SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** IAS MOTION 56EFM

Justice

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INDEX NO. 655530/2019

MOTION DATE 02/11/2020

MOTION SEQ. NO. 001

In the Matter of

ROBERT ANDERSON,

Petitioner,

- v -

AHS (AT HOME SOLUTIONS, LLC), OLGA ARONSHTEIN, and SIMON ARONSHTEIN,

Respondents.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this CPLR article 75 proceeding, the petitioner, a former vice president of marketing and sales for the respondent AHS (At Home Solutions, LLC) (AHS), seeks to vacate an arbitration award dismissing his claims to recover commissions from AHS and its principals and damages arising from an alleged violation of Civil Rights Law § 51, which creates a cause of action to recover for commercial misappropriation of a person's likeness or image. The respondents oppose the petition and, in effect, cross-petition to confirm the award.

In a related action commenced under Index No. 160475/18, this court dismissed the petitioner's causes of action to recover money damages for a violation of Civil Rights Law § 51. Those causes of action alleged that AHS misappropriated the petitioner's voice for commercial purposes by using it on a voicemail greeting even after AHS terminated the petitioner's employment. By order dated April 12, 2019, this court held that such claims for damages, as well as counterclaims asserted by the respondents, were the subject of an arbitration

agreement, and must be arbitrated as part of the arbitration proceeding that was then pending. The court did not dismiss the petitioner's claims for declaratory and equitable relief.

After a hearing in the pending arbitration was conducted, an arbitrator acting under the auspices of the American Arbitration Association (AAA) dismissed the petitioner's breach of contract and Civil Rights Law § 51 claims, concluding that the respondents terminated the petitioner's employment for good cause, that they thus did not breach his employment contract by refusing to pay him ongoing commissions, and that he did not establish that he sustained any damages as a result of the respondents' purported use of his voice on an incoming voicemail greeting heard by its clients.

The grounds specified in CPLR 7511 for the vacatur of an arbitration award are exclusive (*see Bernstein Family Ltd. Partnership v Sovereign Partners, L.P.*, 66 AD3d 201 [1st Dept. 2009]) and it is a "well-established rule that an arbitrator's rulings, unlike a trial court's, are largely unreviewable" (*Matter of Falzone v New York Cent. Mut. Fire Ins. Co.*, 15 NY3d 530, 534 [2013]). CPLR 7511(b)(1) enumerates the exclusive grounds for vacatur, which, as relevant to this proceeding, include situations in which the court finds that the rights of a party were prejudiced because "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]). An arbitrator is deemed to have exceeded his or her power pursuant to CPLR 7511(b)(1)(iii) where the award violates strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power (*see Matter of Isernio v Blue Star Jets, LLC*, 140 AD3d 480 [1st Dept 2016]). Even if, as the respondents contend, this dispute is covered by the Federal Arbitration Act (9 USC §§ 1, *et seq.*; hereinafter the FAA) because the agreement was made "in commerce" (9 USC § 1), the FAA similarly authorizes vacatur of an arbitration award only on several enumerated grounds, including situations "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made"

(9 USC § 10[a][4]). Under the FAA, an arbitrator may be deemed to have exceeded his or her powers by manifestly disregarding the law, but only "in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent" (*T.Co Metals, LLC v Dempsey Pipe & Supply, Inc.*, 592 F3d 329, 339 [2d Cir 2010] [internal quotation marks omitted]). As with CPLR article 75, an arbitrator's determination that is subject to the FAA is largely unreviewable (*see Tempo Shain Corp. v Bertek, Inc.*, 120 F3d 16, 19 [2d Cir 1997]).

Contrary to the petitioner's contention, the arbitrator's finding that AHS had good cause to terminate his employment was not irrational. Good cause means some substantial shortcoming detrimental to the employer's interests that the law and sound public opinion recognize as grounds for dismissal (*see Elsemore v Lake Placid Group, LLC*, 2007 WL 4324254, 2007 US Dist LEXIS 90449 [ND NY, Dec. 7, 2007, No. 8:05-CV-306, Sessions, Ch. J.]). The petitioner's employment agreement itself defines "good cause" for termination to include "failure to perform the duties of the Employee's position in a satisfactory manner," "dishonesty," "breach of duty of loyalty," and "willful disregard of Company's policies and procedures."

The arbitrator credited testimony that the petitioner's performance was substandard. "[T]he satisfactory performance of duty is the condition upon which the continuation of employment depends, [and] it is the employer's prerogative to determine whether the employee is, in fact, living up to the terms of his or her employment" (*Golden v Worldvision Enters.*, 133 AD2d 50, 51 [1st Dept 1987]). An employer's determination that good cause justified the termination of an employment contract is entitled to deference particularly where, as here, a high-level management employee is involved (*see Trieger v Montefiore Med. Ctr.*, 15 AD3d 175, 176 [1st Dept 2005]; *Golden v Worldvision Enters.*, 133 AD2d at 51).

