

Davis v Melnicke

2005 NY Slip Op 30407(U)

August 11, 2005

Supreme Court, New York County

Docket Number: 108916/05

Judge: Eileen Bransten

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

PRESENT: BRAUSTEN
Justice

PART 6

DAVIS, BELLA

INDEX NO. 108916/05

MOTION DATE 7-26-05

- v -

MICHAEL MELNICK

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to ~~4~~ were read on this motion to/for compel arbitration

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

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1, 2, 3</u>
<u>4 (see seq. 02)</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
AUG 15 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8-11-05

Eileen Bransten
EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

-----X
BELLA DAVIS,

Petitioner,

Index No.108916/05
Motion Date: 7/26/05 and 8/3/05
Motion Seq. Nos.: 01, 03

-against-

MICHAEL MELNICKE,

Respondents.

-----X

PRESENT: EILEEN BRANSTEN, J.S.C.

In the interests of efficiency, motions sequence number 01 and 03 have been consolidated for disposition.

In motion sequence number 01, pursuant to CPLR Article 75 petitioner Bella Davis (“Ms. Davis”) seeks a judgment compelling respondent Michael Melnicke (“Mr. Melnicke”) to arbitrate the parties’ disputes before the Beth Din of America. Ms. Davis further seeks a preliminary injunction “enjoining [Mr. Melnicke] from selling or otherwise transferring any portion or his ownership interest in Caton Park and/or the assets of Caton Park during the pendency of the Arbitration.” Amended Petition to Compel Arbitration, And For Temporary Restraining Order And Preliminary Injunction In Aid Of Arbitration (“Amended Petition”), at ¶ 32.

In motion sequence number 03, pursuant to CPLR 7504 and the parties' Purchase Agreement dated June 19, 2001 ("Agreement"), Ms. Davis moves for an Order from this Court appointing a third rabbinic arbitrator to preside over resolution of the parties' disputes.

Mr. Melnicke opposes the relief sought.

Background

On June 19, 2001, Ms. Davis and Mr. Melnicke entered into a Purchase Agreement ("Agreement") related to the Caton Park Nursing Home ("Caton Park"). Amended Petition, at ¶ 8. Pursuant to the Agreement, after certain conditions were fulfilled (including Ms. Davis' payment of \$3.57 million and receipt of appropriate approvals from the New York State Department of Health), Ms. Davis was to purchase "all of [Mr. Melnicke's] right, title and interest in certain assets of [Mr. Melnicke] relating to [Caton Park]," including "the business and operation of the Facility [and] all furniture, fixtures and equipment of the Facility and all leases relating thereto." Affidavit of Bella Davis in Support of Her Application to Compel Arbitration, and for a Temporary Restraining Order and Preliminary Injunction in Aid of Arbitration ("Davis Aff."), Ex. 1, Agreement. The parties dispute the effect of the Agreement. Specifically, Ms. Davis contends that Mr. Melnicke and her former attorney colluded and misrepresented to her that the Department of Health would not approve her application to own Caton Park unless she paid substantial consideration for the nursing home. Davis Aff., at ¶¶ 7-12.

Significantly, the Agreement broadly provides:

“In the event of any dispute arising under this Agreement, including but not limited to payments, adjustments, and the interpretation of the terms and conditions of this agreement, such dispute shall be submitted to and determined by a Rabbinical Court arbitration in the following manner. The party seeking arbitration shall appoint a Rabbi as arbitrator on its behalf and give the other party written notice thereof * * * whereupon the other party shall, within fifteen (15) days thereafter appoint a second Rabbi on its behalf and give written notice to the first party. * * * The two Rabbis designated as arbitrators shall then choose a third, disinterested, person to act as arbitrator, and the three arbitrators shall promptly meet with the disputants to finalize the issues to be settled and the proofs or testimony to be considered. If the two Rabbinical arbitrators cannot, within fifteen (15) days of the appointment of the second Rabbinical arbitrator, appoint the third Rabbinical arbitrator, either party may apply to a Court of Competent Jurisdiction to appoint such third arbitrator. The procedures and conduct of the arbitration proceeding shall be binding on all parties. The award of the arbitrators may be enforced by order of any Court of Competent Jurisdiction.”

Affirmation of Peter J. Gallagher In Support of Petitioner’s Application Pursuant to CPLR Section 7504 and Her Contractual Rights for Court Appointment of an Arbitrator (“*Appoint Aff.*”), Ex. A, Agreement, at ¶ 17 (“*Arbitration Provision*”) (emphasis added).

