

16-1545-cv(L)
Odeon Capital Group LLC, et al v. Bret Ackerman

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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5 August Term, 2016

6
7 (Argued: April 19, 2017

Decided: July 21, 2017)

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9 Docket Nos. 16-1545-cv(L), 16-1717-cv(XAP)

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12 ODEON CAPITAL GROUP LLC, MATHEW VAN ALSTYNE,
13 EVAN SCHWARTZBERG,

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15 *Petitioners-Appellants-Cross-Appellees,*

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17 v.

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19 BRET ACKERMAN,

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21 *Respondent-Appellee-Cross-Appellant.*

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25 Before: CALABRESI, POOLER, and WESLEY, *Circuit Judges.*

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27 Appeal and cross-appeal from the April 25, 2016 opinion and order of the
28 United States District Court for the Southern District of New York (Rakoff, J.)
29 denying petitioners' motion to amend their petition to vacate an arbitration
30 award. Bret Ackerman worked as a bond trader for Odeon Capital Group before

1 he was fired. He arbitrated a variety of claims arising out of his employment
2 against Odeon and its principals, Mathew Van Alstyne and Evan Schwartzberg
3 (collectively, "Odeon"). As is relevant to this appeal, the arbitrators awarded
4 Ackerman \$1,102,193.00 on his claim for unpaid wages.

5 Odeon brought a petition to vacate the award, alleging the arbitrators
6 engaged in misconduct and acted in manifest disregard of the law. It then sought
7 to amend its petition to assert fraud as an additional ground for vacatur. Odeon
8 alleged Ackerman committed perjury during the arbitration, and that the perjury
9 so tainted the proceedings as to require vacatur. The district court disagreed,
10 finding that even if Ackerman committed perjury, the perjury was not material
11 to the arbitration panel's award.

12 We hold that to vacate an arbitration award on the ground that the award
13 was fraudulently procured, the petitioner must demonstrate the fraud was
14 material to the award. That is, there must be a nexus between the alleged fraud
15 and the decision made by the arbitrators. The petitioner, however, need not
16 demonstrate that the arbitrators would have reached a different result. In this
17 case, Odeon failed to establish that Ackerman's alleged perjury had any impact

1 on the arbitration award. The district court therefore correctly denied the petition
2 to vacate.

3 The district court also denied Ackerman’s request for attorneys’ fees
4 incurred in defending the arbitration award, and Ackerman cross-appeals from
5 that denial. We agree with Ackerman that the district court applied the wrong
6 legal standard in denying his fee request. The district court based its denial on
7 the ground that the petition to vacate was not unjustified, such that the court’s
8 invocation of its inherent powers to make a fee award was unwarranted.

9 However, New York law provides statutory authority for Ackerman’s fee
10 request. Where, as here, an employee prevails against an employer on a claim for
11 unpaid wages, New York law mandates that the employee recover “all
12 reasonable attorney[s’] fees.” N.Y. Labor Law § 198(1-a). We therefore vacate the
13 denial of attorneys’ fees and remand for further proceedings consistent with this
14 opinion.

15 Affirmed in part, vacated and remanded in part.

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17 _____
18 MARK D. KNOLL, Bressler, Amery & Ross, P.C.
19 (Nikolas S. Komyati, *on the brief*), New York, NY, *for*
20 *Petitioners-Appellants-Cross-Appellees Odeon Capital Group*
LLC, Mathew Van Alstyne, and Evan Schwartzberg.

1 JANIE BYALIK, Pashman Stein, Walder Hayden P.C.
2 (Sean Mack, *on the brief*), Hackensack, NJ, *for Respondent-*
3 *Appellee-Cross-Appellant Bret Ackerman.*
4

5 POOLER, *Circuit Judge:*

6 Bret Ackerman worked as a bond trader for Odeon Capital Group before
7 he was fired. He arbitrated a variety of claims arising out of his employment
8 against Odeon and its principals, Mathew Van Alstyne and Evan Schwartzberg
9 (collectively, "Odeon"). As is relevant to this appeal, the arbitrators awarded
10 Ackerman \$1,102,193.00 on his claim for unpaid wages.

11 Odeon brought a petition to vacate the award, alleging the arbitrators
12 engaged in misconduct and acted in manifest disregard of the law. It then sought
13 to amend its petition to assert fraud as an additional ground for vacatur. Odeon
14 alleged Ackerman committed perjury during the arbitration, and that the perjury
15 so tainted the proceedings as to require vacatur. The district court disagreed,
16 finding that even if Ackerman committed perjury, the perjury was not material
17 to the arbitration panel's award. Odeon appeals from the April 25, 2016 opinion
18 and order of the United States District Court for the Southern District of New
19 York (Rakoff, J.) denying its motion to amend, as well as its petition to vacate the
20 award.

1 We hold that to vacate an arbitration award on the ground that the award
2 was fraudulently procured, the petitioner must demonstrate the fraud was
3 material to the award. That is, there must be a nexus between the alleged fraud
4 and the decision made by the arbitrators. The petitioner, however, need not
5 demonstrate that the arbitrators would have reached a different result. In this
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13 the ground that the petition to vacate was not unjustified, such that the court’s
14 invocation of its inherent powers to make a fees award was unwarranted.
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16 request. Where, as here, an employee prevails against an employer on a claim for
17 unpaid wages, New York law mandates that the employee recover “all
18 reasonable attorney[s] fees.” N.Y. Labor Law § 198(1-a). We therefore vacate the

1 denial of attorneys' fees and remand for further proceedings consistent with this
2 opinion.

3 **BACKGROUND**

4 Ackerman worked as a bond trader for Odeon, pursuant to an
5 employment agreement, from May 2011 until he was fired in March 2014. After
6 losing his job, Ackerman filed a statement of claim with the Financial Industry
7 Regulatory Authority ("FINRA"), which governs the relationship between
8 brokers and their employers, seeking arbitration. Ackerman asserted a variety of
9 claims against Odeon, including failure to pay commissions owed, breach of his
10 employment agreement, disability discrimination, retaliation arising out of an
11 investigation into a trade he made in a February 2014, and filing of a false
12 termination notice. He sought damages in excess of \$5 million.

13 A three-person arbitration panel took testimony on Ackerman's claims
14 during a six-day hearing in October 2015. Ackerman testified on his own behalf
15 during the arbitration proceedings. During his testimony, Ackerman was asked
16 about an on-the-record interview ("OTR") request FINRA sent him in April 2014.
17 The OTR sought to interview Ackerman regarding a variety of trades he made
18 while working at Odeon in 2011.

1 Odeon alleges that Ackerman committed perjury at least twice during this
2 portion of his testimony. First, Odeon’s counsel asked whether the investigation
3 that was the subject of the OTR was still pending, and Ackerman testified “No.”
4 App’x at 983. Second, Ackerman testified that, during his OTR, he asked the
5 FINRA investigators whether there was anything improper with the bond trade
6 in February 2014 that formed the basis of his retaliation claim:

7 Bret Ackerman: I had brought it up with their
8 investigators asking them about it.
9 As they were asking about other
10 trades from late 2011[,] 2012 and they
11 told me – I asked them is there
12 anything improper with this and
13 they said, “There’s nothing improper
14 with it[.]”

15
16 [Arbitrator]: Just to be clear, FINRA took no
17 action?

18
19 Bret Ackerman: Correct.

20
21 App’x at 983.

22 The arbitration panel rejected the bulk of Ackerman’s claims. It found in
23 Ackerman’s favor only on his claim for unpaid wages, awarding him
24 \$1,102,193.00 of the roughly \$5 million he originally sought, and ordered that
25 negative information be expunged from his U-5 form. In addition, the arbitration

1 award provided that “[a]ttorneys’ fees are awarded pursuant to New York Labor
2 Law” in the amount of \$247,532, with an additional award of costs of \$21,349.25.
3 App’x at 47.

