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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2020-0709-BLS 2

CREDIT SUISSE SECURITIES (USA) LLC,
Petitioner

vs.

JONATHAN J. GALLI, PAUL T. CONNOLLY,
ALEXANDER V. MARTINELLI and CHRISTOPHER L. HERLIHY,
Respondents

MEMORANDUM OF DECISION AND ORDER
ON PLAINTIFF'S APPLICATION TO VACATE IN PART
OR MODIFY ARBITRATION AWARD

This is an action challenging that portion of an arbitration award that required Credit Suisse to pay the attorney's fees of the parties who prevailed against it in that arbitration. Credit Suisse contends that the three-member arbitration panel had no authority to enter such an order and relies on the Federal Arbitration Act, 9 U.S.C. §§1 *et seq.* and the Massachusetts Arbitration Act, G.L.c. 251 §§1 *et seq.* Both statutes, however, envision that judicial review of arbitration awards is extremely narrow, with substantial deference accorded to the arbitrators' decision. Moreover, by requesting its own fees in the pleadings it filed in the arbitration, Credit Suisse placed the issue of fees before the panel and cannot now be heard to complain that the arbitrators exceeded their powers. Accordingly, this Court sees no reason to disturb the panel's decision.

Notice sent
JES
9/1/2020

BACKGROUND

Respondents Jonathan Galli, Paul Connolly, Alexander Martinelli and Christopher Herlihy are all former employees of Credit Suisse who, until their departure from the company, worked as financial advisors in Credit Suisse's Boston office. On June 8, 2017, they filed a

Statement of Claim against Credit Suisse with FINRA that alleged a Massachusetts Wage Act violation and related contract-based claims, all stemming from their assertion that Credit Suisse failed to pay them deferred compensation that they had already earned. Credit Suisse denied the allegations and filed its own Counterclaim alleging that the Respondents had breached their contracts with Credit Suisse. The Counterclaim stated, that because of the Respondents' conduct, Credit Suisse was damaged in an amount "believed to run into the millions of dollars" and, in addition to compensatory damages, sought "transaction costs, interest and fees." See ¶¶ 46, 53, 61, 83, 90, 98, 120, 127, 135 141, 148 and 156 of Counterclaim, attached as Exhibit A to Defendants/Respondents' Consolidated Opposition. This same claim for relief was asserted in Credit Suisse's Answer to an Amended Statement of Claim filed on March 27, 2019, just four months before the arbitration began. See ¶¶ 46, 53, 61, 83, 90, 98, 120, 127, 135 141, 148 of Counterclaim set forth in the Amended Answer, attached as Exhibit B to Defendants/Respondents' Consolidated Opposition.

The arbitration hearing spanned twenty days, concluding on January 23, 2020. Closing arguments were lengthy, with each side using a power point presentation. See e.g. Exhibit G to Defendants/Respondents' Consolidated Opposition. In outlining what Respondents should recover, Respondents' counsel specifically discussed their request for attorney's fees – a request backed up by an affidavit detailing the hours worked on the case. Counsel argued that Respondents were entitled to those fees both under the Wage Act and also "because we believe that Credit Suisse in filing their counterclaims ...are requesting millions of dollars, millions of dollars that they've now withdrawn, plus related transaction costs, interest and fees." Hearing Transcript at 6529:4-25, attached as Exhibit F to Defendants/Respondents' Consolidated Opposition. The attorney went on to explain that, because both parties were requesting

attorney's fees and costs, the arbitrators had the authority to award fees to the successful party.¹ In his closing argument, Credit Suisse's attorney stated that "we don't think there is any legal basis for an award of fees and expense in this case" but then added that, if the panel were to award fees to the Respondents, the fee application they had submitted was insufficient itemized. Hearing Transcript at 6120:10-25 and 6121: 1-19. Credit Suisse did not directly contest the assertion by the opposing attorney that Credit Suisse had itself requested attorney's fees and that in so doing, it had given the arbitrators the legal authority they needed for a fee award, even without a Wage Act violation. Indeed, at no time in the arbitration proceeding did Credit Suisse make it clear to the arbitrators that it was (despite the assertions in the Counterclaim) expressly withdrawing any request that Respondents pay Credit Suisse's attorney's fees if it were to prevail.

