

Matter of Weiner v Siderow Org., LLC

2020 NY Slip Op 30106(U)

January 6, 2020

Supreme Court, New York County

Docket Number: 651689/2019

Judge: W. Franc Perry

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

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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IN THE MATTER OF THE ARBITRATION BETWEEN
LAUREN WEINER,

Petitioner,

- v -

THE SIDEROW ORGANIZATION, LLC, BRADFORD
SIDEROW, JOSHUA ARCUS, SIDEROW ORGANIZATION
RESIDENTIAL, LLC

Respondent.

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INDEX NO. 651689/2019

07/18/2019,

07/18/2019,

MOTION DATE 07/18/2019

MOTION SEQ. NO. 001 003 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 7, 8, 9, 10, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 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, 57, 58, 59

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for ATTORNEY - FEES

Motion sequence numbers 001, 003 and 004 are consolidated for disposition.

BACKGROUND

Petitioner seeks a judgment, pursuant to CPLR 7510, confirming an arbitration award issued on March 14, 2019 (Partial Award), and a final arbitration award (Final Award), delivered to the parties on May 23, 2019, which incorporates by reference the Partial Award (together with the Final Award, the Award), and directing that judgment be entered for the amount of the Award, with interest, costs and expenses. Respondents Bradford Siderow and Joshua Arcus (together, the Individual Respondents) oppose the petition, and move, pursuant to CPLR 7511

(b) (1) (iii), to vacate or modify the Partial Award and cross-move to vacate or modify the Final Award to the extent that these awards impose personal liability on the Individual Respondents for the debts and obligations of the two entity respondents.

In short, petitioner and all respondents engaged in an arbitration before a panel of the Commercial Arbitration Tribunal of the American Arbitration Association (the Panel or AAA), Case No. 01-16-0004-3961, concerning a dispute about a New York real estate brokerage business, formed as a New York LLC in 2013, named Siderow Organization Residential, LLC (SOR). Petitioner Lauren Weiner, and respondent The Siderow Organization, LLC (TSO), are the only members of SOR. TSO's only members are the Individual Respondents.

In the Partial Award, the Panel ruled in petitioner's favor on her claims that she was entitled to certain commissions and a buyout of her interests in SOR, and that certain unauthorized charges had been charged to SOR by TSO. The Panel also determined that it was authorized to make an award of attorneys' fees and expenses pursuant to AAA Commercial Arbitration Rule 47(d), and the parties' stipulation, dated October 5, 2016, which provided that: "[t]he arbitration panel shall have the authority in its discretion to award the substantially prevailing Party its reasonable attorneys' fees and reasonable expenses incurred in connection with this dispute, including but not limited to the Fees imposed by AAA, as part of the arbitration award" (NYSCEF Doc. No. 22, at 5, ¶ 10). That award was made in the Final Award.

The Partial Award reflects that the Panel awarded petitioner \$991,724.00 on her arbitration claims. The Final Award reflects that the Panel awarded petitioner \$513,890.28 for her attorneys' fees, costs and expenses of the arbitration.

DISCUSSION

“It is a bedrock principle of arbitration law that the scope of judicial review of an arbitration proceeding is extremely limited” (*Frankel v Sardis*, 76 AD3d 136, 139 [1st Dept 2010]). CPLR 7510 states that a “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 [CPLR] section 7511.” CPLR 7511 (b) (1) (iii) provides that an arbitration award: “shall be vacated . . . if the court finds the rights of [a party who participated in the arbitration] were prejudiced by: . . . (iii) 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”(CPLR 7511 (b) (1) (iii); see also *Matter of Isernio v Blue Star Jets, LLC*, 140 AD3d 480, 480 [1st Dept 2016] [final and definite award will not be vacated absent violation of a public policy, total irrationality or the arbitrator exceeded a specifically enumerated limitation on his or her power]). The party seeking to have the award vacated carries the heavy burden to demonstrate, by clear and convincing evidence, that the award must be vacated (*Intrepid Invs., LLC v Selling Source, LLC*, 159 AD3d 508, 509 [1st Dept 2018]; *Blumenkopf v Proskauer Rose LLP*, 95 AD3d 647, 647-648 [1st Dept 2012]). An arbitrators’ mere mistakes in fact or law are insufficient alone to demonstrate irrationality (*Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 535 [2010]; *Matter of Karlin v Roman*, 143 AD2d 831, 832 [2d Dept 1988]).