In light of the arbitrator's determination that AHS had good cause to terminate the petitioner's employment and deny him future commissions on the ground of poor performance,

she declined definitively to rule on whether AHS properly revoked his right to such commissions on the additional ground that he violated a non-competition agreement and company policy by transmitting AHS's confidential and competitively sensitive information to his own personal email account and to one Arlene Norris (*cf. Adult Beverage Co., LLC v Reinhardt*, 2017 NY Slip Op 30744[U] [Sup Ct, N.Y. County, Apr. 12, 2017] [violation of contractual non-solicitation clause constitutes good cause for termination of employment]).

There is no merit to the petitioner's contention that the arbitrator "rewrote" the petitioner's employment contract. While the contract provided that the petitioner would forfeit his right to collect future commissions if his employment was terminated for cause "and" if he voluntarily left AHS's employ, AHS need not establish that both situations occurred because they obviously are mutually exclusive. As the Court of Appeals recognized with respect to the drafting of statutes, a common mistake is the use of the word "and" when the word "or" is intended. In such circumstances, a court may construe a statute in a manner that expresses legislative intent and avoids irrational or impossible outcomes (*see Allstate Ins. Co. v Libow*, 106 AD2d 110, 117 [1st Dept 1984], *affd for reasons stated by App Div*, 65 NY2d 807 [1985]; *see also Matter of Jaronczyk v Nassau County Interim Fin. Auth.*, 2014 NY Slip Op 31532[U] [Sup Ct, Nassau County, Mar. 13, 2004]). Indeed, "the words 'or' and 'and' in a statute may be construed as interchangeable when necessary to effectuate legislative intent" (McKinney's Cons Laws of NY, Book 1, Statutes, § 365; *see Davis Constr. Corp. v County of Suffolk*, 95 AD2d 819, 820 [2d Dept 1983]). Similarly, contracts must be construed to effectuate the intent of the parties (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Here, the arbitrator rationally concluded that AHS could properly terminate the petitioner's right to future commissions if his employment was terminated for good cause, even if he did not voluntarily leave his position with AHS, because it would be impossible for his employment to have been terminated both voluntarily and involuntarily.

The court also rejects the petitioner's contention that strong public policy warrants vacatur of the award. The petitioner asserts that the respondents lied to the Unemployment Insurance Division (UID) of the New York State Department of Labor when they responded to his application for unemployment insurance benefits by reporting to the UID that the petitioner's employment had been terminated for misconduct. Based on that response, the UID denied the petitioner's application for benefits. He now contends that, by finding in favor of the respondents in connection with the arbitration, the arbitrator rewarded the respondents for lying to a governmental agency, thus contravening strong public policy.

The question of whether the petitioner committed misconduct by improperly sharing confidential information or violating company policy is a sharply disputed one. The arbitrator made no finding with respect to that issue, concluding that she needn't do so because she based her award on other grounds. Since the award was not based on the allegedly impermissible ground urged by the petitioner, the court has no authority to vacate the award on that ground. The petitioner, moreover, had the opportunity to challenge the UID's initial adverse determination denying benefits for his alleged misconduct by requesting a hearing before an administrative law judge, appealing any subsequent adverse determination to the Unemployment Insurance Appeal Board, and commencing a CPLR article 78 proceeding in the Appellate Division, Third Department, to challenge any adverse determination by the Appeal Board. As the petitioner had a full and fair opportunity before the UID, the Appeal Board, and the Third Department to challenge the respondents' contention that he engaged in employee misconduct, but did not avail himself of that opportunity, the UID's initial administrative determination that he was discharged for misconduct is res judicata with respect to any further contested proceeding, such as the instant arbitration (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 499 [1984]; *Dusovic v New Jersey Tr. Bus Operations, Inc.*, 124 AD2d 634, 638-640 [2d Dept 1986]; *Bernstein v Birch Wathen Sch.*, 71 AD2d 129 [1st Dept 1979]).

The petitioner's remaining contentions are without merit.

Accordingly, it is,

ORDERED that the petition to vacate the award rendered on June 27, 2019 in the arbitration proceeding entitled *Matter of Anderson v At Home Solutions, LLC*, American Arbitration Association Case No. 01-18-0000-8759, is denied, and the petition is dismissed; and it is further,

ORDERED that the cross petition to confirm the award rendered on June 27, 2019 in the arbitration proceeding entitled *Matter of Anderson v At Home Solutions, LLC*, American Arbitration Association Case No. 01-18-0000-8759, is granted, and the award is confirmed; and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

2/18/2020
DATE

JOHN J. KELLEY, J.S.C.

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