4 Odeon filed a petition to vacate the arbitration award in New York State
5 court in December 2015, which Ackerman thereafter removed to the U.S. District
6 Court for the Southern District of New York. Ackerman then filed a cross-motion
7 to confirm the award. While the petition to vacate was pending, Ackerman had
8 received a letter from FINRA requesting a second OTR regarding his 2011 trades
9 to be held at its offices in Maryland. The FINRA letter came roughly one month
10 after the arbitration ended. By then, Ackerman no longer worked as a trader and
11 had moved to California. Ackerman declined to travel to Maryland for a second
12 OTR, and instead accepted a ban from working as a securities trader. To that
13 end, he entered into a letter of acceptance, waiver, and consent (“AWC”) with
14 FINRA.

15 Odeon learned of the AWC in March 2016, and sought to amend its
16 petition to vacate to add fraud as an additional ground for vacatur. Odeon
17 argued that the second request for an OTR established that Ackerman committed
18 perjury during the arbitration. Specifically, Odeon argued that Ackerman

1 “misled the arbitration panel concerning the status and outcome of a FINRA
2 regulatory investigation into his trading activity” by falsely testifying that
3 “(i) FINRA affirmatively told him that there was ‘nothing improper’ about his
4 trading activity, and (ii) the FINRA investigation into his activities was closed.”
5 App’x at 1552. Ackerman opposed the motion, arguing his testimony before the
6 arbitration panel was truthful.

7 The district court denied Odeon’s motion to amend its petition, denied the
8 motion to vacate, and granted the cross-motion to confirm. *Odeon Capital Grp.,
9 LLC v. Ackerman*, 182 F. Supp. 3d 119, 128 (S.D.N.Y. 2016). The district court also
10 denied Ackerman’s motion for attorneys’ fees. *Id.*

11 Despite challenging the arbitration award on multiple grounds before the
12 district court, Odeon appeals only the district court’s denial of its motion to
13 amend to add fraud as an additional ground for vacatur. Ackerman cross-
14 appeals from the district court’s denial of his motion for attorneys’ fees.

15 DISCUSSION

16 I. Materiality as a ground for vacatur

17 “We review a district court’s denial of leave to amend for abuse of
18 discretion, unless the denial was based on an interpretation of law, such as

1 futility, in which case we review the legal conclusion *de novo*.” *Panther Partners*
2 *Inc. v. Ikanos Commc’ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012). “It goes without
3 saying that there should be great hesitation in upsetting an arbitration award.”
4 *Karppinen v. Karl Kiefer Mach. Co.*, 187 F.2d 32, 34 (2d Cir. 1951). However, the
5 Federal Arbitration Act (“FAA”) permits a court to vacate an arbitration award
6 “where the award was procured by corruption, fraud, or undue means.” 9 U.S.C.
7 § 10(a)(1).

8 A petitioner seeking to vacate an award on the ground of fraud must
9 adequately plead that (1) respondent engaged in fraudulent activity; (2) even
10 with the exercise of due diligence, petitioner could not have discovered the fraud
11 prior to the award issuing; and (3) the fraud materially related to an issue in the
12 arbitration. *See Karppinen*, 187 F.2d at 34-35. The district court here did not
13 address the first two factors, basing its denial on Odeon’s failure to demonstrate
14 that the fraud at issue—Ackerman’s alleged perjury—was material to the
15 arbitration award. *Odeon Capital Grp.*, 182 F. Supp. 3d at 128. As we did in
16 *Karppinen*, “[w]e will assume . . . that an arbitration award may be set aside in a
17 case of material perjured evidence furnished [to] the arbitrators by a prevailing
18 party.” 187 F.2d at 34.

