

Cece v 138 Wooster Street Corp.

2002 NY Slip Op 30047(U)

April 9, 2002

Supreme Court, New York County

Docket Number:

Judge: Louise Gruner Gans

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

PRESENT: Hon. HON. LOUISE GRUNER GANS

PART 61

Justice

ARNOLD Ce Ce

INDEX NO.

111.746/00

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

138 Woodruff Street Corp.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is determined per amended decision and order. In any future enforcement proceedings the name of Ed Ce Ce shall be substituted for that of Arnold Ce Ce

SCANNED

APR 15 2002

MOTION/ORDER IS RESPECTFUL Y DEFENSE TO JUSTICE

Dated: _____

4/9/02

Check one:

FINAL DISPOSITION

[Signature]

J.S.C.

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 061

x

ARNOLD CECE, a shareholder of 138
Wooster Street Corporation, suing in the
right of 138 Wooster Street Corporation,

Index No. 111746/00

Plaintiff,

- against -

138 WOOSTER STREET CORPORATION,
CHESTER AUGUSTINE, LINDA AUGUSTINE,
KAREN JANSONS, FRED KUNZLER,
MICHAEL HALLORAN, and DENISE HALLORAN,

Defendants.

-----x

LOUISE GRUNER GANS, J.:

In this shareholder derivative action commenced by plaintiff, Arnold Cece, now deceased, defendants 138 Wooster Street Corporation (the "Corporation"), Chester and Linda Augustine (the "Augustines"), Michael and Denise Halloran (the "Hallorans"), Karen Jansons ("Jansons"), and Fred Kunzler ("Kunzler"), move, by order to show cause (1) pursuant to CPLR 1015 and 1021, for an order substituting the decedent's son, Ed Cece, *nunc pro tunc*, as plaintiff, and (2) pursuant to CPLR article 75, to confirm and enforce an award issued by the American Arbitration Association, in August 2001, in a proceeding commenced by Ed Cece and 138 Wooster Street Corporation, as petitioners, against the Augustines, Jansons, and Kunzler, as respondents.

The facts underlying this action, which are set forth in this court's prior decision and order entered on January 5, 2001,

are recapitulated and enlarged herein, as necessary. Prior to his death, Arnold Cece owned 40% of the outstanding shares of the Corporation, pursuant to a Shareholders' Agreement, dated November 17, 1980, and leased the ground floor and basement of the premise;; located at 138 Wooster Street (the "subject premises"), pursuant to a proprietary lease, also dated November 17, 1980. The Augustines, Jansons, and Kunzler own equal shares of the remaining 60% of the outstanding shares of the Corporation and the proprietary lease to a cooperative unit in the subject premises. Paragraph 10 of each proprietary lease states, in part:

The present violation of the City of New York Department of Buildings alleging that the premises were being used for living, which is not permitted by the Certificate of Occupancy, has been disclosed to all the present tenants and landlord warrants that same shall not be grounds to terminate any of the leases of any present tenants and [sic] shall make their best efforts to remove same.

Until his death, Arnold Cece served with Chester Augustine, Jansons, and Kunzler as members of the Board of Directors.

This shareholder derivative action ensued when the Augustines sublet their cooperative unit to the Hallorans, pursuant to a sublease dated February 7, 2000. The complaint essentially alleges that the Augustines violated paragraph 19 of the proprietary lease by subletting their cooperative unit without prior written permission of the Board of Directors, and

that Jansons and Kunzler, as directors, failed to address said breach. Plaintiff seeks certain injunctive relief, including, *inter alia*, an order directing defendants to serve a notice of default on the Augustines, issue a notice terminating their proprietary lease, commence a summary proceeding to recover possession of the second floor cooperative unit, and sell the Augustine's shares in the Cooperation.

Relying on the arbitration clause in paragraph 23 of the Shareholders' Agreement', defendants moved to compel arbitration of the dispute. Arnold Cece died in October 2000, and Ed Cece was issued Letters of Administration.² This court's decision and

'Paragraph 23 of the Shareholder Agreement states, in Part:

Any controversy arising under, out of, in connection with, or relating to, this Agreement, and any amendment thereof, or breach thereof, shall be determined and settled by arbitration in New York City, in accordance with the rules of the American Arbitration Association. Any award rendered therein shall be final and binding on each and all of the parties thereto and their personal representatives, and judgment may be entered thereon in any court having jurisdiction thereon.

