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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 I. APPEL CORP. a/k/a ALLIANCE
4 CORP.,

5 Plaintiff, New York, N.Y.

6 v. 02 Civ. 8879 (MBM)

7 NORMAN KATZ,
8 Defendant.

-----x

9
10 November 5, 2003
10:30 a.m.

11 Before:

12 HON. MICHAEL B. MUKASEY,
13 District Judge

14 APPEARANCES

15 STORCH, AMINI & MUNVES,
16 Attorneys for Plaintiff,
17 STEVEN G. STORCH,
18 ELIZABETH M. TOLL,
19 of Counsel.

20 FRANKFURT, KURNIT, KLEIN & SELZ, P.C.,
21 Attorneys for Defendant,
22 RONALD C. MINKOFF,
23 KESARI RUZA,
24 of Counsel.

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1 (Case called)

2 THE COURT: There has been a motion in this case to
3 vacate the arbitration award, and this is the decision on that
4 motion.

5 The plaintiff, I. Appel Corporation, commenced an
6 arbitration against defendant Norman Katz for breach of
7 contract, and upon losing the arbitration has moved in this
8 court to vacate the arbitration award.

9 For the reasons that I will explain, the motion is
10 granted. The following facts are based on declarations and
11 exhibits provided by the parties along with their papers in
12 this matter, and these facts do not appear to be in dispute.

13 Norman Katz was a joint owner of I. Appel with Herbert
14 Feinberg until June 20, 1996 when Katz and Feinberg entered
15 into a purchase agreement, which I will refer to as the
16 purchase agreement, whereby Feinberg acquired Katz's interest
17 in the company. At that time, I. Appel was embroiled in
18 several litigations

19 In April 1997, I. Appel filed for reorganization under
20 Chapter 11, United States Bankruptcy Code. After emerging from
21 bankruptcy, I. Appel demanded payment from Katz pursuant to
22 Section 8(d) of the purchase agreement for the losses suffered
23 by the company in connection with the litigations. When Katz
24 did not pay, I. Appel began the arbitration that is the subject
25 of this case.

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1 The arbitration panel was comprised of three
2 arbitrators, one appointed by each of the parties and a third
3 appointed by the American Arbitration Association. Katz moved
4 to strike the arbitration demand on the ground that I. Appel
5 did not have standing to bring a claim for litigation losses
6 because the claim belonged to I. Appel's creditors as a result
7 of I. Appel's bankruptcy.

8 In considering the motion to strike, the panel heard
9 oral argument and accepted documentary submissions by the
10 parties, but the panel did not permit an evidentiary hearing
11 despite I. Appel's request for one. The panel entered an award
12 granting Katz's motion to strike, based on the find that
13 I. Appel had failed to disclose properly to its creditors the
14 claim against Katz during bankruptcy, and therefore lacked
15 standing to press the claim. I. Appel Corp. v. Katz ,AAA case
16 No. 13 181 01022 99 (October 24, 2002).

17 Plaintiffs move to vacate the arbitration award on
18 three grounds: First, plaintiff argues that the panel exceeded
19 its power by excluding one of the arbitrators from the decision
20 thereby violating the terms of the arbitration agreement which
21 mandated a panel of three arbitrators; second, plaintiff argues
22 that the panel is guilty of misconduct by refusing to grant
23 plaintiff's repeated requests for an evidentiary hearing;
24 third, plaintiff argues that the panel manifestly disregarded
25 the law.

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1 Plaintiff is correct that the panel did manifestly
2 disregard the law. Moreover, in disregarding the law, the
3 panel erroneously concluded that it need not hear additional
4 evidence pertinent and material to the controversy, and it
5 improperly denied plaintiff's repeated requests for an
6 evidentiary hearing. For these reasons the arbitration award
7 must be vacated.

8 Although judicial review of an arbitration award for
9 manifest disregard of the law is quote "severely limited," *GMS*
10 *v. Benderson*, 326 F.3d 75, 81 (2d Cir. 2003), a court may
11 vacate an arbitration award on the basis of manifest disregard
12 where "(1) arbitrator knew of a governing legal principle yet
13 refused to apply it or ignored it altogether, and (2) the law
14 ignored by the arbitrator was well defined, explicit, and
15 clearly applicable to the case." *Hoelt v MVL Group, Inc.*,
16 blank F.3d black, No. 02-9155, 2003, WL 22048228 at *10 (2d
17 Cir. 2003). Here, plaintiff apprised the panel of the
18 governing legal principle, and there is no ambiguity
19 surrounding that principle.

