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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK J.S.C. Justice

PART 39

Index Number : 600010/2012
FIELD, DENIS M.
vs.
BDO USA LLP
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
JUL 22 2013
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/19/13

BARBARA R. KAPNICK J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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DENIS M. FIELD,

Petitioner,

-against-

BDO USA, LLP,

Respondent.

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DECISION/ORDER
Index No. 600010/12
Motion Seq. No. 002

BARBARA R. KAPNICK, J.:

In this proceeding, *pro se* petitioner Denis M. Field ("Field") seeks to vacate and modify an arbitration award, awarded in favor of BDO USA, LLP ("BDO") rendered by an arbitrator from Judicial Arbitration and Mediation Services, Inc. ("JAMS") in the case of *Denis M. Field v. BDO Seidman LLP.*

Background[1]

Field is the former Chairman and CEO of BDO Seidman LLP, now, BDO, USA, LLP, one of the largest accounting and consulting firms in the United States. During the relevant time period, BDO was a New York Partnership. Field was the CEO of BDO until 2003. Along with former BDO partners Charles Bee and Adrian Dicker, Field was behind a practice within BDO that developed, marketed, sold and implemented tax shelters to high net worth individuals.

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[1] The bulk of the background facts are taken from respondent's memorandum of law in support of its motion to dismiss, unless otherwise noted.

After a dispute arising in part from his tax shelter activities, Field agreed to resign as BDO's CEO in exchange for, *inter alia*, certain severance and pension payments. The parties' agreement was memorialized in a contract dated October 19, 2003 (the "Disengagement Agreement"). Under the Disengagement Agreement, Field was to receive both an $18 million severance payment and indemnification "to the maximum extent permitted by law."

BDO subsequently concluded that Field had breached the Disengagement Agreement, and in a letter to Field dated February 3, 2004, BDO rescinded the Agreement. On February 20, 2004, Field filed a demand with the American Arbitration Association alleging that BDO had breached the Disengagement Agreement. That dispute was resolved by a Settlement Agreement dated December 11, 2004 (the "Settlement Agreement").

Paragraph 3, parts (a) through (e) of the Settlement Agreement provided the schedule of payments that BDO agreed to make to Field.[2]

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[2] Pursuant to paragraph 4 of the Agreement, BDO also agreed to indemnify Field for certain claims brought against him relating to his employment at BDO. It provides, in relevant part:

> (a) Upon execution of this Agreement, BDO covenants and agrees to indemnify, defend and

According to BDO, the Settlement Agreement represented a resolution of bitterly contested issues that resulted in BDO agreeing to give Field certain monetary benefits in exchange for Field's agreement to accept less indemnification. BDO argues that Field, who was represented by counsel - McGuire Woods LLP - throughout the negotiations, voluntarily and knowingly bargained away any indemnification rights other than those required by New York law.

The United States Attorney's Office for the Southern District of New York investigated the tax shelter activities of Field and many others both within BDO and at other accounting and law firms. On March 4, 2010, a Grand Jury in the United States District Court for the Southern District of New York indicted Field and others for criminal conspiracy, tax evasion, corrupt endeavor to obstruct and impede the Internal Revenue laws, and mail fraud. *United States v.*

> hold Field harmless for any claims, actions, causes of action, demands, losses, liabilities, lawsuits, damages, settlements, and/or judgments ("Claim") (including, but not limited to reasonable attorney's fees and costs associated with the retention of counsel, consultants, experts and/or any other support services that may be reasonably necessary in connection therewith) arising from or in any way relating to Field's employment with, service to, or relationship with BDO **to the extent required by New York and federal law** ("Defense Costs") . . . .

(emphasis added).

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Daugerdas, et. al., 09-CR-0581. After a three-month trial from March through May 2011, a 12-person jury concluded that the Government had proved beyond a reasonable doubt that Field had committed multiple felonies while a BDO partner.

On June 4, 2012, Judge William H. Pauley III granted Field's motion for a new trial, not because of any substantive defect in the jury's findings, but because one of the twelve jurors lied during *voir dire*. A new trial was scheduled for May 5, 2013.

BDO stopped making indemnification payments to Field as of January 1, 2010. On April 26, 2010, Field, through his counsel, served BDO with a demand for arbitration.

The arbitration demand implicated another agreement between the parties, which was an agreement that amended the Settlement Agreement just days after it was reached (the "Amendment to Settlement Agreement"). The Amendment to Settlement Agreement, which is dated as of December 11, 2004, did not alter the extent of BDO's indemnification obligation to Field. Rather, it provided the procedures for resolving disputes between the parties arising out of the Settlement Agreement. The Amendment provides that any dispute would be arbitrated by an arbitrator "who is an experienced commercial litigator at a top 200 law firm in the United States .