The Individual Respondents contend that the Award against them, as individuals, was improper because: (1) the claims sought contract-based recoveries from or relating to the respondent entities, and there was no veil-piercing claim; (2) the briefs submitted contained no argument concerning the imposition of liability upon the Individual Respondents; (3) there was

no proof at the hearing to support a veil-piercing claim or that would justify the imposition of personal liability upon the Individual Respondents for the damages award; and (4) that the arbitrators' written reasoning was grounded in the terms of the operating agreement between petitioner and TSO, and contains no discussion of the theory or the evidence upon which the Individual Respondents should be adjudged liable for commissions, contested expenses, or the buyout. Summed up, the Individual Respondents argue that the awards for commissions, improper charges of expenses to SOR and the buyout of petitioner's interest in SOR were premised on obligations of SOR itself, or TSO as a member of SOR. The Individual Respondents contend that the Panel tacitly pierced the corporate veils of SOR and TSO to impute liability to the Individual Respondents, but in the absence of any claim to do so or evidence to support veil-piercing.

The Individual Respondents also contend that petitioner abandoned her counts in the Amended Statement of Claim, in the arbitration proceeding, because she did not mention the claims in her pre- or post-hearing briefs, or at closing argument. The Individual Respondents argue that to the extent that the Panel imposed liability on them because of their status as officers of SOR, SOR's operating agreement makes clear that the Individual Respondents' only duties to petitioner concerned the day-to-day activities of the business.

The Individual Respondents argue that modification is in order because the Panel's authority was limited to those issues presented by the parties. The Individual Respondents contend that the Panel exceeded its authority by reaching the issue of the imposition of liability upon the Individual Respondents, as the Award and petitioner's briefs before the panel do not raise or suggest a theory through which liability would be imputed to the Individual

Respondents. The Individual Respondents argue that the proper remedy is to delete the reference to them in the decretal paragraphs of the Final Award.

Turning first to the Partial Award, a review of the record reveals that the arbitration proceeding was brought against all of the respondents, and included a breach of fiduciary duty claim against them. Furthermore, petitioner claimed TSO engaged in wrongdoing through the conduct of the Individual Respondents. Concerning what respondents argue is the lack of a veil-piercing claim, courts have stated that a claim to pierce the corporate veil is not itself a separate cause of action (see e.g. *Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013] [“Piercing of the corporate veil is not a cause of action independent of that against the corporation; it is established when the facts and circumstances compel a court to impose the corporate obligation on its owners, who are otherwise shielded from liability”]; see *Parklex Assoc. v Parklex Assoc.*, 15 Misc 3d 1125(A), 2007 NY Slip Op 50842[u] [Sup Ct, Kings County 2007] [stating that although veil piercing is not a separate claim, the determination as to domination in order to justify veil piercing is premature on a motion to dismiss]). Therefore, a separate written claim for veil-piercing was not required.

In any event, petitioner named the Individual Respondents as direct respondents in her arbitration claim. Specifically, petitioner’s First Amended Statement of Claim in the arbitration proceeding defines “TRO Respondents” as The Siderow Organization, LLC, Bradford Siderow, and Joshua Arcus. The statement of claim also includes a breach of fiduciary duty and prima facie tort claim, and seeks recovery against all of the arbitration respondents (see NYSCEF Doc. No. 38 at 71 and ¶¶ 99, 263-272).

At most, the Individual Respondents’ argument is that the Panel made a mistake of law or fact, but this is not dispositive in their favor (*Matter of Falzone*, 15 NY3d at 535; *Matter of*

Karlin, 143 AD2d at 832). This is especially so because the Individual Respondents, who carried the initial burden on this motion, have not demonstrated that they distinguished to the Panel their liability from that of the respondent entities during the arbitration hearings. After the issuance of the Partial Award, the parties submitted letters to the Panel on the issue of modifying that award, so that it would not be entered against the Individual Respondents. After review of the parties' submissions, the Panel issued Procedural Order No. 12 on April 11, 2019, in which it concluded that it lacked the jurisdiction under AAA rules to modify the Partial Award, but that, in any event:

The Claimant's Statement of Claim asserted without distinction the same breach of fiduciary duty and prima facie tort claims against the Individual Respondents as it did against Respondent The Siderow Organization, LLC ('TSO'), the entity that they fully owned and used to control Siderow Organization Residential, LLC ('SOR') in which they had a 66.65 % interest and on whose behalf they served as Managing Principals and as the Chief Executive Officer and the Chief Financial Officer of SOR. These claims included specifically claims as to a failure to accurately distribute commissions, a failure to properly allocate corporate expenses and a failure to compensate Claimant for her ownership interest in SOR. At no time in the pre-hearing proceedings, during the hearing, or in the post-hearing briefings submitted before the Award was rendered did the Individual Respondents raise objections to their inclusion as Respondents or raise any defenses applicable to them (including any contentions that they are not liable for acts attributable to TSO) that are separate from those raised by TSO.

(NYSCEF Doc. No. 33). Finally, while the Individual Respondents argue that petitioner abandoned her breach of fiduciary duty claims, they do not adequately demonstrate this. In fact, petitioner submits a copy of a post-hearing brief which contains arguments concerning the breach of fiduciary duty claim (see e.g. NYSCEF Doc. No. 43 at 3-4).

