NOT FOR PUBLICATION WITHOUT

THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY

ZENSHIN, LLC, et al.

-vs.-

NOBLE LEARNING SYSTEMS, INC, et al.

DOCKET No. BER-C-77-08

CIVIL ACTION

DECISION ON PLAINTIFF'S MOTION TO CONFIRM ARBITRATION AWARD AND DEFENDANT'S CROSS-MOTION TO VACATE ARBITRATION AWARD

ARGUED JULY 20, 2012

DECIDED JULY 31, 2012

APPEARANCES:

Charles M. Radler, Jr., Esq., appearing on behalf of Plantiff, Zenshin, LLC (Dughi, Hewit & Domalewski, P.C.)

Andrew L. Indeck, Esq., appearing on behalf of Defendant, Close Combat, LLC. (Weber Gallagher Simpson)

ROBERT P. CONTILLO, P.J.CH.

Statement of the Case

This matter arises out of a Distribution Agreement between the parties governing the production, marketing and sale of instructional martial arts DVDs which contained the likeness of Plaintiff Damian Ross, Defendant Christopher Pizzo and martial arts figure Carl Cestari in a variety of combinations and formats. (Radler Cert. at ¶2.)

On February 21, 2008, Ross and Zenshin, LLC (collectively the "Ross Parties") filed their initial lawsuit in the Superior Court against Defendants Noble Learning Systems, Inc., Close Combat, LLC, and Pizzo (collectively the "Pizzo Parties"). (Id. at ¶3.)

On February 29, 2008, the Pizzo Parties filed a motion for an order compelling the matter to be transferred to arbitration. (Id. at ¶3.)

On March 14, 2008, the Hon. Peter E. Doyne, P.J.S.C., entered an Order, which stated in paragraph 6:

> The parties shall notify this Court within fourteen (14) days of the date of this Order whether they shall consent to transfer the litigation to arbitration, and, if so, whether the matter shall be conducted pursuant to the Rules of the American Arbitration Association, through the use of a retired Superior Court Judge, or in some other manner.

(Id., Exh. 5.)

On August 13, 2008, Judge Doyne executed a "consent Order of Dismissal without prejudice for referral to arbitration," containing the consent of the attorney for the Pizzo Parties to "proceed to arbitration concerning the claims and defenses asserted in this action." (Id., Exh. 6.)

On January 29, 2009, the Ross Parties filed a Statement of Claim with the American Arbitration Association ("AAA"). (Id., Exh. 7.) On March 20, 2009, the Pizzo Parties filed an Answer and Counterclaim in the AAA arbitration. (Id., Exh. 9.)

After becoming dissatisfied with the AAA's administrative fees, the parties agreed to private arbitration before the Hon. C. Judson Hamlin, J.S.C. (Ret.) concerning all of the issues raised in the AAA arbitration. (Id.) The parties agreed that Judge Hamlin would act as binding arbitrator and Discovery Master. (Id., Exhs. 10-11.)

On November 22, 2011, Judge Hamlin denied the Pizzo Parties' summary judgment application, which asserted that the Ross Parties' claims were preempted by the Federal Copyright Act. (Radler Cert., Exh. 14.) In relation to the preemption argument, Judge Hamlin stated: "I have analyzed the able and challenging legal arguments regarding preemption but in the end am satisfied that the distinctions and analysis urged by plaintiffs regarding applicability are persuasive." (Id.) Judge Hamlin also denied the Ross Parties' cross-motion for summary judgment on their misappropriation of likeness

claims without prejudice as he deemed the deposition of Christopher Pizzo necessary in order to resolve the factual issues pertinent to the Ross Parties' claims. (Id.)

On November 23, 2011, Judge Hamlin entered an Order compelling the deposition of Mr. Pizzo to take place on December 16, 2011 on a preemptory basis, without further delays or adjournments. (Id., Exh 15.)

Also on November 23, 2011, the Pizzo Parties filed a Complaint for Declaratory Judgment with the Superior Court seeking (1) a universal declaration of the rights in the subject media vis-à-vis Defendants, Plaintiffs and Carol Cestari as well as the Estate of Cestari and (2) a stay of the arbitration. (Defendants' Brief at 15.) The Ross Parties cross moved to dismiss the action and to compel the arbitration to continue, and on February 3, 2012, the Hon. Mark M. Russello, J.S.C. entered an order dismissing the Pizzo Parties' Complaint with prejudice and compelling the Pizzo Parties to continue arbitration of all claims before Judge Hamlin. (Radler Cert. at ¶6.)

Judge Russello found that:

> [T]he Pizzo parties waived their right to contest arbitration by moving to compel arbitration and by executing a consent order mandating arbitration and by participating in arbitration for three years though rulings on summary judgment motions, which they initiated…Pizzo parties waived any right to challenge the arbitrator's jurisdiction to decide the entire case before him."

Transcript of Jude's Decision on February 3, 2012 at 3:6-4:12; 8:17-8:19.

On December 15, 2011, the Pizzo Parties' attorney, Andrew Indeck, advised that he would not be producing Mr. Pizzo for deposition, stating that he would not proceed given the pending application for a stay "until all parties are present and represented." (Radler Cert, Exh. 16.) In response, the Ross Parties renewed their motion for summary judgment as to the liability and sought discovery sanctions suppressing the Pizzo Parties' counterclaims. (Radler Cert. at ¶9.)

On January 25, 2012, Judge Hamlin issued a ruling striking the Pizzo Parties' pleadings, defenses, and counterclaims, and entering summary judgment on liability in favor of the Ross Parties subject to their submission of proofs as to damages. (Id., Exh. 17.) Judge Hamlin granted Plaintiffs' application "for: an order striking respondent's defenses for failure to comply…with prior discovery demands" and "summary judgment on liability by the reason [of] the suppression of respondent's defenses and a dismissal of counterclaims." (Id.)

On February 17, 2012, the Ross Parties submitted their proof of damages to Judge Hamlin. The only response the Pizzo Parties provided was a March 19, 2012 letter from Mr. Indeck advising that they did "not intend to participate further in the arbitration process at this stage." (Radler Cert. at ¶ 10.)

On March 26, 2012, well after discovery closed, Defendants' counsel submitted to Judge Hamlin electronic copies of supposed copyright grants issued to Carl Cestari. (Indeck Cert., Exh. P.)

On April 18, 2012, Judge Hamlin rendered his binding arbitration award decision in the matter. (Radler Cert., Exh. 18.) In his decision, Judge Hamlin noted that the Cestari copyright documents were never discovered or supplied prior to the close of the proceedings. (Id.) Judge Hamlin also acknowledges that he received an electronic copy of the copyright grants issued to Cestari as he was drafting the award, but that he could not understand why they were submitted, given that the proceeding was closed and there was no disclosure of when such documents were discovered by Defendants' counsel. (Id.)

Upon review of the award, a miscalculation in the computation of awards was noted, and on April 27, 2012, Charles Radler, the Ross Parties' attorney, notified Judge Hamlin and Mr. Indeck of his belief that the award contained a miscalculation. (Id., Exh. 19.) This miscalculation was not disputed or otherwise addressed by Mr. Indeck or the Pizzo Parties. (Radler Cert. at ¶11.)

On May 16, 2012, Judge Hamlin corrected the miscalculations and entered an Order for Final Judgment in accordance with the findings set forth in his binding arbitration decision. (Id., Exh. 1.)

Judge Hamlin's arbitration award included an award of $2,071,057 for the tort of misappropriation of names and likeness ($1,171,057 in disgorgement of wrongful profits plus $900,000 for harm to Damian Ross' "brand," emotional distress and mental anguish), plus $350,000 in punitive damages for the same tort and $16,989.16 in contract damages. (Radler Cert. at ¶13.)

Plaintiffs' Notice of Motion (6/27/12)

No legal arguments are advanced in Plaintiffs' motion seeking confirmation of the arbitrator's award, and judgment.

However, in addition to confirmation of the decision and award, Plaintiffs also seek an award of prejudgment interest in accordance with R. 4:42-11(b).

Pursuant to R. 4:42-11(b), they argue, plaintiffs in a tort action are entitled to recover interest at the statutory rate from the date of the institution of the action. (Id.) In addition, they argue, the award of prejudgment interest is discretionary in contract and equitable claims. (Id.)