. . ." The Amendment further provides that the arbitrator would accept "written submission[s]" from the parties and then hold a "non-evidentiary hearing."[3] The Amendment to Settlement Agreement also made clear that the arbitrator's award would be binding and not subject to appeal.

After the stay of the arbitration, which was granted by the Appellate Division pending appeal expired, counsel for the parties began negotiating about selecting an arbitrator. By letter dated April 4, 2012, Field's counsel suggested Kenneth M. Kramer, Esq. ("Kramer").[4] Kramer joined the JAMS organization in 2010. BDO agreed to Field's suggestion that Kramer arbitrate the parties' dispute. As a result of Kramer's selection, the parties also agreed to incorporate JAMS rules into their arbitration. On May 4, 2012, JAMS forwarded to the parties its standard disclosure form,

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[3] BDO believed that the non-evidentiary hearing provision of the arbitration procedure was unfair and would skew the results of the arbitration in Field's favor. Accordingly, BDO commenced litigation in this Court, pursuant to CPLR 7503, seeking to reform that provision to allow for an evidentiary hearing. This Court declined to strike the provision and that decision was affirmed by the Appellate Division, First Department. *BDO USA, LLP v. Field,* 79 AD3d 604 (1st Dep't 2010).

[4] Kramer is a veteran, highly-respected member of the New York Bar. He graduated in 1972 from Albany Law School. He served as a law clerk to a federal judge and spent several years as an associate at Cravath, Swaine & Moore. Kramer then spent the bulk of his career at Shearman & Sterling, where he was co-chairman of Shearman's litigation practice. Kramer specialized in complex commercial litigation, including securities and antitrust work.

which specifies that the arbitrator should disclose if the arbitrator "has had a significant personal relationship with any party or lawyer for a party" or "an attorney-client relationship with a party or lawyer for a party" or "has a financial interest in a party." Kramer affirmed in the JAMS form that he had "made a reasonable effort" to disclose matters that "could cause a person aware of the facts to reasonably entertain a doubt" that he "would be able to be impartial." In addition, the JAMS form discloses that "because of the nature and size of JAMS, the parties should assume that one or more of the other neutrals who practice with JAMS has participated in the arbitration, mediation or other dispute resolution proceeding with the parties, counsel or insurers in this case."

After his appointment, Kramer consulted with the parties and agreed to accept lengthy pre and post hearing briefs, along with multiple affidavits and exhibits. The key legal question presented to Kramer was: what is the meaning of the term: "to the extent required by New York and federal law" contained in the indemnification provision of the Settlement Agreement? Kramer conducted the non-evidentiary arbitration hearing on June 25, 2012. Each side made lengthy presentations.

Kramer's July 17, 2012 Award was forwarded to the parties by

JAMS on July 20, 2012. The Award addressed and rejected each of Field's legal arguments and found that the indemnification provision was governed by New York Partnership Law, and that under Section 40(2) of the Partnership Law, the partnership "must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper course of its business . . . ." Therefore, Kramer held that:

> . . . to be successful on his claim for indemnity [Mr. Field] must allege and prove by a preponderance of the evidence that the work he did relating to the tax shelters was ordinary and proper. Other than arguments in his Reply Letter Memorandum quibbling with BDO's recitation of the alleged misconduct, and his assertion that the BDO partnership benefitted royally from the sale of tax shelter advice he has not sought to do so. Therefore, I find that Mr. [Field] has not satisfied his burden of proof by a preponderance of the evidence. I further find, as discussed below, that the obligation to pay defense costs is no broader than the obligation to indemnify.

Field, now acting *pro se*, filed his Petition to Vacate/Modify the Award pursuant to CPLR 7511 and the Federal Arbitration Act ("FAA") on October 12, 2012. His grounds for challenging the Award can be grouped into the following categories: (1) evident partiality based on (a) alleged non-disclosures and (b) failure to order funding of escrow; (2) manifest disregard for the law; and (3) exceeding the scope of the arbitrator's power.

BDO now moves to dismiss the Petition with prejudice and confirm the underlying arbitration award pursuant to CPLR 404(a) and 7511(e).

Discussion

In the instant case, there is no dispute that the FAA applies. (Tr. 5:7-9, April 3, 2013.)

> It is well settled that [under the FAA] 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) (internal citations omitted). The FAA allows vacatur of an arbitration award in the following circumstances:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where 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; or of any other misbehavior by which the rights of any party have been prejudiced; or

> (4) 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.

Federal Arbitration Act, 9 U.S.C.A. § 10 (West 2002). "In addition to these four grounds, an award may be vacated under federal law if it exhibits a 'manifest disregard for the law.'" *Wien & Malkin LLP*, 6 NY3d at 480 (citations omitted).

Evident Partiality

Field argues that the arbitration award should be vacated on the grounds of "evident partiality" because of disclosures that the arbitrator failed to make regarding his knowledge of DLA Piper ("DLA") attorneys[5] and based on his failure to order the funding of an escrow account.

". . . [E]vident partiality within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 72 (2d Cir. 2012). "The burden of proving evident partiality 'rests upon the party asserting bias.'" *Id.* (citation omitted); *see also U.S. Electronics, Inc. v. Sirius Satellite Radio, Inc.* 17 NY3d 912 (2011).

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[5] BDO was represented by DLA during the arbitration.

Evident Partiality Based on Alleged Non-Disclosures of Relationships

> Among the circumstances under which the evident-partiality standard is likely to be met are those in which an arbitrator fails to disclose a relationship or interest that is strongly suggestive of bias in favor of one of the parties. But we have repeatedly cautioned that we are not "quick to set aside the results of an arbitration because of an arbitrator's alleged failure to disclose information." We have concluded in various factual settings that the evident-partiality standard was not satisfied because the undisclosed relationship at issue was "too insubstantial to warrant vacating the award."

Scandinavian Reinsurance, 668 F.3d at 72-3 (internal citations omitted).

Here, Field alleges that Kramer failed to make two disclosures: the first involved Kramer and Christopher P. ('Kip') Hall ("Hall"), a DLA partner who was one of BDO's counsel during the arbitration hearing. Field notes that when Kramer was at Shearman & Sterling, and Hall was at Morgan, Lewis & Bockius, they were both members of a "Steering Committee" established by the Court in 2004 in a multi-district litigation then pending in Maryland Federal Court ("MD Litigation"). The Committee had nineteen members and Kramer and Hall represented different clients in the action. Nevertheless, Field asserts that Kramer's failure to disclose this connection proves that Kramer was biased in BDO's favor.

BDO argues, on the other hand, that Field's papers do not establish that the Committee had a single in-person meeting or had ever even spoken. Additionally, respondent argues that Kramer and Hall were both partners in major law firms for decades, and it is hardly surprising that over the course of their long careers they were counsel for different parties in the same action. Moreover, respondent asserts that being members of a "steering committee" that discussed scheduling and discovery matters in a complex case is hardly the equivalent of a close, ongoing professional relationship requiring disclosure. Respondent argues that Kramer and Hall's service on a single committee many years before the start of the arbitration is precisely the sort of "attenuated matter and relationship" that the Court of Appeals has held insufficient to establish evident partiality.

The second alleged non-disclosure involved a former DLA partner, Charles J. Stevens, Esq. ("Stevens"). Stevens was a partner in DLA's Sacramento office for a brief period starting in 2011, and then joined JAMS in 2012. Field does not allege that Stevens had anything to do with the parties' arbitration. Field nevertheless asserts that Kramer's supposed failure to "disclose" that Stevens joined JAMS also proves bias.

In response to petitioner's claim that former DLA partner,

Stevens, joined JAMS before the start of the arbitration, respondent argues that this claim is irrelevant because Stevens had nothing to do with the arbitration and was one of over three hundred neutrals within JAMS.

This Court finds that here, the undisclosed relationships are "too insubstantial to warrant vacating the award." *Scandinavian Reinsurance,* 668 F.3d at 72. The alleged relationship between Kramer and both Hall and Stevens is not direct, pecuniary or personal and in no way suggests bias. Therefore, the arbitrator's alleged failure to disclose that he once served on a litigation steering committee with Hall and that Stevens, a fellow JAMS arbitrator, was previously a DLA partner does not require vacatur.

Evident Partiality Based on Failure to Order Funding of Escrow

Field next claims that Kramer's supposed failure to order that BDO put into escrow an amount sufficient to cover his legal fees shows "evident partiality" on the part of the arbitrator.

In response to this claim, respondent argues that petitioner's counsel never asked the arbitrator to direct respondent to put any money into escrow. Field's counsel never sent a pre-arbitration letter to Kramer asking him to direct respondent to fund the escrow, and did not include such a request in the prayer for relief

contained in petitioner's pre-hearing brief. Respondent argues that Kramer could not have been "biased" because he failed to award relief that was never requested. *See Matter of Provenzano (Motor Veh. Acc. Indem. Corp.)*, 28 AD2d 528 (1st Dep't 1967) (holding that the claimed inadequacy of an Award is not sufficient to show evident partiality). Respondent further argues that given that petitioner lost the arbitration, the issue that monies should have been deposited into escrow is now entirely moot because the money put into escrow would have been returned to respondent in any event.

Again, the alleged failure to order the funding of the escrow account, when it was never even requested by petitioner, is not suggesitve of bias and does not warrant vacatur under the evident partiality theory.

Manifest Disregard for the Law

> . . . [M]anifest disregard of law is a "severely limited" doctrine. It is a doctrine of last resort limited to the rare occurrences of apparent "egregious impropriety" on the part of the arbitrators, "where none of the provisions of the FAA apply." The doctrine of manifest disregard, therefore, "gives extreme deference to arbitrators." The Second Circuit has also indicated that the doctrine requires "more than a simple error in law or a failure by the arbitrators to understand or apply it; and, it is more than an erroneous interpretation of the law."

Wien & Malkin LLP, 6 NY3d at 480-81 (internal citations omitted). To vacate an arbitration award on this ground, a reviewing court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it all together; and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case. *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997), *cert den* 522 US 1049 (1998).

Field asserts that the Settlement Agreement simply required BDO to indemnify him, and that New York Partnership Law is irrelevant because at the time the Settlement Agreement was reached he was no longer a partner. Field takes issue with the arbitrator's contractual interpretation of the Settlement Agreement and with his finding that New York partnership law governed the interpretation of the contract.

BDO argues that here there was no disregard for the law; Kramer simply interpreted the law in a way that Field disagrees with, which is not a proper basis for vacating an award. BDO also points out that Field himself cited to New York Partnership Law in his briefs and urged Kramer to apply statutory law.

This Court finds that here the doctrine of manifest disregard

does not apply. There is nothing to indicate that the arbitrator knew of a governing legal principal that he refused to apply or chose to ignore. *Wien & Malkin LLP*, 6 NY3d at 481. Despite petitioner citing to the Partnership Law in his submissions to the arbitrator, he now complains of the arbitrator's decision to apply the Partnership Law, a decision that cannot be second guessed by this Court. *Id.* at 479-80. Therefore, the arbitrator's application of New York Partnership Law in construing the Settlement Agreement does not provide a basis for vacatur under this doctrine.

Exceeding Scope of the Arbitrator's Power

Field argues that Kramer was "required" to decide the claims he made that the litigation BDO commenced in this Court and the appeals it took to the Appellate Division were "vexatious." Although it is unclear, it appears that Field is charging that this claim was within the scope of the arbitration provision contained in the Amendment, and that Kramer exceeded the scope of his power when he decided not to decide that claim and instead denied it without prejudice.[6]

[6] Field also asks this Court to appoint an arbitrator and direct that BDO put a sufficient sum into escrow to cover his legal fees. Given that this will be moot if the petition is dismissed, BDO states that it will address this issue in its Answer to the Petition if this motion is denied.

Respondent argues that it was perfectly reasonable for Kramer to conclude that petitioner's "vexatious" litigation claim should be raised (if at all) in court, not in the parties' arbitration. Additionally, respondent argues that the JAMS Rules explicitly give the arbitrator the power to decide the "scope" of an arbitration clause.

According to JAMS Rule 11(c):

> Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation **or scope of the agreement** under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(emphasis added). Respondent argues that because of JAMS Rule 11(c), Kramer was well within his authority to decide that the "vexatious litigation" claim was outside the scope of the arbitration contract.

Lastly, respondent argues that petitioner never properly raised this claim in the parties' arbitration, nor did petitioner ever seek to amend his claim, as required by the applicable JAMS rule. (JAMS Rule 10.)

This Court declines to vacate the arbitration award based on

the arbitrator's decision that certain of Field's claims were not arbitrable and had to be litigated. It was within the arbitrator's power to determine arbitrability under the JAMS rules and petitioner fails to show that the arbitrator exceeded his authority by construing the scope of the arbitration agreement.

Conclusion

Based on the foregoing, respondent's motion to dismiss the petition to vacate the award is granted.

This constitutes the decision and order of this Court.

Dated: July 19, 2013

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED

JUL 22 2013

NEW YORK
COUNTY CLERK'S OFFICE