SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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VITRA, INC.,

Plaintiff,

- v -

NINETY-FIVE MADISON COMPANY, L.P.,

Defendant.

INDEX NO. 652342/2017

MOTION DATE 03/03/2020

MOTION SEQ. NO. 005 006 007

DECISION + ORDER ON MOTION

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 246, 249, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 278, 305
were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 304, 306, 307, 308
were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 336, 337, 338, 340, 341, 342, 343
were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

Motion sequence five, six, and seven are consolidated for disposition herein. In motion sequences five and six, defendant Ninety-Five Madison Company, L.P. ("Ninety-Five Madison") moves, pursuant to CPLR 7511, to vacate certain arbitration awards. Plaintiff Vitra, Inc. ("Vitra") opposes the motions and cross-moves to confirm the awards. In motion sequence seven, the court-appointed Temporary Receiver (the "Temporary Receiver") moves, by order to show cause, to confirm certain awards so that she may be paid her fees. Ninety-Five Madison cross-moves to vacate those awards.

Background

Vitra is a furniture manufacturer that has showrooms and retail stores in cities throughout the United States. Ninety-Five Madison is the owner of the premises located at 95 Madison Avenue, New York, New York. On June 18, 2016, the parties entered into a lease ("Lease") wherein Ninety-Five Madison leased to Vitra the "ground floor center store, containing approximately 4000 usable square feet, and the entire (2nd) floor containing approximately 8060 usable square feet" (the "Premises") (NYSCEF Doc. No. 1 at ¶ 5) (internal quotations omitted). Vitra was to use the Premises as a retail store and showroom for furniture. The parties agreed that Ninety-Five Madison would undertake certain construction work before Vitra began occupying the Premises.

Vitra alleged that Ninety-Five Madison failed to perform its construction work by the agreed-upon date and, as a result, Vitra commenced this action. On December 7, 2017, the parties entered into a Settlement Agreement of the action, which was so-ordered (NYSCEF Doc. No. 43). Pursuant to the Settlement Agreement, all disputes arising out of or relating to the interpretation and enforcement of the Settlement Agreement would be decided through arbitration before the Honorable Stephen Crane (Ret.) (the "Arbitrator") under the auspices of JAMS.

The Arbitrator rendered a series of awards and Ninety-Five Madison now moves to vacate: (1) the Third Interim Award dated March 10, 2019 ("Third Interim Award") and the subsequent Order on Respondent's Motion for Reconsideration of Third Interim Award dated September 18, 2019 (the "September 2019 Order"); and (2) the Arbitrator's

Order on Claimant's Application for Directions to Respondent dated August 29, 2019 ("August 2019 Order") and the Arbitrator's Second Partial Final Award dated January 7, 2020 ("Second Partial Award"). Vitra cross-moves to confirm: (1) the Third Interim Award and for an order directing the Clerk of the Court to enter a money judgment in Vitra's favor and against Ninety-Five Madison in the sum of $596,291.90, plus interest, as provided for in the Third Interim Award; and (2) the Second Partial Award and for an order directing the Clerk of the Court to enter a money judgment in favor of Vitra and against Ninety-Five Madison in the sum of $525,000.00, plus interest as provided for in the Second Partial Award.

The court-appointed Temporary Receiver, Danielle C. Lesser ("Temporary Receiver") also moves, by order to show cause, to confirm the Fourth Partial Final Award and the Fifth Partial Final Award and for an order directing the Clerk to enter judgment on the Fourth Partial Final Award and the Fifth Partial Final Award against Ninety-Five Madison.

Discussion

Pursuant to CPLR 7511 (b)(1)(iii), an arbitration award may only be vacated if the court determines "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." "The scope of judicial review of an arbitration proceeding is extremely limited." *Elul Diamonds Co. v. Z Kor Diamonds, Inc.,* 50 A.D.3d 293 (1st Dept. 2008). "An arbitration award must be upheld when the arbitrator offer[s]

even a barely colorable justification for the outcome reached." *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479 (2006). I review the Arbitrator's awards here pursuant to this standard.

Motion Sequence Five

In motion sequence five, Ninety-Five Madison moves to vacate the Third Interim Award and the subsequent September 2019 Order. In the Third Interim Award, the Arbitrator held that Ninety-Five Madison was obligated to install dunnage (structural support) for four air conditioning units on the second-floor roof of the Premises. The Arbitrator further determined that Vitra was entitled to a rent abatement until Ninety-Five Madison installed the dunnage.

Ninety-Five Madison petitioned the Arbitrator to reconsider the Third Interim Award. The parties submitted motion papers and had oral argument in front of the Arbitrator on July 30, 2019. The Arbitrator issued the September 2019 Order, in which he affirmed the Third Interim Award.

