

Percival v Natixis Corporate & Inv. Banking Ams.

2022 NY Slip Op 33546(U)

October 14, 2022

Supreme Court, New York County

Docket Number: Index No. 651040/2022

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART 63M

Justice

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FRANCESCO PERCIVAL,
Petitioner,

INDEX NO. 651040/2022

MOTION DATE 06/03/2022

MOTION SEQ. NO. 001

- v -

NATIXIS CORPORATE AND INVESTMENT BANKING
AMERICAS, BRIAN FULLAN

DECISION + ORDER ON
MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

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

A Petition states causes of action (i) to vacate an Arbitration Award per CPLR 7506 and 7511, on the grounds that "the arbitrator exceeded her authority and committed error when she did not apply the elements of a prima facie claim of retaliation," and (ii) "the Award should be vacated pursuant to CPLR 7511, on the ground that it would be against public policy for a court to validate the ruling of arbitration that is so unfairly rendered and where the Arbitrator appears to partial."

Respondents – Natixis Corporate and Investment Banking Americas and Brian Fullan cross – move to deny the Petition to vacate the Final Award per CPLR 7511, and to impose sanction against Petitioner and/or his attorney per Part 130 of the Rules of the Chief Administrative Judge.

A "Final Arbitration Award" report has been submitted:

"Respondent Brian Fullan hired [Francesco Percival] to work in the Internal Audit section of the Company and remained his supervisor throughout [Francesco Percival] tenure with Natixis. [Francesco Percival] commenced this Arbitration ... pursuant to the Arbitration

Policy set forth in Natixis' Employee Handbook, claiming unlawful termination for engaging in protected activity in raising complaints of racial discrimination in the workplace in violation of New York State's Human Rights Law, Executive Law §§ 296 *et seq.*, and the New York City Human Rights Law ... in the Administrative Code § 8-101 *et seq.* [Francisco Percival] contends that he was terminated involuntarily in retaliation for complaints he made to Fullan regarding the perception of Aron Spalding, who was hired by Fullan in July 2015 and supervised by Percival, that Fullan was mistreating him and discriminating against him based upon his race. Percival Specifically denies that he was the victim of racial discrimination by Fullan. Both Percival and Spalding are Black, while Fullan is White. Fullan hired both men.

After years of promotions and positive annual reviews, [Francesco Percival]'s performance became merely 'adequate' and his declining quality of performance was noted in the reviews prepared by Fullan for 2015, 2016, 2017.

[A] request was made to produce specific work papers. [Francesco Percival] was asked to provide the requested documents but was unable to do so. A conversation followed between [Francesco Percival] and Fullan in which Fullan conveyed his dissatisfaction, particularly in light of the fact that the federal examination had been scheduled four weeks prior and [Francesco Percival] had been specifically instructed to make sure all work papers were in order" (see NYSCEF Doc. No. 2).

The award continues with "relevant facts" that leads to Petitioner talking with the Human Resources Department and an eventual termination.

The arbitrator used the analysis in *Curtis* to analyze a *prima facie* case of retaliation. "In order to establish a *prima facie* case of retaliation, a plaintiff must prove: (1) participation in protected activity which is known to the defendant, (2) a disadvantageous decision or action relating to plaintiff's employment and (3) a causal connection between the protected activity and the adverse decision (*Curtis v. Citibank, N.A.*, 70 Fed. Appx. 20, 22 [2d Cir. 2003])" (see NYSCEF Doc. No. 2 P. 9).

"There is no written record of any kind to support Mr. Percival's self – serving testimony that on three occasion, including the date of the critical incident resulting in his termination, he

had specifically communicated to Mr. Fullan that Spalding believed, and was suffering from, Fullan's mistreatment of him based upon his race. In fact, [Francesco Percival] admitted that he had altered some of the recordings that he did make and then lost the phone upon which the conversation were recorded. Respondents have asked for an adverse inference [...]. I find such an adverse inference to be justified. All of Respondents' employees disputed [Francesco Percival]'s testimony. [T]here is ample evidence in the annual performance reviews of both [Spalding and Francesco Percival], and even their own admissions of mistakes made, to support a finding that there were serious inadequacies in their performance over a prolonged period of time that would supply a legitimate non – retaliatory reason for dismissal” (see NSYCEF Doc. No. 2 Ps. 9 – 10).

The Arbitration concluded with “[Francesco Percival]’s claim of retaliation for protected activity and wrongful discharge in violation of New York’s human rights law is dismissed for failure of proof” (see NYSCEF Doc. No. 2 P. 11).

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” (see *Wien & Malkin LLP v. Helmsley – Spear, Inc.*, 6 N.Y.3d 471, 479 [2006]).

Petitioner contends that “the award violates public policy, the arbitrator imperfectly executed her power,” and “the arbitrator acted in a partial manner” (see NYSCEF Doc. No. 35 P. 12, 14, 16). Petitioner does not put forth facts and circumstances that warrant the above contentions.

Respondents' Reply states, “[r]ather than acknowledging the flaws in his case, Petitioner doubles down by again pushing arguments that are factually and legally insupportable under the


Arbitrator’s decision and applicable law. 22 NYCRR 130.1-1(a). Frivolous conduct includes that which is ‘completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, ore reversal or existing law.’ 22 NYCRR 130.1-1(c). (see NYSCEF Doc. No. 36 P. 4). This Court does not see the action of Petitioner reaching the level of sanctions nor frivolous conduct.

ORDERED that the Petition to vacate the Arbitration Award is DENIED; and it is further

ORDERED that the motion of Respondents Natixis Corporate and Investment Banking Americas and Brian Fullan to dismiss the petition herein is granted and the petition is dismissed in its entirety as against said Respondents, with costs and disbursements to said Respondents as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said Respondents; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

<u>10/14/2022</u> DATE	 LAURENCE L. LOVE, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE