

<b>Matter of Esrey v Ernst &amp; Young, L.L.P.</b>
2015 NY Slip Op 08632
Decided on November 24, 2015
Appellate Division, First Department
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Decided on November 24, 2015

Gonzalez, P.J., Tom, Mazzaelli, Manzanet-Daniels, JJ.

16213 651530/12

**[\*1] In re William T. Esrey, et al., Petitioners-Appellants,**

**v**

**Ernst & Young, L.L.P., Respondent-Respondent.**

Mishcon De Reya New York LLP, New York (Timothy J. McCarthy and Benjamin Taibleson of counsel), for appellants.

Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL (Sean W. Gallagher of the bar of the State of Illinois,

admitted pro hac vice, of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered October 28, 2014, which, inter alia, denied petitioners' motion to modify or vacate the final award by an arbitration panel, dated February 17, 2014, to the extent that the arbitration panel awarded petitioners a rate of prejudgment interest that was lower than New York's statutory interest rate of 9%, unanimously affirmed, with costs.

The court properly found that the arbitration panel's decision to enforce the provision of the letter agreement between the parties, which limited the prevailing parties' damages to the actual damages suffered, did not evince a manifest disregard of the law, which requires a court 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 471, 481 [2006] [internal quotation marks omitted], *cert dismissed* 548 US 940 [2006]). Here, the panel, while correctly declining to enforce the provision of the agreement that would have limited petitioners to the fees they paid to respondent (*see e.g. Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 18 NY3d 675, 683 [2012]), distinguished the provision that limited the prevailing party to actual damages, on the ground that the actual damages, as measured by the reduced prejudgment interest in this case, fully compensated petitioners. The panel's analysis distinguishing the actual-damages provision, was, at least, "a *barely colorable justification* for the outcome reached" (*T.Co Metals, LLC v*

*Dempsey Pipe & Supply, Inc.*, 592 F3d 329, 339 [2d Cir 2010] [internal quotation marks omitted]), and, thus, is entitled to "extreme deference" (*Wien & Malkin, LLP*, 6 NY3d at 481).

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2015

CLERK

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