Now, Ninety-Five Madison presents the same issues before me and argues that the Third Interim Award and September 2019 Order must be vacated because they are irrational and because there was no factual basis or evidence in the record to demonstrate that Ninety-Five Madison has the obligation to install dunnage for the air conditioning units. In opposition, Vitra argues that the Third Interim Award was rational because the Arbitrator considered all of the evidence before him in rendering the decision.

An arbitration award is deemed irrational when there is "no proof whatever to justify the award." *Peckerman v. D & D Assocs.*, 165 A.D.2d 289, 296 (1st Dept. 1991); *see also Matter of Roberts v. City of New York*, 118 A.D.3d 615, 617 (1st Dept. 2014). In rendering the Third Interim Award, the Arbitrator considered the Lease and specifically, the sole provision in the Lease regarding dunnage and held, "It [the lease] is ambiguous, but its wording and common-sense meaning support the Claimant's [Vitra's] contention that the Landlord [Ninety-Five Madison] would install dunnage for four units." NYSCEF Doc. No. 224 at 3. Because the Arbitrator found the Lease ambiguous, he also considered extrinsic evidence in the form of an affidavit of the person who negotiated the Lease on behalf of Vitra. The Arbitrator found that the Lease, coupled with this affidavit, supported his conclusion that Ninety-Five Madison was responsible for the dunnage. The Arbitrator also noted that Ninety-Five Madison failed to provide its own affidavit from the individual who negotiated the lease on Ninety-Five Madison's behalf.

The Arbitrator supported his decision to grant a rent abatement based on Section 23 of the Settlement Agreement, which states,

> Landlord [Ninety-Five Madison] to complete Landlord's Work and dunnage to the exterior second floor courtyard roof by April 16, 2018. In the event Landlord shall fail to complete Landlord's Work and/or the dunnage work by April 15, 2018, then all rent and additional rent shall be abated on a day-by day basis until such work has been completed, unless and to the extent Landlord is prevented from doing so by force majeure or Tenant delay.

NYSCEF Doc. No. 43 at 14.

In the September 2019 Order, the Arbitrator again considered the parties' arguments on dunnage (*See* NYSCEF Doc. No. 271 at 1-6). The Arbitrator noted for the

second time that he considered all the evidence before him regarding the dunnage issue and that Ninety-Five Madison did not submit any evidence to refute Vitra's interpretation of ambiguities in the Lease.

I find that the Third Interim Award and the September 2019 Order are rationally based. The Arbitrator adequately supported his conclusions, citing the language of the Lease and Settlement Agreement and the supplemental affidavit. For this reason I deny the motion to vacate the Third Interim Award and the September 2019 Order and grant the cross-motion to confirm the Third Interim Award.

Motion Sequence Six

In motion sequence six, Ninety-Five Madison moves to vacate the Second Partial Final Award and August 2019 Order. Leading up to the rendering of the Second Partial Final Award, the parties disagreed about the filing of an online permit application on the Department of Buildings ("DOB") website for a sidewalk shed. Vitra maintained that Ninety-Five Madison was required to file this application so that Vitra could proceed with its renovations. After Ninety-Five Madison failed to file the application, Vitra applied to the Arbitrator to require Ninety-Five Madison to file the application by a certain date or face monetary sanctions. The Arbitrator then issued the August 2019 Order, directing Ninety-Five Madison to file the application by September 3, 2019 or face a monetary sanction of $25,000 per day.

Ninety-Five Madison did not file the application until September 24, 2019, twenty-one days after the deadline. Pursuant to the August 2019 Order, Vitra moved for a monetary award against Ninety-Five Madison for the delay and Ninety-Five Madison filed its own motion to reconsider the August 2019 Order. On January 7, 2020, the Arbitrator issued the Second Partial Final Award, wherein he granted Vitra's application for monetary sanctions of $525,000 and denied Ninety-Five Madison's application to reconsider the August 2019 Order.

Now, Ninety-Five Madison moves to vacate the Second Partial Final Award, arguing that the imposition of sanctions is punitive rather than compensatory and therefore, violates New York public policy and exceeds the Arbitrator's powers. In support of its argument, Ninety-Five Madison cites to the Court of Appeals decision in *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354 (1976), wherein the Court held that an arbitrator does not have the power to award punitive damages, even if agreed upon by the parties.

In opposition, Vitra argues that Ninety-Five Madison misinterprets New York law. It argues that there is a distinction between punitive damages and monetary sanctions for failure to comply with an order, and that the court in *Garrity* only addressed punitive damages. According to Vitra, punitive damages are not at issue here. Rather, what is at issue are monetary sanctions and, pursuant to JAMS Rules, an arbitrator may order appropriate monetary sanctions.

