SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: J. B. TOLUB Justice PART 15

Index Number : 108812/2009
TOCCO, PETER
VS.
WALTER J. DOWD, INC.
SEQUENCE NUMBER : 002
COUNSEL FEES, EXPENSES

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

h this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is consolidated with and decided in accordance with motion Seq. 001

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 11/20/09

J. B. TOLUB J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB PART 15

Justice

PETER TOCCO

INDEX NO. 108812/09

Petitioner,

-v-

MOTION DATE

WALTER J. DOWD, INC., MOTION SEQ. NO. 001

Respondent.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is consolidated with motion sequence 002 and decided in accordance with the accompanying memorandum decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 11/20/09

WALTER B. TOLUB, *J.S.C.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------x

PETER TOCCO,

Petitioner,

Index No.
108812/2009

-against-

WALTER J. DOWD, INC.,

Respondent.

----------x

Walter B. Tolub, J.:

Motion sequence 001 and 002 are hereby consolidated for disposition.

By motion sequence 001, Mr. Tocco petitions the court for an order confirming a Financial Industry Regulatory Authority (FINRA) arbitration award, dated June 9, 2009, and directing that judgment be entered thereon. Respondent, Walter J. Dowd, Inc. (Dowd), Tocco's former employer, cross-moves for an order vacating the award on the ground that the arbitrators manifestly disregarded the law. Tocco also moves (application 002) for an order pursuant to 22 NYCRR 130-1.1, imposing costs, attorneys' fees and sanctions against Dowd, on the ground that its cross motion to vacate the award is allegedly frivolous.

Background

Mr. Tocco, who was employed as a managing director and head of equity trading for a hedge fund, was approached by Dowd's consultant and was thereafter offered employment to expand Dowd's

rudimentary upstairs trading (NASDAQ) operation. He began working for Dowd on March 12, 2007, and was subsequently terminated on February 14, 2008. A March 12, 2008 U-5 form, essentially a securities industry uniform termination notice, which Dowd was required to file with FINRA within 30 days of Mr. Tocco's termination, recited that Mr. Tocco was terminated for "FAILURE TO MEET FIRM'S PRODUCTION REQUIREMENT." (Brecher reply aff., ex. K).

Mr. Tocco's counsel then filed a statement of claim, dated June 4, 2008, with the director of FINRA's director of arbitration to assert claims against Dowd, pursuant to FINRA's arbitration procedure. In that statement, Mr. Tocco's counsel asserted that Mr. Tocco had a written two-year employment contract with Dowd, which commenced on March 12, 2007 and concluded on December 31, 2008, which contract provided for a monthly salary of $30,000, a first-year fixed bonus of $235,000, and a second-year fixed bonus of $420,000.[1] Mr. Tocco's statement alleged that, between September 2007 and January 2008, Dowd failed to pay him his salary and fixed bonuses in accordance with the contract, that when he sought the amounts due him, Dowd tried to pressure him to restructure his contract, and that, when

[1] The alleged contract, which was appended to the statement, also provided for an additional bonus of $235,000 for the first year and $420,000 for the second year if certain gross revenues were generated.

he refused, Dowd fired him, without cause, in breach of the contract. The statement further alleged that, although Mr. Tocco performed services for Dowd, it shortchanged him. Mr. Tocco claimed that Dowd violated New York's Labor Law by failing to pay him his earned salary and bonus. As a result, Mr. Tocco sought an award from the arbitrators directing respondent to pay him, among other things, $1,030,000, the amount of the outstanding salary and fixed bonuses, which was allegedly due over the course of the two-year contract.

Dowd then filed an answer and counterclaim. As is pertinent, the answer asserted that, since the contract, which was for a two-year period, and thus was not by its terms to be performed within a year of its making, was never signed by it, the contract was barred by the statute of frauds under General Obligations Law § 5-701. Dowd therefore maintained that Mr. Tocco was simply an at-will employee, who could be terminated at any time. Dowd asserted that Mr. Tocco was hired based on his representations and projections about earnings and about clients he could bring to Dowd. Dowd further claimed that, based on these representations, it invested significant funds to develop the upstairs trading operation. When it allegedly became clear to Dowd in February 2008, that nothing close to the projections could be met, and that Dowd was in a precarious financial situation, it terminated Mr. Tocco. Dowd asserted a counterclaim

against Mr. Tocco, based on his alleged deceit and misrepresentations regarding his business contacts and relationships and his ability to generate upstairs trading operation revenues.

In September 2008, Mr. Tocco supplemented his statement of claim by indicating that he had been offered employment, which he accepted, to start on October 6, 2008 with another firm, Loop Capital LLC (Loop) (an entity located in Illinois) at a base salary of $175,000 with a minimum guaranteed bonus of $150,000 in March 2010. However, when that entity conducted a background check and viewed the filed U-5 form, it rescinded the offer based on the reason for termination set forth in that form. Loop advised Mr. Tocco that, if he prevailed in the arbitration and had his U-5 expunged, it would consider extending employment to him. Based on these allegations, Mr. Tocco sought, among other things, to have the U-5 expunged and to be awarded compensatory damages based on Dowd's alleged defamation of his character. Mr. Tocco's amended statement recited that he had been told on the date of his termination that no negative comment would be placed in the U-5, and that the U-5 was false and known to be false, because he did not have a production requirement.

In response, Dowd asserted that the U-5 accurately reflected the grounds for Mr. Tocco's termination. Additionally, Dowd maintained that, in New York, broker-dealers have absolute

immunity in defamation cases regarding the content of U-5 filings.

The arbitration hearing was held over five days in June 2009 before three arbitrators. As is relevant, Mr. Tocco testified that at the end of February 2007, before his employment started, there were discussions that included at least him, Dowd's CEO, Gordon Charlop (Charlop), and Dowd's compliance officer, Brett Logan, who was also an attorney. Mr. Tocco did not want to start at Dowd until April because he had a scheduled family vacation in March, but, since Dowd wanted to get the ball rolling, he agreed to start earlier. 6/8/09 hearing transcript (T), at 46-47. Mr. Tocco expressed his interest to Mr. Charlop that he wanted a contract and that it should have both fixed and variable bonus components. Mr. Charlop did not believe that an agreement was necessary before Mr. Tocco started his employment at Dowd, but that it was something Mr. Tocco desired, so that everyone would be clear about expectations (6/3/09 Tr, at 186). According to Mr. Tocco, the fixed bonus component was allegedly to account for the work he did in creating and building up the upstairs operation (6/1/09 Tr, at 87-88). So, that was "how we came up with the ... $235,000 figure." (*Id.* at 91-92). Mr. Charlop allegedly suggested that Mr. Tocco's salary would be $30,000 per month and that he would get the bonus of $235,000. (*Id.* at 93). Mr. Tocco testified that the financial arrangements were worked

out at a February 28 meeting, and that there was a meeting of the minds on that subject (6/8/09 T, at 47-49). Mr. Logan then sent Mr. Tocco an e-mail on March 5, 2007, which attached a proposed contract, containing the salary and bonuses as previously discussed. Mr. Logan conceded at the hearing that the figures contained in the proposed contract were those which were discussed at a February meeting, but asserted that those were not agreed to, but were only what Mr. Tocco desired (6/5/09 T, at 56-62). According to Dowd's witnesses, the only thing to which Dowd agreed was that Mr. Tocco would get $30,000 a month. Mr. Logan claimed that after Mr. Tocco was satisfied with the terms of the proposed contract, he was then to have Mr. Charlop go over them and put in any terms he wanted. Notwithstanding this assertion, the Monday, March 5 e-mail from Logan to Mr. Tocco recited, "Please find attached the employment agreement for your review. I will have two copies on letterhead for you and Gordon to sign on Thursday when you come in." (*Id.* at 90; Brecher reply aff., ex. E).

Upon receipt of the March 5 e-mail, which was appended to the proposed contract, Mr. Tocco had it reviewed by his attorney and made some proposed minor changes, none of which altered the salary/bonus terms. Mr. Logan incorporated some of the suggested changes, but according to Mr. Tocco, not all of them, and gave him an amended version, dated April 30, 2007, on Dowd letterhead.

