United States District Court, S.D. New York.
·
00 Civ. 7120 (RLC) (S.D.N.Y. Jan 11, 2001)
·
Decided January 11, 2001

IN MATTER OF P.M.I. TRADING LTD. v. FARSTAD OIL

In the Matter of the Arbitration Between: P.M.I. TRADING LIMITED Petitioner, v. FARSTAD OIL, INC., Respondent.
· 00 Civ. 7120 (RLC)
·United States District Court, S.D. New York.
· January 11, 2001

Marisa Marinelli Francesca Morris Haight Gardner Holland Knight A Law Office of Holland Knight LLP New York, New York Attorneys for Petitioner

Steven G. Storch Storch Amini Munves, P.C. New York, New York Attorneys for Respondent

OPINION

CARTER, Judge

Petitioner, P.M.I. Trading Limited ("PMI"), seeks an order from the court, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), 9 U.S.C. § 201, et seq., confirming an arbitration award signed on May 19, 2000. Petitioner also seeks prejudgment and post-judgment interest on the award as well as reimbursement for costs and attorneys' fees incurred in bringing this petition. Respondent, Farstad Oil, Inc. ("Farstad"), opposes this petition and demands that the arbitration award be vacated and that the court remand the matter to arbitration with instructions for further proceedings.

BACKGROUND

PMI and Farstad entered a contractual relationship whereby Farstad would supply PMI with certain quantities of liquified petroleum gas ("LPG"). (Verified Petition To Confirm Award of Arbitration ("Petition") ¶ 5.) Farstad delivered the LPG via railcar to a PMI terminal located in Mexico. Id. PMI paid for the shipments in advance based upon invoices supplied by Farstad. Id., ¶ 6. An independent inspector in Mexico would determine the actual quantity of LPG delivered and PMI would be credited for any amount for which it paid but did not receive. Id. This extra amount is referred to as "volume remaining on board." (Resp't. Mem. at 3.)

In arriving at the amount of credit to which it was due, PMI (and the inspector) included vapor product which remained in the railcar in calculating the volume remaining on board. Id. Farstad contended that only liquid — and not vapor — product should be included in the calculation. Id. As a result, Farstad's position is that PMI is only owed $71,207.07 as opposed to the $763,206.50 demanded by PMI. Id.

Pursuant to the relevant contracts, all disputes arising out of these transactions were to be submitted to arbitration in New York and be governed by the laws of New York. (Petition ¶ 8.) An arbitration panel reviewed this matter and determined, with one dissent, that PMI was entitled to $631,015.78 ($628,515.78 as an award amount plus $2500 in administrative fees). (Petition Ex. B.) The panel noted that the "term `volume' as used in both contracts includes both liquid and vapor LPG Mix." Id. Farstad refused to honor the award and PMI brought this action to confirm the arbitrators' decision. (Petition ¶¶ 14, 15.) Farstad contends that by failing to consider the common trade usage of the term "volume," the arbitration panel exhibited a manifest disregard of the law such that the court should vacate the award. (Resp't. Mem. at 8-9.)

DISCUSSION

The court has federal question jurisdiction pursuant to the Convention, 9 U.S.C. § 203. The Convention applies in this case for several reasons. First, PMI is a foreign party.1 See Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983) (holding that arbitration awards are subject to the Convention if they involve "parties domiciled or having their principal place of business outside the enforcing jurisdiction"). Second, the performance at issue occurred in Mexico. See 9 U.S.C. § 202 (stating that an arbitration award arising out of a commercial relationship even between two citizens of the United States is subject to the Convention if "that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states") Finally, PMI appears to have complied with all of the procedural requirements for bringing a petition to confirm under the Convention, and Farstad raises no argument to the contrary.

1.

PMI is organized under the laws of Ireland and has its principal place of business in Mexico. (Petition ¶ 3.)

The grounds for vacating an arbitration award under the Convention are limited; a court may only look to the justifications supplied by Article V of the Convention. Article V(1)(e) of the Convention provides that a court shall not recognize an arbitration award which is subject to

the Convention if the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." 9 U.S.C. § 201. Farstad's contention that the arbitration panel exhibited a manifest disregard of the law finds support, not in the text of the Convention, but rather in the case law interpreting § 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10. Because this award was rendered in the United States and both confirmation and vacatur are now sought in the United States, the court may look to § 10 of the FAA in resolving this dispute so long as it does not directly conflict with the Convention. See Yusuf Ahmed Alghanim Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 21 (2d Cir. 1997). Manifest disregard of the law by the arbitrators can, therefore, be a valid reason for vacating this award.

