UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THULE AB,

Plaintiff,

-against-

ADVANCED ACCESSORY HOLDING CORPORATION, AAS ACQUISITIONS, LLC, CHAAS ACQUISITIONS, LLC and VALLEY INDUSTRIES, LLC,

Defendants.

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09 Civ. 91 (PKC)

MEMORANDUM AND ORDER

P. KEVIN CASTEL, U.S.D.J.:

Plaintiff Thule AB ("Thule") purchased an automotive accessories and specialty car parts business (the "Business") from defendants for $203 million, subject to post-closing adjustments to the closing date balance sheet. When a dispute arose over the adjustments, the parties invoked the dispute resolution procedures in the purchase agreement and engaged a "Reviewing Accountant" who acted as arbitrator. The arbitrator received submissions from the parties, who were represented in part by major accounting firms, and rendered an award setting forth his reasoning in a 67-page opinion.

Thule now contends that the arbitrator's award was unlawful because the arbitrator exceeded his powers under the contractual arbitration provision, and argues that the award should be vacated under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10(a)(4). Thule also contends that it is entitled to partial summary judgment on a breach of contract claim and should be awarded $3.9 million in damages, plus interest. Defendants oppose these motions and move to confirm the arbitration award. For the

reasons explained below, Thule's motion to vacate the arbitration award is denied, the defendants' motion to confirm the arbitration award is granted, and the plaintiff's motion for partial summary judgment is denied.

DISCUSSION

The purchase agreement sets forth dispute-resolution procedures in the event that the parties could not agree on the calculation of post-closing adjustments. The arbitration clause is narrow. It arises under a section captioned "Closing Balance Sheet" and gives the arbitrator the title of "Reviewing Accountant." (Purchase Agreement § 2.10(c-d).) The Reviewing Accountant is empowered to resolve disputes concerning the closing date balance sheet, specifically as it relates to the preparation of a statement of working capital and a statement of indebtedness. (Purchase Agreement § 2.10(b-d).) The Reviewing Accountant is to be selected from an independent accounting firm not regularly retained by the parties or their affiliates. (Purchase Agreement § 2.10(c).) The parties agreed to appoint as the Reviewing Accountant a senior managing director of FTI Consulting, Inc., Basil Imburgia. (See Reviewing Accountant's Decision (the "Decision"), at Calafiore Dec. Ex. G.)

The engagement letter, executed by both parties after the dispute arose, further defines the Reviewing Accountant's authority. It states that "[t]he Parties agree that no items or matters, other than the Disputed Items, will be subject of the arbitration contemplated herein." (Engagement Letter ¶ 2.3.) It contemplates that documentation will be used support the parties' arguments. (Id.) "The Reviewing Accountant shall not be required to follow the practices and procedures required for an audit performed in accordance with generally accepted auditing standards . . . . The Reviewing Accountant

shall perform only such inquiry, investigation and other procedures, as the Reviewing Accountant deems necessary to render the Decision." (Engagement Letter ¶ 4.4.) "Each Party agrees that the Decision will be final and binding subject to there being no 'manifest error' on the part of the Reviewing Accountant." (Engagement Letter ¶ 4.5.) The Engagement Letter also states that "[t]he Reviewing Accountant will make the determination in an impartial manner based on such inquiry, investigation and other procedures (not inconsistent with the foregoing), as the Reviewing Accountant deems necessary." (Engagement Letter ¶ 4.3.)

Section 10(a)(4) of the Federal Arbitration Act ("FAA") provides that arbitrators' awards may be vacated "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." 9 U.S.C. § 10(a)(4). "A party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high." D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006). The Second Circuit has "'consistently accorded the narrowest of readings' to the FAA's authorization to vacate awards pursuant to § 10(a)(4)." Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255, 262 (2d Cir. 2003) (quoting Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 220 (2d Cir. 2002)). Classic (though not exclusive) examples of arbitrators exceeding their powers include a determination of the rights of a corporation not party to the arbitration, see, e.g., Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama S.A., 312 F.2d 299, 300-01 (2d Cir. 1963), or a damages award for events not governed by the arbitration agreement. See, e.g., Matter of Arbitration Between Melun Industries, Inc. and Strange, 898 F.Supp. 990, 993-94

