

**Larsen & Toubro Limited v Millenium Management,
Inc.**

2005 NY Slip Op 30163(U)

July 21, 2005

Supreme Court, New York County

Docket Number: 0106534/2002

Judge: Richard B. Lowe

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

PRESENT: _____

PART 54

RICHARD B. LOWE III

Larsen + Toubro Limited

INDEX NO. 106534/02

MOTION DATE 2/10/05

MOTION SEQ. NO. 802

MOTION CAL. NO. _____

- v -

Mellenium Management

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

FILED
JUL 29 2005
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

Dated: 7/21/05

[Signature]
RICHARD B. LOWE III J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X
LARSEN & TOUBRO LIMITED,

Plaintiff,

- against -

Index No. 106534/02

MILLENIUM MANAGEMENT, INC. KYLCO
MARITIME LTD., VASSILIOS M. LIVANOS,
NICOLAOS A. COTZIAS, JR., THEOTOKIS S.
MILAS and EMANUEL KYPRIOS,

Defendants.
-----X

FILED
JUL 29 2005
NEW YORK
COUNTY CLERK'S OFFICE

RICHARD B. LOWE III, J.:

Defendants Millenium Management, Inc. ("Millenium"), Kylco Maritime Ltd. ("Kylco"),
Vassilios M. Livanos ("Livanos"), Nicolaos A. Cotzias, Jr. ("Cotzias"), Theotokis S. Milas
("Milas"), and Emanuel Kyprios ("Kyprios") move, pursuant to CPLR 7511, to vacate the
arbitration award against them.

Background

Plaintiff, Larson & Toubro Limited ("L&T"), commenced this action to recover on a
Promissory Note and Personal Guarantees executed by defendants. The basic facts of the action
are not significantly disputed.

By En Bloc Sale Agreement, dated May 22, 1998 ("Sale Agreement"), L&T agreed to sell
to Millenium and Kylco six vessels for an aggregate sales price of \$40,000,000. Section 21.1 of
the Sale Agreement states that it and all related memoranda of agreement "shall be governed by
and construed in accordance with the laws of New York." In addition, section 21.2 of the Sale
Agreement contains a broad arbitration clause, stating, in part:

All matters of difference between the parties hereto or to any other claim or controversy arising out of, relating to or resulting from this Agreement, any breach hereof or the transactions contemplated hereby shall be finally settled by arbitration conducted in New York, New York by a single arbitrator to be selected by mutual agreement of the Buyer and Seller. If the parties cannot agree upon the selection of a single arbitrator, the dispute shall be settled by three arbitrators, with the Buyer selecting one arbitrator and the Seller selecting one arbitrator and the third being selected by the two so chosen The award rendered by the arbitrator(s) shall be final and binding upon the parties and shall be enforceable by any court or other competent authority having jurisdiction thereof

In connection with the Sale Agreement, Millenium and Kylco executed a Promissory Note, dated August 25, 1998, agreeing, jointly and severally, to pay to L&T the principal sum of \$7,000,000 on the fifth anniversary of the final delivery date of the vessels sold pursuant to the Sale Agreement, and to pay interest on the principal amount monthly until the principal is paid in full. Paragraph 1.04(b) of the Promissory Note requires Millenium and Kylco to make each payment "without set-off, deduction or counterclaim of any type...." Furthermore, in the event of default, including the failure to make the required principal and interest payments, paragraph 3.01 authorizes L&T to declare the entire principal and interest, at a specified default rate, due and payable.

Livanos, Cotzias, Milas, and Kyprios executed Personal Guarantees, dated May 22, 1998, jointly and severally guaranteeing the performance of Millenium and Kylco under the Promissory Note. The Personal Guarantees are provided for in section 24 of the Sale Agreement, and referred to in paragraph 1.02 of the Promissory Note. The Promissory Notes and Personal Guarantees are also governed by and to be construed in accordance with the laws of New York.

The Promissory Note was also secured by a standby letter of credit posted by Millenium and Kylco in the amount of \$2,860,000.

Millenium and Kylco failed to make the interest payment due under the Promissory Note on February 14, 2002. On February 26, 2002, L&T served on Millenium and Kylco a notice of default and demand for payment, accelerating the Promissory Note and demanding payment of the principal sum of \$7 million, unpaid interest of \$18,795, and default interest of \$35.

Millenium and Kylco failed to make the payment demanded by L&T. On February 28, 2002, L&T drew down the \$2,860,000 posted by Millenium and Kylco under the standby letter of credit and credited \$18,795 toward accrued interest, \$35 toward default interest, and \$2,841,170 toward the principal. Defendants reportedly denied L&T's repeated request for payment of the outstanding balance, and this action ensued.

L&T seeks to recover the principal balance due under the Promissory Note, in the amount of \$4,158,830, plus interest, reasonable attorneys' fees, and costs. The complaint essentially alleges that Millenium and Kylco are in default of their obligations under the Sale Agreement and the Promissory Note as of February 14, 2002, and that Livanos, Cotzias, Milas and Kyprios are liable to L&T under the Personal Guarantees.

By order, entered December 17, 2002, this Court (Lowe III, J.) denied defendants' motion to dismiss the complaint for insufficient service of process, granted a motion by Millenium and Kylco to compel arbitration of the dispute among L&T, Millenium, and Kylco for nonpayment of the Promissory Note, and stayed the entire action pending completion of the arbitration.

Formation of the tripartite arbitration panel was completed on April 7, 2003, and written disclosures were eventually submitted by the parties. Defendants did not dispute L&T's assertions with regard to the principal and interest balance due under the Promissory Note, but claimed, in essence, that L&T breached the Sale Agreement by delivering vessels with

deficiencies and hidden defects resulted in damages totaling approximately \$5,000,000, which should be offset against the principal balance, interests, and costs due under the Promissory Note.