The agreement, which was in letter format, recited that the letter constituted an offer of employment, which, when executed by Mr. Tocco, constituted a binding employment agreement. (*Id.*, ex. D). Both the April agreement and the March draft provided that Dowd could terminate Mr. Tocco for cause, which termination might result in the forfeiture of any remaining bonus or salary owing. The agreement defined cause as fraud and theft from Dowd, material violations of NASD, NYSE or SEC rules or state and federal law, material violations of Dowd's supervisory procedures manual, willful violations of the agreement, willful disregard or neglect of Mr. Tocco's duties under the agreement, and willful and demonstrated unwillingness to perform his duties as head of the upstairs trading operation. The agreement set forth the salary and the guaranteed and earned bonuses through the end of 2008, and stated that the terms for the third year would be based on good faith negotiations.

Mr. Tocco asserted that he had the April agreement reviewed, signed it and gave it back to Logan in early June 2007. Mr. Tocco testified that Logan told him that he would make sure that Charlop got it and would have a copy put in Mr. Tocco's file (6/1/09 T, at 107-108). Mr. Tocco thought that the contract was a fait accompli (6/8/09 T, at 43-44). He further testified that no one ever came to him and said that there was a problem with the contract, or that it had to be discussed with Mr. Charlop

(*Id.* at 44). Mr. Logan and Mr. Charlop concede that they never told Mr. Tocco that the contract had not been executed by Mr. Charlop, nor did Mr. Logan tell Mr. Tocco that Charlop had any problem with the contract. Indeed, while Logan testified that Charlop told him that he was not happy with either the March or April versions, he did not specify what troubled him.

Meanwhile, Mr. Tocco continued to develop the upstairs operation, including seeing to it that it had the necessary equipment and operating systems, and that it was appropriately staffed. The upstairs trading floor was not operational until August 2007 and was not fully staffed until some time in the fall of 2007, owing in part to a restrictive covenant issue that one prospective staff member had to resolve with another employer. It cost about $600,000 to set up the upstairs operation, and during 2007, it made very little money. It had to be funded from Dowd's downstairs operation, which, due to declining market conditions, was not doing as well as usual.

Beginning in September 2007, Dowd failed to pay all of Mr. Tocco's monthly $30,000 salary. Mr. Tocco testified that he had agreed to work with Dowd and defer some of his compensation, until its financial picture improved, but Mr. Tocco was beginning to have doubts about Dowd's ability to pay him. He began to secretly tape meetings and conversations. In one such conversation, on October 29, 2007, Michael Berger, a shareholder

and Dowd partner, informed Mr. Tocco that the company had experienced some good months and some bad months and that, as the firm looked toward the end of the year, "the terms of a contract that -- or an agreement that we had written up before, its getting clear that some of those terms are prohibitive ... No one is trying to walk away from anything ... No one is trying to renege on anything." (Brecher reply aff., ex. H, at 5-6). Mr. Berger, when confronted by that statement, testified that he was not aware that Mr. Tocco had signed an agreement, but that he "was aware that there was an agreement though, that there was something on paper." (6/5/09 T, at 208-209).

Mr. Tocco testified that, thereafter, he had some e-mail correspondence with Mr. Charlop on November 12, 2007, in which he asked Mr. Charlop to bring a copy of his employment contract to a meeting to be held that day, so that they could discuss, among other things, the bonus provisions (*Id.*, ex. I). Mr. Charlop then responded that he would have Berger and another individual bring copies of the draft that Mr. Tocco had been working on with Mr. Logan. Mr. Tocco then responded "Draft? I am referring to the contract I signed and gave to Brett. He said he would file it ... " (*Id*). According to Mr. Tocco's testimony, this was the first time that he was aware that respondent was claiming that there was no contract.

Thereafter, Mr. Berger attempted to have Mr. Tocco sign a

letter agreement, dated December 26, 2007, in which he agreed that, after December 31, 2007, instead of getting $30,000 a month, Mr. Tocco would be getting $10,000, and that any further compensation would be based on Mr. Tocco meeting commission goals. Mr. Tocco ultimately declined to sign that agreement, and was terminated on February 14, 2008 by Berger, who at the hearing acknowledged that he had informed Mr. Tocco that the U-5 would not contain anything deleterious. (6/5/09 T, at 203). In addition to his own testimony, Mr. Tocco had a Loop partner testify, via telephone, as to the facts underlying Mr. Tocco's defamation claim, including that Mr. Tocco had been verbally offered a salary of about $175,000, assuming everything checked out, and that he was likely told that bonuses were "a minimum of probably [$]50,000." (6/2/09 Tr, at 153-155).

At the hearing, Dowd's counsel, relying on GOL § 5-701, urged that there was no valid written contract, because the April 2007 agreement could not by its terms be completed within a year and because the agreement was never signed by the party to be charged, Dowd. Dowd's counsel also asserted that any taped conversation could not obviate the statute of frauds problem, because it did not constitute a signed writing. Dowd's counsel further asserted that, because the alleged agreement violated the statute of frauds, a Labor Law violation could not be predicated on that agreement's terms. Dowd also urged that, under the

relevant New York case law, statements contained in a U-5 form were absolutely privileged and could not form the basis of a defamation claim.

In response, Mr. Tocco's counsel argued before the arbitrators that the statute of frauds was inapplicable because the agreement was not for a particular period of time, and because both Mr. Tocco and Dowd had the power to terminate the employment contract before the end of a year, and, therefore, it could be performed within a year. Mr. Tocco's counsel further urged that Mr. Berger's admission on tape, that there was a contract, took the agreement out of the statute of frauds. Mr. Tocco's counsel also asserted, in essence, that even if the statute of frauds applied, Dowd should be equitably estopped from relying on it because Mr. Tocco performed services in reliance on what he believed to have been a valid agreement, whose existence, until November 2007, was never disputed by Dowd's agents, who misled him into believing that there was a valid agreement. (6/8/09 Tr, at 88). Additionally, Mr. Tocco's counsel urged that Illinois law, which holds that statements contained in U-5 are not absolutely privileged but, rather, are only subject to a qualified privilege (*Baravati v Josephthal, Lyon & Ross, Inc.*, 28 F3d 704 [7th Cir 1994]), applies, because the job with Loop was in Illinois, a place where he was allegedly defamed. Mr. Tocco's counsel further maintained that, even if the defamation claim was

not legally sustainable, Dowd's statement on the U-5 form should be expunged.

On June 9, 2009, the day after the hearing concluded, the three arbitrators rendered their unanimous award in favor of Mr. Tocco. In their Case Summary, the arbitrators stated that Mr. Tocco had asserted causes of action for "breach of contract, wrongful termination, failure to pay earned compensation, and violation of New York Labor Law (Petition to Confirm, Ex. A). Notably absent was that Mr. Tocco had asserted a defamation cause of action. The award noted that Mr. Tocco had sought compensatory damages of $1,030,000, liquidated damages of $257,000, interest, costs, punitive damages, forum fees and expungement of the U-5 form.

Under the Award section, the arbitration panel awarded Mr. Tocco $185,000 in compensatory damages, plus interest at the rate of five percent from February 14, 2008, the date Mr. Tocco was fired, until payment of the award. In addition, the panel recommended expungement of the offending language in the U-5 form and replacement with "Discharged without cause," upon confirmation of the award by a court of competent jurisdiction. (*Id.*). The panel also found that Dowd was liable to Mr. Tocco for $600, to reimburse him for the non-refundable part of the filing fee he had paid to FINRA Dispute Resolution. The award denied Dowd's counterclaim, and any relief not specifically

addressed in the award.

The Instant Applications

Mr. Tocco now seeks confirmation of the award. Dowd cross-moves for an order vacating the award on the ground that the arbitrators manifestly disregarded the law. Specifically, Dowd claims that "it is apparent that the Award was based" on Mr. Tocco's defamation claim, since the amount of the award did not match the $1,030,000, which Mr. Tocco requested under the contract and unpaid wages claims, and was closer to the amount requested under the defamation claim, and because the panel ordered expungement, thereby allegedly demonstrating that the arbitrators believed that the U-5 contained defamatory material. (Dowd memo of law, at 7; Dowd reply memo of law, at 2). Dowd claims that such award demonstrated the arbitrators' manifest disregard of the law because they were specifically advised at the hearing that under settled New York law, the contents of a U-5 are absolutely privileged and cannot serve as the basis for a defamation claim. Dowd further notes that, even if the award was based on the breach of contract or unpaid wages claim, the arbitrators were specifically informed that such claims could not be upheld because the contract was not signed as required under GOL § 5-701, and because Berger's taped admission could not take the place of a signed writing, yet the arbitrators allegedly chose to ignore that law when rendering their award.

In response, Mr. Tocco's counsel questions the viability of the manifest disregard of the law doctrine as a basis for setting aside an arbitration award governed by the Federal Arbitration Act (FAA), which both parties agree governs, but maintains that, in any event, the award was not rendered in manifest disregard of the law. Mr. Tocco claims that the April 2007 agreement was not barred by the statute of frauds because the agreement was terminable at will by him, and for cause by Dowd, and because of equitable grounds, in that he was wrongfully induced to act to his detriment in performing services due to respondent's misleading and equivocal actions. Mr. Tocco's counsel further asserts that, if the award was based on the defamation claim, the panel was entitled to find, under choice of law principles, that Illinois law governed, thus demonstrating at least a barely colorable basis for the award. Mr. Tocco's counsel disputes Dowd's claim that the panel's award was necessarily based on the defamation claim, noting that the panel could simply have awarded Mr. Tocco a pro rata portion of his 2007 compensation.

Mr. Tocco also moves for sanctions and attorneys' fees under 22 NYCRR 130-1.1, claiming that Dowd's cross motion was wholly frivolous. Dowd, in response, asserts that its cross motion is meritorious, particularly since the arbitrators did not explain the basis for their award and since Dowd, at the hearing, clearly raised the legal issues regarding the absence of a signed

agreement and the absolute privilege afforded U-5 statements.

Discussion

Following a review of the papers and the applicable law, the petition to confirm the arbitrators' award is granted, the cross motion to set aside the award is denied, and the motion for sanctions and attorneys' fees is denied.

Both sides concede that this matter is governed by the FAA. Arbitration awards under the FAA are entitled to a great deal of deference and are subject to review that is quite limited. (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 475 [2006]; *Sawtelle v Waddell & Reed, Inc.*, 304 AD2d 103, 108 [1st Dept 2003]). The showing needed to avoid confirmation of the award is "high," and the party seeking to vacate the award bears the burden of proof. (*Willemijn Houdstermaatschappij, BV v Standard Microsystems Corp.*, 103 F3d 9, 12 [2d Cir 1997]; *Sawtelle v Waddell & Reed, Inc.*, 304 AD2d at 108). "[C]ourts should not assume the role of overseers to mold the award to conform to their sense of justice." (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d at 480).

Under the FAA (9 USC § 10[a]), an arbitration award may be vacated:

> 1) where the award was procured by corruption, fraud, or undue means;
>
> 2) where there was evident partiality or corruption in the arbitrators, or either of them;

> 3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> 4) 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.

In addition to these four grounds, many courts have held that an arbitration award may also be vacated if it was based on a manifest disregard of law. (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d at 471; *Morgan Stanley DW, Inc. v Afridi*, 13 AD3d 248 [1st Dept 2004]; *Sawtelle v Waddell & Reed, Inc.*, 304 AD2d at 103; *Sanhi v Prudential Equity Group, Inc.*, 14 Misc 3d 1235(A), 2007 NY Slip Op 50307(U) [Sup Ct, NY County 2007]; *Duferco International Steel Trading v T. Klaveness Shipping A/S*, 333 F3d 383 [2d Cir 2003]). Manifest disregard of the law is a doctrine which is one of last resort, and is limited to rare instances of egregious wrongdoing on the arbitrators' part. (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d at 480-481). It affords the arbitrators a high level of deference. (*Id.* at 481). The doctrine requires more than errors of law or fact. (*Id.* at 479; *Dortheimer v Safir*, 49 AD3d 338 1st Dept 2008]; *Matter of DeRaffele Manufacturing Co., Inc. v Kaloakas Management Corp.*, 48 AD3d 807, 809 [2d Dept 2008]; *Wallace v Buttar*, 378 F3d 182, 190 [2d Cir 2004]).