The Individual Respondents ignore that, by arguing that the Award is irrational because there was no evidence before the Panel on an issue, they carried the burden, in the first instance, to demonstrate that there was no such evidence by providing the full record (*Blumenkopf*, 95 AD3d at 648 [petitioner failed to meet heavy burden of establishing that the arbitration award

was irrational]). The Individual Respondents merely attempt to shift the burden to petitioner, by offering the conclusory assertion that petitioner should demonstrate that the portions of the record that the Individual Respondents did not submit here, contain supporting evidence.

As to the Final Award, the bulk of which is for attorneys' fees in the arbitration, the Individual Respondents contend that if they are found not to be liable to petitioner on her substantive claims, then it would be irrational to impose personal liability upon them for the attorneys' fees, expenses and AAA fees she incurred in prevailing against the entity respondents. The Individual Respondents' irrationality argument fails because, for the aforementioned reasons, the Partial Award is not being vacated.

Concerning the attorneys' fee award, the Panel determined that petitioner had substantially prevailed in the arbitration. Petitioner sought \$524,319.82 in attorneys' fees, costs and expenses incurred due to the arbitration, and the Panel awarded her \$471,887.84 for attorneys' fees, \$7,777.40 in expenses, and \$34,225.04 for administrative fees and expenses of the AAA and compensation for the arbitrators. As part of the basis for awarding the fees to petitioner, the Panel stated that respondents' prior counsel had improperly prolonged the proceedings, caused unnecessary expense and engaged in frivolous conduct, which fell below that expected of an attorney representing a client. However, the Panel's attorneys' fees award was not punitive but compensatory. Therefore, in order to avoid petitioner's duplicative recovery, the Panel deemed her attorneys' fees award to encompass her losses due to respondents' improper conduct. After review of the submissions and arguments, the Panel reduced petitioner's request for attorneys' fees by 10%, but otherwise determined that the hourly fees were within a reasonable range for the highly qualified and skilled attorneys. Under these circumstances, the Final Award will not be vacated or modified but will be confirmed.

Although the Partial Award could be confirmed separately from the later Final Award, addressing attorneys' fees, the Award will be confirmed here, as: (1) the attorneys' fees portion of the award now has been issued; (2) the Final Award incorporated the Partial Award; (3) the parties' motions have been consolidated; and (4) the motion to vacate or modify is denied. (see, e.g., *Matter of Franco v Dweck*, 165 AD3d 551 [1st Dept 2018] [affirming the confirmation of a partial final award that expressly reserved the issue of the amount of attorneys' fees]; *Blumenkopf*, 95 AD3d at 648 [CPLR 7511 (e) "mandates confirmation upon denial of a motion to vacate or modify"]). Consequently, the judgment will be for the amount awarded in: (1) the Partial Award, with petitioner awarded the principal amount of \$991,724.00 together with an award of pre-judgment interest at the rate of 9% per annum commencing on May 20, 2015 as compensation for her claims; and (2) the Final Award, of \$513,890.28 plus pre-judgment interest at the rate of 9% commencing on May 23, 2019 for petitioner's attorneys' fees and fees associated with the arbitration only, as detailed in the Final Award.

CONCLUSION

Accordingly, the arbitration award will be confirmed and, in light of the foregoing, it is hereby

ORDERED that the motion of respondents Bradford Siderow and Joshua Arcus to vacate and/or modify the arbitration award dated March 14, 2019 ("Partial Final Award") (motion sequence No. 003) is denied; and it is further

ORDERED that the motion to confirm the arbitration award dated May 23, 2019 ("Final Award") (motion sequence No. 004) is granted and the cross motion of respondents Bradford Siderow and Joshua Arcus to vacate and/or modify the Final Award is denied; and it is further

ORDERED and ADJUDGED that the petition to confirm the arbitration award dated March 14, 2018 (“Partial Final Award”) (motion sequence No. 001) is granted; and it is further

ORDERED and ADJUDGED that judgment shall enter in favor of petitioner, Lauren Weiner, against respondents The Siderow Organization, LLC, Bradford Siderow, Joshua Arcus and Siderow Organization Residential, LLC, jointly and severally, in the amount of (1) \$991,724.00 plus pre-judgment interest at the rate of 9% commencing on May 20, 2015 until the date judgment is entered herein in the amount calculated by the clerk of the court; (2) in the amount of \$513,890.28 plus pre-judgment interest at the rate of 9% commencing on May 23, 2019 until the date judgment is entered herein in the amount calculated by the clerk of the court; and (3) the costs of this proceeding as calculated by the clerk of the court.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

1/6/2020
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

WFP

W. FRANC PERRY, J.S.C.
HON. W. FRANC PERRY, III
J.S.C.

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE