APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

Matter of 544 Bloomrest, LLC v. Harding

2022 NY Slip Op 00936 (App. Div. 2022) · No. 2021-03415 · Decided February 10, 2022

SUMMARY

The Appellate Division, First Department modified an order confirming an arbitration award by vacating punitive damages, sanctions, and attorneys' fees that had not been demanded in the arbitration. The court otherwise upheld the award, including the findings concerning conversion by fraud, the individual respondent's personal liability, dismissal of counterclaims, and arbitration costs. The court held that an arbitrator may not award relief beyond the issues and remedies presented by the parties.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, First Department
WRITING FOR THE COURT	Gische, J.P.; Kern, J.; Moulton, J.; Kennedy, J.; Rodriguez, J.
JURISDICTION	New York
DECIDED	February 10, 2022
DOCKET	2021-03415
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Respondents appealed from an order of Supreme Court, New York County, confirming an arbitration award and denying their cross motion to vacate the award.
STANDARD OF REVIEW	An arbitration award may be vacated where the arbitrator exceeded her power; purported errors of law or fact by the arbitrator are not subject to judicial review.
PRECEDENTIAL VALUE	published opinion
PARTIES	Alexi Harding et al. v. 544 Bloomrest, LLC

TOPICS

arbitration · appellate procedure · attorney fees · punitive damages · sanctions

PRACTICE AREAS

arbitration · commercial litigation · corporate law · torts · remedies

QUESTIONS PRESENTED

1. Whether respondents' challenges to the arbitrator's determination concerning conversion by fraud and dismissal of their breach-of-contract counterclaims were subject to judicial review.
2. Whether a corporate officer or director who personally participated in or had actual knowledge of fraud may be held personally liable.
3. Whether an arbitrator exceeds her power by awarding punitive damages, sanctions, or attorneys' fees that were not demanded in the arbitration.
4. Whether arbitration costs were properly awarded and confirmed when they were requested in the arbitration demand and authorized by the applicable arbitration rules and CPLR 7513.

HOLDINGS

1. Respondents' challenges to the arbitrator's award on Bloomrest's conversion-by-fraud claim and dismissal of their breach-of-contract counterclaims, insofar as they asserted only errors of law or fact, were not subject to judicial review.
2. A corporate officer or director is not immune from personal liability when there is evidence that the individual personally participated in the fraud or had actual knowledge of it.
3. An arbitrator exceeds her power by awarding punitive damages, sanctions, or attorneys' fees that were not demanded in the particular arbitration.
4. AAA Commercial Rule 47(d) does not authorize an award of attorneys' fees unless all parties requested the award or it is authorized by law or by the arbitration agreement; even where the arbitrator otherwise has authority, the fees must have been demanded in the particular arbitration.
5. The arbitration-cost portion of the award was properly confirmed because Bloomrest requested those costs in its demand and AAA Commercial Rule 47(c), as well as CPLR 7513, authorized the arbitrator to assess them.

KEY QUOTATIONS

> *"The arbitrator, however, exceeded her power by awarding petitioner punitive damages, sanctions and attorneys' fees none of which were demanded"* (*1)

> *"An "arbitrator's authority extends to only those issues that are actually presented by the parties""* (*2)

> *"In contrast, the arbitrator's award granting petitioner the costs of arbitration was properly confirmed by Supreme Court."* (*2)

FACTUAL BACKGROUND

544 Bloomrest pursued arbitration against respondents for conversion by fraudulent means, seeking $362,456.77, interest, and arbitration costs. Its arbitration demand did not request punitive damages or attorneys'

fees, and Bloomrest did not amend the demand or seek those forms of relief in its post-arbitration memorandum. The arbitrator nevertheless awarded punitive damages, sanctions, and attorneys' fees, as well as arbitration costs, and Supreme Court confirmed the award.

PROCEDURAL HISTORY

Supreme Court granted 544 Bloomrest, LLC's motion to confirm an arbitration award dated May 27, 2020 and denied respondents' cross motion to vacate. The Appellate Division modified the order to vacate the portions of the award granting punitive damages, sanctions, and attorneys' fees, and otherwise affirmed.

DISPOSITION

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reversed_and_remanded
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REMAND INSTRUCTIONS

The order was modified to vacate the portions of the arbitration award awarding punitive damages, sanctions, and attorneys' fees; it was otherwise affirmed. The matter was not remanded for further factual proceedings.

CASES CITED

- Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 NY3d 471, 479-480 [2006], cert dismissed 548 US 940 [2006]
- Matter of SCM Corp. [Fisher Park Lane Co.], 40 NY2d 788, 793 [1976]
- Marine Midland Bank v. Russo Produce Co., 50 NY2d 31, 44 [1980]
- Denson v. Donald J. Trump for President, Inc., 180 AD3d 446, 451 [1st Dept 2020]
- Matter of Steyn v. CRTV, LLC, 175 AD3d 1, 6-8 [1st Dept 2019]
- Matter of Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp., 13 NY3d 168, 173 [2009]
- Matter of Stewart Tabori & Chang [Stewart], 282 AD2d 385 [1st Dept 2001], lv denied 96 NY2d 718 [2001]
- Myron Assoc. v. Obstfeld, 224 AD2d 504 [2d Dept 1996], lv denied 88 NY2d 807 [1996]
- Matter of Flintlock Constr. Svcs., LLC v. Weiss, 122 AD3d 51 [1st Dept 2014], appeal dismissed 24 NY3d 1209 [2015]

OPINION

PER CURIAM.