The Plaintiffs have calculated interest from February 21, 2008, the date on which the Complaint was filed, for each of the three components of the final arbitration separately. (Id.) For the tort award of $2,071,057, they calculate 314 days from February 21, 2008 through the end of 2008, at 7.5% as $133,625.73. (Id.) The statutory rates for 2009,

2010 and 2011 were 6%, 3.5% and 2.5%, respectively, resulting in interest calculations of $2,071,057 of $124,263.42, $72,487.00 and $51,776.43, respectively. (Id.) For 2012, 195 days will have elapsed through the return date of this motion, making the interest calculation at 2.5% equal to $27,661.38. (Id.) Accordingly, Plaintiffs assert, prejudgment interest on the $2,071,057 compensatory portion of the arbitration award amounts to $409,813.96. (Id.)

For the $350,000 in punitive damages for the tort of misappropriation of likeness, Plaintiffs calculate the prejudgment interest on that award as follows: for 314 days in 2008, at 7.5%, they calculate interest of $22,582.19. (Id. at ¶14.) For the years 2009, 2010 and 2011, the interest rates were 6%, 3.5% and 2.5%, respectively, resulting in interest calculations of $21,000, $12,250 and $8,750, respectively. (Id.) For 195 days in 2012, at 2.5%, Plaintiffs calculate interest in the amount of $4,674.66, making the total interest on the punitive damages award $69,256.85. (Id.)

For the $16,989.16 contract award, Plaintiffs calculate the prejudgment interest on that award as follows: for 314 days in 2008, at 7.5%, they calculate interest of $1,096.15. (Id. at ¶15.) The interest rates for 2009, 2010 and 2011 were 6%, 3.5%, and 2.5%, respectively, resulting in interest calculations for those full years of $1,019.35, $594.62 and $427.73. (Id.) For 195 days in 2012, at 2.5%, Plaintiffs calculate interest in the amount of $226.91. (Id.) The total amount of prejudgment interest, calculated pursuant to R. 4:42-11 on the contract claim of $16,989.16 is $3,361.76, and the total amount of interest on the entire award is $482,432.57. (Id.)

Defendants' Opposition and Cross-Motion (7/12/12)

Defendants argue that the award must be vacated because it is against public policy and in manifest disregard of the law insofar as it contravenes and completely fails to address the applicability and defenses to Plaintiffs' claims mandated by the Federal Copyright Act. (Defendants' Brief at 1.) In addition, Defendants assert that the award must be vacated because the arbitrator refused to consider unrefuted evidence which directly contradicted the factual basis for his decision—specifically that Plaintiffs had no intellectual property rights in the subject media, that no permission to modify the works had ever been granted to Plaintiff, and that the owners of the copyrighted subject media were unaware of Plaintiffs' misappropriation, alteration and distribution of their intellectual property. (Id.) Defendants further contend that the arbitrator exceeded his powers by: (i) basing his award and deciding matters upon claims that fell outside the scope of the agreement to arbitrate; and (ii) awarding punitive damages in contravention of the Punitive Damages Act. (Id.)

I. The award should be vacated because it is against the public policy embodied in the Federal Copyright Act.

The Defendants cite Weiss v. Carpenter, Bennett & Morrissey to assert the proposition that a court must intervene to prevent enforcement of any arbitration award that would violate a clear mandate of public policy. 143 N.J. 420, 443 (1996); see Telephone

Workers Union of New Jersey, Local 827, Intern Broth. of Elec. Workers, AFL-CIO v. New Jersey Bell Telephone Co., 450 F. Supp. 284, 291 (D.N.J. 1977) (court should decline to enforce an award insofar as it may conflict with statutory law or public policy) *aff'd* 584 F.2d 31 (3d Cir. 1978).

Thus, Defendants conclude, courts are authorized to refuse confirmation of arbitration awards that violate well-defined public policy as embodied by federal law, such as the Federal Copyright Act. Acands, Inc. v. Travelers Cas. and Sur. Co., 435 F.3d 252, 258 (3d Cir. 2006); see New Jersey Turnpike Authority v. Local 196, 190 N.J. 283, 288 (2007) (courts may vacate an arbitration award on public policy grounds when it violates public policy embodied in statute, regulation, or legal precedent).

In such an instance, Defendants argue, the court is duty-bound "to provide an enhanced level of review of such arbitration awards" "by a carefully scrutiny of the award…to verify that the interests and objectives to be served by the public policy are not frustrated and thwarted by the arbitral award." Weiss, 143 N.J. at 443. Thus, they maintain, the courts will vacate awards that counter public policy expressed in the law. See Liberty Mut. Ins. Co. v. Open MRI of Morris & Essex, L.P., 356 N.J. Super. 567, 581-85 (Law Div. 2002) (vacating arbitration award as contrary to public policy articulated in state laws governing licensure of health care providers); Acands, *supra*, 435 F.3d at 259-60 (invalidating arbitration award rendered in contravention of Bankruptcy Code's automatic stay); Exxon Shipping Co. v. Exxon Seamen's Union, 11 F.3d 1189 (3d Cir. 1993) (vacating arbitration award which required employer to reinstate seaman to oil tanker despite seaman's intoxication while on duty because award countered federal public policy for prevention of oil spills).

Defendants assert that the Federal Copyright Act indisputably governs this matter. (Defendants' Brief at 21.) They argue that the subject matter of copyright, as defined by the Federal Copyright Act, encompasses the subject media at issue in this matter. See 17 U.S.C. §102(a) (copyright protection subsists in original works of authorship including motion pictures and other audiovisual works). They also contend that the rights asserted in this matter are similarly within the Act's purview. See 17 U.S.C. §106 (right to reproduce work, distribute work or prepare derivative works therefrom belong exclusively to copyright holder). Moreover, Defendants argue, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright (as specified by 17 U.S.C. §106) in works of authorship within the subject matter of copyright (as specified by 17 U.S.C. §102) are governed exclusively by the Federal Copyright Act and no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State. See 17 U.S.C. §301(a).

Defendants argue that the award herein essentially rewards Plaintiffs for infringing and creating unauthorized works in violation of the Federal Copyright Act and eviscerates the Act's bar against any recovery for such unauthorized derivative works and frustrates the Act's preemptive scope. (Defendants' Brief at 22.)

II. The award should be vacated because it is in manifest disregard of the law as articulated in the Federal Copyright Act.

Defendants argue that Judge Hamlin, in his three letter rulings on the cross-motions for summary judgment brought before him, "essentially ignore[d] the Federal Copyright Act." (Id. at 22.) As such, Defendants contend, these rulings and the related award are subject to vacatur as being in manifest disregard of applicable law. See Cybul v. Atrium Palace Syndicate, 272 N.J. Super. 330, 334 (App. Div. 1994); see also Brabham v. A.G. Edwards & Sons Inc., 376 F.3d 377, 381 (5th Cir. 2004) (manifest disregard is an accepted nonstatutory ground for vacatur); Solvay Pharmaceuticals, Inc. v. Duramed Pharmaceuticals, Inc., 442 F.3d 471, 476, n.3 (6th Cir. 2006) (judicial intervention is appropriate where arbitrators act with manifest disregard of the law).

Defendants cite to Vitarroz Corp. v. G. Willi Good Intern. Ltd., to assert the proposition that an award is subject to vacatur for manifest disregard of the law where the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether, and the law ignored by the arbitrator was well defined, explicit, and clearly applicable to the case. 637 F.Supp.2d. 238, 244 (D.N.J. 2009); see Amerada Hess Corp. v. Local 22026 Federal Labor Union, A.F.L.-C.I.O., 385 F. Supp. 279, 284 (D.N.J. 1974) (award may be vacated if it is in manifest disregard of the law, that is, the arbitrator understood the applicable law yet proceeded to ignore it).

Defendants rely on Liberty Mutual, *supra*, to state that New Jersey courts have not hesitated to vacate awards entered in manifest disregard of the law. See 356 N.J. Super. at 585. In that case, the court vacated an arbitrator's award as being in manifest disregard of the law where the award countered state law on licensure of health care providers by awarding compensation to health care providers for services rendered without requisite license. (Id.) The court observed that "the claimant…urged the arbitrator to totally disregard licensure which the arbitrator did." (Id.) As a further parallel to Liberty Mutual, Defendants argue that the award herein awards compensation to Plaintiffs for conduct which is penalized by the Federal Copyright Act with a bar against recovery. (Defendant's Brief at 23.)

Similarly, Defendants claim, in Cybul, *supra*, the Appellate Division reversed the Law Division's confirmation of an arbitrator's award where the arbitrator incorrectly concluded that the New Jersey Consumer Fraud Act did not apply to the claims before him and refused to apply the Consumer Fraud Act. See 272 N.J. Super. at 335. Defendants argue that the result reached in Liberty Mutual and Cybul is warranted in this matter wherein the arbitrator affirmatively chose to disregard the Federal Copyright Act and proceeded to resolve this matter as though it merely implicated common law tort claims thereby circumventing the Federal Copyright Act and eviscerating the Act's preemptive function. (Defendants' Brief at 23.)

III. The award should be vacated because the arbitrator exceeded his powers by awarding punitive damages.

The New Jersey Arbitration Act provides that "the court shall vacate an award made in the arbitration proceeding if…an arbitrator exceeded the arbitrator's powers." N.J.S.A. 2A:23B-23(a)(4). Similarly, the Federal Arbitration Act ("FAA")[1] provides for vacatur of an arbitration award "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. The Punitive Damages Act bars punitive damages because they were not prayed for in the Complaint nor Statement of Claim.

Pursuant to the New Jersey Arbitration Act, an "arbitrator may award punitive damages" only "if such an award is authorized by law….and the evidence produced at the hearing justifies the award in accordance with the legal standards otherwise applicable to the claim." N.J.S.A. 2A:23B-21 (a).

Defendants argue that Judge Hamlin was not authorized to award punitive damages because neither the Statement of Claim (that was before him) nor the Verified Complaint previously filed in trial court specifically requests punitive damages. (Defendants' Brief at 24.) In New Jersey, all elements of the Punitive Damages Act must be satisfied in order to sustain a punitive damages award. W.J.A. v. D.A., 210 N.J. 229 (2012); N.J.S.A. 2A:15-5.11; see Holland v. New Community Corp., 2007 WL 2710718, at *2 (App. Div. 2007) (the jury was not authorized to award punitive damages where plaintiff's complaint never requested punitive damages).

B. The award does not conform to the Punitive Damages Act.

Defendants assert that while Judge Hamlin purported to defer to the Punitive Damages Act, his award flouts the strictures of the Punitive Damages Act and its implementing decisional law. (Defendants' Brief at 25.)

Pursuant to the Punitive Damages Act, punitive damages may be awarded to the plaintiff who proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those actors or omissions. N.J.S.A. 2A:15-5.12 (a). Defendants state that "actual malice" means an intentional wrongdoing in the sense of an evil-minded act. N.J.S.A. 2A:15-5.10. "Wanton and willful disregard" means a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission. Id.

[1] Defendants assert that the arbitration agreement herein is within the FAA's ambit because it is "written" and in a contract "evidencing a transaction involving commerce" inasmuch as the Distribution Agreement expressly contemplates internet sales. See Utah Lighthouse Ministry v. Found. For Apologetic Info. & Research, 527 F.3d 1045, 1054 (10th Cir. 2008) ("the Internet is generally an instrumentality of interstate commerce"). The FAA applies in state courts as well as federal courts. Liberty Mutual, 356 N.J. Super. at 582.

Defendants assert that circumstances of aggravation and outrage, beyond the simple commission of a tort, are required for an award of punitive damages under the Punitive Damages Act. Pavlova v. Mint Management Corp., 375 N.J. Super 397 (App. Div. 2005); Stern v. Abramson, 150 N.J. Super. 571, 573-74 (Law Div. 1977) (something more than the mere commission of an intentional tort is a necessary prerequisite to punitive damages). Defendants argue that the award adduces no circumstances of aggravation and outrage beyond commission of the alleged torts. (Defendants' Brief at 26.)

Pursuant to the New Jersey Arbitrator Act, "[i]f an arbitrator awards punitive damages…the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award…" N.J.S.A. 2A:23B-21 (e). Defendants state that the award does not denote consideration of all the factors required for an award of punitive damages. (Defendants' Brief at 25.) Specifically, in determining whether punitive damages are to be awarded, the trier of fact shall consider: (1) the likelihood, at the relevant time, that serious harm would arise from the defendant's conduct; (2) the defendant's awareness or reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct; (3) the conduct of the defendant upon learning that its initial conduct would likely cause harm; and (4) the duration of the conduct or any concealment of it by the defendant. N.J.S.A. 2A:15-5.12 (b). In addition, in determining the amount of punitive damages, the trier of fact shall consider: (1) the previously enumerated factors in the foregoing paragraph; (2) the profitability of the misconduct of the defendant; (3) when the misconduct was terminated; and (4) the financial condition of the defendant. N.J.S.A. 2A:15-5.12 (c).

IV. The award should be vacated because the arbitrator exceeded his powers in deciding matters outside the scope of the arbitration.

An arbitrator's authority to resolve a dispute is based upon the contract between the parties; therefore, his jurisdiction and authority is circumscribed by and limited to the powers delegated to him and any action taken beyond that authority is impeachable. High Voltage Engineering Corp. v. Pride Solvents & Chemical Co. of New Jersey, Inc., 326 N.J. Super. 356, 361-62 (App. Div. 1999); see Kimm v. Blisset, LLC, 388 N.J. Super. 14, 25 (App. Div. 2006) (an arbitrator's powers are limited by the agreement of the parties and an arbitrator may not exceed the scope of the powers granted to him or her by the parties).

In his second letter ruling, dated November 22, 2011, Judge Hamlin acknowledges that the contract containing the arbitration clause expired on December 8, 2006 (Radler Cert., Exh. 14 at p. 2). Defendants claim, however, that Judge Hamlin nonetheless purports to preside over claims outside the arbitration agreement's purview inasmuch as the vast majority, if not all, of the conduct underlying Plaintiffs' claims occurred long after expiration of the Distribution Agreement and not under the auspices of the Distribution Agreement containing the arbitration clause. (Defendants' Brief at 26-27.)

In addition, Defendants assert that Judge Hamilton purported to bind nonparties to the arbitration agreement. (Id. at 27.) They claim that Judge Hamlin's ruling repeatedly presumed that Plaintiffs could bind non-party Carl Cestari to the obligation of the parties' Distribution Agreement which Mr. Cestari never signed. (Id.) In his November 22, 2011 ruling (Plaintiffs' Exhibit 14), for instance, Judge Hamlin opines that the Distribution Agreement "would seem to bind…[Carl] Cestari" (p. 3.) and "Certainly, at a minimum, a determination here will define any contingent liability that may or may not exist to the Cestari estate…" (p. 4). But see NCR Corp. v. Sac-Co., Inc., 43 F.3d 1076, 1080 (6th Cir. 1995) (vacatur warranted where the arbitrator purported to determine the rights of individuals who were not parties in the arbitration proceedings).

V. The award should be vacated because the arbitrator refused to consider evidence.

The New Jersey Arbitration Act provides that "the court shall vacate an award made in the arbitration if" an arbitrator "refused to consider evidence material to the controversy." N.J.S.A. 2A:23B-23(a) (3). Similarly, the FAA includes an analogous provision. 9 U.S.C. §10 (a) (3).

Defendants assert that in the second letter ruling, dated November 22, 2011, Judge Hamlin entirely dismissed the deposition testimony of Carol Cestari (Plaintiffs' Exhibit 14, p. 3) purportedly because she could not recall precise compensation terms—notwithstanding her testimony of a 50/50 compensation agreement. (Defendants' Brief at 27.)

Defendants contend that in his third letter ruling, dated January 25, 2012 (Plaintiffs' Exhibit 17), Judge Hamlin refused to consider evidence of Carol Cestari's sworn testimony as well as admissions of Damian Ross contained in correspondence and transcribed telephone conversations (disavowing any right to the subject media) which were submitted to Judge Hamlin in Defendants' summary judgment papers and in a supplemental submission provided per his request. (Defendants' Brief at 27-28.) Defendants also assert that Judge Hamlin ignored the Cestaris' trademark and copyright registrations which were provided to him. (Id. at 28.)

VI. Plaintiffs cannot recover prejudgment interest on the arbitration award because the Distribution Agreement does not provide for prejudgment interest.

Defendants argue that Plaintiffs cannot recover prejudgment interest because the Distribution Agreement does not provide for prejudgment interest. (Id.) They rely on Elliott-Marine Campanella to assert that if, during the pendency of a tort action, the parties agree to submit the controversy to binding arbitration, prejudgment interest will not be awardable if the agreement to arbitrate does not specifically so provide. 351 N.J. Super 135, 141-42 (App. Div. 2002).

