Yakuel v Gluck
2020 NY Slip Op 31251(U)
May 7, 2020
Supreme Court, New York County
Docket Number: 158184/2019
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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JOSEPH YAKUEL, AGENCY WITHIN LLC, GET THINGS DONE LLC

Petitioners,

- v -

ANDREW GLUCK,

Respondent.

INDEX NO. 158184/2019

MOTION DATE 08/22/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 27, 28, 54, 55, 69, 113, 114, 115, 116, 117, 118, 119, 120, 121, 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, 163, 164, 165, 166, 167, 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, 205, 206, 207, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222

were read on this motion to CONFIRM/VACATE APPRAISAL AWARD.

This case involves a petition to confirm an appraisal award under CPLR 7601 and a cross-petition to vacate the same award. For the reasons that follow, the parties' dueling applications to summarily confirm or vacate the award are denied.

There is, under federal and New York law, a strong presumption in favor of confirming appraisal and arbitration awards. Moreover, there is a presumption in favor of doing so in a summary procedure that avoids the litigation costs and delays that alternative dispute resolution mechanisms are designed to minimize or eliminate. However, one of the few grounds for vacating an award is if the *process* itself was fundamentally unfair and skewed because the losing side was not given an opportunity to present its case to the appraiser/arbitrator. Here, Respondent Gluck has provided enough evidence to raise a legitimate question as to whether he

was given that opportunity. On this record, disputed issues of fact must be resolved before confirming or vacating the award.

BACKGROUND

Petitioner Yakuel and Respondent Gluck founded and jointly owned Agency Within LLC (the "Company"), which was formed pursuant to a Limited Liability Company Agreement dated February 20, 2015 ("LLC Agreement"). Yakuel owned, directly and indirectly, a 65% interest in the Company and was the managing member. Gluck owned the remaining 35%.

The LLC Agreement was amended effective March 23, 2018 (the "Amendment"). Section 3(a) of the Amendment gives the Company (effectively, Yakuel) the option to repurchase all (but not less than all) of Gluck's Units for a Purchase Price determined by the Fair Market Value ("FMV") of those Units.[1]

Under Section 3(e) of the Amendment, FMV was to be determined by an Appraisal conducted by "a third party appraisal firm, whose appraisal will be ***final and binding on all parties*** and the cost of which shall be borne by Gluck and the Company on a 50-50 basis" (emphasis added). That section further provides that the third party appraisal firm would be one of the following prestigious accounting firms: PricewaterhouseCoopers, Deloitte Touche, Ernst & Young, KPMG, or BDO Seidman. "Each of Yakuel and Gluck shall have the right to veto any one of such firms within seven (7) days after notification of the Company's intent to exercise the option and retain an appraiser." Thereafter, "[w]ith respect to the firms which have not been vetoed, the Company shall engage the firm which has offered to perform the appraisal at the lowest cost."

[1] Gluck contends he was lured into signing the Amendment and was told at the time that Yakuel had no intention of exercising the option.

Section 3(f) of the Amendment provides that, upon exercising the repurchase option, Yakuel has "the right to exclude … Gluck from participating in the affairs of the Company, including without limitation the business operations of the Company, and … entering the business offices of the Company. Immediately upon such exercise, Gluck's sole right with respect to the Company and its business operations shall be to receive the Purchase Price for the Units." Notably, that section does not reference Section 3(e) or otherwise indicate that it extends to the appraisal process.

Less than two months after the Amendment, on May 11, 2018, the Company gave Gluck notice that it was exercising its repurchase option. Under the terms on Section 3(e), the Company vetoed EY and Gluck vetoed BDO Seidman. The Company then selected PricewaterhouseCoopers ("PwC") to be the third-party appraiser.

An intense dispute ensued. In July 2018, Gluck brought an action in this Court to rescind the Amendment on the grounds of fraud, want of consideration, and mutual mistake, and alleged breach of contract and fiduciary duty in connection with the appraisal process. As the appraisal drew near, Gluck moved for an injunction on the ground that he was being improperly excluded from participating in the process. The Court (Sherwood, J.) denied Gluck's motion for a temporary restraining order. With assistance from the Court, the parties entered into a So-Ordered stipulation under which Yakuel "agreed in good faith to allow [Gluck] to participate in the Appraisal without waiver of his rights," and Gluck "agreed to participate in the Appraisal in good faith, without delay or obstruction." (NYSCEF 6.)[2]