After considering the evidence before it, the panel decided to proceed to issue a Partial Final Award with respect to the parties' obligations under the Promissory Note, and then afford defendants the opportunity to participate in a hearing on their claim under the Sale Agreement.

Thus, by Partial Final Award, dated August 31, 2004, a majority of the arbitration panel directed defendants to pay L&T the sum of \$4,433,375, reflecting the principal amount due under the Promissory Note, unpaid interest thereon to June 1, 2003, and a portion of the arbitrators' fees. The majority determined that the Promissory Note is enforceable in full by L&T, thereby rejecting the assertion by Millenium and Kylco that the alleged deficiencies in the vessels delivered under the Sale Agreement can reduce their obligation under the note. The majority recognized the right of Millenium and Kylco to claim against L&T for losses and damages attributable to defects in the vessels purchased, but rejected their attempt to offset the alleged defects against their obligations under the Promissory Note. The majority ruled instead that the claim for defects in the vessels would be the subject of a final award.

As to the Personal Guarantees, the majority found that they are enforceable by L&T to the extent which Millenium and Kylco fail to fulfill their obligation under the Promissory Note. The majority also rejected the Guarantors' attempt to offset their obligations under the Personal Guarantees.

The dissenting arbitrator stated that L&T's claim under the Promissory Note should not be allowed without the arbitration panel also passing on defendants' counterclaims.

Defendants now seek to vacate the Partial Final Award.

Discussion

Preliminarily, contrary to defendants' assertions, New York law applies on judicial review of the challenged award. Paragraph 4.09 of the promissory note expressly states that the note "shall be governed by, and construed in accordance with, the laws of the State of New York." Similarly, the Sale Agreement, which contains the arbitration clause and the Personal Guarantees, states that it shall be governed by and construed in accordance with the laws of New York.

Under New York law, courts cannot "pass upon the merits of the dispute" raised in an arbitration proceeding (CPLR 7501; *see also Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 307 [1984]). Indeed, judicial review is so circumspect that an arbitrator's award will not be set aside even though the arbitrator misconstrues or disregards the agreement, or misapplies substantive rules of law, unless it violates strong public policy or is totally irrational (*see id.* at 308). Rather, a party who participated in an arbitration may seek vacatur of a resulting award only on the grounds that the rights of that party were prejudiced by corruption, that the award was procured by fraud or misconduct, that the arbitrator was partial, exceeded his power, or failed to make a final and definite award, or that a procedural failure exists that was not waived (*see* CPLR 7511[b][1]; *id.* at 307).

Livanos, Cotzias, Milas, and Kyprios, contend that the panel majority exceeded their authority by finding them liable for damages since they were not parties to the arbitration. Although arbitration is favored as a matter of public policy, equally important is the policy that seeks to avoid the unintentional waiver of the benefits and safeguards which a court of law may provide in resolving disputes (*TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). Indeed, unless the parties have subscribed to an arbitration agreement, it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent (*id.*).

Furthermore, a decision whether parties other than those formally signatories to an arbitration clause may have their rights and obligations determined by an arbitrator when the issue has not been submitted to him is not within the province of the arbitrator, but only for the court (*Brescia Constr. Co. v Walart Constr. Co.*, 238 App Div 45, 47 [1st Dept 1933], *aff'd* 264 NY 260 [1934]).

As noted, the Court expressly directed arbitration only as to the dispute among L&T, Millenium, and Kylco concerning nonpayment of the Promissory Note. However, the panel majority determined, *inter alia*, that “the Promissory Note ... is enforceable in full by L&T” and that “the Joint and Several Guarantee ... is enforceable in full by L&T to the extent which [Milleniun and Kylco] fail to fulfill their obligation under the Promissory Note.” Thus, the panel majority directed Millenium, Kylco “and/or Guarantors” to pay \$4,433,375 to L&T.

The Court concludes that to the extent that the award directs non-party guarantors Livanos, Cotzias, Milas, and Kyprios to pay \$4,433,375 to L&T, the panel majority exceeded their powers, and the award against them must be vacated. However, the Court also determines that Millenium and Kylco have not satisfied any of the grounds for vacatur of the award against them.

The Court is not persuaded by the assertion that the vacatur is warranted because the panel majority did not allow defendants to present evidence and witnesses to support their defense and counterclaim before issuing the award. The submissions contain numerous requests from the arbitration panel seeking evidentiary support for any defenses and counterclaims and, in any event, the panel granted defendants’ request for an oral hearing to establish their counterclaim for damages under the Sale Agreement.

Similarly, the Court rejects the assertion that the award is not final since it does not completely and conclusively resolve the issues submitted to arbitration, namely defendants’

claim under the Sale Agreement as an offset to L&T's claim under the Promissory Note. The Court directed arbitration only as to the dispute among L&T, Millenium, and Kylco concerning nonpayment of the Promissory Note, and the Promissory Note expressly required Millenium and Kylco to make each payment without set-off, deduction or counterclaim of any type.

Accordingly, it is

ORDERED that the motion is granted to the extent that the Partial Final Award against defendants Vassilios M. Livanos, Nicolaos A. Cotzias, Jr., Theotokis S. Milas, and Emanuel Kyprios is vacated, and it is otherwise denied.

The foregoing constitutes the decision and order of the Court.

Dated: July 21, 2005

ENTER:



J.S. C.

RICHARD B. LOWE III

FILED

JUL 29 2005

NEW YORK
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