Conversely, if the court nonetheless proceeds to award prejudgment interest, Defendants contend that the court should not award any prejudgment interest on the portion of the award comprising punitive damages since prejudgment interest is not allowed on punitive

damages.[2] See Belinski v. Goodman, 139 N.J. Super. 351, 360 (App. Div. 1976) (holding that prejudgment interest was not intended by R. 4:42-11(b) to have application to awards of punitive damages and the trial court erred in ruling otherwise); Cappiello v. Ragen Precision Indus., Inc., 192 N.J. Super. 360, 373 (App. Div. 1977); Zalewski v. Gallagher, 150 N.J. Super. 360, 373 (App. Div. 1977).

Defendants further argue that any award of prejudgment interest should be suspended to account for Plaintiffs' eight month delay. (Defendants' Brief at 29.) Defendants state that Plaintiffs unaccountably absented themselves from the arbitration for eight months from August 2010 to April 2011. (Id.) They argue that no prejudgment interest should be recovered by Plaintiffs for the eight month delay they caused. See Allen v. Heritage Courts Assocs., 325 N.J. Super. 112, 121 (App. Div. 1999) (suspending prejudgment interest to account for period of claimant's delay in moving for confirmation of arbitration award).

Plaintiff's Reply (7/16/12)

I. Under both the Uniform Arbitration Act and controlling case law, the Pizzo parties present no legal or factual basis to vacate Judge Hamlin's arbitration award.

Arbitration is a favored method of resolving disputes between parties in New Jersey. Malik v. Ruttenberg, 398 N.J. Super. 489, 495 (App. Div. 2008). The primary purpose of arbitration is to reach a final disposition "in a speedy, inexpensive, expeditious and perhaps less formal manner." Fawzy v. Fawzy, 199 N.J. 456, 468 (2009). In order to ensure finality and to attain these goals, arbitration awards are presumed valid, and there is a strong preference for judicial confirmation of arbitration awards. Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 372 N.J Super. 503, 510 (App. Div.), *certif.. granted*, 283 N.J. 218 (2004), appeal dismissed, 195 N.J. 512 (2005); New Jersey Turnpike Authority v. Local 196, I.F.P.T.E., 190 N.J. 283, 292 (2007) ("Arbitration is meant to be a substitute for and not a springboard for litigation."); County College of Morris Staff Association v. County College of Morris, 100 N.J. 383, 390 (1985) (arbitration should spell litigation's conclusion, rather than its beginning).

"Because arbitration is so highly favored by the law, the presumed validity of the arbitration award is entitled to every indulgence, and the party opposing confirmation has the burden of establishing statutory grounds for vacation." Pressler & Verniero, *Current N.J. Court Rules*, comment 3.3.3 on R. 4:5-4 (2012).

Private arbitration proceedings are governed by the Revised New Jersey Arbitration Act of 2003 ("the Act"), N.J.S.A. 2A:23B-1 to -32, which codifies New Jersey's policy favoring arbitration and precludes judicial interference with an arbitrator's award "except in extremely limited circumstances." Malik, 398 N.J. Super. at 495; see Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349, 358 (1994) (adopting the Chief Justice's

[2] Defendants state that Plaintiffs' proposed form of order erroneously provides for prejudgment interest ($69,256.85) on the punitive damages portion of the arbitration award ($350,000). See Plaintiffs' proposed form of order, ¶3(b).

concurring opinion in Perini Corp. v. Greater Bay Hotel & Casino, Inc., 129 N.J. 479, 548 (1992) (defining the Supreme Court's newly adopted standard of review as, "Basically, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators.").

The Act contains specific provisions governing appeals from arbitration awards. (Plaintiffs' Reply at 4.) N.J.S.A. 2A:23B-22, which sets for the standard governing a court's confirmation of an arbitration award, states: "After a party to an arbitration proceeding receives notice of an award, the party may file a summary action with the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to [N.J.S.A. 2A:23B-20 or 2A:23B-24] or is vacated pursuant to [N.J.S.A. 2A:23B-23]." N.J.S.A. 2A:23B-23a, the standard governing the court's vacation of an award, permits a court to vacate an arbitration award only upon finding of one or more of six grounds:

> (1) the award was produced by corruption, fraud, or other undue means;
>
> (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator, or misconduct by an arbitrator prejudicing the rights of a party to the arbitration hearing;
>
> (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to [N.J.S.A. 2A:23B-15] so as to substantially prejudice the rights of a party to the arbitration proceeding;
>
> (4) an arbitrator exceeded the arbitrator's powers;
>
> (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to [N.J.S.A. 2A:23B-15c] not later than the beginning of the arbitration hearing; or
>
> (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in [N.J.S.A. 2A:23B-9] so as to substantially prejudice the rights of a party to the arbitration proceeding.

N.J.S.A. 2A:23B-23a.

In Tretina, *supra*, the Supreme Court addressed and adopted a new, and significantly narrower standard of review of an arbitrator's decision. (Plaintiffs' Reply at 5.) The Court held that unless the parties contractually agreed to a different standard of review, arbitration awards may only be vacated for fraud, corruption or similar wrongdoing on the part of the arbitrator, and not for legal errors or mistakes. Tretina, 135 N.J. at 357-58; Empire Fire & Marine Insurance Co. v. GSA Insurance Co., 354 N.J. Super. 415, 421 (App. Div. 2002) (holding that where an appeal arises from a private sector arbitration

and the parties did not agree to the contrary, the judicial "scope of review does not encompass errors of fact or law.").

II. This case does not warrant heightened scrutiny of a private arbitration award under the "Public Policy" exception, and if such an analysis were performed, Judge Hamlin's award is entirely consistent with public policy.

It is settled in New Jersey that "in rare circumstances a court may vacate an arbitration award for public policy reasons." Tretina, 135 N.J. at 364-65. Plaintiffs cite to Weiss to assert the proposition that this "heightened judicial scrutiny" is limited to review of public sector arbitration awards and limited private "arbitration awards that sufficiently implicate public policy concerns." 143 N.J. 420, 429 (1996). In Weiss, the Supreme Court held that law firm partnership agreements that contain a forfeiture provision that conflict with the Rules of Professional Conduct impact important public policies, and an arbitration award that violates such an explicit public policy is subject to an enhanced level of scrutiny. (Id.) Drawing on the Supreme Court's most recent previous private arbitration opinion in Tretina, the Weiss Court began its analysis with the newly adopted standard of review for a private arbitration award, as follows:

> Basically, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators. [They] can be corrected or modified only for very specifically defined mistakes as set forth in [N.J.S.A. 2A:24-9]. If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award.

The Supreme Court in Weiss then noted that heightened judicial scrutiny may be required for certain arbitration awards that sufficiently implicate public policy concerns. (Plaintiffs' Reply at 6.) However, the Court characterized such heightened judicial scrutiny as follows:

> In rare circumstances, a court may vacate an arbitration award for public policy reasons.

Weiss, 143 N.J. at 429-30. The Court went on to analyze the cases where modification of an arbitration award might be necessary for public policy reasons, including Faherty v. Faherty, 97 N.J. 99 (1984) (requiring heightened judicial scrutiny because of the courts' "traditional role as *parens patria* in evaluating adequacy of child support awards), and Communication Workers v. Monmouth County Board of Social Services, 96 N.J. 442 (1984) (reasoning that a public policy exception was necessary in public sector arbitration awards because of the effect that such a decision had on the public interest and welfare). The Weiss Court cited with approval the United States Supreme Court's ruling in W.R. Grace & Co. v. Local Union 759, et al., 461 U.S. 757 (1983), stating "Such a public policy, however, must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interest.'" Weiss, *supra*, 143 N.J. at 434-35. In concluding its analysis of Grace, the New Jersey Supreme Court stated as follows:

> First, a court may refuse to enforce a collective-bargaining agreement when the specific terms in that agreement violate public policy. Second, it is apparent that our decision in that case does not otherwise sanction a broad judicial power to set aside arbitration awards against public policy.

Plaintiffs argue that it is well settled law that in "rare circumstances," Weiss, *supra*, 143 N.J. at 430, if an award in a private sector arbitration violates some "explicit…well defined and dominant" public policy, Id. at 434, courts should exercise some heightened level of scrutiny to determine whether the arbitrator's award violates the dictates of unique statutes so grounded in public policy that the traditional standards of deference to an arbitration award must give some way. (Plaintiffs' Reply at 9.) Plaintiffs argue this is so when the support of a child is at issue, Faherty, *supra*, when laws and regulations governing healthcare facilities are ignored, risking the lives of the public and the state's interest in controlling health care costs and eliminating fraud, Liberty Mutual, 356 N.J. Super. at 567, and in cases involving New Jersey's strong public policy underlying what was the nation's strongest Consumer Fraud Act when originally enacted. Cybul v. Atrium Palace Syndicate, 272 N.J. Super. 330 (App. Div. 1994).