Matter of 544 Bloomrest, LLC v Harding (2022 NY Slip Op 00936) Matter of 544 Bloomrest, LLC v Harding 2022 NY Slip Op 00936 Decided on February 10, 2022 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided and Entered: February 10, 2022 Before: Gische, J.P., Kern, Moulton, Kennedy, Rodriguez, JJ. Index No. 652658/20 Appeal No. 15275 Case No. 2021-03415 [*1]In the Matter of

544 Bloomrest, LLC, Petitioner-Respondent, vAlexi Harding et al., Respondents-Appellants. Levine & Blit, PLLC, New York (Russell S. Moriarty of counsel), for appellants. Peyrot & Asscoiates, PC, New York (David C. Van Leeuwen of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about February 23, 2021, which granted petitioner's motion to confirm an arbitration award dated May 27, 2020 and denied respondents' cross motion to vacate the award, unanimously modified, on the law, to vacate that part of the award awarding petitioner punitive damages, sanctions and attorneys' fees, and otherwise affirmed, without costs.

As to the arbitrator's award on petitioner's claim for conversion by fraud and dismissing respondents' counterclaims for breach of contract, respondents raise only purported errors of law and fact by the arbitrator, which are not subject to judicial review (see Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d 471, 479-480 [2006], cert dismissed 548 US 940 [2006]); Matter of SCM Corp. [Fisher Park Lane Co.], 40 NY2d 788, 793 [1976]).

Contrary to respondents' contention, the individual respondent, a corporate officer or director, is not immune from personal liability, since there is evidence that he personally participated in the fraud or had actual knowledge of it (Marine Midland Bank v Russo Produce Co., 50 NY2d 31, 44 [1980]).

The arbitrator, however, exceeded her power by awarding petitioner punitive damages, sanctions and attorneys' fees none of which were demanded (CPLR 7511[b][1][iii]; Denson v Donald J. Trump for President, Inc., 180 AD3d 446 [1st Dept 2020). Petitioner filed a demand for arbitration form stating that its dispute with respondents concerned "[c]onversion by a variety of fraudulent means" in the sum of $362,456.77, the dollar amount of its claim.

Although the American Arbitration Association (AAA) preprinted form petitioner used allows a claimant to seek other relief, including attorneys' fees, interest, arbitration costs and punitive/exemplary damages, the only boxes that petitioner checked off were for interest and arbitration costs. It did not check the punitive damages box or attorneys' fees box, nor indicate anywhere on its demand that it was seeking such relief.

Petitioner never amended its demand for arbitration. Nor did it include a prayer for such relief in its subsequently filed post-arbitration memorandum. By granting unrequested relief, the arbitrator exceeded the expressly enumerated limits on her authority by deciding matters that were not before her (Denson at 451).

Although AAA commercial rule 47(d) empowers an arbitrator to award attorneys' fees, this is only "if all parties have requested such an award or it is authorized by law or their arbitration agreement." Here, neither party requested such an award and it is not authorized by law.

The Engagement Letter that petitioner relies on does not incorporate AAA rule 47(d) into that agreement (Matter of Steyn v CRTV, LLC, 175 AD3d 1, 6 [1st Dept 2019]). In any event even if the arbitrator has the authority to make an award, it must be demanded in the particular arbitration for the matter to be considered. An "arbitrator's authority extends to only [*2]those issues that are actually presented by the parties" (Matter of Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp., 13 NY3d 168, 173 [2009]).

Consequently, in the absence of a demand for such fees (Denson, 180 AD3d at 451; Steyn, 175 AD3d at 7-8) or the parties' agreement that the prevailing party is entitled to legal fees (see Matter of Stewart Tabori & Chang [Stewart], 282 AD2d 385 [1st Dept 2001], lv denied 96 NY2d 718 [2001]; Myron Assoc. v Obstfeld, 224 AD2d 504 [2d Dept 1996], lv denied 88 NY2d 807 [1996]), they may not be awarded.

Similarly, even though an arbitrator is authorized to award punitive damages pursuant to AAA rule 47(a), they still must be demanded (see Matter of Flintlock Constr. Svcs, LLC v Weiss,122 AD3d 51 [1st Dept 2014], appeal dismissed 24 NY3d 1209 [2015]). Petitioner's request that the arbitrator award such "other relief that the AAA deems just and proper" does not satisfy the requirements of a demand.

In contrast, the arbitrator's award granting petitioner the costs of arbitration was properly confirmed by Supreme Court. Not only did petitioner request them in its demand for arbitration, AAA rule 47(c) provides that "the arbitrator shall assess the fees, expenses, and compensation," including administrative fees, expenses, and the arbitrator's own compensation, "among the parties in such amounts as the arbitrator determines is appropriate" (see also CPLR 7513).

We have considered respondents' remaining arguments and find them unavailing. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: February 10, 2022