[2] On a separate track, during the litigation before Justice Sherwood, Yakuel initiated a AAA arbitration under Section 5(d) of the Amendment – which applies contractual disputes generally, without referencing the more specific dispute resolution provisions of Section 3(e) – to address Gluck's complaints about Yakuel's actions. That arbitration remains pending. The Court denied

The Peace Treaty did not last. Yakuel contends that he held up his end of the bargain and permitted Gluck to participate in the appraisal process, including by providing information and arguments to PwC with respect to valuation. Gluck vigorously disagrees. According to Yakuel, Gluck's "bad faith and litigious approach to the appraisal process eventually caused PwC to halt its work and threaten to quit," and Gluck's obstructionist behavior "forced [the Company] to exercise its right under Section 3 of the Amendment to exclude him from the appraisal process." Pet. ¶ 33.

At that point, the parties returned to court to continue litigating Gluck's motion to preliminarily enjoin the appraisal. After oral argument, Justice Sherwood denied that motion. In doing so, the Court found that Gluck had not demonstrated a likelihood of success because "[t]he parties' contract clearly provides at Section 3(f) that upon exercise of the repurchase contract, the company shall have the right to exclude Gluck from participating in the affairs of the company, from entering into the business offices … and above that in Section 3(e) it provides for the company obtaining an appraisal by a well-known accounting firm." But, he found, "more important than that is the question of irreparable harm.…[T]he issue really has to do with how much money Mr. Gluck is entitled to … upon the buyout. That's a claim for money. He could be … completely satisfied by money judgment." (NYSCEF 8 at 35-36.) The Court thus left open the question whether Gluck might have an opportunity to seek a money judgment and made no ruling as to whether an appraisal (which had not yet occurred) would be subject to challenge.

Gluck has a very different take on the facts. He contends that Yakuel blocked him from participating meaningfully in the appraisal process. He points, particularly, to the engagement

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a motion to stay this litigation pending the arbitration, ruling that it had an obligation to address Yakuel's petition to confirm the appraisal award notwithstanding the parties' other contractual disputes.

letter between the Company (*i.e.*, the client) and PwC, which provided that PwC would "perform[] Services on the basis that the information provided is accurate and complete," and that PwC "will not audit or verify any information provided to it." (Gluck interprets this language to prohibit PwC from accepting information from anyone other than Yakuel. Cross-Pet ¶ 96.) He contends that the appraisal was "rigged" because he "never had an opportunity to participate, present evidence, or object to false and inaccurate evidence provided by Mr. Yakuel." *Id.* ¶ 12.

There is some support in the record for that proposition. Early in the process, PwC raised the question that there might be the "perception of a conflict" without both sides agreeing to its engagement letter, and stated that "[f]rom our perspective, we believe [Gluck] should be made a party to the engagement letter to allow for his participation in the process," and that it would need modify its "data collection parameters" and "defin[e] a process for the respective parties to resolve disputes." *Id.* ¶ 99, 129. Yakuel responded that the Company "must remain the sole party to the engagement letter" and that it "does not wish to modify the engagement terms, so let's proceed accordingly," though he agreed that Gluck could submit information. *Id.* ¶ 100. After PwC again expressed discomfort about proceeding "without agreement from all parties," and agreement "on the information that we do ultimately select to use in the valuation," Yakuel again refused to change the scope of the engagement. *Id.* ¶ 101-03.

Gluck contends that the appraisal was not "fair, neutral and balanced," was fueled by "false and misleading information" submitted by Yakuel that resulted in undervaluing Gluck's LLC Units by tens of millions of dollars. *Id.* ¶ 17-19. He asserts that he "was never interviewed by PWC and did not have the opportunity to submit information to PWC for its consideration, or to object to, or rebut, information provided by Mr. Yakuel." *Id.* ¶ 122.

In addition to challenging the appraisal process, Gluck presents many arguments suggesting that PwC's appraisal was substantively incorrect. *Id.* ¶¶ 136-99.

Yakuel filed the instant action to confirm the petition on August 21, 2019. At the outset, the Court denied Gluck's request to stay the litigation pending the result of an arbitration Yakuel had initiated in October 2018 to address Gluck's objections to the appraisal. The Court determined that it was obliged to decide Yakuel's petition to confirm the appraisal award.

Gluck responded to Yakuel's petition to confirm the appraisal and submitted his own cross-petition to vacate the appraisal award.