²In addition, Ed Cece was appointed receiver of 138 Wooster Street Corp. by an award, dated October 6, 1999, in a prior arbitration commenced by Arnold Cece against the Augustines, Jansons, and Kunzler for continuing and ongoing violations relating to the premises at 138 Wooster Street. The award appointed Ed Cece as receiver for a two-year period to cure violations and obtain a Certificate of Occupancy to allow residential use of the floors occupied by the respondents. This court (Payne, J.) confirmed the award on March 31, 2000.

order of January 5, 2001, *inter alia*, granted defendants' motion to compel arbitration, and stayed this action pending arbitration of the dispute.

Ed Cece filed a Demand for Arbitration against the Augustines, Jansons and Kunzler (collectively, the "respondents") on January 26, 2001, seeking, *inter alia*, to extend by one year his term as receiver, terminate the respondents' proprietary leases and shareholder status, and sell respondents' shares in the Corporation, based on the illegal sublease by the Augustines and the inaction of the Board of Directors.

The Augustines and Kunzler sought to assert a counterclaim seeking the removal of Ed Cece as receiver. The arbitrators accepted the filing fee for a proposed counterclaim, but reportedly rejected the counterclaim as untimely.

In August 2001, the American Arbitration Association issued an award, *inter alia*, (1) finding that the respondents did not materially breach their proprietary leases, and, as such, their ownership interests in the Corporation and proprietary leases remain in full force and effect; (2) terminating Ed Cece's receivership for misconduct and failure to comply with the prior award; (3) directing the parties to apply to this court for the appointment of a statutory receiver for the purpose of obtaining a certificate of occupancy and removing certain violations from the premises; (4) prohibiting Ed Cece from making any further

payments from a special account, which was established pursuant to the prior award; (5) directing Ed Cece to turn over to the statutory receiver all documents relevant to obtaining the Certificate of Occupancy or to carrying out the duties of the receiver; (6) directing Ed Cece to bear all penalties claimed by contractors against the Corporation during his tenure as receiver; (7) relieving Ed Cece of the receivership duties contemplated by the prior award; (8) denying all other claims submitted to the arbitration panel; (9) directing Ed Cece to bear two-thirds of the compensation, administrative fees and expenses of the arbitration, with the Augustines, Jansons, and Kunzler bearing the remaining one-third; and (10) directing Ed Cece to pay the sum of \$4,627.77 to the Augustines and Kunzler, and \$1668.19 to Jansons the sum of \$1,668.19. The award further stated that it "is in full settlement of all claims" submitted to the panel, and that all claims not expressly granted therein are denied.

Thereafter, plaintiff moved unsuccessfully to modify the arbitration award. In addition, the Augustines and Kunzler sought to recover their filing fee for the rejected counterclaim.'

'A review of the submissions hereto reveal no disposition of the claim for reimbursement of the filing fee for the counterclaim.

Defendants now seek to substitute Ed Cece as plaintiff in this action. CPLR 1015(a) authorizes the court to order substitution of the proper parties "[i]f a party dies and the claim for or against him is not thereby extinguished." In addition, CPLR 1021 directs that "[a] motion for substitution may be made by the successors or representatives of a party or by any party." The branch of the motion that seeks to substitute Ed Cece *nunc pro tunc* as plaintiff in this action is granted since Ed Cece shares an interest with his late father in the subject matter of this dispute, will suffer no prejudice as a result of the substitution, and does not oppose the substitution. *See, In re St. Luke's-Roosevelt Hosp. Center (Marie H.)*, 261 AD2d 320 (1st Dept 1999).

Defendants also move to confirm the August 2001 arbitration award, and seek an order enforcing so much of the award as (1) directs the Augustines, Jansons, and Kunzler to apply to this court for the appointment of a statutory receiver for the purpose of removing certain violations from the subject premises and obtaining a Certificate of Occupancy; (2) denies all other claims submitted to the arbitration panel;' (3) directs judgment in favor of the Augustines and Kunzler, and against Ed Cece, in the sum of \$4,627.77; and (4) directs judgment in favor of Jansons

'Defendants request that the court dismiss the instant action but retain jurisdiction for the purpose of enforcing the award.

and against Cece in the amount of \$1668.19. It is axiomatic that where a dispute has been arbitrated pursuant to a broad arbitration agreement between the parties, the resulting award may be confirmed unless it violates a strong public policy, is totally irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power. *See, Matter of Town of Callicoon (Civil Serv. Employees Assn., Town of Callicoon Unit)*, 70 NY2d 907, 909 (1987). The party opposing confirmation bears the burden of proof by clear and convincing evidence. *See, Janis v New York State Div. of Hous. & Community Renewal*, 271 AD2d 878 (3d Dept 2000).

In opposing confirmation, plaintiff asserts that the award should be vacated on the grounds that the arbitrators engaged in misconduct, which denied him procedural due process. The alleged misconduct and due process violation involve the arbitrators' handling of the proposed counterclaim by the Augustines and Kunzler seeking the removal of Ed Cece as receiver. Plaintiff claims that the arbitrators improperly permitted the untimely filing of the counterclaim, accepted the filing fee, indicated on the record that the counterclaim would not be considered, while granting the relief sought in the counterclaim, and depriving plaintiff of the opportunity to defend against said counterclaim. However, a review of the submissions reveals nothing to indicate that the panel of

arbitrators considered or ruled on the proposed counterclaim. Rather, the submissions make clear that plaintiff's demand for arbitration included a request for a one-year extension of his term as receiver, and the denial of said request is consistent with the terms of the award.

Plaintiff also argues that the arbitrators exceeded their authority and violated public policy by failing to terminate the sublease between the Augustines and the Hollorans even though the residential use contemplated by said sublease violates Multiple Dwelling Law § 301(1)⁵. The purpose of the Multiple Dwelling law is to assure residents of safe, sound, and approved construction of their home, as evidenced by a duly issued Certificate of Occupancy. *See, Multiple Dwelling Law 52; Washington Square Professional Bldg., Inc. v Leader*, 68 Misc 2d 72, 74 (Civil Ct, NY County 1971). That purpose is not hampered by the residential use of the cooperative units pending the receiver's removal of certain violations and acquisition of a Certificate of Occupancy, as directed in the award.

Plaintiff further asserts that the award is not sufficiently final to warrant confirmation since he has sought a reduction of the award, and the Augustines and Kunzler have requested the return of the counterclaim fee. However, as stated, the award

⁵Multiple Dwelling Law section 301(1) directs, in part, that "[n]o multiple dwelling shall be occupied * * * until the issuance of a certificate [of occupancy]."

makes clear that it is "in full settlement of all claims" submitted to the panel of arbitrators, and that all claims not expressly granted therein are denied. As such, the award is sufficiently final and definite to warrant confirmation, and the parties' post-award claims do not compel a contrary conclusion. See, *PPX Enters., Inc. v Warner Bros. Records, Inc.*, 167 AD2d 330, 331 (1st Dept 1990).

Based on the foregoing, the arbitration award is confirmed. Furthermore, since there are no unresolved claims among the parties, the complaint in this action is dismissed.

Accordingly, it is

ORDERED that the motion is granted; and it is further

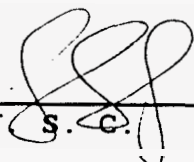
ORDERED that Ed Cece is substituted *nunc pro tunc* for the deceased plaintiff in this action; and it is further

ORDERED and ADJUDGED that the August 2001 award issued by the American Arbitration Association in the proceeding commenced by Ed Cece against Chester and Linda Augustine, Karen Jansons, and Fred Kunzler is confirmed; and it is further

ORDERED and ADJUDGED that the dismissal of the complaint is held in abeyance and the Court retains jurisdiction of this matter for the purpose of enforcing the terms of the award; and it is further.

ORDERED that the Clerk is directed to enter the appropriate judgment.

Dated: 4/8/02

ENTER:


J S. C.

HON. LOUISE GRUNER GANS