

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 6
INDEX NO. 652065-19
MOTION DATE
MOTION SEQ. NO. 1

R. M. STARK & Co., Inc.

Nicholas Adelani Owoyemi

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 7/31/19

[Signature] J.S.C.

HON. EILEEN A. RAKOWER

- 1. CHECK ONE: [X] 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: PART 6

-----X
R.M. Stark Co., Inc.,

Index No.
652065/2019

Petitioner,

- against -

**DECISION
and ORDER**

Nicholas Adelani Owoyemi

Mot. Seq. #001

Respondent.
-----X

HON. EILEEN A. RAKOWER, J.S.C.

On April 8, 2019, Petitioner R.M. Stark Co., Inc., (“R.M. Stark”) filed a Petition pursuant to CPLR § 7510 and 9 U.S.C. § 10 to vacate the arbitration award (“the Award”) issued by the Financial Industry Regulatory Authority, Inc. (“FINRA”) Office of Dispute Resolution (“Arbitrators”) in the matter of *Nicholas Adelani Owoyemi (“Owoyemi”) v. R.M. Stark*, FINRA Case No. 18-02435. The Award was signed on March 7, 2019. R.M. Stark argues that the Arbitrators committed misconduct by denying its motions to compel discovery and adjourn the hearing and by showing partiality to Owoyemi during the course of the proceeding.

On May 6, 2019, Owoyemi, pro se, filed an Order to Show Cause seeking the dismissal of the Petition. Among other reasons, Owoyemi asserts that he was served with a “Notice of Petition (sic) ... without a Court Date.” Owoyemi also seeks an Order confirming the Award and costs and disbursements for the filing of his Order to Show Cause. R.M. Stark opposes the Order to Show Cause. Oral argument was held on June 18, 2019.

The commencement of a special proceeding requires the preparation of two documents: a petition and either a notice of petition or an order to show cause. The pleading rules that apply to a complaint also govern the petition. NY CPLR § 402 (2014). CPLR § 105(b) provides that notice of petition is analogous to a summons (“the words ‘summons’ and ‘complaint’ include the notice of petition and the petition, respectively in a special proceeding”).

Moreover, CPLR § 403(b) provides in part, “a notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party at least eight days before the time at which the petition is noticed to be heard.” CPLR § 403 (a) provides that “[a] notice of petition shall specify the time and place of the hearings on the petition and the supporting affidavits, if any, accompanying the petition.” CPLR § 403(d) provides that “[t]he court may grant an order to show cause to be served, in lieu of a notice of petition at a time and in a manner specified therein.”

CPLR § 2001, as amended in 2007, provides that “the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, ... provided that any applicable fees shall be paid.” In addition, under CPLR § 7511(a), “an application to vacate or modify an award may be made by a party within ninety days after its delivery to him.”

Preliminarily, R.M. Stark has failed to file or provide proof that a Notice of Petition accompanied the Petition that was served on Owoyemi as required under CPLR § 403(b). Additionally, R.M. Stark did not bring an order to show cause in lieu of a Notice of Petition in accordance with CPLR § 403(d). Rather, it was Owoyemi that brought the Order to Show Cause seeking a dismissal of the Petition and the confirmation of the Award.

Background/Factual Allegations

On or about July 7, 2018, Owoyemi filed an Amended Statement of Claim with FINRA. Declaration of R.M. Stark’s Vice President Ellen R. P. Adler (“Adler Declaration”), ¶ 3. Owoyemi alleged the following claims against R.M. Stark: unlawful withholding of his commissions; unjust enrichment; failure to properly supervise him; and complaints regarding his financial hardship, which affected his health. Adler Declaration, ¶ 4.

On or about August 27, 2018, R.M. Stark filed a Statement of Answer. Adler Declaration, ¶ 5. On or about October 30, 2018, the Arbitrators held an initial Pre-Hearing Teleconference with both parties. *Id.*, ¶5. The parties agreed to a discovery deadline of November 28, 2018. *Id.*, ¶7.

On or about November 26, 2018, R.M. Stark served Owoyemi with its First Request for Production of Documents and Request for Information (“Request for Production”). Adler Declaration, ¶ 8. The documents sought from Owoyemi

included: income tax returns, including W-2s, 1099s, and 1099 Miscellaneous; documents reflecting commissions earned by Owoyemi from employers other than R.M. Stark; medical records; all employment agreements executed by Owoyemi and negotiations; all Written Supervisory Rules from each employer with which Owoyemi was employed; and documents reflecting communications between Owoyemi and each of his employers, FINRA, and his customers. *Id.* at Exh. B.

