COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-486

CREDIT SUISSE SECURITIES (USA) LLC

vs.

JONATHAN J. GALLI & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Credit Suisse Securities (USA) LLC (employer), appeals from a judgment of the Superior Court affirming, and denying a petition to vacate or modify, an arbitration award issued by a panel of the Financial Industry Regulatory Authority (panel). The parties dispute whether the panel had the authority to award attorney's fees to the defendants, Jonathan J. Galli, Paul T. Connolly, Christopher L. Herlihy, and Alexander V. Martinelli (collectively, employees).[2] We conclude that the authority of the arbitrators did not include an award of attorney's fees except upon a finding of a violation of the Massachusetts Wage Act, G. L. c. 149, § 150

[1] Paul T. Connolly, Christopher L. Herlihy, and Alexander V. Martinelli.

[2] The employer does not challenge any other portion of the arbitration award.

(wage act). The panel explicitly based the award of attorney's fees on other grounds, which were outside its authority. The award of attorney's fees, however, could be supported by a violation of the wage act, and the panel's decision is silent concerning this ground. Accordingly, we remand the matter for further proceedings.

1. Judicial review of arbitration award. "[A]n arbitration award is subject to a narrow scope of review." Springfield v. United Pub. Serv. Employees Union, 89 Mass. App. Ct. 255, 257 (2016), quoting Lynn v. Lynn Police Ass'n, 455 Mass. 590, 596 (2010). See American Fed'n of State, County, and Mun. Employees, Council 93, AFL-CIO v. School Dep't of Burlington, 462 Mass. 1009, 1010 (2012). Under G. L. c. 251, §§ 12-13, a court may vacate, modify, or correct an arbitration award in limited circumstances. See Katz, Nannis & Solomon, P.C. v. Levine, 473 Mass. 784, 793 (2016) (Katz), quoting G. L. c. 251, § 11. One of those limited circumstances, "whether an arbitrator acted in excess of his authority[,] is always open for judicial review." Northern Assur. Co. of Am. v. Payzant, 80 Mass. App. Ct. 223, 226 (2011), quoting Boston Hous. Auth. v. National Conference of Firemen & Oilers, Local 3, 458 Mass. 155, 161 (2010). See Beacon Towers Condominium Trust v. Alex, 473 Mass. 472, 475 (2016), quoting Superadio Ltd. Partnership v. Winstar Radio Prods., LLC, 446 Mass. 330, 334 (2006). "An

arbitrator exceeds his or her authority by granting relief that is beyond the scope of the arbitration agreement, beyond that to which the parties bound themselves, or prohibited by law." Katz, supra at 795. Under G. L. c. 251, § 13, the court may modify or correct an arbitration award if "the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted." See Katz, supra at 790 n.9.

2. Arbitration award of attorney's fees. a. Overview. "[A]ttorneys' fees are unavailable in arbitration save under limited circumstances." Matza v. Oshman, Helfenstein & Matza, 823 N.Y.S.2d 47, 48-49 (N.Y. App. Div. 2006). See Beacon Towers Condominium Trust, 473 Mass. at 475 (G. L. c. 251, § 10, prohibits attorney's fees "unless the parties have entered into an agreement authorizing the award of such fees" or "a party prevails on a statutory claim in which the statute mandates the recovery of attorney's fees by the prevailing party"). Contrast Central Ceilings, Inc. v. Suffolk Constr. Co., 93 Mass. App. Ct. 207, 214 (2018) (arbitrator did not exceed his authority in calculating pre-award interest below statutory rate because "arbitrators are authorized to grant pre-award interest" and "have substantial discretion" in fashioning remedies). Under New York law, by which the parties agreed to be bound, an arbitrator may award attorney's fees if (1) "it was authorized

by an express provision in the agreement," (2) "it is 'unmistakably clear' that both parties intended such an award," or (3) "a statute provides for such an award." Steyn v. CRTV, LLC, 103 N.Y.S.3d 415, 420 (N.Y. App. Div. 2019).

b. Contract. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." Monarch Consulting, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, 26 N.Y.3d 659, 674 (2016), quoting AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 648 (1986). "When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." Monarch Consulting, Inc., supra at 675, quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

Here, the underlying contract (the employer's "Employment Dispute Resolution Program" manual) states, "The law applied by a mediator or arbitrator(s) will be the laws of the State of New York." The contract further provides that arbitrators must adhere to the applicable law concerning attorney's fees and other remedies, and that the arbitrators "will have no authority either to abridge or to enlarge substantive rights available under existing law." In their submission agreement, the parties submitted the instant matter, including the "statement of claim,

answers, and all related cross claims, counterclaims and/or third-party claims which may be asserted, to arbitration." They did not, however, submit the issue of attorney's fees to arbitration. Accordingly, the panel's award cannot be justified by the language in the contract or the submission agreement. Cf. Katz, 473 Mass. at 797 (motion judge did not err in awarding attorney's fees where "agreement provided that 'the cost of enforcing any judgment entered by the arbitrator [including reasonable attorney's fees] shall be borne by the party against whom such award was made'").

c. Unmistakably clear agreement to arbitrate.

i. Arbitration of arbitrability. "[T]he general presumption is that the issue of arbitrability should be resolved by the courts." Alliance Bernstein Inv. Research & Mgt., Inc. v. Schaffran, 445 F.3d 121, 125 (2d Cir. 2006) (Alliance Bernstein). Parties may, however, "agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." Revis v. Schwartz, 140 N.Y.S.3d 68, 74-75 (N.Y. App. Div. 2020), quoting Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68-69 (2010). To do so, the parties must "'clearly and unmistakably' agree[] to arbitrate arbitrability." Monarch Consulting, Inc., 26 N.Y.3d at 676, quoting AT&T Techs., Inc., 475 U.S. at 649. Accord Boursiquot v. United Healthcare

Servs. of Delaware, Inc., 98 Mass. App. Ct. 624, 627 (2020). "[A]bsent an express agreement" to this effect, questions of arbitrability are for judicial determination. John Hancock Life Ins. Co. v. Wilson, 254 F.3d 48, 57 (2d Cir. 2001).

In their opposition to the employer's motion to vacate, the employees argued that the panel "had exclusive authority under the [Financial Industry Regulatory Authority (FINRA)] Rules both to determine 'any dispute, claim or controversy' between [the employees] and Credit Suisse and to interpret the scope of its own authority." The employees cited FINRA rules 13200 and 13413 for support. At the motion hearing, the employees restated this argument, citing FINRA rule 13200. The employees then reiterated this argument in their sur-reply, citing these two rules and FINRA rule IM-13000.

On appeal, the employees argue in passing that the parties submitted the question of arbitrability to the panel by agreeing to be bound by the FINRA rules, and thus we must defer to the panel's determination that the parties agreed to submit the award of attorney's fees to the panel, even if plainly erroneous. Relying on an unpublished case, the employees claim that the FINRA rules establish a clear and unmistakable

agreement to arbitrate arbitrability. The employees do not point to a specific rule for support.[3]

We are not aware of any New York or Second Circuit case stating that incorporation of the FINRA rules provides clear and unmistakable intent to arbitrate questions of arbitrability. Moreover, the FINRA rules that the employees cited in the Superior Court do not support this claim. FINRA rule 13200(a) states, "Except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among: Members; Members and Associated Persons; or Associated Persons."[4] FINRA rule IM-13000(a) states that a violation of this rule is "inconsistent with just and equitable principles of trade." FINRA rule 13413 states, "The panel has the authority to interpret and determine the applicability of all provisions under the Code. Such interpretations are final

[3] Although the employees raise this issue, the FINRA rules are not in the record appendix before us, nor does the record appendix provide any indication that the rules were given to the Superior Court judge. The Superior Court judge did not rely on these rules or defer to the panel on this point. We assume, without deciding, that we may take judicial notice of the FINRA rules. See Kreger v. McCance, 537 F. Supp. 3d 234, 239 n.3 (D. Conn. 2021); Royal Alliance Assocs., Inc. v. Liebhaber, 2 Cal. App. 5th 1092, 1097 (2016). Accord Robbins v. B&B Lines, Inc., 830 F.2d 648, 651 n.6 (7th Cir. 1987) (taking judicial notice of American Arbitration Association rules).

[4] The FINRA rules are available at https://www.finra.org/rules-guidance/rulebooks/finra-rules.

and binding upon the parties." These provisions do not suggest, let alone clearly and unmistakably show, that questions of arbitrability are for the arbitrator, rather than the court, to decide.

This conclusion is unaltered by New York case law stating that incorporation of the American Arbitration Association (AAA) rules into an arbitration agreement may clearly and unmistakably evidence an intent to arbitrate arbitrability. See, e.g., Revis, 140 N.Y.S.3d at 79. But see Kettle Black of MA, LLC v. Commonwealth Pain Mgt. Connection, LLC, 101 Mass. App. Ct. 109, 117, 118 (2022) (incorporation of AAA rule giving "[t]he arbitrator . . . the power to rule on . . . the arbitrability of any claim or counterclaim" does not "evince a clear and unmistakable intent to submit . . . arbitrability . . . to an arbitrator"). The AAA rules differ markedly from the FINRA rules. Of note, AAA rules 7(a) and (c) state that the arbitrator "shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement," and "shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties" (emphasis added). American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures (2013). See Revis, supra at 77-78. "[U]nlike the AAA rules," the FINRA rules "do[] not clearly and

unmistakably provide for all issues of arbitrability to be arbitrated." Alliance Bernstein, 445 F.3d at 126 (interpreting predecessor National Association of Securities Dealers code).