The three-member panel (the Panel) issued its decision on February 14, 2020 (the Award). The Award required Credit Suisse to pay each Respondent a sum of money in compensatory damages and to pay interest to one of them (Herlihy). The Award did not specifically state whether the damages were based on a finding that there was a Wage Act violation; on the other hand, it did not order that the damages be trebled, as a Wage Act violation would have required. As to attorney's fees, the Award required Credit Suisse to pay each of the Respondents a sum of \$102,733 in attorney's fees. The Panel stated that it was authorized to make such an award "because both parties requested attorneys' fees in closing arguments."

¹ This theory should have come as no surprise to Credit Suisse, which had already been required to pay the attorney's fees of the prevailing party in another arbitration (Chilton) decided the year before that involved similar claims. In his closing argument to the Panel in the instant case, Respondents' counsel specifically referred to Chilton.

DISCUSSION

Judicial review of an arbitrator's decision is "extremely narrow and exceedingly deferential." Keebler Co. v. Truck Drivers, Local 170, 247 F.3d 8, 10 (1st Cir. 2001). A court may vacate the award only in the rare circumstance where the arbitrator has exceeded the scope of his or her arbitral authority or makes an award in manifest disregard of the law. Seagate Technology Intern. v. Alliance Computer Systems, 2002 WL 15694 at *1 (D.Mass. 2002) (citations omitted). Courts do not "hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." Ortiz-Espinosa v. BBVA Sec. of Puerto Rico, Inc., 852 F.3d 36, 48 (1st Cir. 2017), quoting Advest Inc. v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990). Given this deference, a party challenging an arbitral award necessarily bears a "heavy burden." Photographic Illustrators Corp. v. Osram Sylvania, Inc., 366 F.Supp. 3d 160, 166 (D.Mass. 2019), quoting Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 (2013).

This deference to the arbitral decision is codified in both the Federal Arbitration Act and the Massachusetts Arbitration Act. The federal statute permits vacatur only "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject submitted was not made." 9 U.S.C. §10(a)(4). Judicial review under the Massachusetts statute contains similar restrictions: as set forth in G.L.c. 251 §12, judicial review is limited to determining whether the award was procured by "corruption, fraud or other undue means," whether the arbitrator was evidently partial, or whether the arbitrator exceeded the scope of his or her authority. "An arbitrator exceeds his authority by granting relief beyond the scope of the arbitration agreement or by awarding relief beyond that to which the parties bound themselves...or by awarding relief prohibited by law." Superadio Ltd. Partnership v.

Winstar Radio Prods., LLC, 446 Mass. 330, 334 (2006). Here, Credit Suisse contends that the Panel exceeded its powers in awarding attorney's fees. This Court disagrees.

The Respondents alleged both a violation of the Massachusetts Wage Act and a breach of contract. A party who proves a violation of the Wage Act is clearly entitled to recover his or her attorney's fees pursuant to that statute. Credit Suisse argues that the Wage Act cannot support an award of attorney's fees here because the Panel did not find a Wage Act violation. That is not exactly accurate: the Panel did not make an express finding one way or the other. What is true, however, is that the Panel did not cite the Wage Act as the basis for the fee award: rather, the Panel stated that it had the authority to award fees because each side had requested its fees. Where the parties mutually request attorney's fees in an arbitration, courts have concluded that this mutual request can provide the requisite legal basis for an award of fees, even though the general rule is that each party pays its own attorney's fees. That is precisely what happened here.