1 Our review, then, necessarily focuses on the appropriate standard for
2 evaluating whether the alleged fraud was material to the arbitration. For fraud to
3 be material within the meaning of Section 10(a)(1) of the FAA, petitioner must
4 demonstrate a nexus between the alleged fraud and the decision made by the
5 arbitrators, although petitioner need not demonstrate that the arbitrators would
6 have reached a different result. *See, e.g., Karaha Bodas Co., v. Perusahaan*
7 *Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004)
8 (holding that the alleged fraud must be “materially related to” the basis for the
9 panel’s decision); *Int’l Bhd. of Teamsters, Local 519 v. United Parcel Serv., Inc.*, 335
10 F.3d 497, 503 (6th Cir. 2003) (same); *Forsythe Int’l, S.A. v. Gibbs Oil Co. of Texas*, 915
11 F.2d 1017, 1022 (9th Cir. 1990) (holding that to vacate for fraud, there must be “a
12 nexus between the alleged fraud and the basis for the panel’s decision”); *Bonar v.*
13 *Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988) (holding that the
14 alleged fraud must be “materially related to” the basis for the arbitral award); *see*
15 *also Hakala v. Deutsche Bank AG*, No. 01 Civ. 3366, 2004 WL 1057788, at *3
16 (S.D.N.Y. May 11, 2004) (noting that party seeking vacatur must “show that the
17 fraud was material to an issue in dispute during the arbitration”).

1 This standard is consistent with the guidance provided by *Karppinen*.
2 There, the parties arbitrated the issue of whether two buyers could rescind the
3 purchase of an industrial canning machine that allegedly did not work properly.
4 *Karppinen*, 187 F.2d at 33. Before the arbitrators, the sellers argued that the buyers
5 wanted to rescind, not because something was wrong with the canning machine,
6 but “because they wished to buy a cheaper machine of a lower productive
7 capacity.” *Id.* The buyers refuted that theory through testimony averring that the
8 buyers had already purchased another canning machine with greater capacity at
9 a higher price, and submitted a purchase order for the new machine to the
10 arbitrators. *Id.* The arbitrators granted the buyers’ request to rescind. *Id.* The
11 sellers then sought to vacate the award based on alleged perjury. Specifically, the
12 sellers argued the testimony regarding the purchase of the alternate canning
13 machine was untrue and the purchase order false. *Id.* at 34.

14 The panel in *Karppinen* upheld the district court’s decision to confirm the
15 arbitration award, explaining that:

16 the bearing of the price of the [replacement canning]
17 machine on the issues before the arbitrators is extremely
18 remote. . . . The price paid by the purchasers for some
19 other machine had no bearing on the real issues before
20 the arbitrators and cannot reasonably be thought to
21 have affected their decision in determining any relevant

1 questions before them. At most it could only bear on a
2 possible impeachment of [the affiant] as to collateral
3 matters, and he was subjected at the hearing below to
4 an elaborate and inconclusive examination by appellant
5 regarding the price of the [replacement canning]
6 machine.

7
8 *Id.* at 35. *Karppinen* thus anticipates that a showing of materiality requires some
9 nexus between the alleged perjury and the arbitration award.

10 Applying that standard here, we agree with the district court that Odeon
11 cannot demonstrate Ackerman's alleged perjury was material to the arbitration
12 award. While Ackerman brought a variety of claims against Odeon, the
13 arbitrators granted him relief only on his claim for unpaid wages. That claim
14 alleged that Odeon failed to pay him wages that were due and owing under the
15 terms of Ackerman's employment agreement. Neither party asked for a reasoned
16 decision from the arbitration panel. Accordingly, the award does not provide any
17 sort of rationale or explanation for how the panel arrived at its damages award of
18 \$1,102,193.00. There is simply no basis in the record to find that Ackerman's
19 testimony regarding the FINRA investigation played any role in the arbitrators'
20 award on his unpaid wages claim.

