbitrators, or if the award exhibits a manifest disregard of the law. *Wien & Malkin LLP, v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 480 (2006). "To modify or vacate an award on the ground of manifest disregard of the law, a court must find 'both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.'" *Id.* at 481 (citations omitted). Notably, "[m]anifest disregard of the facts is not a permissible ground for vacatur of an award." *Id.* at 483.

In sum, under New York and federal law, "'[a] party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high.'" *U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912, 915 (2011) (quoting *Ecoline, Inc. v. Local Union No. 12 of Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers, AFL–CIO*, 271 F. App'x 70, 72 (2d Cir. 2008)).

The SPA's description of the narrow standard of review – *i.e.*, that the arbitrator's decision is "final, conclusive and binding on the Parties, absent fraud or manifest error" – is consistent with if not more stringent than the standards described above.[1]

Plaintiff has not provided sufficient grounds to warrant vacating BDO's arbitration award. First, BDO's decision did not constitute "manifest error." While reasonable minds might differ as to whether the exclusion of Transaction Bonuses from Transaction Expenses and Indebtedness elsewhere in the contract shows an intent for Transaction Bonuses to be excluded from Net Working Capital under the Calculation Principles, the Court cannot conclude that BDO's decision was fraudulent or manifestly wrong. BDO consulted the Calculations Principles and concluded that that company's historical accounting methods, the first guiding principal, did not provide proper guidance as to how the Transaction Bonuses should be accounted. Therefore, it concluded, GAAP was the proper methodology to apply in determining Net Working Capital. The record does not support Plaintiff's assertion that BDO's conclusion was so beyond the pale as to constitute manifest error.

Second, Plaintiff has not shown that BDO was prohibited from determining whether the Transaction Bonuses impacted the Final Closing Price. The reference to

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[1] The SPA provides that "[t]his Agreement, and all Actions (whether in contract or tort) that may be based upon, arise out of or relate to this Agreement or the negotiation, execution or performance hereof (including any claim or cause of action based upon, arising out of or related to any representation or warranty made in or in connection with this Agreement or as an inducement to enter into this Agreement), shall be governed by and construed in accordance with the law of the State of New York... Each of the Parties hereby irrevocably and unconditionally submits, for itself and its property, to the exclusive jurisdiction of the state courts sitting in the borough of Manhattan of the State of New York or, if such courts shall not have jurisdiction, any federal court in the United States of America sitting in the borough of Manhattan of the State of New York..." (NYSCEF 18, SPA § 11.05).

"calculations" in Section 2.07 does not constitute the type of enumerated carve out that would limit the authority of BDO to resolve "any items that remain in dispute" at the end of the sixty-day period after Plaintiff's notice of objection to Buyer's Final Closing Documents. (NYSCEF 18, SPA 2.07(d)). *See Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 307 (1984) ("[A]ny limitation upon the power of the arbitrator must be set forth as part of the arbitration clause itself"). The bottom line is that BDO was retained to resolve the dispute over the Final Purchase Price, and the categorization of Transaction Bonuses as Net Working Capital under the Calculation Principles is an integral part of that dispute. That is what it did.

Plaintiff also cannot vacate the award on the basis that the arbitrator made a mistake of law. The "'manifest disregard' standard rarely results in vacatur because it is limited to those 'rare occurrences of apparent 'egregious impropriety' on the part of the arbitrators,' which requires 'more than a simple error in law or failure by the arbitrators to understand or apply it;' in other words, it must be 'more than an erroneous interpretation of the law.'" *Cheng v. Oxford Health Plans Inc.*, 45 A.D.3d 356, 357 (1st Dep't 2007) (citations omitted). This type of error did not occur in this case.

Separately, Plaintiff has waived its opportunity to assert that BDO exceeded its authority. Plaintiff participated actively in the arbitration and presented its arguments with respect to the proper treatment of Transaction Bonuses, including the contractual interpretation arguments it now contends were beyond the scope of the arbitrator's authority. Plaintiff did not raise any objection that this was an issue beyond BDO's contractual remit until after BDO had issued its decision in Defendant's favor. Plaintiff cannot remain silent during the arbitration, hoping for a positive result, and only later

argue that the matter was never properly before the arbitrator to begin with. *Cf. Smullyan v. SIBJET S.A.*, 201 A.D.2d 335, 336 (1st Dep't 1994) ("[A] party otherwise entitled to a judicial determination of the arbitrability of a dispute may waive that right by actively participating in the arbitration without seeking a stay pursuant to CPLR 7503 (b) or otherwise preserving their right to have the issue of arbitrability judicially determined" (citations omitted)); *Application of Dember Constr. Corp.*, 190 A.D.2d 537 (1st Dep't 1993) ("Respondent waived its right to contest the arbitrators' authority to determine whether the dispute was arbitrable by actively participating in the arbitration for more than two years rather than promptly seeking a judicial determination of the arbitrability issue once it became clear that petitioner was raising non-arbitrable claims in the arbitration proceeding").[2]

Accordingly, Plaintiff's motion to vacate the arbitration award is Denied and Defendants' cross-motion to confirm the award is Granted.

Motion to Dismiss

The foregoing analysis dispenses with Plaintiff's claims for breach of contract and declaratory judgment. Once a determination has been made by an arbitrator, the parties may not relitigate the decision in court. *I. Appel Corp. v. Mahoney Cohen & Co. CPA, P.C.*, 294 A.D.2d 196 (1st Dep't 2002). Plaintiff's claim that the determination by

[2] Plaintiff argues that a finding of waiver improperly conflates the question of whether a dispute is arbitrable (which can be waived) with a dispute regarding whether the arbitrator's decision exceeded the scope of its authority (which can always be raised in challenging an arbitrator's award). While that generally is true, in this case Plaintiff engaged with the arbitrator on the very issue it now says was beyond the scope of the arbitration provision. In that setting, the Court believes it is appropriate to apply the line of cases concerning the waiver of objections to arbitrability. In any event, the finding of waiver is an alternative ground for denying Plaintiff's motion and does not impact the other grounds.

BDO was an appraisal and not an arbitration is unavailing. The SPA expressly describes the "accounting firm" to be "an arbitrator." The Court sees nothing about the process that occurred in this case to suggest that the process was anything other than what the SPA says it is: that is, an arbitration.

That leaves only Plaintiff's claim for fraudulent inducement. The gravamen of that claim is that Defendants never intended to comply with their representation that they would absorb the economic impact of the Transaction Bonuses. Any binding commitments with respect to that issue are, however, contained in the SPA, and it has already been determined that Defendants did not breach the agreement by taking the position (confirmed through arbitration) that Transaction Bonuses should be included in the calculation of the purchase price adjustment. In these circumstances, Plaintiff's claim for fraudulent inducement is duplicative of and subsumed by its claim for breach of contract. "[A] viable claim of fraud concerning a contract must allege misrepresentations of present facts (rather than merely of future intent) that were collateral to the contract and which induced the allegedly defrauded party to enter into the contract." *Orix Credit Alliance, Inc., v. R.E. Hable Co.*, 256 A.D.2d 114, 115 (1st Dep't 1998).

Accordingly, Defendants' motion to dismiss Plaintiff's Complaint is granted.

Therefore, it is:

ORDERED that Plaintiff's motion to vacate the arbitration award (Motion Sequence 001) is Denied, and Defendants' cross-motion to confirm the arbitration award is Granted; and it is further

ORDERED that Defendants' motion to dismiss the Complaint (Motion Sequence 002) is Granted.

This constitutes the Decision and Order of the Court.

6/12/2019
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE