

AMERICAN ARBITRATION ASSOCIATION
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JOHN MITCHELL DOLAN,

Case No. 13 166 00615 09

Claimant,

-against-

RADIO NETWORKS, LLC,

Respondent.
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PARTIAL FINAL AWARD

This matter comes before me by means of a demand for arbitration dated March 5, 2009 filed by John Mitchell Dolan ("Dolan" or "Claimant") against Radio Networks, LLC ("RN" or "Respondent") alleging, among other things, that he was constructively terminated and entitled to severance pay under the terms of a letter agreement between the parties dated June 12, 2007 (the "Agreement"). Respondent denies any liability to Claimant. Claimant withdrew his claim for severance under Citadel's separate severance plan prior to the hearing.

A hearing was held in this matter on August 11, 12, and 13, 2009. Claimant presented the testimony of Dolan, James Christopher Berry, a former station general manager for RN, and John Hare, the former President of ABC's Radio Division. Respondent chose not to present any testimony in support of its case.

Based on the testimony and documentary evidence presented at the hearing, a full review of the record in this case, the post-hearing memoranda submitted by the parties, and applicable case law, I find as follows.

PROCEDURAL BACKGROUND

The Agreement provides, at paragraph 6, that RN "shall indemnify [Claimant] against all reasonable, out-of-pocket expenses (including attorneys' fees) and reimburse such expenses" within ten days of invoicing on any "good faith" claim related to his entitlement to severance under the Agreement. Dolan

moved for enforcement of this provision during these proceedings; Respondent objected arguing that enforcement was premature in the absence of a finding that in fact Dolan's claim was brought in good faith. By means of an Interim Award dated May 6, 2009, I ruled that Respondent was required to reimburse Claimant for all reasonable fees and expenses incurred in accordance with paragraph 6 of the Agreement. I further ruled that the advanced fees may be required to be returned in the event that a lack of good faith was demonstrated at the hearing.

Respondent moved for summary judgment on several grounds following completion of discovery. First, RN sought dismissal on arbitrability grounds of Dolan's claim for severance under a memorandum issued in October 2006 by an executive of RN's predecessor. RN's motion was granted by Order dated August 4, 2009 as I found that the operative arbitration provision in the Agreement did not encompass any claims that Dolan may have relating to the October 2006 memorandum.

Respondent further moved to dismiss Dolan's claim for severance under the Agreement. RN also sought dismissal of this claim on the ground that Dolan was guilty of misconduct in violation of RN's Code of Conduct. The motion was denied as to both Dolan's constructive termination claim and RN's misconduct defense as I found questions of material fact to be present with respect to both.

Finally, I denied RN's request that I find a lack good faith on Claimant's part warranting a return of fees advanced. I reserved on that issue, once again, for a determination to be made at the completion of the hearing.

FINDINGS OF FACT

As Respondent chose to present no witnesses, the testimony of Messrs. Dolan, Berry, and Hare stands without challenge on in the record.

Dolan worked for over three decades in the radio business rising to become President of the ABC Radio Station Group in 1999. In that position, he reported to Mr. Hare. In February 2006, ABC Radio's parent company, The Walt Disney Company, entered into a merger agreement with Citadel Broadcasting Company ("Citadel"). The merger closed in June 2007. Dolan continued on as President of what was now called by Citadel the "Major Market Station Group"

and began to report to Farid Suleman ("Suleman"), the Chief Executive Officer of RN's parent, Citadel. In that capacity, he managed nine major markets, including Los Angeles, RN's largest radio market.

Key Terms of Agreement

The Agreement sets forth Claimant's rights with respect to the "special severance payment" provided therein in the event of a "constructive termination." In particular, the Agreement provides that Dolan "shall be entitled to receive a payment equal to \$850,000" in the event a "triggering event" occurs. A "triggering event" is defined as including the occurrence of a "Constructive Termination" which in turn is defined as "the occurrence of any of the following events without [Dolan's] written consent: any reduction in position, title, overall responsibilities, level of authority, level of reporting" Upon receipt of written notice of a Constructive Termination, RN may either make the special severance payment or contest the claim. RN has done the latter here.

As determined in the Interim Award, Dolan is entitled to reimbursement of his reasonable fees and costs unless it is determined that his claim for severance was not brought in "good faith."

Dolan's Duties and Authority

As President of the Major Market Station Group, Dolan's "most fundamental, most significant responsibility" was to "hire, to fire, to compensate, to manage, motivate" the general managers reporting to him and to "ensure that we had strong management in every station." (Hearing transcript ("Tr.") 33-34). These general managers who reported to Dolan in turn managed RN's radio stations in their assigned markets. The witnesses confirmed the importance of Dolan's role and responsibilities as the general managers oversaw RN's most valuable asset, its radio stations, and drove company profits. Dolan and Suleman never discussed Claimant's duties and responsibilities or any changes thereto prior to or after the acquisition.

Several new policies were instituted after the Citadel acquisition. For example, a new policy required corporate approval for any hires with salaries greater than \$50,000. Other policy changes included the requirement that

advertising expenses and travel costs be approved at the corporate level. Dolan testified that each of these policy changes served to reduce his overall responsibilities and level of authority. Dolan indicated that at the time of the policy changes he did not invoke his right under the Agreement to assert a Constructive Termination because he was trying to "make things work". (Tr. 81, 87, 89-90)

Relationship Between Dolan and Suleman

Dolan and Suleman spoke by telephone on an almost daily basis and Dolan estimated that he would visit with Suleman about once a week or every other week.

Beginning in the summer of 2008, Suleman made certain personnel decisions involving Dolan subordinates without consulting him. For example, Suleman hired a director of sales for the Los Angeles stations without consulting either Dolan or the general manager for those stations, John Davison ("Davison"). Suleman also offered the position of general manager of WPLJ in New York, a position held by Dolan, to the general manager of another station without discussing it with Dolan. Suleman apologized to Dolan in each instance. Suleman also hired a friend to run a station in Dallas and told Claimant that this individual would report directly to Suleman rather than through the normal chain of command to Dolan.

Firing of Davison

Davison was the general manager for RN's Los Angeles stations. Davison was nominated by Dolan and was recognized by RN as its general manager of the year for 2007.

In January 2009 Suleman hired his friend Bob Moore ("Moore") to become the general manager of the Los Angeles market for RN and fired Davison. Dolan was not consulted with respect to either decision. Further, Suleman set Moore's salary at the same rate as Dolan's even though Moore reported to Claimant. Dolan and Mr. Hare both indicated that a salary at that level for a general manager was excessive and unprecedented.

Dolan first learned of these decisions made by Suleman via a phone call from Suleman after they had been made and implemented. Suleman had never mentioned to Dolan that he thought Davison should be fired prior to actually terminating Davison's employment. Rather, Davison's stations outperformed the market during the period prior to his termination and Suleman awarded Davison the largest number of shares in 2008 of any awarded to a general manager.

The witnesses testified consistently and without contradiction that Dolan's level of responsibilities and authority had been reduced as a result of Suleman's actions.

Dolan's Resignation

Claimant asserted by letter from his counsel on February 4, 2009 that a Constructive Termination had occurred based on the firing of Davison and the hiring of Moore. Respondent disputed this claim. I denied Respondent's contention on summary judgment in my Order dated August 4, 2009.

Misconduct Claim

In its summary judgment papers, RN argued that Dolan was guilty of misconduct that it only learned about after his separation. Respondent argued at the time that the misconduct was so serious that, on an after-acquired evidence basis, it warranted dismissal of Dolan's constructive discharge claim.

RN informed Claimant and this Tribunal prior to the commencement of testimony that it had decided not to pursue this claim further in arbitration.

Payment of Fees and Costs

Following issuance of the Interim Award, apparently Claimant submitted a number of invoices which were paid by Respondent. Based on correspondence from the parties after the close of the hearing, it appears that Respondent disputes the reasonableness of certain of Dolan's recent requests for reimbursement of fees and expenses and had not paid one or more invoices.

CONCLUSIONS OF LAW

Severance is awardable to Dolan under the Agreement in the event that “any reduction in position, title, overall responsibilities, level of authority . . .” occurs.

Dolan’s constructive termination claim is rooted principally in a single event, the decision by Suleman to fire the existing general manager in Los Angeles and then recruit and hire a new general manager and set his salary without consulting Claimant. The salary Suleman set for the new general manager, Dolan’s subordinate, was identical to Dolan’s salary. The question posed is did Suleman’s actions constitute a reduction in Dolan’s position, responsibilities, or authority. The testimony at the hearing consistently supported the view, and I find, that it did. The testimony of Dolan, coupled with the testimony of Messrs. Berry and Hare, establish the detrimental impact of Suleman’s actions on Claimant’s responsibilities and authority both inside and outside of RN.

In opposition to Dolan’s clear testimony on these points, Respondent relied solely on cross-examination, relatively inconsequential exhibits, and attorney’s arguments. This limited factual showing was patently insufficient to defeat Dolan’s cogent presentation in support of his claim.

Respondent correctly points out that Suleman, as CEO, had the ultimate authority to hire and fire the entire staff. That, however, is not the issue. The standard set by the Agreement for the award of special severance is quite low and does not require that the reduction in position, responsibilities, or authority be material, but rather “any” reduction is sufficient. The fact that Suleman’s decision to fire Davison and hire Moore may very well have been a savvy business decision, as suggested by RN, and may have been in the best interests of shareholders is of no consequence. Contractual obligations are not subject to the whimsy of the bottom line or of shareholder profitability.

I find significant not only that Suleman made the decision to fire Davison and hire Moore and pay him the equivalent of Dolan’s salary but that he made no effort to discuss any of these significant decisions with Dolan. This is particularly

so knowing that Suleman and Dolan were in regular contact and there was no exigent circumstances that required that these decisions be made when they were, or indeed at all. RN, in its post-hearing memorandum at page 13, criticized Dolan for not discussing his decision to terminate his employment with Suleman before invoking his contractual rights. In doing so, RN compared that act with prior instances in which Dolan “raised his concerns with Suleman and they discussed it like adults, like professionals. By doing so, Dolan discharged his duty of good faith . . .” Certainly the same logic can be applied to Suleman and the impetuous, unilateral decisions he made with respect to the general manager position in Los Angeles. By not discussing his plans with Dolan about key personnel decisions for which Dolan was directly responsible and which were at the essence of Dolan’s position, Suleman not only did not meet the standard of good faith set forth in Respondent’s Memorandum but his actions served thereby to reduce Dolan’s credibility as a manager and his level of responsibility and authority and triggered the Constructive Termination provision of the Agreement.