Plaintiffs argue that no case law says that the public interest in copyright preemption is so strong that a heightened level of scrutiny should apply. (Plaintiffs' Reply at 10.) They point out that Defendants cite no authority that a preemption defense rejected by an arbitrator in a purely private arbitration warrants any heighted level of scrutiny. (Id.) Plaintiffs assert that absent proof that the arbitrator's rejection of Defendants' preemption defense involves a "rare circumstance" of public policy, Tretina controls and this Court should enforce the arbitration award without even considering Defendants' argument that Judge Hamlin made a legal error in rejecting preemption as a defense. (Id.) They argue that if courts were to review every claim by every dissatisfied party to an arbitration award that the arbitrator made a mistake applying the law to the facts, arbitration would become just another layer of the Superior Court process. (Id.)

Plaintiffs further argue that the Pizzo parties are incorrect when they state that private arbitration awards are subject to review in the Superior Court on the basis of an alleged reversible error in applying the law. (Id.) To the contrary, Plaintiffs assert, in 2005, after the Act was enacted in New Jersey, the Superior Court addressed this issue in 700 Gotham, LLC v. J. Manheimer, Inc., 2005 WL 1017593 (N.J. Super. Law Div.), which involved a dispute between private business entities concerning a commercial lease. Absent any of the statutory conditions for vacating or modifying the arbitration award ultimately rendered in the matter, tenant claimed that the award should be modified "based upon a manifest disregard of the law." (Plaintiffs' Reply at 11.) The court refused to follow the reasoning in Liberty Mutual, *supra*, and rejected the "manifest disregard" exception, stating:

> Defendants claimed at oral argument that a New Jersey trial court has also adopted the manifest disregard of law "exception" to justify overturning an arbitration award in Liberty Mutual Insurance Company v. Open MRI

> of Morris and Essex, LLP, 356 N.J. Super. 567 (Law Div. 2002). This court is not bound by the decision in Liberty Mutual and finds that, in accordance with the New Jersey Supreme Court's decision in Tretina, a mistake of law does not constitute "undue means" and a manifest disregard of the law does not provide a basis to vacate or modify an arbitration award. The court declines to comment on whether the award in Liberty Mutual should have been vacated because it violated the well-established public policy of requiring health care providers to be licensed. The narrow public-sector exception is briefly discussed *infra*, but is inapposite to the arbitration between Gotham and defendants.

700 Gotham, 2005 WL 1017593 at *2 (footnote 3). The court went on to hold that it was "not at liberty to vacate or modify an arbitration award based on a mistake of law, no matter how egregious." Id. Plaintiffs argue that this Court should reach a similar conclusion. (Plaintiffs' Reply at 12.)

Conversely, if the Court considers Defendants' preemption argument, Plaintiffs assert that the law that misappropriation of likeness claims survive a copyright preemption defense is settled in New Jersey, and that Judge Hamlin got it right. (Id.)

Plaintiffs argue that the facts and law are clear that the only public policy at issue is that victims of serious, intentional and malicious commercial torts are entitled to redress. (Id.)

Plaintiffs state that Defendants' preemption defense was extensively briefed and re-briefed by the parties, and the Arbitrator entertained oral argument concerning this issue. (Id.) The written decision of Judge Hamlin states that for the reasons set for by the Ross Parties, the Federal Copyright Act was irrelevant to this proceeding. (Id.) Judge Russello has already confirmed that the issue of preemption was being resolved at the request of the Pizzo Parties by Judge Hamlin in the pending arbitration. (Id.)

Plaintiffs also argue that the Pizzo Parties' reliance upon Weiss is misplaced. (Id.) The Supreme Court therein stated as follows:

> Thus, the critical question is not whether the subject matter and the award in the underlying arbitration sufficiently implicate a clear mandate of public policy to warrant our consideration of the appropriate standard of judicial review. They do. Rather, our task is to determine the circumstances under which an arbitration award that implicates a clear mandate of public policy should be subjected to judicial intervention to safeguard the public interest. We note that the federal precedents are not dispositive because they deal primarily with arbitration of labor disputes, a class of cases in which the federal courts traditionally have extended expansive deference to arbitral awards.
>
> Our resolution of that issue is informed by our strong preference for judicial confirmation of arbitration awards untainted by "fraud, corruption

> or similar wrongdoing." We are persuaded that the standard advocated by the Chief Justice in his Perini concurrence and ultimately adopted by the court in Tretina ordinarily will govern even if the arbitration award implicates a clear mandate of public policy. Assuming that the arbitrator's award accurately has identified, defined, and attempted to vindicate the pertinent public policy, courts should not disturb the award merely because of disagreements with arbitral fact findings or because the arbitrator's application of the public-policy principles to the underlying facts is imperfect. If the correctness of the award, including its resolution of the public-policy question, is reasonably debatable, judicial intervention is unwarranted.

143 N.J. at 442.

III. Judge Hamlin did not disregard the Federal Copyright Act.

Plaintiffs assert that the Defendants have disregarded the procedural history and factual findings set forth in the November 22, 2011 and January 25, 2012 letter opinions of Judge Hamlin. (Plaintiffs' Reply at 13.) Plaintiffs state that Judge Hamlin considered the failure by the Pizzo Parties, Mr. Indeck and two prior attorneys to raise the defense of Copyright Act preemption to defeat the Ross Parties' claims until more than three years after the legal action commenced, and he gave, according to Plaintiffs' understanding, thoughtful and deliberate consideration to the submissions presented to him regarding the applicability of the Federal Copyright Act to the use of Damian Ross' name, likeness and reputation to sell the products in question. (Id. at 14.) On Page 3 of his November 22, 2011 decision on the Pizzo Parties' application for summary judgment based upon the preemption argument, Plaintiffs' Exhibit 14, Judge Hamlin stated as follows: "I have analyzed the able and challenging legal arguments regarding preemption but in the end I am satisfied that the distinctions and analysis urged by [the Ross Parties] regarding applicability are persuasive."

Plaintiffs argue that Judge Hamlin did not "disregard" the law. (Plaintiffs' Reply at 14.) They assert that the issue was not glossed over by Judge Hamlin, and that it was the subject of serious legal debate. (Id. at 14-15.)

IV. Judge Hamlin did not exceed his powers.

Plaintiffs also assert that the Pizzo Parties' argument that Judge Hamlin exceeded his powers by awarding the Ross Parties punitive damages in this matter is also without merit. (Id. at 15.) Plaintiffs state that the Demand for Arbitration filed on behalf of the Ross Parties expressly sought "punitive/exemplary damages." See final page of Plaintiffs' Exhibit 7 under the heading "Other Relief Sought." Plaintiffs also state that this position was not taken by the Pizzo Parties in response to the Ross Parties' proof of damages, and that the Pizzo Parties did not formally object, let alone respond, to the Ross Parties' damages submission, wherein damages were expressly sought and the legal and factual basis supporting punitive damages was explained at length. (Plaintiffs' Reply at 15.) Plaintiffs argue that for the Pizzo Parties to obtain an extension of time to submit

their damages submission, then waive any such submission despite Judge Russello's Order compelling them to return to arbitration, and to now appear and contest the validity of punitive damages is incredulous. (Id.)

Plaintiffs further argue that Judge Hamlin aptly described the standard for awarding punitive damages, relying upon both case law and N.J.S.A. 2A:15-5.2. (Id.) They argue that Judge Hamlin detailed quite specifically the facts which supported his decision to impose punitive damages against the Pizzo Parties and the amount thereof in his April 18, 2012 decision. (Id.)

Plaintiffs additionally argue that the Pizzo Parties cite no support for their position that Judge Hamlin exceeded his authority in rendering a decision on the Ross Parties' claims because the Distribution Agreement which contained an arbitration clause allegedly expired prior to commencement of the Ross Parties' lawsuit. (Id. at 17.) Plaintiffs state that the record is uncontroverted. (Id.) The Plaintiffs filed all of their claims in the Chancery Division. Defendants moved to dismiss the entire case and to compel arbitration of every claim asserted by Plaintiffs in Superior Court. The parties jointly agreed to submit the entire matter to arbitration. (Id.) The Plaintiffs also note that the Pizzo Parties' current counsel wrote to Judge Hamlin to confirm that he would be acting as the binding Arbitrator and discovery master in connection with the claims of the parties, the substance of which were set forth in the Ross Parties' Demand for Arbitration/Statement of Claim and the Pizzo Parties Response and Counterclaim thereto which the Pizzo Parties' counsel forwarded to Judge Hamlin. See Radler Cert., Exh. 10. Plaintiffs argue that the parties expressly agreed to arbitrate their claims as formulated in their respective AAA pleadings before Judge Hamlin and that is precisely what they did. (Plaintiffs' Reply at 18.)

