

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KENNINGTON, LTD., INC. : CIVIL ACTION  
 :  
 v. :  
 :  
 NORMAN WOLGIN and :  
 I. ROBERT WOLGIN : NO. 97-CV-7492

MEMORANDUM AND ORDER

**J. M. KELLY, J.**

**May, 1998**

Presently before the Court is Kennington Ltd., Inc.'s ("Kennington") Motion to Vacate in Part an Arbitration Award. For the reasons stated below, the motion is granted in part and denied in part.

BACKGROUND

Norman Wolgin, Robert Wolgin ("the Wolgins") and Kennington are the sole partners in a real estate venture known as the Green Island Associates ("GIA") partnership. The GIA partnership agreement includes a provision governing the allocation of losses among the partners. The partnership agreement also contains an arbitration clause, wherein the partners agreed to submit all disputes over the interpretation of the agreement to arbitration "in accordance with the then current rules of the American Arbitration Association, Philadelphia Chapter."

The Wolgins instituted an arbitration claiming, inter alia, that Kennington improperly allocated the partnership's losses. The arbitration panel agreed that Kennington violated the loss allocation provision of the agreement. Kennington's motion to

vacate is not directed at the finding of a breach, it is directed at the panel's remedy. Paragraph 4 of the arbitration award states:

(a) With respect to all tax years as to which amended tax returns can be filed , [Kennington] shall cause the partnership to file amended returns in accordance with Section 503 of the Partnership Agreement; or, in the alternative, [Kennington] shall permit [the Wolgins] to designate a firm of certified public accountants with at least 25 partners or principals, whose fees and expenses are to be paid by the partnership, willing to prepare and sign such returns.

(b) With respect to any tax year as to which amended tax returns cannot be filed (other than because [the Wolgins] cannot designate a firm of certified public accountants willing to so as described above), [Kennington] shall pay to [the Wolgins] all damages [the Wolgins] suffer as a result of the improper allocation, when and if [the Wolgins] suffer such damages.

Paragraph 4(a) grants injunctive relief, while Paragraph 4(b) awards money damages "when and if" they occur.

### **DISCUSSION**

#### **A. Grounds for Vacating an Arbitration Award**

The grounds for vacating an arbitration award are extremely limited. When parties agree to resolve their disputes outside of the traditional court system, part of their agreement is that the arbitration decision is "final and binding" and not subject to the usual right of appeal. Perna v. Barbieri, No. 97-5943, 1998

WL 181818, at \*1 (E.D. Pa. April 16, 1998). The limited grounds for vacating an arbitration award are set out in the Federal Arbitration Act:

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) 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).

In addition, a court may vacate an award if the arbitrators "manifestly disregarded the law." Virgin Islands Nursing Ass'ns v. Schneider, 668 F.2d 221, 223 (3d Cir. 1981). A misinterpretation of the law is not sufficient. The party seeking vacatur must show that the arbitrators understood the law and chose to ignore it. See Merrill Lynch, Pierce, Fencer & Smith, Inc. v. Bobber, 808 F.2d 930, 933 (2d Cir. 1986).

B. IRS Form 8082

The IRS provides a procedure, Form 8082, for a partner to reject loss allocations made by their partnership. The Wolgins did not avail themselves of this procedure. Kennington argues that all of the Wolgins' claims are barred by their failure to

file a Form 8082 when they received notices of GIA's loss allocations. Kennington characterizes the Wolgin's failure to file Form 8082 as a failure to mitigate damages.

It appears that the panel considered and rejected this argument. Kennington does not claim that they were impeded in submitting their case to the panel. The panel simply agreed with the Wolgins that Form 8082 was not their exclusive remedy. The panel could have reasoned that the Wolgins were entitled to enforce the partnership agreement without resorting to the IRS. Regardless of whether the panel's conclusion was correct, they did not "manifestly disregard the law."

C. Injunctive Relief for Open Tax Years

GIA's 1994 and 1995 tax years are open. The panel ordered Kennington to file amended returns for those years, or, alternatively, to allow the Wolgins to designate a firm of certified public accountants to file amended returns. Kennington and GIA's accountant believe that the loss allocation provision of the partnership agreement violates the Internal Revenue Code and that compliance with the panel's order would violate the law.

The panel found that Kennington violated the loss allocation provision and that the provision was legal. The award recognizes, however, that there is a substantial question as to the legality of the loss allocation provision. Based on these considerations, the panel fashioned an appropriate remedy.

The award does not force Kennington to file tax returns that it believes are illegal. Kennington may instead permit the Wolgins to designate a firm of certified public accountants to file the amended returns. If the Wolgins can find a firm of certified public accountants willing to file returns that allocate losses in accordance with the partnership agreement, then Kennington must allow them to do so. If Kennington objects to the amended returns, they can file a Form 8082 with the IRS.

D. Damages for Closed Tax Years

For closed tax years, the panel ordered Kennington to pay all damages the Wolgins suffer as a result of the improper loss allocations, "when and if" they suffer such damages. The Wolgins admit that, as of now, they do not have sufficient income to utilize the losses.

A court should vacate an arbitration award that does not provide a "final and definite" resolution of the controversy submitted to the arbitrators. 9 U.S.C. § 10(a)(4). In order for an award to be "final and definite," it must "resolve all the issues submitted to arbitration, and determine each issue fully so that no further litigation is necessary to finalize the obligations of the parties under the award." Puerto Rico Maritime Shipping v. Star Lines, Ltd., 454 F. Supp. 368, 372 (S.D.N.Y. 1978).

In the present case, the award declares that Kennington is liable for violating the partnership agreement, but it does not

assess damages. The Wolgins' damages are speculative. The panel could not determine damages with the "reasonable certainty" required by law. Their solution, to declare that damages are awarded "when and if" they occur, is not a "final and definite" award.

If GIA's losses became useful to the Wolgins, the arbitration award would not be self-executing. The parties would have to litigate the amount of damages attributable to Kennington's violation of the partnership agreement. Therefore, the award of contingent future damages is not "final and definite" and it must be vacated.

#### **CONCLUSION**

The panel's finding of a breach and its grant of injunctive relief was proper and it is confirmed. There were no irregularities in the proceedings and the arbitrators did not "manifestly disregard the law." The award of contingent future damages, however, is improper and must be vacated.

There is no reason to remand this matter to the arbitration panel. The panel has already done all that it had the power to do, which is to order Kennington to file amended returns for the open tax years. Kennington must comply with Paragraph 4(a) of the award and file, or permit the filing of, amended returns for open tax years. Paragraph 4(b), however, is vacated.

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ORDER

AND NOW, this day of May, 1998, upon consideration of Kennington's Motion to Vacate in part an Arbitration Award, the response thereto, oral argument, and the parties' supplemental briefs, it is ordered:

1. The portion of Kennington's Motion that requests that the Court vacate Paragraph 4(a) of the arbitration award is DENIED;
2. The portion of Kennington's Motion that requests that the Court vacate Paragraph 4(b) of the arbitration award is GRANTED.

BY THE COURT:

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JAMES MCGIRR KELLY, J.