21 Nor are we persuaded by Odeon's argument that because Ackerman was
22 the primary witness on the wage claim, any perjury he committed during his

1 testimony taints the entirety of his testimony and undermines his credibility. A
2 holding that any untruth could serve as a basis for vacating the award regardless
3 of its materiality is wholly inconsistent with the language of the FAA, which
4 allows vacatur only where the award was “procured by . . . fraud.” 9 U.S.C.
5 § 10(a)(1) (emphasis added). If the alleged fraud went only to a collateral issue,
6 or to an issue that did not influence the arbitrators’ findings, then that fraud
7 cannot serve as a basis for vacating the award because the award was not
8 “procured by” fraud.

9 Odeon relies on *Bonar v. Dean Witter Reynolds, Inc.*, arguing that it stands
10 for the proposition that perjury can so injury a witness’s credibility as to taint the
11 entire proceedings and require the resulting arbitration award be vacated. *See*
12 835 F.2d at 1383. *Bonar* is distinguishable. There, the Eleventh Circuit vacated an
13 award based on fraud after determining that plaintiff’s expert witness lied about
14 his credentials, faking multiple degrees and employment positions. *Id.* at 1384. In
15 finding the perjury material, the Eleventh Circuit explained that the only issue
16 before the arbitrators was whether to award damages, as defendant had
17 conceded liability. *Id.* at 1384. The only evidence before the panel on the issue of
18 punitive damages was the testimony offered by the expert witness. *Id.* at 1384-85.

1 The Eleventh Circuit concluded that if the expert “had not committed perjury by
2 falsifying his credentials, it is extremely doubtful that he would have been
3 permitted to testify as an expert, and the arbitrators would have heard none of
4 the . . . testimony” regarding punitive damages. *Id.* at 1385. Without the expert’s
5 testimony, then, there would have been no evidence in the record to support any
6 award of punitive damages. “Thus, by establishing the foundation that allowed
7 the panel to hear influential expert testimony on the central issue of negligent
8 supervision, the fraud materially related to an issue in the arbitration.” *Id.* The
9 Eleventh Circuit found that the expert’s lies regarding his background
10 established his bona fides as an expert witness, and absent those credentials, he
11 would not have been able to testify as to punitive damages. Here, in contrast, the
12 record does not suggest Ackerman’s alleged perjury was so significant that it
13 would have caused the arbitrators to disregard his testimony in its entirety.

14 Equally unavailing is Odeon’s reliance on *MidAmerican Energy Company v.*
15 *International Brotherhood of Electrical Workers Local 499*, 345 F.3d 616 (8th Cir. 2003).
16 There, an employee charged with maintaining the security of a natural gas
17 storage facility was fired after he abandoned his post. *Id.* at 618. He challenged
18 his firing in an arbitration. During the arbitration, the employee testified that he

1 left his post after his wife called and told him his son was missing. *Id.* The
2 arbitrator ordered the employee be rehired, based in part on the arbitrator's
3 assessment that the employee took full responsibility for his actions, cooperated
4 with management's investigations, and "has consistently owned up to what he
5 did, indicating that he knew it to be wrong." *Id.* at 623. After the arbitration
6 award issued, the employer allegedly learned that the employee had actually left
7 that night to cheat on his wife. *Id.* at 619. The Eighth Circuit found that if the
8 employee did commit perjury, it was material to the arbitration because the
9 arbitrator's award stressed the employee's honesty and truthfulness. *Id.* at 623.
10 Here, however, nothing in the award indicates that the arbitrators relied heavily
11 on Ackerman's truthfulness in making its award. Indeed, given that Ackerman
12 sought damages in excess of five million dollars and received roughly one-fifth
13 of that amount, and that Ackerman prevailed on just one of his eleven claims, it
14 appears the arbitrators took most of what Ackerman said with a grain of salt.
15 Accordingly, we affirm the district court's finding that the alleged perjury was
16 immaterial to the arbitration award.