Accordingly, we conclude that the parties did not agree to submit questions of arbitrability -- including the arbitrability of attorney's fees -- to arbitration. See Alliance Bernstein, 445 F.3d at 125, quoting First Options of Chicago, Inc., 514 U.S. at 943 (arbitration is appropriate only for "those disputes . . . that the parties have agreed to submit to arbitration"). Thus, regardless of whether the issue of arbitrability "require[s] interpretation of the [FINRA] Code," MF Global, Inc. v. Morgan Fuel & Heating Co., 896 N.Y.S.2d 326, 327 (N.Y. App. Div. 2010), it remains our duty to determine whether the scope of the arbitrators' authority included the award of attorney's fees.

ii. Mutual request for attorney's fees. New York law recognizes that parties may agree to the award of attorney's fees in an arbitration by mutually requesting them. See Goldberg v. Thelen Reid Brown Raysman & Steiner LLP, 860 N.Y.S.2d 93, 94 (N.Y. App. Div. 2008) ("mutual demands for counsel fees in an arbitration proceeding constitute, in effect, an agreement to submit the issue to arbitration, with the resultant award being valid and enforceable"). The mutual request exception requires "an 'unmistakably clear' expression

of a party's intention to waive the rule that parties are responsible for their own attorneys' fees." Matza, 823 N.Y.S.2d at 48.

Here, in awarding attorney's fees to the employees, the panel claimed that it was "authorized to [do so] because both parties requested attorneys' fees in closing arguments." We conclude that the employer did not clearly and unmistakably agree to arbitrate attorney's fees by making a mutual request for them, in closing argument or otherwise.

In their statement of claim, the employees requested attorney's fees, costs, and treble damages, "as required by Massachusetts Wage Law." The employer, in turn, requested "related transaction costs, interest, and fees" for twelve of its twenty-two counterclaims. Nothing in the employer's pleadings clearly specified that "fees" meant attorney's fees incurred in the arbitration. Rather, in context, the most likely reading is that this referred to fees caused by the breaches of confidentiality the employer alleged that the employees caused. In this regard, the arbitration trial involved an extensive discussion of the various fees paid by the clients of the employer, as well as a controversy concerning millions of dollars in referral fees. Accordingly, the employer did not "affirmatively request[] attorneys' fees" (emphasis

added), Matza, 823 N.Y.S.2d at 48, in any of its counterclaims.[5] See John Hancock Life Ins. Co., 254 F.3d at 57 ("one party's membership in an exchange, is insufficient, in and of itself, to evidence the parties' clear and unmistakable intent to submit the 'arbitrability' question to the arbitrators"). Contrast Goldberg, 860 N.Y.S.2d at 94 ("it was respondents that first sought such fees in their counterclaim").

Similarly, the employer also did not ask for attorney's fees at the arbitration hearing -- a point that the employees concede. Unlike the employees, the employer did not submit a calculation of attorney's fees. Indeed, for most of the arbitration hearing, the employees sought attorney's fees under the wage act, not on the theory that there had been a mutual request for attorney's fees. See Ameriprise Fin. Servs. v. Brady, 325 F. Supp. 3d 219, 231 (D. Mass. 2018). Contrast Bear, Stearns & Co., Inc. v. International Capital & Mgt. Co., 952 N.Y.S.2d 106, 107-108 (N.Y. App. Div. 2012) (respondent consented to arbitration of attorney's fees as sanction for discovery abuse where petitioner had accused respondent of discovery abuse and respondent had paid attorney's fees in pre-hearing discovery). The arbitrators acknowledged this during

[5] In some cases, even a boilerplate request for attorney's fees has been deemed insufficient to show a mutual request for such fees. See Matza, 823 N.Y.S.2d at 48

the hearing. Perhaps because the employees did not allege a mutual request for attorney's fees, the employer opposed the employees' request on the employees' purported failure to prove a violation of the wage act and on the ground that the attorney's fees that the employees sought were not reasonable.