(S.D.N.Y. 1990). The FAA establishes a strong presumption in favor of enforcing an arbitration award, and an award is presumed valid unless proved otherwise. Wall St. Associates, L.P. v. Becker Paribas Inc., 27 F.3d 845, 849 (2d Cir. 1994). When a party seeks to vacate an arbitration award under Section 10(a)(4), the inquiry looks only to whether the arbitrator "had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue," and does not consider whether the arbitrator decided the issue correctly. Hoeft v. MVL Group, Inc., 343 F.3d 57, 71 (2d Cir. 2003), overruled on other grounds, Hall Street Associates, L.L.C. v. Mattel, Inc., __ U.S. __, 128 S.Ct. 1396, 1403-04 (2008).

At argument, plaintiff's counsel confirmed that its motion to vacate is based solely on the Reviewing Accountant's scope of authority, and does not implicate the "manifest disregard" doctrine recognized in this Circuit. See Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 93-95 (2d Cir. 2008). Plaintiff's motion is premised on a contention that by identifying portions of the purchase agreement as ambiguous and then attempting to resolve the ambiguity, the Reviewing Accountant exceeded his authority. Plaintiff's reliance on section 10(a)(4) of the FAA attempts to position plaintiff's disagreement with the Reviewing Accountant's conclusions as an issue of the scope of authority granted to him under the purchase agreement. At argument, plaintiff's counsel contended that the Reviewing Accountant had authority to determine the "application" of certain accounting principles, but not to interpret the purchase agreement's provisions regarding "Closing Date Working Capital." Inherent in the task of applying a contractual provision is understanding its meaning; this is the essence of contract interpretation. The purchase agreement, at § 2.10(a)(i), stated that

"Closing Date Working Capital" was to be calculated "in accordance to Exhibit 2.10" of the purchase agreement, but upon review of Exhibit 2.10, the Reviewing Accountant identified different methodologies used to calculate "Closing Date Working Capital." Specifically, he found that the phrase "all liability captions," as it was used in the text of Exhibit 2.10, should be read in a manner consistent with its application in attachments A-D of exhibit 2.10. (Decision ¶ 19.) The Reviewing Accountant concluded that "the manner in which Closing Date Working Capital should be calculated must be consistent with the methodologies employed in the computations of working capital in the Working Capital Exhibits included by subsidiary as Exhibits A-D to Exhibit 2.10." (Decision ¶ 19.)

The Reviewing Accountant's award was within the scope of the purchase agreement's narrow arbitration clause, and the plaintiff's disagreement with the Reviewing Accountant's methods does not place the arbitration award beyond the reach of the contract. Here, the Reviewing Accountant "clearly had the power to reach the issue" of the calculation of closing date working capital. Stolt-Nielsen, 548 F.3d at 101 (emphasis in original). "[T]he arbitration panel did not exceed its authority in deciding that issue – irrespective of whether it decided the issue correctly." Id. Section 10(a)(4) of the FAA is especially inapplicable when "'it has been invoked in the context of the arbitrators' alleged failure to correctly decide a question which all concede to have been properly submitted in the first instance.'" DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 824 (2d Cir. 1997) (quoting Fahnestock & Co., Inc. v. Waltman, 935 F.2d 512, 515 (2d Cir. 1991)). Plaintiff's contention that the Reviewing Accountant had the authority to determine post-closing adjustments, but was not empowered to interpret

contract provisions while doing so, lacks merit, because the Reviewing Accountant here determined that it was not possible to determine post-closing adjustments without reference to the contract. Whether the Reviewing Accountant's calculation of Closing Date Working Capital was correct is beyond the reach of Section 10(a)(4). Id. (denying motion to vacate when the "real objection appears to be that the arbitrators committed an obvious legal error in denying him attorney's fees. Section 10(a)(4) was not intended to apply to such a situation.").