This case is quite similar to Matter of Goldberg v. Thelen Reid Brown Raysman & Steiner LLP, 52 A.D.3d 392, 860 N.Y.S.2d 93 (N.Y.App.Div. 2008).² In that case, a court affirmed an arbitration award that included attorney's fees to the prevailing party because it was the defendant who first sought such fees in its counterclaim, thus agreeing to submit the dispute to arbitration. Following the same reasoning, the court in Matter of Warner Brothers Records (PPX Enters.), affirmed an arbitration award that included attorneys' fees even though the underlying agreement that led to arbitration did not provide for the recovery of fees. 776 N.Y.S.2d 269, 7 A.D.3d 269 (2004). "Inasmuch as both sides are on record as having requested

² This Court cites New York cases because the three agreements implicated by the dispute between the parties state that New York law is to govern. Without conceding that New York law applies, Credit Suisse does agree that Massachusetts law is not any different with regard to the issue before the Court.

attorney's fees, the award was appropriate." Id. The court also relied on the Commercial Arbitration Rules of the American Arbitration Association, specifically Rule 43(d), which the court described as authorizing an award of attorneys' fees where all parties have requested it. In the instant case, the arbitration was conducted pursuant the FINRA rules, but they are not substantially different in that they give the arbitrator final and binding authority to decide the disputes between the parties as described in their statements of claims and counterclaims. By itself demanding attorneys' fees and then submitting that demand (through its Counterclaim) to arbitration, Credit Suisse effectively gave the arbitrators the authority they would not have otherwise had to award attorney's fees to the prevailing party.

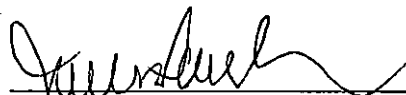
Credit Suisse attempts to escape this conclusion by noting that the Counterclaim referred only to "fees," not attorney's fees. It was clear from the closing arguments, however, that the Respondents understood that to be a demand for attorney's fees and that their counsel was expressly using that demand as the legal basis for an award of fees to the Respondents, regardless of whether the Panel found a Wage Act violation. Rather than correct this supposed mischaracterization of its Counterclaim or make it clear on the record that Credit Suisse was not asking for attorney's fees, Credit Suisse was silent. Although Credit Suisse generally opposed an award of attorneys' fees to the Respondents, it did not explain the basis for that opposition except to attack the sufficiency of the Fee Application submitted by Respondents.

This case therefore stands in sharp contrast to the Matter of Stewart Abori & Chang, 282 A.D.2d 385, 723 N.Y.S.2d 492 (Ny.App.Div. 2001). In that case, the court vacated an award of attorney's fees to the prevailing party where petitioner, "prior to the rendering of the award, withdrew any claim to recover their own attorney's fees and objected to the submission of [respondent's] claim for such relief" and therefore "did not acquiesce in the arbitrator's

consideration of that claim.” 282 A.3d at 386. The record before this Court is quite different: although Credit Suisse did not actively litigate the issue of its own fees, neither did it expressly withdraw that claim. Even more significant, Credit Suisse did not take on the Respondents’ assertion in closing arguments that the parties had agreed to submit the question of attorney’s fees for resolution by the Panel and that as a consequence of that, this was a “dispute” that the arbitrators had the authority to decide. This was telling, particularly since Respondents’ counsel cited another case Credit Suisse had been involved in the year before where a claimant recovered his fees against Credit Suisse using the identical argument. See fn. 1, *supra*. It would be hardly surprising that the Panel construed Credit Suisse’s silence as a concession that the Panel had the legal authority to do what the arbitrators did in that other case – namely, award fees to the prevailing party.

CONCLUSION AND ORDER

For all the foregoing reasons and for other reasons set forth in Respondents’ Memoranda, the Credit Suisse’s Application to Vacate in Part or to Modify the Award is **DENIED**. Because Credit Suisse raises no other objection to the Award, it is hereby **ORDERED** that judgment enter **AFFIRMING** the Award dated February 14, 2020.



Janet L. Sanders
Justice of the Superior Court

Dated: August 31, 2020