SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SALIANN SCARPULLA** **PART** **IAS MOTION 39EFM**

Justice

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KAHAN JEWELRY CORPORATION, YITZCHOK KAHAN,

Petitioners,

- v -

FIRST CLASS TRADING, L.P., FIRST CLASS IMPORT, INC., MORRIS BERKOVITS,

Respondents.

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INDEX NO. 650040/2018

MOTION DATE _____

MOTION SEQ. NO. _____

DECISION AND ORDER

Saliann Scarpulla, J.S.C.:

In this Article 75 proceeding, petitioners Kahan Jewelry Corporation ("KJC") and Yitzchok Kahan ("Kahan") filed a petition to confirm the arbitration award entered by the Rabbinical Court of Mechon L'Hoyroa on December 13, 2017, and respondents First Class Trading, L.P. ("FCT"), First Class Import, Inc. ("FCI") and Morris Berkovits ("Berkovits") filed a cross-petition to vacate the arbitration award.

Kahan is the officer, director and shareholder of KJC, a distributor of gold to jewelry manufacturers. FCT and FCI, companies controlled by Berkovits, were jewelry manufacturers and importers.

The parties entered into an agreement to arbitrate in September 2009, which provided:

> FOR VALUABLE CONSIDERATION, the receipt and sufficiency of which is hereby acknowledged, the undersigned parties hereby agree to submit any claim, controversy, or dispute arising, out of or in connection with the sale of goods, services, materials or other transaction of business by Kahan Jewelry Corp., Yitzchok Kahan, individually, and their successors and assigns ("Kahan") to Morris Berkovits and any and all extensions of credit, agreements and

> transactions related thereto, to arbitration for a decision and resolution thereof. It is fully agreed and understood that Kahan shall have the exclusive and sole discretion to select the arbitration or Beth Din forum and panel of its choice. As of now the two choices that Kahan selected [are] Yeshiva Beth Joseph located at 1427 49th [S]treet, Brooklyn N.Y. 11210 and Mechon L'Hoyroa 168 Maple Ave., Monsey N.Y. 10952. These choices are subject to change [and] can be changed at any time at the sole discretion of Kahan.

According to the petition, respondents admitted in writing, on or about April 27, 2015, that they were indebted to KJC in connection with gold supplied to them by KJC and monies loaned to them by KJC. Petitioners commenced an arbitration in May 2015 to recover the monies owed to them. Respondents refused to submit to arbitration.

Thereafter, on November 11, 2015, petitioners commenced a special proceeding, *Kahan Jewelry Corporation, et al. v. First Class Trading, L.P., et al.* (Index No. 653725/2015) seeking an order compelling FCT, Berkovits, and Berkovits' wife Susan to proceed to arbitration. The petition was granted on May 18, 2016 as to Berkovits only.

Petitioners and respondents, who are Orthodox Jews observant of the requirement that any disputes be resolved in rabbinical courts, attended an arbitration with Mechon L'Hoyroa Beth Din, with three rabbis as arbitrators. Arbitration sessions were conducted on March 8, 2017, March 28, 2017 and November 13, 2017. After hearing testimony and considering the evidence presented, the arbitrators found in favor of the petitioners. The award, dated December 13, 2017, stated that respondents were jointly and severally obligated to pay petitioners the sum of $1,989,980, provided however that if respondents either: (a) pay petitioners the sum of $1,500,000 within ninety (90) days of the date of the Award (i.e., by March 12, 2018); or (b) enter into a plan to pay petitioners the sum of $1,500,000 on terms satisfactory to the Arbitrators within ninety (90) days of the date of

the Award and comply with said payment plan thereafter, then respondents will only be obligated to pay petitioners the sum of $1,500,000.

Respondents have not made the required payments, and therefore, petitioners commenced this proceeding to confirm the award. They are requesting that judgment be granted "in favor of Petitioners and against Respondents, jointly and severally, in the amount of $1,500,000 (without prejudice to Petitioners rights or ability to request the entry of an amended or superseding judgment in the amount of $1,989,980 less any payments received from Respondents prior thereto)."

Respondents filed a cross-petition, seeking an order vacating the arbitration award, alleging that the arbitrators failed to follow procedures pursuant to CPLR 7506 and 7511. Specifically, they alleged that the arbitrators denied respondents the right to be represented by counsel in the arbitration, coerced Berkovits into signing an arbitration agreement on behalf of his companies, and improperly conditioned continued hearings on the execution of an arbitration agreement by Susan Berkovits and tried to coerce her into participating in the arbitration.

According to respondents, when Berkovits appeared at the arbitration, he was directed to sign an arbitration agreement on behalf of himself, FCT and FCI, even though he showed the Beit Din the 2016 order, in which only Berkovits was directed to appear at the arbitration. Berkovits claims that he was threatened with contempt or further litigation if he did not sign the arbitration agreement presented to him. He claims he only signed under duress.

At the arbitration, Berkovits was assigned a "Toen," the equivalent of an attorney, to represent him. Subsequently, the Toen resigned, and Berkovits requested time to procure new representation. Respondents argue that they were denied their right to have counsel of their choice at the arbitration, in violation of CPLR 7506(d).

Further, according to Berkovits, in certain correspondence, opposing counsel tried to coerce his wife, Susan Berkovits into participating in the arbitration. He also claims the Beit Din informed him that she would need to sign the arbitration agreement, otherwise, the arbitration would not continue. Berkovits claims that in emails exchanged in December 2017, Susan Berkovits' execution of the arbitration agreement was a condition precedent set by the Beit Din to continue hearing the issues relating to interest on the loan, which has still not been heard, because she did not execute the agreement. The Beit Din precluded any further hearing, and instead issued its award.