The employees continued to base their request for attorney's fees on the wage act in the first part of their closing argument. The employees did not claim that there had been a mutual request for attorney's fees until the end of the second part of their closing argument:

> "Not only under the wage act are we entitled to reasonable attorneys fees, but we believe that Credit Suisse in filing their counterclaims and . . . requesting millions of dollars, . . . plus related transaction costs, interest and fees . . . . [I]t's our interpretation that they're requesting attorneys fees -- when both parties request attorneys fees and costs, the arbitration Panel in the State of New York is free to award attorneys fees to the successful party."

After this, counsel for the employer said, "There is one thing he said at the very end that I just need to clarify to the Panel. . . . If you'll permit me one sentence." The panel denied counsel's request. The employees' failure to allege a mutual request for attorney's fees until the employer could not rebut the allegation underscores the lack of a clear agreement to arbitrate attorney's fees. Cf. Bear, Stearns & Co., Inc., 952 N.Y.S.2d at 108 (party's "last-minute attempt to withdraw

consent was ineffectual" where party "waited until its closing statement" to do so).

An "arbitrator's authority extends to only those issues that are actually presented by the parties." 544 Bloomrest, LLC v. Harding, 162 N.Y.S.3d 53, 55 (N.Y. App. Div. 2022), quoting Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp., 13 N.Y.3d 168, 173 (2009). Thus, because there is no evidence in the record that the employer clearly and unmistakably agreed to arbitrate attorney's fees, the panel "grant[ed] unrequested relief," thereby exceeding its authority. 544 Bloomrest, LLC, supra at 54. Cf. American Int'l Specialty Lines Ins. Co. v. Allied Capital Corp., 35 N.Y.3d 64, 67 (2020) (arbitrators acted within authority in reconsidering initial determination where record was "devoid of any evidence that the parties . . . mutually agreed to the issuance of a partial decision that would have the effect of a final award"). Contrast Warner Bros. Records, Inc., 776 N.Y.S.2d at 270 (attorney's fees properly awarded where "both sides are on record as having requested attorneys fees").

d. Massachusetts Wage Act. "[A]n arbitrator may [also] award attorney's fees where a party prevails on a statutory claim in which the statute mandates the recovery of attorney's fees by the prevailing party." Beacon Towers Condominium Trust, 473 Mass. at 475. The wage act "overrides the general

unavailability of attorney's fees under G. L. c. 251, § 10," Drywall Sys., Inc. v. ZVI Constr. Co., 435 Mass. 664, 672 (2002) (describing G. L. c. 93A, § 11), by providing that a prevailing employee "shall be awarded . . . the costs of the litigation and reasonable attorneys' fees." G. L. c. 149, § 150. The statute also mandates "treble damages, as liquidated damages, for any lost wages and other benefits." G. L. c. 149, § 150. See Reuter v. Methuen, 489 Mass. 465, 476 (2022).

Here, although the panel could have awarded attorney's fees to the employees had it found a violation of the wage act, see Reuter, 489 Mass. at 476, it did not make a finding on the wage act either way. We cannot assume in these circumstances that the panel found no violation of the wage act simply because it failed to award treble damages.[6] Accordingly, we vacate the order and remand to the panel for further findings on whether the employer violated the wage act and attorney's fees should be awarded on that basis.[7] See Sheriff of Suffolk County v. Jail

[6] The panel stated, "Any and all claims for relief not specifically addressed herein, including treble damages, are denied." Whether this means that the panel found that there was no violation of the wage act or that the panel declined to award treble damages for some other reason is best known to the panel.

[7] The employees' request for appellate attorney's fees is denied. "A party that prevails on a Wage Act claim 'is statutorily entitled to recover reasonable appellate attorney's fees and costs with respect to the claims on which he prevailed,'" Ferman v. Sturgis Cleaners, Inc., 481 Mass. 488, 496-497 (2019), quoting Fernandes v. Attleboro Hous. Auth., 470 Mass. 117, 132 (2014), provided that the party "made the request for

Officers & Employees of Suffolk County, 451 Mass. 698, 702 n.5 (2008) (court had previously remanded matter to arbitrator for specific findings because court was "not able to tell exactly what the arbitrator found").

3. Conclusion. The judgment of the Superior Court is vacated, and the matter is remanded to the Superior Court for the issuance of an order remanding the matter to the arbitration panel for the purpose of determining whether an award of attorney's fees is justified by a violation of the wage act.

So ordered.

By the Court (Rubin, Kinder & Ditkoff, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: August 11, 2022.

[statutory] appellate attorney's fees in its brief." Ferman, 481 Mass. at 497. Here, the employees requested attorney's fees "on the same basis that the arbitrator awarded [the employees] their attorney's fees." The panel, however, awarded attorney's fees "because both parties requested attorneys' fees in closing arguments." Accordingly, the employees have not alleged a proper basis to award appellate attorney's fees.

[8] The panelists are listed in order of seniority.