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United States District Court, C.D. California.

Annemarie CRONIN
v.
ADVANCED FRESH CONCEPTS FRANCHISE CORPORATION

Case No. 2:20-cv-0816-SVW (JPRx)
|
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Attorneys and Law Firms

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Proceedings: ORDER DENYING PETITION TO VACATE ARBITRATION AWARD [18]

STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

***1** Before the Court is Plaintiff Annemarie Cronin's ("Plaintiff") petition to vacate a final arbitration award entered into by a panel of three American Arbitration Association ("AAA") arbitrators on March 3, 2022. For the below reasons, Plaintiff's petition is DENIED.

II. BACKGROUND

Plaintiff was employed by Advanced Fresh Concept Franchise Corp. ("AFC" or "Defendant"), which owns sushi stands primarily located in supermarkets, for three years before entering into a Franchise Agreement (the "Agreement"). Plaintiff then resigned her position as an employee and adopted a new compensation structure based on the Agreement. *See* Complaint, Dkt. 1-1 ¶ 10. Plaintiff alleges that she turned the franchise location into a "highly profitable operation," but that Defendant "initiated a plan of harassment and discrimination against Plaintiff in order to fabricate a basis to seize the Franchise location and force Plaintiff to return to her Regional Manager position." *See* Petition to Vacate ("Pet.") at 3. Defendant ultimately terminated the Agreement.

Plaintiff then brought eight claims against Defendant, including those for breach of contract, fraud, unlawful discrimination, wrongful termination, and retaliation. *See* Declaration of Sean Novak ("Novak Decl."), Ex. K at 1, ECF No. 18-12. Defendant removed the case to this District and filed a motion to compel arbitration. *See* Mot. Compel, ECF No. 9. In July 2020, the Court granted Defendant's motion and stayed the case. *See* Order Granting Mot. Compel, ECF No. 16; Order Moving Case to Inactive Calendar, ECF No. 17.

Plaintiff then submitted a demand for arbitration to the AAA to be conducted pursuant to the Employment Arbitration Rules. *See* Novak Decl. ¶ 4. This was improper, as the Agreement's arbitration provision provided for arbitration in accordance with the Commercial Arbitration Rules. *See* Order Granting Mot. Compel, at 2. Defendant's counsel filed an objection with the AAA, and the AAA solicited comment from Plaintiff's counsel, who advocated for use of the Employment Arbitration Rules. *See* Novak Decl., Ex. C. The AAA determined that the Agreement provided for application of the Commercial Arbitration Rules and dismissed the action. *Id.*

Then, Plaintiff re-filed a demand for arbitration, this time with ADR Services, rather than the AAA. *Id.* ¶ 7. Defendant's counsel filed another objection, citing the Agreement's requirement that "[f]or all disputes, at least one arbitrator shall be a practicing attorney that specializes in franchise law." *See id.* Ex. E. ADR Services indicated that it did not have any such arbitrators and stated that it could "no longer administer" the arbitration. *Id.* Exs. E, F.

Plaintiff then re-filed a demand for arbitration with the AAA pursuant to the Commercial Arbitration Rules. *See* Novak Decl. ¶ 10. This time, Defendant's counsel did not object. The AAA then appointed a panel of three arbitrators. *Id.* ¶ 11.

On May 3, 2021, Defendant sought leave to file a dispositive motion. *Id.* ¶ 15. Though Plaintiff opposed Defendant's request, the panel granted Defendant leave to file the motion, following a hearing on May 18, 2021. *Id.* The panel held argument on the motion in August 2021 and issued a ruling granting Defendant's motion in part. *Id.* ¶ 16, Ex. K. The case then proceeded to arbitration on Plaintiff's remaining claims. The panel entered an interim award in Defendant's favor on January 20, 2022, and a final award on March 3, 2022.

III. DISCUSSION

***2** Plaintiff's petition seeks vacatur of the arbitration award on three grounds: (1) that the arbitrators erred in concluding that Plaintiff and Defendant did not have an employment relationship; (2) that the arbitrators erred in declining to consider Plaintiff's claim for breach of the implied covenant of good faith and fair dealing; and (3) that Defendant's counsel Grant Nigolian and the arbitrators failed to disclose that Nigolian is on the AAA's National Panel.

The Court considers each in turn.

1. Panel Ruling as to Employment Relationship

First, Plaintiff argues that the panel erred in concluding that Plaintiff and Defendant did not have an employment relationship. This portion of Plaintiff's petition is inscrutable: without citing to any portion of the record, Plaintiff attempts to challenge the panel's factual findings and legal rulings by raising a number of complicated factual and legal issues, including application of California versus North Carolina law; a claim that the panel failed to consider a presumption of employee status in California Labor Code § 3357; application of the California Fair Employment and Housing Act ("FEHA"); Defendant's potential status under federal law as a joint employer; the panel's supposed misapplication of North Carolina law; and federal preemption of North Carolina's labor rules. *See* Pet. at 12–15.

Plaintiff's half-hearted attempt at challenging the panel's decision is meritless. Plaintiff fails to include with her petition the portions of the record upon which the panel's decision was based, providing no way for the Court to evaluate her claims. Specifically, though Plaintiff claims that the panel's grant of partial summary adjudication was erroneous, the summary adjudication issues were briefed and considered at oral argument before the arbitration panel. Moreover, as to the arbitration itself, the panel's decision was based on a six-day evidentiary hearing. Plaintiff does not include the transcript of this hearing or any other relevant portions of the record, only providing the Court with the panel's final orders.

Plaintiff apparently recognized the deficiency in her attempt to challenge these rulings, because she abandoned her argument in her reply brief and only addressed the partiality issue discussed in Section 3 below. Ultimately, because Plaintiff provides no basis for the Court to evaluate her claim that the arbitrators' decision was "clearly erroneous," the Court denies vacatur on these grounds.

2. Summary Adjudication of Plaintiff's Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing

Next, Plaintiff challenges the panel's decision to reject her claim for breach of the implied covenant of good faith and fair dealing. *See* Pet. at 17–18. The panel wrote: "The claim for breach of the implied covenant of good faith and fair dealing was not pleaded and was raised for the first time in Claimant's Opposition to the Motion. It is not timely, and accordingly will not be considered by the panel." *See* Noval Decl., Ex. K at 10.

Other than stating that this decision was erroneous and unfair, Plaintiff does not explain the panel's ruling. However, the panel's Interim Arbitration Award, attached to Plaintiff's petition at Exhibit L, provides the context necessary to understand the panel's decision:

> Following an initial conference with counsel, the Panel issued a scheduling order dated March 15, 2021 ("Scheduling Order No. 1"). The Panel concluded that the allegations in Claimant's arbitration demand and attached complaint are vague and uncertain, including uncertainty about what contracts had allegedly been breached and what those breaches were.

***3** *See* Ex. L at 2. Notably, Plaintiff's initial demand for arbitration, which did not itself set forth factual allegations, *see* Ex. K at 1—and her complaint—did not mention any breach of the implied covenant of good faith and fair dealing. The panel's decision continues:

> Accordingly, Scheduling Order No. 1 required Claimant to file a detailed statement of all claims and all damages being sought, setting forth with particularity as to each claim the specific types of damages and exact amount being sought, along with the detailed facts and legal basis in support thereof (the "Detailed Statement of Claims"). Scheduling Order No. 1 also provided that pursuant to AAA Commercial Rule R-6 [1], there would be no new or different claims or defenses filed or submitted without seeking leave from the Panel, and that requests for permission to file any new or different claims or amounts, defenses or choice of law issues, must be requested prior to the next status conference. Claimant filed a Detailed Statement of Claims, and Respondent filed its response to the Detailed Statement, as provided in the Panel's order.

See Ex. L at 2; *see also* Ex. K at 2. Thus, Plaintiff was on express notice that she would not be entitled to pursue any claim not included in her Detailed Statement without the panel's leave. [2] Plaintiff does not argue that she sought the panel's leave to pursue this claim—and the Court is unaware of any evidence that would suggest she did so.