The plaintiff relies on then-District Judge Leval's opinion in Melun Industries, Inc., 898 F. Supp. at 993-94, which vacated an arbitration award under the predecessor of section 10(a)(4). In Melun, the arbitrator did not limit his determination to ascertaining post-closing adjustments, as required by the arbitration agreement, and instead made an independent evaluation of the transaction's overall value. Id. at 994. The arbitrator "clearly viewed his task as to determine the true value" of the assets purchased "and to correct any perceived errors in the accounting methods used in valuing the assets." Id. at 994. Melun stands for the principle that arbitration is a creature of contract, and that an arbitrator may not exceed his contractual authority by deciding issues not within the scope of the arbitration agreement. Unlike the arbitrator in Melun, the Reviewing Accountant did nothing more than resolve the dispute over post-closing adjustments, which fell within the scope of the arbitration agreement and had been submitted to him for decision. He calculated closing date working capital. He did not endeavor to revalue the deal.

The plaintiff's motion to vacate the arbitration award is denied, and the defendants' motion to confirm the award is granted.

In addition to moving to vacate the arbitration award, the plaintiff also moves for partial summary judgment on Count I of the First Amended Complaint, which seeks $4,122,100, plus interest, in purchase price adjustments agreed to by the defendants independent of the Reviewing Accountant's award. (Compl. ¶¶ 74-77.) The sum represents undisputed adjustments to closing date indebtedness and combined closing date working capital. In opposing the motion for partial summary judgment, the defendants observe, among other things, that "if our motion [to confirm] is granted, then the sums sought by Count I will be owed," and that Thule's entitlement to the payment "will be disposed of by the Court's rulings on the motion and cross-motion concerning the validity of the arbitral award." (Def. Mem. in Opp. to Summary Judgment at 1.)

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. It is the initial burden of a movant on a summary judgment motion to come forward with evidence on each material element of his claim or defense, demonstrating that he or she is entitled to relief. A fact is material if it "might affect the outcome of the suit under the governing law . . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The evidence on each material element must be sufficient to entitle the movant to relief in its favor as a matter of law. Vt. Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004). In reviewing a motion for summary judgment, the court must scrutinize the record, and grant or deny summary judgment as the record warrants. Rule 56(c), Fed. R. Civ. P. In the absence of any disputed material fact, summary judgment is appropriate. Id.

The relevant provision of the purchase agreement states:

> If the sum of the Closing Date Indebtedness Differential and the Closing Date Working Capital Differential (the "Aggregate Final Adjustment") is a positive number, Sellers shall pay that amount to Purchaser. If the Aggregate Final Adjustment is a negative number, Purchaser shall pay to Sellers an amount equal to the amount by which the Aggregate Final Adjustment is less than zero. All payments under Section 2.10 shall be made by wire transfer of immediately available funds and shall be accompanied by interest at a fixed annual rate . . . .

(Purchase Agreement § 2.10(e) (emphasis in original).) The defendants argue that this language contemplates a single payment of Aggregate Final Adjustment, whereas the plaintiff suggests that the use of the plural "[a]ll payments" contemplates multiple payments made over time. Plaintiff contends that the $4,122,100 sum should already have been paid. Neither party suggests that extrinsic evidence is required to interpret this provision.

As noted, the summary judgment movant has the burden to establish its entitlement to judgment as a matter of law. Rule 56(c). The text of section 2.10(e) does not, on its face, require piecemeal payments prior to determination of an Aggregate Final Adjustment. Rather, it appears to contemplate that "payments" will be made once a Closing Debt Indebtedness Differential and a Closing Date Working Capital Differential have been determined, and an Aggregate Final Adjustment has been reached. The "payments" should then be made, either from the seller to the purchaser or from the purchaser to the seller. The plural use of the word "payments" arises only in discussing the method by which money is to be transmitted, and not in context of whether "payments" must pre-date the determination of a final Aggregate Final Adjustment.

With the confirmation of the arbitration award, the sum will now be due and owing. If not paid, Thule may pursue all remedies available to it.

CONCLUSION

The plaintiff's motion to vacate the arbitration award is denied. The defendants' motion to confirm the arbitration award is granted. The plaintiff's motion for partial summary judgment is denied.

SO ORDERED.

P. Kevin Castel
United States District Judge

New York, New York
April 2, 2009