Plaintiffs also argue that, as previously determined in connection with the Pizzo Parties' efforts to abandon the arbitration proceeding to seek a Superior Court determination on the issue of preemption, the Pizzo Parties waived the right to contest Judge Hamlin's authority to render a decision in the arbitration. (Id.) A party's participation in an arbitration hearing may be deemed a waiver of the party's right to later claim that the Arbitrator lacked authority to make an award to claimant. See Highgate Development Corp. v. Kirsh, 224 N.J. Super. 328, 333 (App. Div. 1988); Cable Management Services, Inc., RCH v. Berkowitz, 2009 WL 838167 at *4 (N.J. Super. App. Div.).

Plaintiffs further assert that Judge Hamlin did not exceed his authority as concerns Carol Cestari. (Plaintiffs' Reply at 18.) Neither she nor her husband's estate have been named parties in this matter, nor do any orders, rulings, decisions or judgments entered by Judge Hamlin in connection with the case compel any action or inaction regarding them, impose liability or any obligation upon them, or confer upon them any right or relief. (Id.) They argue that Judge Hamlin's reference to Carol Cestari's participation or lack thererof in this matter is irrelevant. (Id.)

V. Judge Hamlin did not refuse to consider evidence.

Plaintiffs argue that while the Pizzo Parties may not have been pleased with the weight Judge Hamlin afforded the deposition testimony of Carol Cestari or his assessment of her credibility, their direct reference to his consideration of her testimony readily demonstrates that he did not ignore it. (Id. at 18-19.) They contend that Judge Hamlin's exercise of discretion in the manner he conducted the arbitration was consistent with the law and was not an abuse of the authority implicitly conferred upon him. (Id. at 19.) "An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding." N.J.S.A. 2A:23B-15(a); McHugh Incorporated v. Soldo Construction Co., Inc., 238 N.J. Super. 141, 146 (App. Div. 1990) (a court is precluded from overturning an arbitration award relating to assessment of witness credibility or the weight accorded their testimony).

Moreover, Plaintiffs argue, Carol Cestari's testimony had nothing to do with the award in favor of the Plaintiffs or the basis of Defendants' undisputed misappropriation of Plaintiffs' names, likeness, and reputation in connection with the sale of millions of dollars of products. (Plaintiffs' Reply at 19.) They state that her testimony concerned only Defendants' preemption defense, which Judge Hamlin found to be meritless as a matter of law. (Id.)

VI. The cases relied upon by Defendants to vacate the arbitration award on the basis of "Manifest Disregard of the Law" do not support Defendants' position.

Defendants rely upon six cases in support of their argument that the arbitration award should be vacated because Judge Hamlin acted in "manifest disregard" of the law. (Id.) Plaintiffs assert that two of those cases involved the heightened level of scrutiny applicable to clearly delineated, dominant public policy issues arising from statutes and regulations enacted for the public good. Cybul, *supra*, and Liberty Mutual, *supra*. Cybul relied upon the standard of review enunciated by the Supreme Court's plurality opinion in Perini, 129 N.J. 479, which was overruled in Tretina, *supra*, 135 N.J. at 358. Plaintiffs argue that Defendants' reliance on the overruled Perini standard (that the court may review arbitration awards for an alleged legal error, limited to "gross, unmistakable, undebatable or in manifest disregard of applicable law and leading to an unjust result"), Perini, *supra*, 129 N.J. at 496, is misplaced because the standard was overruled in Tretina. (Plaintiffs' Reply at 20.) Plaintiffs concede that while Cybul may retain some vitality under the "public policy" exception because of the unique public policy underlying the Consumer Fraud Act, it has been overruled as legal authority concerning the "manifest disregard of the law standard" when the Supreme Court set forth its new and "correct standard of review" in Tretina, a month after Cybul was published. (Id.)

Except for the two "public policy" exception cases noted above, Plaintiffs argue that it is curious that every other case cited by Defendants in support of their claim that this arbitration award should be vacated because it was in "manifest disregard" of the law actually enforced the arbitration awards in their entirety, and each and every one recited that courts must be exceedingly deferential to the award of an arbitrator in a private contract matter. (Id.)

In Brabham, after the District Court vacated an arbitrator's award as being "arbitrary and capricious," the Fifth Circuit reversed the District Court's decision and enforced the award in its entirety, holding that a private arbitration award cannot be vacated because it is arbitrary and capricious. 376 F.3d at 379.

In Solvay, the Sixth Circuit declined to apply the "manifest disregard" standard and held that "a question of what remedies were appropriate" was "a matter well within the power of the arbitrators, rather than the courts, to decide," 442 F.3d at 477.

Vitarroz arose from an arbitration clause in a commercial contribution agreement that would have transferred the plaintiff's business to a new company owned by the defendants. 637 F.Supp. 2d 238. The arbitrator found that the defendants breached confidentiality provisions in the agreement by issuing a press release concerning its reasons for discontinuing the transaction. (Plaintiffs' Reply at 22.) Judge Hayden's analysis began with the standard of review dictated by the Federal Arbitration Act and then explained:

> The parties agree, correctly, that this court's role is highly deferential and that "an arbitration award is presumed to be valid unless it is affirmatively shown otherwise." The court may not "overrule an arbitration decision because it finds an error of law," because "in reviewing an arbitration award, courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.'
>
> The parties further agree that the Third Circuit has previously approved the "manifest disregard of the law" standard for reviewing an arbitral award. Under this standard, the court "should not vacate [the] award unless it finds both that the arbitrators knew of a governing legal principle yet refused to reply it or ignored it altogether, and the law ignored by the arbitrator was well defined, explicit, and clearly applicable to the case. The standard is necessarily a strict one, and means that a reviewing court will decline to sustain an award "only in the rarest case."

The Vitarroz Court found that the controlling principle the case was follows:

> Again, the court does not sit as a super-arbitrator to hear "claims of factual legal error by an arbitrator as an appellate court does in reviewing decisions of the lower courts." Major League Umpires Ass'n., 357 F.3d at 280. So long as a coherent basis in law and fact underlies the award, and the court finds such to be the case here—vacatur is improper.

Plaintiffs argue that even if Vitarroz stands for the proposition that some measure of the "manifest disregard" standard still exists in the Third Circuit, it does not address the decision in Tretina which abrogated any such basis to vacate an arbitration award, and it certainly does not stand for the proposition that this court should entertain Defendants'

argument concerning an alleged error in the law on the applicability of the copyright protection doctrine to a state court commercial misappropriation of likeness claim. (Plaintiffs' Reply at 23.)

In Amerada Hess Corp., the plaintiff resisted the defendant's enforcement of the arbitration award, claiming that the arbitrator showed signs of partiality. 385 F.Supp 279. The court rejected that claim, limiting partiality or corruption defenses to undisclosed business dealings, a personal or business interest in the outcome of the proceeding or a relationship other than a business relationship between an arbitrator and a party to the arbitration. (Plaintiffs' Reply at 24.) The plaintiff's second basis for vacating the arbitration award was the claim that the arbitrator exceeded his powers. (Id.) While that is a recognized statutory basis for vacating an arbitration award, the court commented, "An analysis of the stipulated issues submitted to the arbitrator, and the arbitrator's opinion and award reveals that the arbitrator decided the precise issue presented to him." Id. at 282.

Plaintiffs argue that the same is true in this case. (Plaintiffs' Reply at 24.) Plaintiffs filed a Complaint in the Chancery Division, and Defendants filed a motion compelling arbitration. The entire case was transferred to arbitration, and after years of litigation, the Defendants raised a preemption defense and asked the arbitrator to rule on it. The arbitrator rejected Defendants' preemption defense, found that the proof of Defendants' wrongful conduct was uncontested, and entered an award in favor of the Plaintiffs. (Id.)