Moreover, Plaintiff's Detailed Statement alleged nine distinct breaches of the contract by Defendant. Though a breach of "the implied covenant is necessarily a breach of contract," the "gravamen" of the two types of claims differs. *Digerati Holdings, LLC v. Young Money Ent., LLC*, 194 Cal. App. 4th 873, 885 (2011). A "breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself and it has been held that bad faith implies unfair dealing rather than mistaken judgment[.]" *Careau & Co.* v. *Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1394 (1990) (citations omitted). Thus, because her claim for breach of the implied covenant was conceptually and analytically distinct from her other claims, Plaintiff cannot argue that the breach of the implied covenant claim was somehow subsumed within her other claims. This is all the more certain considering that she pleaded with particularity all other claims she sought to pursue—including nine different alleged breaches of the contract. *See* Ex. K at 7.

For these reasons, the panel acted well within its discretion to decline to consider Plaintiff's claim for breach of the implied covenant of good faith and fair dealing. Plaintiff cites no evidence or authority to the contrary. The Court therefore denies vacatur of the arbitration award on this basis.

3. Failure to Disclose Nigolian's Status as an AAA Commercial Arbitrator Panel Member

Third, Plaintiff argues that Mr. Nigolian's failure to disclose his status as a member of the Commercial Panel of the AAA raises a question as to the arbitrators' impartiality.

***4** As an initial matter, the Court notes that the arbitration fell within the scope of the Federal Arbitration Act ("FAA"). *See* Mot. Compel Arbitration, ECF No. 9; Order Granting Mot. Compel Arbitration, ECF No. 16. As a result, much of the California statutes cited by Plaintiff are inapposite: "[u]nder the FAA, [ ] the reform of arbitration awards, including the severe remedy of vacatur, is limited by those grounds established by Congress in the Act." *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 647 (9th Cir. 2010). As relevant to Plaintiff's petition, this Court may vacate the arbitration award "where the award was procured by corruption, fraud, or undue means [or] where there was evident partiality or connption in the arbitrators, or either of them[.]" *See* 9 U.S.C. § 10(a)(1)–(2).

Plaintiff's claim is based on the discovery of Mr. Nigolian's LinkedIn Profile, which is available to the public and lists Mr. Nigolian as "Panelist - National Roster of Commercial Arbitrators; American Arbitration Association."[3] Mr. Nigolian's status as a panelist was also listed on his law firm's website, on the bottom of his firm's "About Us" page.[4]

By admitting that this information was publicly available. Plaintiff and her counsel likely had "at least constructive notice" that Mr. Nigolian was on the AAA Commercial Panel before the arbitration took place.[5] *See Peraton Gov't Commc'ns, Inc. v. Hawaii Pac. Teleport L.P.*, No. CV 20-00287 JMS-WRP, 2021 WL 767854, at *8 (D. Haw. Feb. 26, 2021). "A party with constructive knowledge of potential partiality of an arbitrator waives its right to challenge an arbitration award based on evident partiality if it fails to object to the arbitrator's appointment or his failure to make disclosures until after an award is issued." *See Fidelity Fed. Bank v. Durga Ma Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004). Given Plaintiff's constructive knowledge of Mr. Nigolian's status as a panel member, Plaintiff waived objection to any issues of partiality. *See id.*

Nevertheless, even assuming that Mr. Nigolian's LinkedIn Page and website were insufficient to establish constructive notice and Plaintiff's subsequent waiver, Plaintiff's claim fails on the merits. It is well-established that an "arbitrator's failure to disclose to the parties any dealings that might create an impression of possible bias is sufficient to support vacatur." *EHM Prods., Inc. v. Starline Tours of Hollywood, Inc.*, 1 F.4th 1164, 1173 (9th Cir. 2021) (citing *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1105 (9th Cir. 2007)). However, vacatur is appropriate only if the undisclosed facts amount to a real, non-trivial conflict. *New Regency*, 501 F.3d at 1110. "[C]laims of evident partiality based on long past, attenuated, or insubstantial connections between a party and an arbitrator" will not support vacatur. *Id.*; *see also Collins* v. *Laborers Int'l Union of N. Am. Loc. No. 872*, No. 211CV00524GMNDJA, 2021 WL 5068901, at *3 (D. Nev. Sept. 22, 2021).

***5** This principle is based on *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), where the Supreme Court held that a party seeking to vacate an arbitration award for evident partiality need not show that the arbitrator "was actually guilty of fraud or bias in deciding th[e] case." *Id.* at 147. "The Court found 'impression of possible bias' standard was satisfied where a neutral arbitrator in a dispute between a contractor and subcontractor failed to disclose that he had previously performed consulting work worth about $12,000 for the contractor." *New Regency*, 501 F.3d at 1105–06 (quoting *Commonwealth Coatings*, 393 U.S. at 147). Although "there had been no dealings between them for about a year immediately preceding the arbitration," the arbitrator's past relationship with the contractor had included irregular contacts "over a period of four of five years" and had

gone "so far as to include the rendering of services on the very projects involved in th[e] lawsuit." *Id.* (quoting *Commonwealth Coatings*, 393 U.S. at 146).

Interpreting *Commonwealth Coatings*, the Ninth Circuit held that a petitioner's facts must show a "reasonable impression of partiality" to justify vacatur. *Schmitz v. Zilveti*, 20 F.3d 1043, 1048 (9th Cir. 1994). The Ninth Circuit found this standard satisfied where the arbitrator's law firm had represented the parent company of a party "in at least nineteen cases during a period of 35 years[,] the most recent representation end[ing] approximately 21 months before [the] arbitration was submitted." *Id.* at 1044.

More recently, in *Andes Petroleum*, the court declined to vacate an arbitration award where an arbitrator and one party's lead counsel served on the same panel. *Andes Petroleum Ecuadro Ltd.* v. *Occidental Expl. & Prod.* Co., No. 21 CIV. 3930 (AKH), 2021 WL 5303860, at *1, 3 (S.D.N.Y. Nov. 15, 2021). In fact, the lead counsel was actually the president of the panel. *Id.* at * 1. Ultimately, because the "argument of partiality" was based only on "concurrent service on two panels," the respondent's speculation about "the opportunity to engage in misconduct" was insufficient. *Id.* at *3. The also court noted that "[w]hile neither [the arbitrator] nor [counsel] disclosed their appointments directly to Respondent, the appointments were publicly listed on multiple websites[.]" *Id.* at * 1; *see also Peraton Gov't Commc'ns, Inc.*, 2021 WL 767854, at *7–8 (finding that that mere concurrent membership on the panel was not a fact indicating that the arbitrator 'might reasonably be thought biased *against one litigant and favorable to another.' "*) (quoting *Commonwealth Coatings*, 393 U.S. at 150) (emphasis in original)).

Here, Mr. Nigolian's "concurrent service" on the same AAA panel is insufficient to warrant vacatur. Plaintiff's argument is based not on any specific claim of partiality as it relates to a specific arbitrator and Mr. Nigolian; rather, Plaintiff merely challenges partiality generally. But Plaintiff presents no evidence that the arbitrators knew or reasonably should have known that Mr. Nigolian was on the AAA Commercial Rules panel. Though arbitrators have a duty to investigate potential conflicts with parties, the arbitrators here did so and submitted lengthy disclosure statements evidencing their investigation. *See* Nigolian Decl., ¶ 9, Ex. 3, ECF No. 19; *cf. Schmitz*, 20 F.3d at 1048 ("[The arbitrator] did nothing to fulfill [his] duty" to "make a reasonable effort to inform himself of [the potential conflict].").

Plaintiff fails to address other factual issues. For example, Plaintiff provides no evidence as to the size of the AAA Commercial Rules panel, though Defendant's counsel wrote in Defendant's opposition that the panel has hundreds of attorneys. *See* Opp'n at 4. Indeed, the court in *Peraton* noted that one arbitrator explained that the list of panel members is "proprietary" to the AAA, suggesting that other arbitrators may not even have access to the list. *Peraton Gov't Commc'ns, Inc*, 2021 WL 767854, at *8.

***6** Ultimately, the Court finds that a claim of "evident partiality" based merely on concurrent service on the same AAA Commercial Panel, with nothing more, is insufficient to support vacatur. At most, Plaintiff's speculative claim only suggests an "attenuated" connection that does not provide a reasonable basis for questioning any arbitrator's impartiality. *See Lucile Packard Children's Hosp. & Stanford Hosp. Clinics v. U.S. Nursing Corp.*, 2002 WL 1162390 (N.D. Cal. May 29, 2002) ("Vacatur of an arbitration award for evident partiality is appropriate where the possibility of bias is direct, definite, and capable of demonstration rather than remote, uncertain and speculative.").