Finally, Berkovits argues that the award is not final and therefore, cannot be confirmed. Rather, the intent of the award was to allow respondents to come up with a payment plan to prevent the entry of judgment against them.

In opposition, and in further support of their petition, petitioners maintain that no threat was made to Berkovits that litigation would be commenced, or that he would be subject to contempt to force him to sign the arbitration agreement on behalf of FCI and FCT. In any event, even if threats had been made, respondents waived their arguments because they did not repudiate the arbitration agreement and in fact, continued to participate in arbitration.

Petitioners next maintain that respondents were not deprived of their right to counsel. Rather, the Beit Din decided to not reschedule a September 13, 2017 arbitration date after respondents' Toen resigned, because several adjournments had already been granted to respondents, and the record was already closed. Nevertheless, the Beit Din gave respondents another opportunity to appear on November 13, 2017, and Berkovits appeared on his own behalf without a new Toen. At that appearance, he presented his evidence and then told the arbitrators that he had no further evidence to submit.

As to Susan Berkovits, petitioners note that their counsel simply sent emails to Susan Berkovits and Joseph Berkovits notifying them of the date, time and place of the arbitration sessions and advised them that they "may wish to attend." These emails were not attempts to coerce Susan Berkovits into attending. Rather, counsel explained if she did not appear, there would be no reason to have any further sessions because all the other evidence had already been gathered. Further, throughout the proceedings, respondents allegedly informed the Beit Din that Susan Berkovits would be joining the arbitration and used that information as an excuse for adjournments. Some of those adjournments were granted even though she never ultimately appeared.

Finally, petitioners argue that the award is final and binding and may be confirmed at this time.

Discussion

Pursuant to CPLR 7511(b), an arbitration award may be vacated upon the application of a party only "if the court finds that the rights of that party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an

arbitrator appointed as a neutral . . .; or (iii) an arbitrator . . . exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection."

It is well settled that "[r]epudiation of an agreement on the ground that it was procured by duress requires a showing of both (1) a wrongful threat, and (2) the preclusion of the exercise of free will." *Fred Ehrlich, P.C. v. Tullo*, 274 A.D.2d 303, 304 (1" Dep't 2000); *see In re Guttenplan*, 222 A.D.2d 255 (1st Dept. 1995). An agreement procured under duress must be promptly disaffirmed, or otherwise deemed to have been ratified. *In re Guttenplan*, 222 A.D.2d 255 (1st Dept. 1995). Objections to the validity of an arbitration agreement allegedly entered into under duress are waived if the objecting party participates in the arbitration. *See e.g., Berg v. Berg*, 20 Misc.3d 1142(A) (Sup. Ct. N.Y. Co., 2008) *affd in part, modified in part* 85 A.D.3d 950 (2011).

Here, Berkovits claims that he was coerced into signing the arbitration agreement on behalf of his companies at the Beit Din, and only did so under duress. However, Berkovits is a sophisticated business owner who executed the agreement, and he has submitted no objective evidence to show that he could not have declined to execute the agreement. Most importantly, Berkovits did not disaffirm the agreement at any time thereafter, and in fact, proceeded with and participated in the arbitration.

Berkovits' argument that he was denied the right to counsel is also without merit. After his Toen resigned, he had time to procure new counsel, however did not do so.

Even though the matter was closed, upon request by Berkovits for one more appearance, the Beit Din gave him the opportunity to appear once more on November 13, 2017. He appeared at the final hearing, presented evidence on his own and then told the arbitrators that he had no further evidence to introduce.

Further, his contention that the Beit Din improperly conditioned continued hearings on the execution of an arbitration agreement by Susan Berkovits is also meritless. Upon close examination of the email exchange from December 2017, as well as letters from petitioners' counsel, it is clear that no one was attempting to coerce Susan Berkovits into attending the arbitration, or conditioning continued hearings on the execution of an arbitration agreement by Susan Berkovits. Rather, the correspondence simply explained that as someone who guaranteed the obligations at issue, she "may wish" to appear at the arbitration, and the later correspondence explained that if she did not appear, there would be no reason to have any further sessions because all the evidence had already been submitted.

At bottom, the evidence submitted with this petition shows that respondents were given a full and fair opportunity to present their evidence and arguments to the arbitrators, and that they were given reasonable adjournments and other considerations by the arbitrators.

Finally, an award is only indefinite or non-final for the purposes of CPLR§7511 and subject to vacatur only if it "leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy." *Meisels v. Ukr*, 79 N.Y.2d 526, 536 (1992) (internal citations omitted).

The award here sufficiently sets forth the parties' rights and obligations and resolves the controversy submitted.

In accordance with the foregoing, it is

ORDERED that the petition to confirm the arbitration award entered by the Rabbinical Court of Mechon L'Hoyroa on December 13, 2017 is granted in its entirety; and it is further

ORDERED and ADJUDGED that the award made by the Rabbinical Court of Mechon L'Hoyroa on December 13, 2017, is hereby confirmed; and it is further

ORDERED that the Clerk of this Court is directed to enter judgment in favor of the petitioners Kahan Jewelry Corporation and Yitzchok Kahan, jointly and severally, and against the respondents First Class Trading, L.P., First Class Import, Inc. and Morris Berkovits, jointly and severally, in the sum of $1,500,000;[1] and it is further

ORDERED that the cross-petition is denied in its entirety.

This constitutes the decision and order of the Court.

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1/4/2019
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[1] The entry of judgment is without prejudice to petitioners' rights or ability to request the entry of an amended or superseding judgment in the amount of $1,989,980 (less any payments received from respondents prior thereto).