20 In response to defendant's motion to strike the
21 arbitration demand, plaintiff asserted that not only did it
22 properly disclose the claim against Katz in the bankruptcy
23 proceeding but also that the creditors were aware of the claim
24 and had knowingly assigned the claim to plaintiff. (Storch
25 declaration, Exhibit 4 at 1-2, 11-12, Exhibit 7, Exhibit 9;

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1 Minkoff declaration Exhibit 4 at 1-2, 11-12, Exhibit 7, Exhibit
2 9)

3 Plaintiff argued that regardless of whether its
4 notification met the disclosure requirements for bankruptcy,
5 the notification as given was sufficient to effect a valid
6 assignment of the claim by the creditors, and therefore,
7 plaintiff has the right to pursue the claim (Id.) To prove its
8 position, plaintiff requested an evidentiary hearing to elicit
9 testimony from its own bankruptcy counsel and from the
10 creditors' bankruptcy counsel (who purportedly refused to
11 testify without being subpoenaed) in order to demonstrate the
12 creditors' knowledge of the claim at the time of the
13 assignment. (Storch declaration paragraph 4, and Exhibit 10;
14 Rosen declaration, paragraph 3; Minkoff declaration, Exhibit
15 11)

16 Without hearing this testimony, the panel "found that
17 the requisite notification of the Claim was never made" and
18 thus "no knowing assignment of this claim could have been
19 made." I. Appel Corp. v. Katz, AAA case No. 13 181 01022 99, at
20 5-6 (October 24, 2002)

21 The panel's conclusion that no knowing assignment was
22 made -- for which no explanation appears in the decision --
23 seems to turn on plaintiff's bankruptcy filings and whether
24 plaintiff properly disclosed the claim against Katz as an asset
25 in any of its filings. Id. However, this analysis ignores the

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1 governing legal principle at issue. "In general, claims or
2 choses in action may be freely transferred or assigned to
3 others" *Advanced Magnetics Inc. v. Bayfront Partners, Inc.*,
4 106 F.3d 11, 17 (2d Cir.1997) (citing *Titus v. Wallick*, 306
5 U.S. 282, 288-289 (1939)) "In order to make a valid assignment,
6 the owner must manifest 'an intention to make the assignee the
7 owner of [the] claim.'" *Id.* "Nor need the owner of the claim
8 use a particular form of assignment, so long as the language
9 manifests his intention to transfer at least title or ownership
10 to accomplish 'a complete transfer of the entire interest of
11 the assigner in the particular subject of assignment.'" *Id.*
12 citations omitted; see also Restatement (Second) of Contracts,
13 Section 324 (1981).

14 Therefore, in order to effect a valid assignment,
15 plaintiff's creditors need only have manifested an intention to
16 transfer the claim to plaintiff, and they may know of the claim
17 by any means possible, not solely by means of plaintiff's
18 bankruptcy filings according to the bankruptcy nondisclosure
19 requirements. Indeed, the panel was aware of the
20 "well-defined, explicit, and clearly applicable" law because
21 plaintiff argued to the panel that the creditors knew of the
22 claim against Katz and intended to assign the claim to
23 plaintiff and that the assignment is valid.

24 Plaintiff also requested an evidentiary hearing to
25 introduce testimony necessary to prove the creditors' knowledge

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1 and intention. However, the panel not only ignored the
2 governing legal principle but also ignored plaintiff's requests
3 for an evidentiary hearing and granted defendant's motion to
4 strike. In so doing, the panel manifested disregard of the
5 law, and for this reason the arbitration award must be vacated.
6 In disregarding the law, the panel failed to recognize the
7 pertinence and materiality of the testimony plaintiff sought to
8 introduce at an evidentiary hearing. The Federal Arbitration
9 Act, ("FAA"), provides that courts may vacate an arbitration
10 award where "the arbitrators were guilty of misconduct in
11 refusing to . . .hear evidence pertinent and material to the
12 controversy; or of any other misbehavior by which the rights of
13 the party have been prejudiced." 9 U.S.C. section 10(a) (3)
14 (2002).

15 "Courts have interpreted Section 10(a)(3) to mean that
16 except where fundamental fairness is violated, arbitration
17 determinations will not be opened up to evidentiary review."
18 *Tempo Shain Corp.v. Bertek, Inc.*, 120 F.3d 16, 19-20 (2d Cir.,
19 1997) "It has long been recognized that '[a]rbitrators must be
20 given discretion to determine whether additional evidence is
21 necessary or would simply prolong the proceedings." *Id.* at 19.
22 "However, although not required to hear all the evidence
23 proffered by a party, an arbitrator 'must give each of the
24 parties to the dispute an adequate opportunity to present its
25 evidence at argument.'" *Id.* at 20.

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1 In Tempo Shain, an arbitration panel refused to hear
2 testimony from a witness because it found the testimony would
3 be cumulative. Id. at 20. On appeal, the Second Circuit held
4 that "the panel excluded evidence plainly 'pertinent and
5 material to the controversy.'" Id. The court found that the
6 witness "was the only person who could have testified in
7 rebuttal of" the plaintiff's claim, and that "the documentary
8 evidence did not adequately address such testimony." Id. at 21.