VII. The Ross Parties are entitled to prejudgment interest.

Both parties sought interest as a form of damages. (Id. at 25.) Judge Hamlin awarded "interest and costs as may be permissible by rule, legislation or the parties' private arbitration agreement." Radler Cert., Exh. 1.) In County of Essex v. First Union National Bank, 186 N.J. 46, 61 (2006), the New Jersey Supreme Court held as follows:

> Unlike prejudgment interest in tort action, which is expressly governed by Rule 4:42-11(b), the award of prejudgment interest on contract and equitable claims is based on equitable principles. Pressler, *Current N.J. Court Rules*, comment 9 on R. 4:42-11 (2006) (see cases cited therein). In awarding prejudgment interest,
>
> > [t]he basic consideration is that the defendant has had the use, and the plaintiff has not, of the amount in question; and the interest factor simply cover the value of the sum awarded for the prejudgment period during which the defendant had the benefit of monies to which the plaintiff is found to have been earlier entitled. [*Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474, 506, 323 A.2d 495 (1974) (citations omitted.]

> The allowance of prejudgment interest is a matter for discretion for the trial court. *In re Estate of Lash*, 169 N.J. 20, 34, 776 A.2d 765 (2001). Unless the award 'represents a manifest denial of justice,' an appellate court should not interfere. *Musto v. Vidas*, 333 N.J. Super. 52, 74, 754 A.2d 586 (App. Div.), *certif. denied*, 165 N.J. 607, 762 A.2d 221 (2000).
>
> Both the trial court and the Appellate Division concluded that awarding prejudgment interest to the County was appropriate…

Plaintiffs argue that the Pizzo Parties' reliance upon Elliot-Marine in support of disallowing prejudgment interest on the Ross Parties' award is misplaced. (Plaintiffs' Reply at 25-26.) In Elliot-Marine, a written agreement between the parties to enter binding private arbitration was silent as to the issue of prejudgment interest. (Id. at 26.) In contrast, in this case, by Consent Order of Dismissal Without Prejudice for Referral to Arbitration entered nearly four years ago, the parties consented that the "[parties] shall proceed to arbitration concerning the claims and defense asserted in this action." See Radler Cert., Exh. 6, ¶2.

Plaintiffs further argue that the Pizzo Parties' argument that prejudgment interest should be suspended during a time in the proceeding when no motions were pending and discovery demands/responses were being prepared is without merit inasmuch as they incorrectly rely upon one decision that addressed post-arbitration delay. See Allen v. Heritage Courts Association, 325 N.J. Super. 112 (App. Div. 1991). Plaintiffs contend that Defendants' arguments also fails to consider the inordinate delay explicitly recognized by Judge Hamlin as being precipitated by the Pizzo Parties in producing Mr. Pizzo for deposition and by virtue of filing an unsupportable declaratory judgment action in the Superior Court seeking to stay the arbitration, which was summarily dismissed with prejudice. (Plaintiffs' Reply at 26.) As the controlling criteria for awarding prejudgment interest is whether the defendant had the use of the money during the pendency of the case, Plaintiffs argue that this Court should award prejudgment interest on that basis, and without regard to allegations of fault concerning delay in the arbitration and litigation process. (Id.)

Analysis

Based on the record and New Jersey's standard of review for vacating private arbitration awards, Plaintiffs' application to confirm the arbitration award and enter judgment is granted and Defendants' application to vacate the arbitration award is denied.

Defendants raise four challenges as to why Judge Hamlin's arbitration award should be vacated. The first is that the award is in manifest disregard of the law as articulated in the Federal Copyright Act. The second is that the award is against public policy embodied in the Federal Copyright Act. The third is that the arbitrator exceeded his powers by deciding matters outside the scope of the arbitration and awarding punitive damages. The fourth is that the arbitrator refused to consider evidence.

Standard of Review for Vacating an Arbitrator's Award

Certain basic principles guide the Court when entertaining an application to vacate or confirm an arbitration award. Arbitration is a favored method of resolving disputes between parties in New Jersey. Malik v. Ruttenberg, 398 N.J. Super. 489, 495 (App. Div. 2008). The primary purpose of arbitration is to reach a final disposition "in a speedy, inexpensive, expeditious and perhaps less formal manner." Fawzy v. Fawzy, 199 N.J. 456, 468 (2009). In order to ensure finality and attain these goals, arbitration awards are presumed valid, and there is a strong preference for judicial confirmation of arbitration awards. Del Piano v. Merrill Lynch, Pearce, Fenner & Smith, Inc., 372 N.J. Super. 503, 510 (App. Div.); *certif. granted*, 183 N.J. 218 (2004), appeal dismissed, 195 N.J. 512 (2005).

The Revised New Jersey Arbitration Act of 2003, N.J.S.A. 2A:23B, (the "Act") governs private arbitration proceedings.

N.J.S.A. 2A:23B-22 sets out the standard governing a court's confirmation of an arbitration award. It states: "After a party to an arbitration proceeding receives notice of an award, the party may file a summary action with the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to [N.J.S.A. 2A:23B-20 or 2A:23B-24] or is vacated pursuant to [N.J.S.A. 2A:23B-23]."

The Act also defines the narrow circumstances under which a court may vacate an arbitrator's award.

Under the Act, a court shall vacate an arbitration award if:

> (1) the award was produced by corruption, fraud, or other undue means;
>
> (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator, or misconduct by an arbitrator prejudicing the rights of a party to the arbitration hearing;
>
> (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to [N.J.S.A. 2A:23B-15] so as to substantially prejudice the rights of a party to the arbitration proceeding;
>
> (4) an arbitrator exceeded the arbitrator's powers;
>
> (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to [N.J.S.A. 2A:23B-15c] not later than the beginning of the arbitration hearing; or

> (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in [N.J.S.A. 2A:23B-9] so as to substantially prejudice the rights of a party to the arbitration proceeding.

N.J.S.A. 2A:23B-23a.

Given the strong judicial preference to uphold an arbitrator's award, the Supreme Court has adopted a very narrow standard of review for these decisions, limiting the circumstances under which a court may vacate an arbitration award to those listed in the Act. 40 New Jersey Practice, Appellate Practice and Procedure § 26.9 (Edward A. Zunz, Jr. & Edwin F. Chociey, Jr.) (2d. ed. 2005). Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc., 135 N.J. 349 (1994) is the controlling opinion on the court's standard of review for vacating an arbitrator's award. In that case, the Supreme Court, adopting the standard set forth by former Chief Justice Wilentz's concurring opinion in Perini Corp. v. Greater Bay Hotel & Casino, Inc., 129 N.J. 479, 548 (1992), held that:

> Basically, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators. [They] can be corrected or modified only for very specifically defined mistakes as set forth in [N.J.S.A. 2A:24-9].

Tretina, 135 N.J. at 358.[3]

The Court further held that unless the parties contractually agreed to a different standard of review, errors of law or fact are not grounds for the court to vacate an arbitrator's decision. Tretina, 135 N.J. at 359; Empire Fire & Marine Insurance Co. v. GSA Insurance Co., 354 N.J. Super. 415, 421 (App. Div. 2002) (holding that where an appeal arises from a private sector arbitration and the parties did not agree to the contrary, the judicial "scope of review does not encompass errors of law or facts.").

Arbitrator's Determination as to Federal Copyright Act

The Defendants' first challenge to the arbitrator's award is that it is in manifest disregard of the law—specifically that the Plaintiffs' claims were preempted by the Federal Copyright Act because the Plaintiffs did not possess the copyrights to the subject media.

Judge Hamlin ruled on the preemption issue during the arbitration proceedings. In his November 22, 2011 decision denying Defendants' partial summary judgment motion based on a theory of preemption, Judge Hamlin wrote: "I have analyzed the able and challenging legal arguments regarding preemption but in the end am satisfied that the distinctions and analysis urged by plaintiffs regarding applicability are persuasive." (Radler Cert., Exh. 14, p. 3.)

[3] It should be noted that the Supreme Court in Tretina articulated its standard for vacating an arbitrator's award in light of N.J.S.A. 2A:24-8, which governed the vacation of private arbitration awards at the time that case was decided. However, given that the language in the current standard, N.J.S.A. 2A:23B-23(a), is nearly identical to the language found in the previous standard, N.J.S.A. 2A:24-8, (except for the additions of clauses (5) and (6) in the current standard) the reasoning in Tretina applies.

Judge Hamlin reviewed the submissions and reached a determination as to the applicability of the Federal Copyright Act to this case. Because errors of law and fact are not grounds for the court to vacate an arbitrator's decision, the Court is not authorized to vacate Judge Hamlin's award based on this determination. I make no determination as to whether the arbitrator was correct on the legal issue. The parties chose to be bound by his determination. I have no jurisdiction to sit as an appeals court of the arbitrator's considered legal opinion.