Waiver Argument

Respondent contends that by failing to invoke the Constructive Termination provision of the Agreement prior to the Davison firing he waived any subsequent right to invoke the provision. This contention is without basis in fact or law.

The Agreement imposes no such requirement on Dolan. Indeed, the Constructive Termination provision, immediately after setting forth the standard, states that “if” Claimant provides written notice RN may make the severance payment or dispute the claim. The choice to invoke his rights under the Agreement is clearly with Claimant.

Claimant explained his failure to invoke the Constructive Termination provision at an earlier point as an effort on his part to make things work with new management. Ironically, Respondent argues in its brief, at page 13, for just such forbearance and good faith. “As the party obligated to pay the special severance payment under the June 2007 Agreement, RN had the justifiable expectation that Dolan would make a good faith effort to resolve any concerns he may have had

about perceived changes to his overall responsibilities or level of authority before claiming that he had been constructively terminated.” That is precisely what Dolan did with respect to the policy changes and the personnel decisions prior to Davison’s termination to which he objected.

New York law does not support Respondent’s position. Clearly, no express waiver is present here. A claim of waiver based on actions allegedly inconsistent with a contractual right is not to be lightly presumed but rather must be based on a clear manifestation of the intent to relinquish that contractual right. *Team Marketing USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 941-42, 839 N.Y.S.2d 242 (3d Dep’t 2007). Claimant’s good faith effort to work through issues with Suleman, as well as Suleman’s various apologies for his rash actions, defeat any suggestion that Dolan evinced an intent to relinquish his contractual rights.

Reimbursement of Fees and Costs

I find that Dolan’s claim was brought in good faith and that he is entitled to reimbursement of his reasonable fees and costs as provided for in the Interim Award.

The parties have indicated following the close of the hearing in this matter that there is a dispute with respect to the payment of fees and costs due to Claimant. In the absence of an agreement on this issue, I direct Claimant to submit his attorneys’ fees application to me by affidavit on or before November 20, 2009 and Respondent is instructed to submit its opposition to Claimant’s application by December 21, 2009. I retain jurisdiction until February 4, 2010 to rule solely on the attorneys’ fees application and, in the event that there is any issue with respect to the calculation of pre-judgment interest, with respect to that issue as well.

Conclusion

In sum, Dolan has carried his burden of demonstrating a Constructive Termination under the Agreement and is awarded \$850,000 in contractual damages. Claimant is awarded pre-judgment interest at the statutory rate of 9% calculated on a simple interest basis (i.e. not compounded) on this amount.

In the Matter of the Arbitration between

**Re: 13 166 00615 09
John Mitchell Dolan, Claimant
-against-
Radio Networks, LLC., Respondent**

PARTIAL FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, having been duly designated pursuant to the letter agreement between the above-named parties dated June 12, 2007 and having been duly sworn, and having duly heard the proofs and allegations of the parties, AWARD as follows:

- 1) Claimant's constructive termination claim seeking the award of the contractual severance payment is granted. Claimant is therefore awarded the following: (a) contract damages in the amount of \$850,000 (Eight hundred and fifty thousand dollars), and; (b) statutory interest at the rate of 9% calculated on a simple interest basis (i.e. not compounded). Payment is to be made with 10 (ten) calendar days of the date of the Final Award to be subsequently issued. Post-award interest at the statutory rate of 9% calculated on a simple interest basis shall be awarded commencing from the date of this Final Award in the event payment is not made in a timely manner as set forth in this paragraph.

- 2) Claimant's claim for the reimbursement of attorneys' fees and costs in accordance with the Interim Award dated May 6, 2009 issued in this matter is reaffirmed. As the parties have indicated that there is a dispute with respect to such obligation, Claimant is instructed to submit to the Arbitrator his attorneys' fees application by affidavit with accompanying exhibits on or before November 20, 2009 and Respondent is instructed to submit its opposition to Claimant's application on or before December 21, 2009. I retain jurisdiction until February 4, 2010 to rule solely on the attorneys' fees application and, in the event that there is any issue with respect to the calculation of pre-judgment interest, on that issue as well.

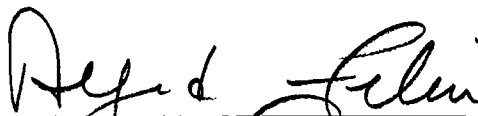
- 3) This Partial Final Award is in full settlement of all claims submitted to this arbitration except as expressly provided above.



ARBITRATOR

I, Alfred G. Feliu, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Partial Final Award.

10-20-09
Date



Alfred G. Feliu