On or about November 28, 2018, Owoyemi responded to R.M. Stark's Request for Production. *Id.*, ¶10. R.M. Stark states that Owoyemi objected to every request. *Id.* On or about February 2, 2019, R.M. Stark filed a motion to compel Owoyemi's response to its Request for Production and a motion for adjournment. *Id.*, ¶11. On or about February 22, 2019, the Arbitrators denied both motions. *Id.*, ¶13.

On or about March 7, 2019, the Arbitrators issued the Award finding R.M. Stark liable in the sum of \$30,725.00 in compensatory damages plus interest on this sum at the rate of 8% per annum from February 29, 2016 through the payment of the award in full. The Arbitrators denied Owoyemi's request for punitive damages and "any and all claims for relief not specifically addressed herein." The Arbitrators stated that this determination was rendered "[a]fter considering the pleading, the testimony and evidence presented at the hearing." Exhibit 2 to the Petition.

Parties' Contentions

R.M. Stark argues that the Award should be vacated because the Arbitrators committed misconduct by denying its motion to compel Owoyemi to produce discovery and its motion to adjourn. R.M. Stark contends that the documents requested, which related to Owoyemi's "securities employment experience, financial resources, medical and health conditions, and professional background" (Adler Declaration, ¶9), were relevant to the claims at issue and to R.M. Stark's defense. R.M. Stark contends that prejudice resulted from the Arbitrators' denial of its motion to compel Owoyemi to provide discovery responses. R.M. Stark also contends that the Arbitrators abused their discretion in denying its request for an adjournment which caused them further prejudice because they had to proceed to the hearing without relevant evidence.

Owoyemi states that on or about October 30, 2018, he "specifically demanded discovery from R.M. Stark and also stated that he did not have any more discovery

material to be given to the firm.” Owoyemi’s Affidavit, ¶ 3. Owoyemi states that “he had already attached all discovery materials he had in his possession.” *Id.*

R.M. Stark further contends that the Arbitrators committed misconduct by exhibiting partiality towards Owoyemi. R.M. Stark argues that the Chair instructed and advised Owoyemi on various issues, failing to maintain neutrality as required under the FINRA Arbitrator’s Guide. Specifically, R.M. Stark references a hearing tape where the Chair interjected Owoyemi’s questioning of a witness to advise that he “might determine if the witness had any part in that matter.” *See Adler* (“Decl.”) at ¶ 14. R.M. Stark contends that the FINRA Arbitrators exceeded the scope of assistance allowed under the FINRA Arbitrator’s Guide by advising and assisting Owoyemi and improperly presenting his case.

R.M. Stark further contends the FINRA Arbitrators demonstrated partiality towards Owoyemi by directly arguing with R.M. Stark about contested legal issues. Specifically, R.M. Stark contends that the Arbitrator, Ms. Chin, “argued with them about a legal point of contention – the meaning of a certain provision in the parties’ Agreement – instead of requesting briefs from the parties, the proper course of action under the Arbitrator’s Guide.” R.M. Stark contends that Ms. Chin’s actions indicated her disbelief towards their position and displayed a preference for Owoyemi.

Owoyemi states that “towards the end of the hearing, before the parties’ closing arguments, the panel Chair asked both parties if they had any complaints or anything they wanted to address.” Owoyemi states that both he and Adler responded, “No.” Owoyemi’s Affidavit, page 4. Owoyemi further states that the FINRA Arbitrators ruled against R.M. Stark twice, at two different hearings, regarding the withholding of his pay. He also notes that he was served with a “Notice of Petition ... without a Court Date” and that such action constitutes a “wrong tactic by plaintiff.” *Id.* at page 5.

Legal Standard

“It is well settled that judicial review of arbitration awards is extremely limited.” *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479 (2006). “An arbitration award must be upheld when the arbitrator ‘offers even a barely colorable justification for the outcome reached.’” *Wien*, 6 N.Y.3d at 470-480 (internal citations omitted). CPLR §7510 states, “[t]he court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.”

CPLR §7511 provides that an arbitration award shall be vacated upon the motion of a party to the arbitration “if the court finds that the rights of that party were prejudiced by” certain enumerated grounds, including, “corruption, fraud or misconduct in procuring the award;” or “partiality of an arbitrator appointed as a neutral” and “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.” CPLR § 7511(b)(1)(iii). It is well settled that a party seeking to vacate an arbitration award bears the “heavy burden” of demonstrating that the award “violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator’s power under CPLR §7511(b)(1).” *Scollar v. Cece*, 28 A.D. 3d 317 (1st Dep’t 2006).