ANALYSIS

CPLR 7601, under which Yakuel's proceeding is brought, provides that "[a] special proceeding may be commenced to specifically enforce an agreement that a question of valuation, appraisal or other issue or controversy to be determined by a person named or to be selected. The court may enforce such an agreement ***as if it were an arbitration agreement***, in which case the proceeding shall be conducted as if brought under article seventy-five of this chapter." (emphasis added). Similarly, binding appraisals are considered to be arbitration awards for purposes the Federal Arbitration Act, (*See*, *e.g.*, *Milligan v CCC Information Services, Inc.*, 920 F.3d 146, 152 [2d Cir 2019] [finding that a binding appraisal process "constitutes arbitration for purposes of the FAA"]; *Seed Holdings, Inc. v Jiffy Int'l AS*, 5 F. Supp. 3d 565, 576-78 [SDNY 2014] [finding that binding price appraisal by accounting firm constituted an arbitration under the FAA]).

Yakuel's reliance on *Penn Cent. Corp. v Consolidated Rail Corp.*, 56 NY2d 120 [1982], to suggest that there is a higher bar for challenging a binding appraisal than for challenging an arbitration award, is not persuasive. In that case, the Court of Appeals noted that appraisal

proceedings may be more informal than arbitrations, but it did not suggest that a review of an appraisal award is beyond the scope of CPLR 7511. Indeed, the court stated that "[a]s a general rule under CPLR 7601, 'a dissatisfied party who participated in the selection of an independent appraiser has no *greater* right to challenge the appraiser's valuations than he would have to attack an award rendered by an arbitrator'" (*Id.* at 130 [citation omitted; emphasis added]). The case does not stand for the principle, which Yakuel asserts, that a dissatisfied party has *less* right to challenge an appraisal than it would to challenge an arbitration.

The Standard for Confirming or Vacating the Appraisal Award

The Court's role in reviewing an arbitration award is tightly constrained. "It is well settled that judicial review of arbitration awards is extremely limited. An arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached.' Indeed, we have stated time and again that an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice" (*Wien & Malkin LLP, v Helmsley-Spear, Inc.*, 6 NY3d 471, 479-80 [2006] ["[A]n arbitrator's rulings, unlike a trial court's, are largely unreviewable."]; *In re Falzone (New York Cent. Mut. Fire Ins. Co.)*, 15 NY3d 530, 534 [2010]). In sum, "'[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 NY3d 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]).

Under the FAA, which applies in all cases involving interstate commerce, an arbitral award may be vacated, inter alia, if the "arbitrators were guilty of misconduct in refusing to

postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy." 9 U.S.C. § 10(a)(3).[3] That section has been interpreted to require that arbitrators "give each of the parties to the dispute an adequate opportunity to present its evidence and argument" (*Tempo Shain Corp. v Bertek, Inc.*, 120 F3d 16, 20 [2d Cir. 1997]; *see also Bowles Fin. Group, Inc. v Stifel, Nicolaus & Co., Inc.*, 22 F.3d 1010, 1013 [10th Cir. 1994] [fundamentally fair hearing requires, *inter alia*, an "opportunity to be heard and to present relevant and material evidence and argument before the decision makers"]; *Yonir Techs., Inc. v Duration Sys. (1992) Ltd.,* 244 F.Supp.2d 195, 208-209 [SDNY 2002] ["[a]rbitrators must give both parties to the dispute an opportunity to present their evidence and argument" and "[a]n award can be vacated if an arbitrator refuses to hear material and pertinent evidence"]).

New York courts agree that "[t]he right of a party to have appraisers receive all pertinent evidence offered is a fundamental procedural right to which plaintiff was entitled, and its denial by the umpire and the company's appointed appraiser has been characterized as 'misconduct, in a legal sense' which is sufficient … to set aside the award in equity" (*Gervant v New England Fire Ins. Co.*, 306 NY 393, 399-400 [1954]; *see also McMahan & Co. v Dunn Newfund I, Ltd*, 230 AD2d 1, 4 [1st Dept. 1997] ["Fundamental unfairness often involves insufficient notice or refusal to receive appropriate evidence."] [citations omitted]; *Olympia & York 2 Broadway Co. v.*

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[3] The FAA applies to all arbitration matters that affect interstate commerce. The coverage of the FAA is thus quite broad. Although the parties to the case are all New York residents, the record indicates that the Company operates in interstate commerce. Yakuel cites no law to the contrary, instead suggesting generally that if the FAA were that broad it would apply to most commercial contracts. There is no support for that as an argument against the applicability of the FAA. Though not binding on the Court, it is worth noting that in the concurrent arbitration arising out of the same contract, the AAA determined that the arbitration was subject to the FAA. (NYSCEF 45 at 1.) New York arbitration law applies to the extent it is not inconsistent with the FAA. (*E.g.*, *Roffler v Spear, Leeds, & Kellogg*, 13 AD3d 308, 314 [1st Dept 2004]; *Matter of Propulsora Ixtapa Sur, S.A. de C.V.*, 211 AD2d 546, 548 [1st Dept 1995].)

