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

PRESENT: Hon. DIANE A. LEBEDEFF PART 8
Justice

Solow Building Co.

-v-

Morgan Guaranty Trust

INDEX NO. 114972/01

MOTION DATE 10/22/01

MOTION SEQ. NO. 01

MOTION CAL. NO. 15

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

	PAPERS NUMBERED
Order to Show Cause — Affidavits — Exhibits	1-6
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers it is ordered that this ~~motion~~

SCANNED
JAN 14 2002

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: JAN 07 2002

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8
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Application of

SOLOW BUILDING CO., LLC.,

Petitioner,

For an Order Pursuant to Article 75 of the CPLR permanently staying a Demand for Arbitration,

Index No. 114972/01
Mot. Seq. No. 001

-against-

MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

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DIANE A. LEBEDEF'F, J.:

Petitioner Solow Building Company, LLC ("Solow"), seeks a permanent stay of the arbitration demanded by respondent, Morgan Guaranty Trust Company of New York ("Morgan"), and asserts a claim for costs, expenses and disbursements, including reasonable counsel fees, incurred in enforcing its rights against Morgan.

Solow is the owner of 9 West 57th Street, which the parties describe as a prestigious commercial office building. Morgan leased a large block of space in the building under a 25-year lease, for the period commencing February 1, 1974, and ending on January 31, 1999. Article 7 of the lease provided for escalation of rent, based on "changes in the Wage Rate." Article 7.03 provided that a notice of a change in wage rate given by Solow shall be "conclusive and binding,"

unless Morgan "shall submit the dispute" to arbitration "within 90 days after receipt of the notice."

Solow gave Morgan a notice of change dated February 19, 1998, and Morgan responded by serving a demand for arbitration on June 11, 1998. Morgan's demand was timely because Solow had consented to an extension of the 90-day period provided for in the lease. Morgan's claim for $1.3 million was submitted to an arbitration panel, which ultimately issued an award in favor of Morgan in the amount of $721,580.

Morgan moved to confirm and Solow cross-moved to vacate the award in the Supreme Court, New York County (Hon. Carol E. Huff). The court granted Solow's cross-motion to vacate on the grounds that the fairness of the arbitration procedure had been "tainted" by the bias of one arbitrator who had close prior business dealings with Morgan's counsel and had been retained to testify against Solow in another matter. The Appellate Division, First Department, affirmed and the Court of Appeals denied leave to appeal ***(In the Matter of Morgan Guaranty Trust Co. of N.Y. v. Solow Building*** Co., *LLC*, 279 A.D.2d 431 [1st Dept.], leave to appeal denied, 96 N.Y.2d 711 [2001]).

Following completion of the CPLR article 75 proceedings, Morgan served Solow with a formal demand for arbitration on July 25, 2001. Solow now hopes to convert its procedural win in the vacatur proceedings into a complete victory on the merits by precluding Morgan from submitting it's claims for rehearing before an arbitration panel.

Solow first argues that Morgan's July 25, 2001, demand for arbitration is untimely because it comes three years after the notice of wage rate change, and is therefore well beyond the 90-day time limit in the Lease. Solow alternatively argues that Morgan is barred by the ***res***

judicata effect of the prior arbitration and the vacatur decision from relitigating its claims. In particular, Solow argues that the Supreme Court order vacating the arbitration award did not direct a rehearing pursuant to CPLR 7511(d), and that this presumed ruling-by-omission is entitled to ***resjudicata*** effect. Neither argument has merit.

There is no support for Solow's assertion that Morgan's demand for arbitration is untimely. While Solow is correct that timely demand for arbitration is a "condition precedent," it is undisputed that Morgan did timely demand arbitration in June, 1998. There was no need for Morgan to serve a new demand for arbitration following vacatur of the arbitration award, because the demand was not vacated. Morgan is correct in viewing the rehearing as a continuation of the original arbitration proceedings commenced by its demand for arbitration in June, 1998.

Solow's alternative argument is also without merit. Solow argues that Morgan is precluded from "relitigating" the claims presented in the first arbitration because it already had an opportunity to litigate the claims. However, it **is** settled law that a prerequisite to application of ***resjudicata*** **is** a "final judgment on the merits" ***(Gramatan Home v. Lopez,*** 46 N.Y.2d 481,485 [19791). **A** vacated judgment or award, by definition, has no preclusive effect (see ***Ruben v. American and Foreign Ins. Co.,*** **185** A.D.2d 63, 65 [4th Dept. 19921). Therefore, the prior vacated arbitration award is no bar to further proceedings on the merits.

The decisions relied on by Solow are plainly distinguishable (see ***Matter of Eagle Insurance Co. v. Facey,*** 272 A.D.2d 399, 400 [2d Dept. 20001, which held that arbitration was precluded by a prior default judgment permanently staying arbitration between the parties, because a "judgment taken by default ***which has not been vacated"*** is entitled to preclusive effect; ***Ulster Elec. Supply Co., Inc. v. Local 1430, Int'l Brotherhood of Electrical Workers,*** 253 A.D.2d

765 [2d Dept. 19981, which gave preclusive effect to a final arbitration award which had not been judicially confirmed or vacated). Since there has been no final decision on Morgan's claims, there is no ***resjudicata*** bar to submitting those claims for rehearing.

Alternatively, Solow bases its ***resjudicata*** argument on Justice Huffs decision vacating the award. Solow argues that because the decision does not explicitly direct a rehearing, it ruled that Morgan was not entitled to a rehearing, possibly as a penalty for its bad conduct in the arbitration hearing. However, there is no indication in the record that the court was asked to grant such relief, and no language in the decision supports Solow's urged characterization of the decision. There is simply no basis for concluding that the court determined, both ***sua sponte*** and ***sub silentio,*** that the matter should not be remanded for rehearing. Indeed, it is doubtful whether the court even has statutory authority to preclude rehearing of any issues following vacatur of an arbitration award (see ***Board of Education of East Hampton Union Free School Dist. v. Yusko,*** 269 A.D.2d **445** [2d Dept. 20001, holding that the trial court exceeded its statutory authority when, upon determining that an arbitration award was contrary to public policy, it directed that respondent teacher's employment be terminated, rather than remitting the matter for rehearing and a new determination on the issue of an appropriate penalty). The discretionary language of CPLR 7511 (d)[1] gives the court discretion to limit the scope of issues to be determined on rehearing, or to direct a hearing before a new panel, but, although ambiguously drafted, does not appear to grant the court authority to order that no rehearing be had. While it may have been

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[1] CPLR 7511(d) provides: Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article.

preferable for the parties to have sought specific directives concerning the rehearing in connection with the petitions to vacate and confirm the award, the absence of a specific directive does not result in depriving Morgan of any hearing at all. Even though the first arbitration was tainted by procedural unfairness in which Morgan's counsel was partly at fault, there is no basis for finding that Morgan has lost its right to have its claims determined on the merits in arbitration.

Finally, there is no authority in the Lease for the requested award of costs and attorneys fees. In fact, the Lease provides that the parties will bear their own costs and attorneys fees in connection with arbitration, including judicial enforcement (see Epstein aff , Exh. 1, Lease, *Art.* **34).**

Accordingly, Solow's petition is denied in full. The parties are directed to submit the matter to arbitration within thirty (30) days.

So ordered.

Dated: January 7 ,2002

J.S.C.