“[A]n arbitration proceeding is, except in specified particulars, outside the court realm and jurisdiction - deliberately so taken out of the court by choice and commitment of the parties.” *Matter of Katz (Barkin)*, 160 N.Y.S. 159, 161 (1st Dept 1957). “Arbitration is subject to its own rules and practices at variance with court procedures” and “is supposed to be a complete proceeding, without resort to court facilities, for handling and disposing of a controversy submitted to arbitration.” *Id.* at 161. “It would be generally incompatible with the nature and scope of an arbitration proceeding to allow a shift to the court forum of that part of a proceeding relating to the prehearing examination of witnesses or collection of evidence.” *Id.*

“Assessment of the evidence presented at an arbitration proceeding is the arbitrator’s function rather than that of the court.” *Fitzgerald v. Fahnestock & Co., Inc.*, 48 A.D.3d 246, 247 (1st Dep’t 2008) (quoting *Peckerman v. D & D Assoc.*, 165 A.D.2d 289, 296 (1st Dep’t 1991)). “Absent provision to the contrary in the arbitration agreement, arbitrators are not bound by principles of substantive law or rules of evidence.” *Lentine v. Fundaro*, 29 N.Y.2d 382, 385 (1972). Nor can an arbitration award “be overturned merely because the arbitrator committed an error of fact or law.” *Matter of Motor Veh. Accident Indem. Corp.*, 89 N.Y.2d at 223.

“An arbitrator possesses considerable discretion in the matter of whether to grant a party disclosure and thus may deny it in the absence of a showing that the documents sought cannot be obtained from other sources.” 5 N.Y. Jur. 2d Arbitration and Award § 152. “Disclosure is, of course, properly denied by an arbitrator where the matter to be established by the documents sought is determined not to represent pertinent and material evidence.” *Id.* See e.g. *In the Matter of Southwest Securities, Inc v. Packard Group, Inc.* 603 N.Y.S.2d 13, 13 (1st Dept. 1993) (holding that “Petitioner’s argument that arbitrators’ refusal to compel discovery of documents ...

constituted misconduct and an imperfect execution of arbitral power is without merit.”);

In addition, “it is well settled that a party wishing to object to an arbitrator’s purported partiality should do so immediately and not wait for the award.” *Santana v. County-Wide Ins. Co.*, 675 N.Y.S.2d 817, 819 (Civ. Ct. 1998), *aff’d*, 184 Misc. 2d 294 (App. Term 2000).

Discussion

Here, Owoyemi has demonstrated that the Award should be confirmed. R.M. Stark failed to meet its heavy burden of showing arbitrator misconduct or partiality by clear and convincing proof. The Arbitrators’ decision to deny R.M. Stark’s motion to compel disocery and motion to adjourn the hearing does not constitute misconduct. R.M. Stark has not shown how documents requested, which related to Owoyemi’s finances, medical records, and employment background and experiences, were necessary to its defense to Owoyemi’s claim that he was entitled to unpaid commissions from R.M. Stark. The Court specifically notes that the Arbitrators denied Owoyemi’s request for punitive damages. In addition, the record shows that the Arbitrators demonstrated appropriate sensitivity to the pro-se Claimant Owoyemi’s opposition. Additionally, R.M. Stark did not object to the Arbitrators’ alleged partiality and misconduct immediately, despite the fact that the Arbitrators offered the opportunity to do so towards the end of the hearing, before the parties’ closing arguments. *See Santana*, 675 N.Y.S 2d at 819. R.M. Stark therefore fails to meet the burden of demonstrating the Award should be distributed by the Court.

Wherefore, it is hereby,

ORDERED that the Order to Show Cause is granted to the extent that the Petition to vacate the Arbitration Award rendered in the FINRA arbitration proceeding between Nicholas Adelani Owoyemi and R.M. Stark Co., Inc., dated March 7, 2019, is dismissed; and it is further

ORDERED the Arbitration Award rendered in the FINRA arbitration proceeding between Nicholas Adelani Owoyemi and R.M. Stark Co., Inc., dated March 7, 2019 is hereby confirmed; and it is further

ORDERED and ADJUDGED that Petitioner R.M. Stark Co., Inc., is liable and shall pay to Respondent Nicholas Adelani Owoyemi the sum of \$30,725.00 in compensatory damages plus interest at the rate of 8% pers annum from February 29, 2016 through and including payment of the award in full; and it is further

ORDERED and ADJUDGED that Respondent Nicholas Adelani Owoyemi's request for punitive damages and any all claims for relief not addressed in the Final Award are denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: JULY 31, 2019



Eileen A. Rakower, J.S.C.