To warrant vacatur under the doctrine of manifest disregard of the law, the court is required to find "both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d at 481 [internal quotation marks and citations omitted]). "[A] court may infer that the arbitrators manifestly disregarded the law if it finds that the error made by the arbitrators is so obvious that it would be instantly perceived by the average person qualified to serve as an arbitrator." (*Willemijn Houdstermaatschappij, BV v Standard Microsystems Corp.*, 103 F3d at 13; *Sawtelle v Waddell & Reed, Inc.*, 304 AD2d at 108). In this regard, it must be remembered that there is no requirement that an arbitrator be an attorney. (*Wallace v Buttar*, 378 F3d at 190).

The arbitrators are not required to explain their award. (*Bear, Stearns & Co., Inc. v 1109580 Ontario, Inc.*, 409 F3d 87, 91 [2d Cir 2005; *Willemijn Houdstermaatschappij, BV v Standard Microsystems Corp.*, 103 F3d at 12). When they fail to provide an explanation, the award must still be confirmed if a ground for the award "can be inferred from the facts of the case," even if the ground is due to an error of fact or law. (*Willemijn*, 103 F3d at 13; *Bear, Stearns & Co., Inc. v 1109580 Ontario, Inc.*, 409

F3d at 91; *Wallace v Buttar*, 378 F3d at 193). Of course, if a court were inclined to find that the arbitrators manifestly disregarded the law, it could take the absence of an explanation into account. (*Matter of Spear, Leeds & Kellogg v Bullseye Securities, Inc.*, 291 AD2d 255 [1st Dept 2002]). The arbitrators' award is required to be confirmed if there is any basis for it or if there is only a "*barely colorable justification* for the outcome reached." (*Wallace v Buttar*, 378 F3d at 190 [internal quotation marks and citations omitted] [*emphasis in original*]; *Bear, Stearns*, 409 F3d at 91; *Sawtelle v Waddell & Reed, Inc.*, 304 AD2d at 108).

While the United States Supreme Court recently held, in *Hall Street Associates, L.L.C. v Mattel, Inc.* [552 US 576 [2008], that the statutory grounds set forth in the FAA for vacating or modifying an arbitration award are exclusive, thereby causing Mr. Tocco's counsel to question the continuing viability of the manifest disregard of law doctrine, that Court did not rule out the possibility that the doctrine was simply "shorthand" for 9 USC § 10 grounds. Since then, courts have continued to rely on that doctrine. (*See Stolt-Nielsen SA v AnimalFeeds International Corp.*, 548 F3d 85 [2d Cir 2008]; *Chase Bank USA, N.A. v Hale*, 19 Misc 3d 975 [Sup Ct, NY County 2008]). Moreover, the Appellate Division, First Department, recently reaffirmed the doctrine's viability in securities arbitration. (*See McLaughlin, Piven,*

Vogel Securities, Inc. v Ferrucci, _AD3d_, 2009 NY Slip Op 07926 [1st Dept 2009]). Accordingly, the doctrine still governs.

Nonetheless, after reviewing the facts of this case, Dowd has failed to meet its burden of establishing that the arbitrators' award was made in manifest disregard of the law, and I find that there is at least a colorable basis for the award. It is readily apparent that the arbitrators' award of compensatory damages was not based on a claim of defamation, as was urged by Dowd. That the award did not mirror the $1,030,000 requested under the breach of contract and failure to pay wages/bonuses claims is not determinative, especially since the award did not mirror the amount that Mr. Tocco sought for lost salary and bonus, as a result of the alleged defamation. Nor is the fact that the arbitrators recommended expungement controlling, since that is precisely the relief they are permitted to grant. (*Rosenberg v MetLife, Inc.*, 8 NY3d 359, 368 2007] [an arbitration proceeding may be commenced to have any allegedly defamatory language expunged from a U-5 form, notwithstanding that such language cannot sustain a defamation claim]). Moreover, as previously noted, the award did not even list defamation as one of Mr. Tocco's causes of action. If that was the basis for their award of compensatory damages, surely the panel would have listed defamation as one of Mr. Tocco's causes of action. In addition, the arbitrators' award of interest ran