Plaintiff's remaining arguments only further undermine her claim. For example, Plaintiff misleadingly states that "Defendant and its counsel have a proven relationship with the Arbitrators appointed to the panel by the AAA as they have all been employed by Defendant and its counsel of record on several occasions before the instant matter." Pet. at 10.

This is unavailing for two reasons. First, as courts have recognized, "[s]ome connection between parties and arbitrators is not unexpected, particularly when an arbitration agreement ... requires that the arbitrators be experienced in the relevant field." *U.S. Care, Inc.* v. *Pioneer Life Ins. Co. of Illinois*, 244 F. Supp. 2d 1057, 1064 (C.D. Cal. 2002); *see also Sphere Drake Ins., Ltd. v. All Am. Life Ins.*, 307 F.3d 617 (7th Cir. 2002) ("An arbitration panel will contain some actual or potential friends, counselors, or business rivals of the parties [because] industry arbitration ... often uses panels composed of industry insiders, who are better able to understand the trade's norms of doing business and the consequences of proposed lines of decision.").

Second, the arbitrators disclosed to Plaintiff the fact that Mr. Nigolian had previously had cases before them, *see* Nigolian Decl., ¶ 9, Ex. 3, ECF No. 19, and Plaintiff filed no objection. More importantly, these disclosure forms indicate that Plaintiff's counsel *himself* had previously engaged in arbitration with two of the arbitrators (Ms. Jones and Ms. Rothman). *Id.*, Supplemental Disclosure of Mary Jones, p. 41 of 61. That Plaintiff's cormsel Mr. Novak chose to describe the arbitrators' disclosures as to Mr. Nigolian while neglecting to mention his own previous relationship with the arbitrators is misleading and highly suspect.

Finally, Plaintiff recounts much of the history of the arbitration proceedings—including her initial attempt to conduct arbitration pursuant to the Employment Rules, Defendant's objection to arbitration by ADR Services because of the lack of a franchise law specialist, and Defendant's non-objection to AAA Arbitration conducted pursuant to the Commercial Arbitration Rules. Presumably, Plaintiff would like the Court to draw an inference that Mr. Nigolian improperly steered the arbitration before the AAA's Commercial Panel because he too was on the panel.

This too is groundless. Mr. Nigolian's objections, as recounted in the Court's statement of background above, were premised on specific grounds required by the Agreement: the arbitration provision required that arbitration be administered under the AAA Commercial Rules, and that at least one of the arbitrators have franchise experience. There is no evidence to suggest that Mr. Nigolian's objections were merely an attempt to improperly influence the proceedings.

Accordingly, the Court concludes that vacatur of the award, which was unanimously agreed upon by three neutral arbitrators, is not warranted here. Plaintiff fails to adduce sufficient evidence to establish a "real, non-trivial conflict" that would create a "reasonable impression of partiality" of the arbitrators. *Collins*, 2021 WL 5068901, at *3 (citing *New Regency*, 501 F.3d at 1105-06).

IV. CONCLUSION

***7** For the above reasons, the petition to vacate the arbitration award is DENIED.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2022 WL 2063476

Footnotes

1 R-6 provides, in relevant part, that, "After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent."

2 Despite its significance, Plaintiff neither challenges the propriety of the scheduling order, nor does she attach it as an exhibit to her petition.

3 The Court conducted a Google Search and located Mr. Nigolian's profile at https://www.linkedin.com/in/grant-n-9591abl87. Plaintiff also attached screen captures of Mr. Nigolian's profile to the petition.

4 Available at https://gnpclaw.com/about-us/.

5 Moreover, Plaintiff's counsel, Mr. Novak, does not dispute that Mr. Nigolian told him on a phone call on April 27, 2021 that he (Mr. Nigolian) had previously served as an arbitrator. *See* Novak Decl. to Reply, ¶ 3. Mr. Nigolian included a

declaration stating that he told Mr. Novak he was on the Commercial Panel, but Mr. Novak asserts that Mr. Nigolian never said that. *See* Nigolian Decl., ¶ 7; Novak Decl. to Reply, ¶ 3.

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