9 The court concluded that the panel's refusal to allow
10 the testimony amounted "to fundamental unfairness and
11 misconduct sufficient to vacate the award pursuant to Section
12 10(a)(3) of the FAA." Id.

13 The facts of Tempo Shain are strikingly similar to the
14 facts here. As discussed above, plaintiff requested an
15 evidentiary hearing in order to elicit the testimony of its own
16 bankruptcy counsel as well as that of the creditors' bankruptcy
17 counsel to demonstrate the creditors' knowledge of the claim
18 against Katz at the time of the assignment. Just as in Tempo
19 Shain, these were the only witnesses who could have testified
20 to rebut defendant's charges by establishing what the creditors
21 did or did not know concerning the claim against Katz and the
22 assignment; the documentary evidence, namely the bankruptcy
23 filings did not adequately address this testimony.

24 Furthermore, because the creditors' counsel refused to
25 testify without being subpoenaed, which defendant does not

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1 appear to dispute, plaintiff was left with no recourse other
2 than an evidentiary hearing. Accordingly, just as in *Tempo*
3 *Shain*, the panel's refusal to allow this testimony amounts to
4 fundamental unfairness and misconduct pursuant to Section
5 10(a)(3), and for this reason the arbitration award must be set
6 aside.

7 Because I have concluded already that the arbitration
8 award must be vacated, both for manifest disregard of the law
9 and for misconduct by the panel, I need not address the issue
10 of whether the panel exceeded its powers.

11 Also before the court is a motion to stay execution of
12 a judgment entered for defendant in an arbitration preceding
13 the arbitration at issue here. The facts surrounding the
14 motion to stay are set forth in an earlier memorandum opinion
15 by Judge Haight. See *Katz v. Feinberg*, 99 Civ. 11705, 2001 WL
16 1132018, (SDNY, September 24, 2001).

17 Judge Haight granted the motion to stay but then
18 lifted the stay after the arbitration panel entered an award
19 for defendant, finding that "the vessel carrying Feinberg's
20 possible set-off against the Judgment has sunk." *Katz v.*
21 *Feinberg*, No. 99 Civ.11705, 2003 WL 21750102 at *2 (S.D.N.Y.
22 July 29, 2003)

23 Because this court has granted plaintiff's motion to
24 vacate the arbitration award, it is appropriate to stay the
25 judgment again for all the reasons set forth in Judge Haight's

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1 opinion and order first granting the stay. See Katz 2001, WL
2 1132018 at *1-4. To take Judge Haight's metaphor, Feinberg's
3 vessel has been salvaged and refloated.

4 For the reasons set forth above, the motion to vacate
5 the arbitration award is granted and the matter is remanded to
6 the arbitration panel for further proceedings consistent with
7 this opinion. The motion to stay execution of the judgment is
8 also granted pending resolution of the ongoing arbitration
9 between I. Appel and the defendant. The stay is effective
10 immediately.

11 Is there anything else that I can do for you, or to
12 you?

13 MR. MINKOFF: Your Honor, I just want to say for the
14 record that our exception to those rulings and --

15 THE COURT: You don't have to.

16 MR. MINKOFF: I understand that, your Honor. I just
17 want to point out that, you know, the reasons that in terms of
18 the stay, the reasons that Judge Haight pointed out have also
19 changed in the two years. As he pointed out in the decision
20 last summer, not only was the tax issue far less severe than
21 originally understood, but also the passage of time is starting
22 to become a factor as well.

23 THE COURT: I understand that, but the whole basis for
24 the award granted by the arbitration panel is faulty. and under
25 those circumstances, I can't see limiting the stay.

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1 MR. MINKOFF: Well, the only difference your Honor, is
2 that we won already, and we got a judgment, and it's been
3 affirmed by the Second Circuit, and under these circumstances
4 now we are starting again after four years of arbitration at
5 Square 1 and --

6 THE COURT: And if I were you, I would be very cross
7 with the arbitrators.

8 MR. MINKOFF: Your Honor, I have said what I want to
9 say. I thank you.

10 MR. STORCH: We have nothing, your Honor.

11 MR. MINKOFF: Your Honor, on the stay, I take it that
12 the bond has to remain in place?

13 THE COURT: Yes.

14 MR. STORCH: That will be understood, your Honor.

15 MR. MINKOFF: All right.

16 THE COURT: The bond stays in place. I am going to
17 enter a written order simply saying what I have done for the
18 reasons stated in open court, and you can use that as the basis
19 for whatever appeal you have.

20 MR. MINKOFF: Thank you, your Honor.

21 MR. STORCH: Thank you, your Honor.

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