Farstad's argument is, nevertheless, a difficult one to sustain.2 In Merrill Lynch, Pierce, Fenner Smith v. Bobker, 808 F.2d 930 (2d Cir. 1986), the Court of Appeals provided guidance for this analysis:

2.

Farstad's contention that the arbitration award should be vacated appears to be time barred. The arbitrators' award was signed on May 19, 2000. PMI did not file its Notice of Petition to Confirm until September 20, 2000. Farstad requests the court to vacate the award for the first time in response to PMI's petition. Under § 12 of the FAA (which applies in this respect since it is not in conflict with the Convention,see Yusuf Ahmed, 126 F.3d at 20), a motion to vacate must be made within "three months after the award is filed or delivered." 9 U.S.C. § 12. Furthermore, a "defendant's failure to move to vacate the award within the three month time provided precludes him from later seeking that relief when a motion is made to confirm the award." See Florasynth, Inc. v. Pickholz, 750 F.2d 171, 175 (2d Cir. 1984). PMI has not raised this argument, however, and the court therefore will not consider it further.

"Manifest disregard of the law" by arbitrators is a judicially-created ground for vacating their arbitration award. . . . Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.
Id. at 933 (citations omitted)

Farstad argues that the majority of the arbitration panel manifestly disregarded the law by refusing to consider that the common trade practice is to exclude vapor product in determining volume. Farstad points to Article 28.2 of the American Arbitration Association's International Arbitration Rules which states that, "[i]n arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract." Farstad contends that the arbitration panel was aware of this provision because it is a part of the rules which govern their conduct as arbitrators and because it was cited by the dissent in an opinion which was dated prior to the majority rendering its opinion.

The court is unpersuaded by Farstad's analysis. The two contracts at issue each provide that the volume determination will be made by an independent inspector. (Marinelli Reply Aff. Ex. B.) The independent inspector in this case decided that both liquid product and vapor product constituted volume remaining on board. Thus, even if the trade custom was to not include vapor product, the contract provided for a unique method of volume calculation. The provision of the Arbitration Rules cited by Farstad states that arbitrators "shall take into account usages of the trade applicable to the contract." American Arbitration Assoc.'s Internat'l Arbitration Rules, Art. 28.2 (emphasis added). Since the parties explicitly contracted for how volume would be determined, the customary procedure for such a calculation is irrelevant and therefore inapplicable to the contract.

The mere fact that the arbitration panel did not specifically address the issue of trade custom does not suggest a manifest disregard of the law. See Fahnestock Co., Inc. v. Waltman, 935 F.2d 512, 516 (2d Cir. 1991) ("[I]t is axiomatic that arbitrators need not disclose the rationale for their award."). The majority decision did note that "[t]he term `Volume' as used in both contracts includes both liquid and vapor LPG Mix. The parties failed to define and clarify these terms. Inchcape Testing Services/Caleb Brett was the mutually agreed independent inspector to measure the `Volume' at the discharge (unloading) terminal." (Petition Ex. B.) One can infer from this that because of the contracts' unique method of calculating volume, the majority found the industry practice to be inapplicable. The award in this case does not demonstrate a manifest disregard of the law and is therefore confirmed. See Sobel v. Hertz, Warner Co., 469 F.2d 1211, 1216 (2d Cir. 1972) ("[I]f a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed.").

The only remaining issues are whether PMI is entitled to prejudgment and post-judgment interest and/or costs and fees. Absent persuasive argument to the contrary, post-award, prejudgment interest is available for judgments rendered under the Convention and is presumed to be appropriate. See Waterside Ocean Nav. v. International Nav. Ltd.,737 F.2d 150, 153-54 (2d Cir. 1984)

Farstad has not provided a persuasive basis for rebuttal of this presumption of propriety.3 Seeming content to defy the arbitration award without making any legitimate move to contest it, Farstad allowed its judicial remedy to lapse by letting the time period expire for moving the court to vacate the award. See supra note 2. It cannot be said that Farstad acted in good faith in contesting PMI's petition to confirm. Indeed, it thwarted the purpose of the federal arbitration law which promotes a "quick and final resolution of . . . disputes." See Florasynth, 750 F.2d at 177. PMI is therefore entitled to interest to compensate it for the amount by which inflation may have reduced the present day value of its award.

3.

The mere fact that the arbitrators chose not to award post-ward, prejudgment interest does not control this analysis. See Moran v. Arcano, No. 89 Civ. 6717, 1990 WL 113121, at *2-3 (S.D.N.Y. July 27, 1990) (Haight, J.) (holding that post-award, prejudgment interest was the province of the district court, not the arbitrator).

The arbitrators intended payment of the award to be made within thirty days from the date of transmittal of the award to the parties. (Petition ¶ 13.) Since Farstad was not required to make payment until the end of that thirty day period, and the arbitration panel did not impose post-

award interest, the court will only require that interest be paid from June 22, 2000, the date when the payment was due.

As for the rate of interest, the federal rate, 28 U.S.C. § 1961, is appropriate for calculating post-award, prejudgment interest in cases arising under the Convention.4 See Industrial Risk v. M.A.N. Gutehoffnungshutte, 141 F.3d 1434, 1447 (11th Cir. 1998) (holding that where a court has subject matter jurisdiction pursuant to the Convention, the rate of post-award, prejudgment interest is controlled by federal law). The calculation of post-judgment interest is also governed by 28 U.S.C. § 1961. See Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Internat'l, Ltd., 888 F.2d 260, 269 (2d Cir. 1989)

4.

At least one court has held that a state law rate of interest should apply to post-award, prejudgment interest. See Northrop Corp. v. Trian Internat'l Marketing, 842 F.2d 1154, 1155 (9th Cir. 1988).Northrop, however, was apparently not decided under the Convention, but rather under Chapter 1 of the FAA which the court concluded did not confer federal question subject matter jurisdiction. Since jurisdiction was predicated on diversity grounds, the court found that state law controlled the rate of interest. This case, however, is governed by the Convention which specifically confers federal question jurisdiction.9 U.S.C. § 203.

Finally, PMI urges the court to invoke its inherent equitable power to order an award of costs and attorneys' fees arguing that Farstad "has acted in `bad faith, vexatiously, wantonly or for oppressive reasons.'" (Pet'r Mem. at 6 (quoting Chambers v. Nasco, Inc., 501 U.S. 32, 45-46 (1991)). Here, not only are Farstad's arguments incorrect, but they were not raised in a timely fashion. Because Farstad had no legitimate basis for contesting the confirmation of the arbitration award, PMI is entitled to reimbursement for the costs and attorneys' fees incurred in pursuit of this petition.

CONCLUSION

The arbitration award is confirmed and Farstad is ordered to pay PMI immediately $628,515.78 plus post-award, prejudgment interest and post-judgment interest. The interest rate shall be calculated in accordance with 28 U.S.C. § 1961 starting from June 22, 2000. Farstad is also ordered to pay PMI immediately the $2500 in administrative fees awarded by the arbitration panel.

In addition, Farstad is ordered to pay PMI's costs and expenses incurred in confirming the award, including PMI's reasonable attorneys' fees. Petitioner's counsel shall submit, on notice, an affidavit of costs and attorneys' fees that PMI has incurred in pursuing this petition, accompanied by contemporaneous attorney time records, the names of the attorneys who have worked on this petition, how long those attorneys have practiced law, those attorneys' regular hourly billing rates and any other appropriate documentation. Farstad may file papers in opposition to PMI's assessment of costs and attorneys' fees.

IT IS SO ORDERED.

PMI TRADING, LTD. v. Farstad Oil, Inc., 160 F. Supp. 2d 613 (S.D.N.Y 2001)

U.S. District Court for the Southern District of New York - 160 F. Supp. 2d 613 (S.D.N.Y 2001)
April 10, 2001

160 F. Supp. 2d 613 (2001)

In the Matter of the Arbitration Between P.M.I. TRADING LIMITED Petitioner,
v.
FARSTAD OIL, INC., Respondent.

No. 00 CIV. 7120(RLC).

United States District Court, S.D. New York.

April 10, 2001.

*614 Haight, Gardner, Holland & Knight, A Law Office of Holland & Knight LLP, New York City, Marisa Marinelli, Francesca Morris, Of Counsel, for Petitioner.

Storch, Amini & Munves, P.C., New York City, Steven G. Storch, Of Counsel, for Respondent.

OPINION

ROBERT L. CARTER, District Judge.

BACKGROUND

On January 11, 2001, the court issued an order confirming an arbitration award in favor of Petitioner P.M.I. Trading Limited ("PMI") and ordered Respondent Farstad Oil, Inc. ("Farstad"), to pay $628,515.78 plus interest. Farstad was also ordered to pay $2500 in

administrative fees awarded by the arbitration panel, and to reimburse PMI for its costs and fees incurred in bringing the petition to confirm the arbitration award, including reasonable attorneys' fees. PMI was instructed to submit its calculation of interest and fees to which it was entitled, accompanied by appropriate documentation, such as contemporaneous attorney time records, the names and experience levels of the attorneys who worked on the petition and their regular hourly billing rates. Counsel for PMI has made a submission in accordance with these orders, and Farstad has filed a memorandum of law opposing PMI's calculation of attorneys' fees.

PMI has requested compensation for the work done by the following individuals. Marisa Marinelli served as the supervising attorney for all work done on this matter. She is a partner with the law firm of Holland & Knight, has practiced law for over twelve years, and her normal billing rate is $300 per hour. Francesca Morris is an associate at the same law firm who has been practicing law in New York for approximately one and a half years and her regular billing rate is $200 per hour. Marc Antonecchia is associated with the same firm. Antonecchia has not yet been admitted to the New York Bar, but did pass the New York State Bar exam given in July, 2000. His normal billing rate is $180 per hour. Wallis Karpf is apparently a paralegal at the firm whose normal billing rate is $115 per hour. Jerome Wills and Rudy Green are both clerks with the firm whose normal billing rates are $35 and $65 per hour, respectively.

DISCUSSION

In determining appropriate attorneys' fees, courts employ a "lodestar" methodology.[1] The court multiplies the "number of hours reasonably expended on the litigation" by "a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The court must consider the normal hourly rate for an attorney in the same community with the same experience and training, as well as the number of hours which *615 reasonably should be required to prosecute the claim. See Orchano v. Advanced Recovery, Inc., 107 F.3d 94, 98 (2d Cir. 1997). While the district court has the discretion to adjust the lodestar amount based on several factors, it is presumed to be a reasonable fee. See Quaratino v. Tiffany & Co., 166 F.3d 422, 425 (2d Cir.1999). The calculation of reasonable attorneys' fees using the lodestar method includes not only work done specifically by attorneys, but also by paralegals and other legal personnel. See Missouri v. Jenkins by Agyei, 491 U.S. 274, 285, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989); U.S. Football League v. Nat'l Football League, 887 F.2d 408, 416 (2d Cir.1989).

Hourly Rates

In its two page memorandum in opposition to the assessment of fees, Farstad does not take issue with the hourly rates of PMI's attorneys. Marinelli's hourly rate of $300 is reasonable when compared to other attorneys in the community with similar experience. See, e.g., Yurman Designs, Inc. v. PAJ, Inc., 125 F.Supp.2d 54, 58 (S.D.N.Y.2000) (Sweet, J.) (approving $520.69 per hour for partner in complicated intellectual property case); Marisol A. v. Giuliani, 111 F.Supp.2d 381, 386 (S.D.N.Y.2000) (Ward, J.) (awarding $300 for attorneys with ten to fifteen years experience in civil rights suit). While Morris's rate of $200 per hour seems high for a first year associate, it is not unprecedented for a large New York law firm. See, e.g., Samborski v. Linear Abatement Corp., No. 96 Civ. 1405(DC), 1999 WL

739543, *1 (S.D.N.Y. Sept.22, 1999) (Chin, J.) ($175 for associate); Berlinsky v. Alcatel Alsthom Compagnie, 970 F.Supp. 348, 351 (S.D.N.Y.1997) (Motley, J.) ($225 for a junior associate). Furthermore, she seems to have played an integral role in the prosecution of this matter, billing nearly two thirds of the total hours. That level of involvement justifies her higher hourly rate. See, Soberman v. Groff Studios Corp., 99 Civ. 1005(DLC), 2000 WL 1010288, *5 (S.D.N.Y. July 21, 2000) (Cote, J.).[2]

The hourly rate of $180 for Antonecchia, however, is excessive. Antonecchia had not yet been admitted to the Bar of the State of New York when he worked on the case. Furthermore, based upon the description contained in the contemporaneous time records, his work could have been satisfactorily performed by a well trained paralegal. The paralegal who worked on this case, Karpf, billed at a rate of $115 per hour. Farstad complains that this amount is excessive. The court agrees. While such an amount is not unprecedented, see, e.g., National Helicopter Corp. of Am. v. City of New York, 96 Civ. 3574(SS), 1999 WL 562031, *6 (S.D.N.Y. July 30, 1999) (Sotomayor, J.) (finding a rate of $105 per hour "reasonable and appropriate"), most courts in this district that have addressed this question recently have awarded less. See, e.g., Marisol A., 111 F.Supp.2d at 389 (awarding paralegal at large Manhattan law firm with six years of experience $75 per hour); Soberman, 2000 WL 1010288, *5 ($75 per hour); Samborski, 1999 WL 739543, *1 ($75 per hour). PMI has not presented any evidence regarding the exceptional qualifications of, or work performed by, either Karpf or Antonecchia which would warrant an award at the higher end of the pay scale. Accordingly, PMI is entitled to compensation in *616 the amount of $75 per hour for the work done by both Karpf and Antonecchia.