A court "may vacate an arbitral award where strong and well-defined policy considerations embodied in constitutional, statutory or common law prohibit a particular matter from being decided or certain relief from being granted by an arbitrator." *New York State Corr. Officers & Police Benev. Ass'n, Inc. v. State,* 94 N.Y.2d 321, 327 (1999). Additionally, "[a] court, however, may not vacate an award on public policy grounds when vague or attenuated considerations of a general public interest are at stake. Courts shed their cloak of noninterference where specific terms of the arbitration agreement violate a defined and discernible public policy; where an arbitrator exceeds his or her legal authority; or where the final result creates an *explicit* conflict with other laws and their attendant policy concerns." *Id.* (internal citations omitted).

I agree with Vitra that punitive damages are not at issue here. The Arbitrator conditionally awarded delay, monetary sanctions to give teeth to his directive that Ninety-Five Madison comply with the August 2019 Order. The term "punitive damages" itself is not used anywhere in the Arbitrator's award. For this reason, I find that there is no public policy basis for vacating the Second Partial Award.[1]

Moreover, the Arbitrator did not exceed his authority in issuing the Second Partial Final Award. The Settlement Agreement provides that JAMS Rules govern the

[1] Even if the Arbitrator awarded punitive damages, rather than reasoned delay damages for failure to comply with the August 2019 Order, I note that the United States Supreme Court, in *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 55 (1995), addressed *Garrity* and found that when the governing law of an arbitration agreement is New York law, if the arbitration agreement does not *specifically* exclude punitive damages, an award of punitive damages issued by the Arbitrator would still stand. The Settlement Agreement here does not even mention punitive damages at all, and therefore does not exclude them.

arbitration. Pursuant to JAMS Rule 29, "[t]he Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator." Thus, the Arbitrator had the authority, under JAMs rules, to issue the Second Partial Final Award.

Finally, the Arbitrator's proffered reasons for the decision to award monetary sanctions have a sound basis. An arbitration award is deemed irrational when there is "no proof whatever to justify the award." *Peckerman v. D & D Assocs.*, 165 A.D.2d 289, 296 (1st Dept. 1991); *see also Matter of Roberts v. City of New York*, 118 A.D.3d 615, 617 (1st Dept. 2014). Leading up to the rendering of the Second Partial Final Award, the Arbitrator considered multiple sets of motion papers submitted by the parties on the issue of sanctions and had a hearing on the parties' motions on December 19, 2019.

The Arbitrator considered all the arguments presented by Ninety-Five Madison as to why sanctions should be denied (*See* Second Partial Award Decision, NYSCEF Doc. No. 282 at 7-10). In his decision on the Second Partial Final Award, the Arbitrator explained that, "The Order was intended to be coercive. The Respondent's [Ninety-Five Madison's] history of obstruction was strong motivation to put teeth into the order in view, especially, of its flaunting of prior orders and directives, and the disruption it caused in the construction schedule. These are more than enough to justify the $25,000 per day sanction." *Id*. at 10. Because the Arbitrator considered all the arguments presented and thoroughly explained his decision, I find that the Second Partial Final Award and the August 2019 Order were reasonable and rational.

For the foregoing reasons I deny the motion to vacate the Second Partial Final Award and the August 2019 Order and grant the cross-motion to confirm the Second Partial Final Award.

Motion Sequence Seven

In the Amended Fifth Interim Award, the Arbitrator appointed a Temporary Receiver. The Arbitrator ordered that, "respondent [Ninety-Five Madison] shall be responsible for the payment of all fees, costs and expenses of and incurred by the Temporary Receiver, within twenty (20) days of the Arbitrator's approval that such charges are reasonable following submission of billing and justification therefor to the Arbitrator and to the Respondent." NYSCEF Doc. No. 312 at 14. Now, the Temporary Receiver moves, by order to show cause, to confirm two awards: (1) the Fourth Partial Final Award; and (2) the Fifth Partial Final Award so that she can recover fees from Ninety-Five Madison. In the Fourth Partial Final award, the Arbitrator found that Ninety-Five Madison is obligated to pay the Temporary Receiver for services rendered for the month of November 2019 (NYSCEF Doc. No. 313). In the Fifth Partial Final Award, the Arbitrator found that Ninety-Five Madison is obligated to pay the Temporary Receiver for services rendered for the months of December 2019 and January 2020. To date, Ninety-Five Madison has not paid the Temporary Receiver for these months.

The Temporary Receiver argues that, because the Arbitrator has determined that the Temporary Receiver's fees are reasonable, Ninety-Five Madison must issue payment. In opposition, Ninety-Five Madison claims that the Temporary Receiver misinterprets the

language of the Amended Fifth Interim Award and that it is not obligated to pay the Temporary Receiver in the first instance. Rather, the Temporary Receiver must seek payment from Vitra first and then, Vitra can seek a rent abatement from Ninety-Five Madison for the fees. Ninety-Five Madison also argues that the fees are excessive.