Produce Exchange Realty Tr., 93 A.D.2d 465, 471 [1st Dept. 1983] [finding that party to an appraisal did not have a right to see its opponent's submission, but noting that each party must have "an opportunity to submit his view to the appraiser"] [citing *Matter of Delmar Box Co.*, 309 NY 60 [1955]]; *Coty Inc. v Anchor Const. Inc.*, 2003 WL 139551 [Sup Ct NY County Jan. 8, 2003) [finding party was denied a "fundamentally fair hearing" because, among other things, he was "denied the opportunity to be heard" and "the opportunity to present evidence"]).

That said, arbitrators are properly given broad discretion with respect to the scope of discovery (*Matter of Merrill Lynch, Pierce, Fenner & Smith*, 198 AD2d 181, 181 [1st Dept. 1993] [finding that denial of discovery request "cannot be characterized as misconduct in the sense of refusing to hear pertinent and material evidence."]). In sum, it is a delicate balance for the arbitrator between fairly considering the positions of both parties and maintaining control over the process.

This case presents an unusual circumstance in which there is evidence to suggest that the appraiser/arbitrator (*i.e.*, PwC) *wanted* to hear Gluck's side of the story, and repeatedly asked for that opportunity, but may have been hindered by Yakuel. Yakuel's contention that Section 3(f) of the Amendment gave him the unfettered right to exclude Gluck from presenting evidence during the appraisal process is not persuasive. That provision limits Gluck from being involved in the business or coming to the corporate office. It does not, on its face, suggest any agreed-upon limitation on Gluck's ability to tell his side of the story on the significant question of the value of his Units. Nor does Section 3(e), which governs the dispute resolution process, suggest that would be the case.[4]

[4] As noted above, the Court does not view Judge Sherwood's ruling on Gluck's motion for a preliminary injunction to dictate the result in this case, which involves a challenge to the award itself.

The core question is whether the facts support Gluck's assertion that he did not have a fair opportunity to present his case. Yakuel argues, with some support, that Gluck was able to present significant evidence to PwC. Gluck argues, with some support, that he was not able to provide evidence that would have been material to PwC's appraisal. The record is not sufficiently clear at this stage to permit a decision on this question one way or the other. In those circumstances, the Court finds that the pending motions to confirm or vacate the opinion must be denied.

The Court has considered Gluck's remaining arguments opposing confirmation of the appraisal award and finds them to be without merit.[5]

Accordingly, it is

ORDERED that Petitioner's motion to confirm the award is **denied** without prejudice, pending further fact-finding; it is further

ORDERED that Respondent's motion to vacate the award is **denied** without prejudice, pending further fact-finding; and it is further

ORDERED that the parties will appear for a status conference on June 23, 2020 at 10:00 am, subject to adjournment based on restrictions impacting court operations or counsel availability. In the meantime, discovery may proceed, subject to the same restrictions. To the

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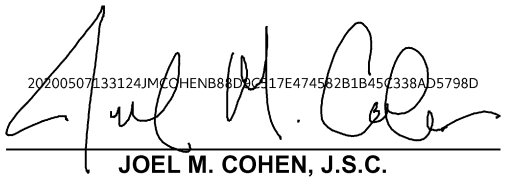
[5] The Court recognizes that the parties are in the unenviable position of actively litigating and arbitrating similar factual issues in this action and the pending arbitration. While that is unfortunate, the Court continues to believe this case should go forward to resolve the petition and cross-petition under CPLR 7601. Moreover, the legal issues in the two proceedings are not necessarily the same. As the Court understands it, the arbitration is to determine, among other things, whether Yakuel breached the parties' agreement. The contract or implied covenants therein may provide participation rights that go beyond the minimum requirements imposed by federal and state law with respect to confirmation of appraisal awards. That said, the parties and/or the arbitrator can, of course, choose to suspend the arbitration or otherwise coordinate their activities to avoid duplication of effort.

extent discovery disputes referenced in the parties' letters under Commercial Division Rule 14 remain, the parties are asked to update their letters to reflect the impact of this Decision and Order and any other developments.

This constitutes the decision and order of the Court.



5/7/2020
DATE

JOEL M. COHEN, J.S.C.

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