17

18

1 **II. Attorneys' fees**

2 We review the district court's denial of a request for attorneys' fees for
3 abuse of discretion. *Scarangella v. Grp. Health Inc.*, 731 F.3d 146, 151 (2d Cir. 2013).
4 "A court necessarily abuses its discretion when it applies an incorrect legal
5 standard." *Id.*

6 "Under the prevailing American rule, in a federal action, attorneys' fees
7 cannot be recovered by the successful party in the absence of statutory authority
8 for the award." *International Chemical Workers Union, Local No. 227 v. BASF*
9 *Wyandotte Corp.*, 774 F.2d 43, 47 (2d Cir. 1985). But, we noted, "[p]ursuant to its
10 inherent equitable powers . . . a court may award attorneys' fees when the
11 opposing counsel acts in bad faith, vexatiously, wantonly, or for oppressive
12 reasons." *Id.* (internal quotation marks omitted). The *International Chemical* court
13 denied fees because the statute at issue in the arbitration—the Labor
14 Management Relations Act—did not provide for a fees award to a prevailing
15 party in an action to vacate or confirm an arbitration award. The district court
16 relied on *International Chemical* for the proposition that "[a]s applied to suits for
17 the confirmation and enforcement of arbitration awards, the guiding principle
18 has been stated as follows: when a challenger refuses to abide by an arbitrator's

1 decision without justification, attorneys' fees and costs may properly be
2 awarded." (internal quotation marks omitted).

3 The district court misapprehended the basis for Ackerman's request.
4 Ackerman sought fees pursuant to the district court's statutory powers under
5 New York Labor Law, not its equitable powers. New York Labor Law § 198(1-a)
6 provides in relevant part that "[i]n any action instituted in the courts upon a
7 wage claim by an employee . . . in which the employee prevails, the court shall
8 allow such employee to recover . . . all reasonable attorneys' fees." The
9 arbitrators specified Ackerman's award was for "compensatory damages based
10 on unpaid wages" and attorneys' fees "pursuant to New York Labor Law."
11 App'x at 46-47.

12 Odeon argues that because Section 198(1-a) does not specifically state that
13 that fees are due in an action to confirm or enforce an arbitration award, it does
14 not mandate fees here. We disagree. New York's Civil Practice Law and Rules
15 define "action" to include a "special proceeding," N.Y.C.P.L.R. § 105(b).
16 Applications to confirm, vacate, or modify arbitration awards are made through
17 special proceedings. *Id.* §§ 7502(a), 7510, (confirmation), 7511 (vacating or
18 modifying). It necessarily follows that the term "action" as used in Section 198(1-

1 a) includes special proceedings to confirm or enforce an arbitration award. This
2 is consistent with the purposes underlying Section 198(1-a), which explicitly
3 serves as a fee-shifting statute to provide “one more safeguard to assure
4 employees of proper payment of wages under the law and [to act as] a deterrent
5 against abuse and violations.” *Gottlieb v. Kenneth D. Laub & Co.*, 82 N.Y.2d 457,
6 464 (1993) (emphasis omitted).

7 It is also consistent with how the courts have read similar language where
8 a statute provides for fee shifting. For example, the Employment Retirement
9 Security Act of 1974 (“ERISA”) provides that the prevailing party in an action to
10 recover unpaid contributions to a benefit fund is entitled to an award of
11 reasonable attorneys’ fees and costs. 29 U.S.C. § 1132(g)(2)(D). The district court
12 in *Supreme Oil Co. v. Abondolo* relied on that provision to award attorneys’ fees in
13 an action to confirm an arbitration award. 568 F. Supp. 2d 401, 409 (S.D.N.Y.
14 2008). The court noted that “[a]n action to confirm an arbitrator’s award of such
15 payments [under ERISA] is considered to be an action to recover unpaid
16 contributions,” allowing for an award of attorneys’ fees pursuant to Section
17 1132(g)(2)(D). *Id.* (collecting cases).