In the Amended Fifth Interim Award, the Arbitrator ordered, "in the event the Respondent [Ninety-Five Madison] does not timely pay the approved charges, the Claimant [Vitra] shall do so and upon making such payment, the Claimant shall be entitled to a further rent abatement equivalent to the amount of such payment from the next rent or additional rent due from the Claimant to the Respondent." NYSCEF Doc. No. 312 at 14-15. When rendering the Fourth Partial Final Award, the Arbitrator expressly addressed Vitra's responsibility to pay the Temporary Receiver's fees in the event that Ninety-Five Madison does not. The Arbitrator reasoned,

> There is no disputing that Respondent [Ninety-Five Madison] is primarily liable for the payment of the fees of the Temporary Receiver. The provision in the Award for a backup mechanism to see that she is paid by someone exists for the protection of the Temporary Receiver and not for the benefit of the Respondent. Moreover, this provision of the Award is not exclusive. The Temporary Receiver may pursue her own remedy against the Respondent. Should the Claimant step in to pay her past due fees, she may assign to the Claimant the benefit of this FOURTH PARTIAL FINAL AWARD or any judgment thereafter entered.

NYSCEF Doc. No. 313 at 3.

Based on the plain terms of the Fourth Partial Final Award, Ninety-Five Madison is responsible for paying the Temporary Receiver and in the event that Ninety-Five Madison does not pay her, the Temporary Receiver may then seek

payment from Vitra. In her order to show cause the Temporary Receiver seeks payment from the primary obligor, Ninety-Five Madison. Because the Arbitrator has already concluded that Ninety-Five Madison must pay the Temporary Receiver's fees and because "a reviewing court may not second-guess the fact-findings of the arbitrator" (*Liberty Mut. Ins. Co. v. Sedgewick of New York*, 43 A.D.3d 1062, 1063 (2d Dept. 2007), I find that the Fourth and Fifth Partial Final Awards must be confirmed.

Lastly, I find that Ninety-Five Madison's contention that the Temporary Receiver's fees were excessive is meritless. Ninety-Five Madison had the opportunity to object the fees and it did not. In its rendering of the Fifth Partial Final Award, the Arbitrator expressly noted that Ninety-Five Madison had the opportunity to object in a timely manner and it failed to do so (NYSCEF Doc. No. 314 at 9). Therefore, I grant the motion to confirm the Fourth and Fifth Partial Final Awards and deny the cross-motion to vacate the Fourth and Fifth Final Partial Awards.

In accordance with the foregoing, it is hereby

ORDERED that in motion sequence five, Ninety-Five Madison's motion to vacate the Third Interim Order and the September 2019 Order is denied and Vitra's cross-motion to confirm the Third Interim Award is granted; and it is further

ORDERED that Vitra is directed to settle an order, on notice, on motion sequence five; and it is further

ORDERED that in motion sequence six, Ninety-Five Madison's motion to vacate the Second Partial Award and August 2019 Order is denied and Vitra's cross-motion to confirm the Second Partial Final Award is granted; and it is further

ORDERED that, on motion sequence six, the Clerk of the Court is directed to enter judgment in favor of plaintiff Vitra, Inc. and against defendant Ninety-Five Madison Company, L.P. on the Second Partial Final Award in the amount of $525,000.00, with interest thereon from February 7, 2020 to the date judgment is entered; and it is further

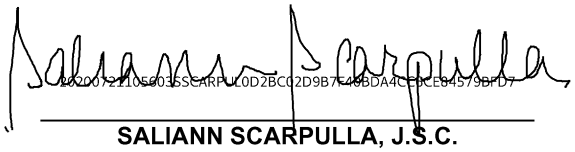
ORDERED that in motion sequence seven, the Temporary Receiver's motion to confirm the Fourth Partial Final Award and Fifth Partial Final Award is granted and Vitra's cross-motion to vacate the Fourth Partial Final Award and Fifth Final Partial Award is denied; and it is further

ORDERED that, on motion sequence seven, the Clerk of the Court is directed to enter judgment in favor of Danielle C. Lesser of Morrison Cohen LLP and against Ninety-Five Madison Company, L.P. on the Fourth Partial Final Award in the amount of $19,047.38 plus interest thereon at the statutory rate from January 2, 2020 to the date judgment is entered; and it is further

ORDERED that, on motion sequence seven, the Clerk of the Court is further directed to enter judgment in favor of Danielle C. Lesser of Morrison Cohen LLP and against Ninety-Five Madison Company, L.P. on the Fifth Partial

Final Award in the amount of $21,203.04 plus interest thereon at the statutory rate from February 5, 2020 to the date judgment is entered, and in the amount of $22,607.50 with interest thereon at the statutory rate from March 11, 2020 until the date judgment is entered.

This constitutes the decision and partial order of the Court.



7/21/2020
DATE

SALIANN SCARPULLA, J.S.C.

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