The Court also notes that neither Mr. Cestari nor his Estate has ever once sought to assert Mr. Cestari's intellectual property rights. Counsel for the Cestari Estate participated in the original TRO hearing before Judge Doyne and was on notice about the possible arbitration. (Radler Cert., Exh. 17, p. 9.) In addition, the Cestari Estate participated as a witness to the arbitration and did not seek leave to intervene or make an independent affirmative claim in the Superior Court, or anywhere else, seeking copyright protection. (Id.) The Court further notes that Judge Hamlin's arbitration award does not necessarily preclude the Cestari's Estate from asserting the decedent's intellectual property rights against either party.

Public Policy Concerns

Defendants' second challenge to the award is that it runs counter to public policy embodied in the Federal Copyright Act.

Although it is well settled law in New Jersey that "in rare circumstances a court may vacate an arbitration award for public policy reasons," Tretina, 135 N.J. at 364-65, those reasons are not apparent in this case.

Weiss v. Carpenter, 143 N.J. 420 (1996), is the controlling opinion governing the public policy exception. In that case, the Supreme Court held that "heightened judicial scrutiny" is limited to review of public sector arbitration awards and private "arbitration awards that sufficiently implicate public policy concerns." Id. at 429.

While the importance of federal copyright law is not denied, the arbitrator's award in this dispute between private parties does not implicate public policy concerns, and certainly not to the extent that the Court is required to adopt a heightened standard of scrutiny to review the award. All Judge Hamlin's decision does is award monetary damages to one party in a private arbitration; it does not implicate public policy concerns to the extent prior decisions have that courts have said warrant heightened scrutiny. Faherty v. Faherty, 97 N.J. 99 (1984) (when support of a child is at issue); Liberty Mutual Insurance Company v. Open MRI. of Morris & Essex, L.P., 356 N.J. Super. 567 (Law Div. 2002) (when laws and regulations governing health care facilities are ignored); Cybul v. Atrium Palace Syndicate, 272 N.J. Super. 330 (App. Div. 1994) (in cases involving New Jersey's strong public policy underlying the state's Consumer Fraud Act).

Perhaps most telling, the Cestari Estate is the non-party most greatly affected by Judge Hamlin's decision, and yet, as noted above, the Estate has failed to assert any claim

seeking to protect its purported intellectual property rights for the subject media. It hardly seems appropriate for the Court to intervene and vacate the arbitrator's award based on public policy concerns when even the Estate apparently does not deem these concerns significant enough to assert its rights against the Plaintiffs.

Scope of Arbitrator's Authority

Defendants' third challenge to the arbitrator's award is that Judge Hamlin exceeded his powers by deciding matters outside the scope of the arbitration and awarding punitive damages.

The Act mandates that courts must vacate decisions when arbitrators exceed their powers, N.J.S.A. 2A:23B-23a (4). That, however, did not occur in this case.

Judge Hamlin did not decide matters outside the scope of the arbitration. The Plaintiffs filed all of their claims in the Chancery Division. It was the Defendants who moved to dismiss the entire case and to compel the entire matter to arbitration. The parties jointly agreed to submit the entire matter to arbitration and Judge Doyne ordered the parties to proceed to arbitration concerning the claims and defenses asserted in the action commenced on February 21, 2008. Judge Hamlin ruled on those claims.

It was untimely during the arbitration proceedings, and it is much too late now, for the Defendants to assert that Judge Hamlin ruled on matters outside the scope of the arbitration based on an arbitration clause or expiration date in the Distribution Agreement. If Defendants had wished to limit the arbitration proceedings to certain claims or ones that arose before a certain date, they would have been required to raise those issues with Judge Doyne prior to the issuance of his Order sending the parties to arbitration on *all* of the parties' claims and defenses. As Judge Russello stated in his decision denying the Defendants' request for a stay in the arbitration proceedings, "The facts of this case compel this Court to conclude that the Pizzo parties waived any right to challenge the arbitrator's jurisdiction to decide the entire case presently before him." (2/3/12 Transcript at 8:16-8:22.)

In addition, Judge Hamlin did not exceed his authority as concerns Carol Cestari or the Cestari Estate, as none of the orders, rulings, decisions, or judgments entered by Judge Hamlin in connection with the case compel any action or inaction regarding them, impose liability or any obligation upon them, or confer upon them any right or relief.

Judge Hamlin also did not exceed his powers by awarding punitive damages. The Plaintiffs' Demand for Arbitration filed with the American Arbitration Association sought "punitive/exemplary" damages. (Radler Cert., Exh. 7 under the heading "Other Relief Sought.") It is irrelevant that Plaintiffs' Verified Complaint did not seek punitive damages because the parties arbitrated their dispute based on the pleadings they submitted to the AAA. In addition, Judge Hamlin's decision, contrary to Defendants' assertions, provides the basis in fact justifying and the basis in law authorizing the award for money damages in compliance with N.J.S.A. 2A:15-5.12c.

Arbitrator's Hearing of Evidence

Defendants' fourth challenge to the arbitrator's award is that Judge Hamlin refused to consider evidence.

The Act stipulates that courts must vacate an award when the arbitrator "refused to consider evidence material to the controversy… so as to substantially prejudice the rights of a party to the arbitration proceeding." N.J.S.A. 2A23B-23a (3). That, however, also did not occur in this case.

Defendants' first assert that Judge Hamlin, in his November 22, 2011 ruling, refused to consider the deposition testimony of Carol Cestari. This assertion, however, is plainly contradicted by Judge Hamlin's ruling when he states: "Reference to Carol Cestari's deposition is of little help in view of the lack of specifics in her possession or knowledge." (Radler Cert., Exh. 14, p. 3.) Judge Hamlin did not refuse to consider Carol Cestari's deposition; rather, he considered it but determined that it was of little help.

Defendants also assert that Judge Hamlin, in his January 25, 2012 ruling, refused to consider Carol Cestari's testimony as well as admissions of Damian Ross contained in correspondence and transcribed telephone conversations.

There is nothing in the record to suggest that Judge Hamlin refused to consider this evidence. As mentioned above, in the arbitrator's November 22, 2011 ruling, Judge Hamlin considered Carol Cestari's testimony but determined that it was of little help. In addition, in his January 25, 2012 ruling, Judge Hamlin specifically noted that it was he who ordered a deposition of Carol Cestari and that her testimony was placed on the record. (Radler Cert., Exh. 17, p. 7.)

Judge Hamlin also did not refuse to consider Damian Ross's correspondences and telephone transcripts. In his January 25, 2012 ruling, Judge Hamlin noted that he had earlier directed the parties to submit any final applications and supporting materials. In regards to those materials, which included Damian Ross's correspondences and telephone transcripts, Judge Hamlin plainly states: "I have considered all those submitted materials as well as a supplemental filing by Mr. Indeck after the cutoff date for final submission." (Radler Cert., Exh. 17, p. 8.).

Defendants lastly assert that Judge Hamlin also ignored Carl Cestari's trademark and copyright registrations when they were provided to him. The Court also rejects this argument because the Defendants did not submit Mr. Cestari's copyright grants until after the close of the arbitration proceedings.

Defendants' counsel did not submit electronic copies of Mr. Cestari's copyright grants until March 26, 2012, a full two months after Judge Hamlin issued his ruling granting Plaintiffs' motion for summary judgment. (Indeck Cert., Exh. P.) As Judge Hamlin noted in his April 18, 2012 decision, the Cestari copyright documents were never

discovered or supplied prior to the close of the proceedings, and there was no disclosure of when such documents were discovered by Defendants' counsel. Simply put, Defendants' submission of these documents was untimely and Judge Hamlin was not required to review them.

Prejudgment Interest

Plaintiffs also seek an award of prejudgment interest for their tort, contract, and punitive damages.

The Court grants Plaintiffs prejudgment interest for the tort damages pursuant to R. 4:42-11(b). Using its discretion, the Court also grants Plaintiffs prejudgment interest for the contract damages. The Court does not, however, grant Plaintiffs prejudgment interest for the punitive damages. Judge Hamlin reached a determination as to the appropriate amount of punitive damages to be awarded to the Plaintiffs in accord with the purposes of such damages, and this Court sees no reason to deviate from that amount.

Conclusion

For the reasons set forth above, Plaintiffs' application to confirm the arbitration award and enter judgment is granted and Defendants' application to vacate the arbitration award is denied.

Plaintiffs are also entitled to prejudgment interest for the tort and contract damages.

Two Orders are attached.

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ROBERT P. CONTILLO, P.J.Ch.