not from when it should have run if the award of compensatory damages was based on the alleged defamation stemming from the March 12, 2008 U-5 form, but rather, from February 14, 2008, the date that Mr. Tocco's employment was terminated. As such, there is no reason to infer that the arbitrators ignored the New York law (*Bear, Stearns & Co., Inc. v 1109580 Ontario, Inc.*, 409 F3d at 91) in holding that employers' statements in U-5 forms are absolutely privileged and cannot sustain a defamation action. (*Rosenberg v MetLife, Inc.*, 8 NY3d at 368; *Barclays Capital Inc. v Shen*, 20 Misc 3d 319 [Sup Ct, NY County 2008] [due to its compulsory nature and its role in protecting the interests of the public through the NASD's regulatory process, employers' statements in U-5 forms are absolutely privileged in a defamation suit]).

Similarly, has failed to otherwise meet its burden of establishing that the arbitrators' award of compensatory damages was made in manifest disregard of the law because Dowd did not sign the April 2007 agreement. GOL § 5-701 provides in relevant part that:

> a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> 1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime[.]

Implicit in Mr. Tocco's claim, under the agreement, for compensatory damages for lost wages and bonuses limited to a two-year period, is that the employment contract was for a two-year term, as was explicitly stated in his statement of claim filed with the arbitrators. (*See also* 6/1/09 T, at 24 [in which Mr. Tocco's counsel asserted that the March 5 version of the agreement was a "two-year employment agreement"]). Alternatively, since he was also seeking damages for the time after his termination, i.e., his $30,000 salary and $420,000 fixed bonus, he seems to have urged that he was impermissibly discharged without cause. (*Id.* at 29-30). Either scenario would be covered by the statute of frauds. (*Marks v Nassau County Association for Help of Retarded Children, Inc.*, 135 AD2d 512 [2d Dept 1987] [where plaintiff urged that her oral employment contract was for a five-year term, it was barred by the statute of frauds, nor did the oral provision that plaintiff could only be terminated for flagrant neglect of her duties avail her, since that provision contemplated a termination of plaintiff within one year, only in the event that plaintiff breached the agreement, which did not take the contract out of the statute of frauds]; *see also Weisse v Engelhard Minerals & Chemicals Corp.*, 571 F2d 117 [2d Cir 1978]).

While, as correctly urged by Dowd, the tape did not constitute a signed memorandum under GOL § 5-701 (*Sonders v*

Roosevelt, 64 NY2d 869 [1985]), and part performance is inapplicable (*Stephen Pevner, Inc. v Ensler*, 309 AD2d 722 [1st Dept 2003]), because the usual impact of the statute of frauds can be overridden by equitable considerations, it cannot be said that this is one of those rare instances where the arbitrators egregiously and knowingly flouted the law. The arbitrators did not award Mr. Tocco the $1,030,000 he sought, and thus, presumably awarded him nothing for the time after he was discharged. It seems that the panel only awarded him compensatory damages for the time he worked at Dowd. It is entirely possible that, notwithstanding the statute of frauds, the panel awarded Mr. Tocco compensatory damages on equitable grounds for the services he rendered before Dowd terminated him.

As previously noted, Mr. Tocco's counsel urged the arbitrators at the hearing to grant him equitable relief if necessary. No one disputed at the hearing that Mr. Tocco was entitled to $30,000 a month. Regarding the fixed $235,000 bonus, the arbitrators could have credited Mr. Tocco's testimony, that before he commenced working for Dowd, it had been agreed by Charlop that Mr. Tocco would get that bonus for his setting up, staffing and developing the upstairs operation, and that such agreement induced Mr. Tocco to work for Dowd. In addition, the arbitrators could have found that Mr. Tocco, who continued to work in setting up and staffing the upstairs operation, was so