Finally, with regard to the work performed by Wills and Green, defendants have failed to justify the disparate hourly rates between the two ($35 and $65 per hour respectively). The work done by both men required roughly the same level of skill. The court therefore orders that PMI be compensated at a rate of $35 per hour for the work of both Wills and Green.

Number of Hours Worked

Farstad complains that the number of hours worked by PMI's counsel is excessive because the matters of law involved in this case were, for the most part, elementary. The petition to confirm was brought pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), 9 U.S.C. § 201, et seq. Discerning the law applicable to the Conventionspecifically how an arbitration award may be vacatedis a somewhat complicated endeavor. The court's role is not to determine whether the number of hours worked by PMI's attorneys represents the most efficient use of resources, but rather whether the number is reasonable. The work performed by counsel for PMI was relevant and productive, and not duplicative. PMI is entitled to reimbursement for all of the hours that its attorneys and their staff worked in prosecuting this petition.

The court has also reviewed the miscellaneous costs and expenses incurred by PMI in confirming the arbitration award. These costs are reasonable and PMI is entitled to reimbursement for them.

Total Amount Owed for Costs and Fees

Farstad is ordered to pay PMI $20,335.11 to compensate PMI for its costs and fees incurred in prosecuting this matter. Below is a table which itemizes this amount.

Individual	Number of Hours	Hourly Rate	Total
Marisa Marinelli	5.8	$300	$ 1740.00
	21.5	$265.38	$ 5705.67
Francesca Morris	30.7	$200	$ 6140.00
	19.9	$153.28	$ 3050.27
Marc Antonecchia	2	$ 75	$ 150.00
Wallis Karpf	1.5	$ 75	$ 112.50
Jerome Wills	0.6	$ 35	$ 21.00
Rudy Green	0.8	$ 35	$ 28.00
		COSTS:	$ 3387.67
		TOTAL:	$20,335.11

Interest

The court ordered that Farstad pay interest on the awarded amount of $628,515.78 calculated from June 22, 2000 (the date the award was due) until the *617 award is finally paid. The interest rate for the relevant period, in accordance with 28 U.S.C. § 1961, is apparently 6.052%. Counsel for PMI shall calculate the amount of interest which is due (based upon a rate of 6.052%) when payment is finally made by Farstad. It is the court's sincere hope that, now that the interest rate has been established, the calculation of interest is a mathematical exercise which will not produce disagreement among the parties. If, however, there is a dispute with regard to the amount of interest, the parties may submit letters to the court (on notice to one another) explaining the disagreement.

CONCLUSION

In accordance with the court's earlier order, Farstad shall pay PMI $628,515.78 plus interest. The interest shall be calculated at a rate of 6.052% from June 22, 2000 until the date when payment is made. Farstad is still obligated to reimburse PMI for $2500 in administrative fees, as previously ordered. In addition, Farstad shall pay $20,335.11 to compensate PMI for its costs and fees incurred in bringing this petition to confirm arbitration.

IT IS SO ORDERED.

NOTES

[1] The court recognizes that much of the precedent that is pertinent to the calculation of attorneys' fees involves the application of a specific statutory justification for such fees. See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (applying 28 U.S.C. § 1988). In this case, the award of attorneys' fees was based upon the court's inherent equitable powers. (Op. at 10-11.) Nevertheless, the application of this lodestar methodology is appropriate to aid the court in arriving at a reasonable fee. It is the only method which is advanced by the parties, and, indeed, appears to be the only approach invoked by courts when calculating attorneys' fees.

[2] The court notes that, based upon the invoices submitted by PMI's counsel, PMI was billed for Marinelli's and Morris's work during the month of October, 2000, at a rate of $265.38 and $153.28 per hour, respectively. Obviously, Farstad will only be liable for reimbursement at this same reduced rate for the work done during this period.