After Ms. Davis believed that she had been misled by Mr. Melnicke, she consulted with a rabbinical arbitrator about the possibility of commencing an arbitration against him “to force him to turn ownership of Caton Park” over to her. *Davis Aff.*, at ¶ 12. Ms. Davis alleges that upon hearing of her plans, Mr. Melnicke “preemptively initiated a rabbinical arbitration” by issuing a Hazmanah (summons) dated February 17, 2005 from the Rabbinical Court of the Central Rabbinical Congress of the U.S.A. and Canada (“*Central Rabbinical*

Congress”). The Hazmanah indicated that “the issues of this Arbitration are the circumstances under which [the Agreement] may either be cancelled, the price adjusted, and the respective benefits and burdens of the parties during the pendency of the contract.” Davis Aff., Ex. E.

On April 6, 2005, Ms. Davis responded that she was willing to arbitrate disputes. She asserted, however, that based on the Agreement she was not obligated to arbitrate before the Central Rabbinical Congress and that she instead decided to pursue the matter before the Beth Din of America. Davis Aff., at ¶ 15 and Ex. G. Ms. Davis subsequently filed a formal removal notice with the Beth Din of America. Davis Aff., Ex. H.

Article 75 Petition

In a Petition dated June 27, 2005, which accompanied an Order to Show Cause seeking injunctive relief, and in the Amended Petition, Ms. Davis requests that this Court compel Mr. Melnicke to participate in the arbitration believed to be pending before the Beth Din of America. She also requested a temporary restraining order and preliminary injunction enjoining Mr. Melnicke from “selling or otherwise transferring any portion of his ownership interest in Caton Park and/or the assets of Caton Park during the pendency of the Arbitration.” Amended Petition, at ¶¶ 30, 32. The Court issued the temporary restraining order to maintain the *status quo*.

Rabbinical Court Arbitration

In accordance with the Arbitration Provision, Mr. Melnicke designated Rabbi Mendel Epstein as a rabbinical arbitrator. *See*, Affirmation of Mendel Zilberberg in Opposition to Petitioner's Application to Appoint Arbitrator ("Zilberberg Aff."), Ex. 3, Affirmation of Rabbi Epstein ("Epstein Aff."), at ¶ 1. Ms. Davis subsequently designated Rabbi Barry Freundel to act as her rabbinic arbitrator. *Appoint Aff.*, at ¶ 6.

Ms. Davis now requests, pursuant to the Arbitration Provision, that this Court "appoint [a] third [Rabbinical] arbitrator" so that the dispute can expeditiously proceed to arbitration. *See*, *Appoint Aff.*, Ex. A, Agreement, at ¶ 17. Ms. Davis asserts that:

"More than 15 days have passed since [she] and Mr. Melnicke selected their arbitrators. Yet their arbitrators have been unable to agree to a third arbitrator."

Appoint Aff., at ¶10. Ms. Davis proposed five individuals to serve as the third rabbinical arbitrator. One of them is Rabbi Irving Breitowitz ("Rabbi Breitowitz"), who was ordained at Ner Israel Rabbinical College and earned a Doctor of Talmudic Law from that institution (known as a Yeshiva) as well. *Appoint Aff.*, Ex. B. He serves as the Rabbi of the Woodside Synagogue Ahavas Torah. *Id.* Rabbi Breitowitz, who obtained a J.D. from Harvard Law School, is also a tenured Professor of Law at the University of Maryland School of Law. *Id.*

In opposition, Mr. Melnicke argues that by entertaining this proceeding and appointing a third rabbinical arbitrator, this Court would be impermissibly entangling itself in the Jewish religion because it will have to determine both what constitutes rabbinical arbitration and who is qualified to be a rabbinical arbitrator. *Zilberberg Aff.*, at ¶ 10. Mr. Melnicke asserts that Ms. Davis is improperly seeking this Court to “pass upon the doctrinal issues of the appointment and qualifications of a Rabbinical Arbitrator, which is an ecclesiastical issue, [and would] interfere with the Code of Jewish Law’s ordained methodology for the appointment of the third Rabbinical Arbitrator in the case of an impasse.” *Id.*, at ¶ 14. Relying on the Restatement of Rabbinic Civil Law and the Affirmation of Rabbi Mendel Epstein, Mr. Melnicke urges that as a matter of Jewish law, the Arbitration Provision’s reference to a “Court of Competent Jurisdiction” cannot be interpreted as “referring to any body other than an established Beth Din, and it certainly does not refer to the Supreme Court of the State of New York.” *Zilberberg Aff.*, at ¶ 24; *see also* *Zilberberg Aff.*, Ex. 2, A Restatement of Rabbinic Civil Law; Ex. 3, Epstein Aff., at ¶ 12 (Agreement’s “reference to a ‘Court of Competent Jurisdiction’ refers to an established Beth Din, and not to this Honorable Court”).

In response to Ms. Davis’ list of suggested third rabbinic arbitrators, Rabbi Epstein (who also suggested five impressive rabbis--though this Court has not received a request by Mr. Melnicke for appointment of a third rabbinic arbitrator) indicated that:

“In a gesture of good will, I very reluctantly agreed to choose [Rabbi Breitowitz], conditioned on an agreement by [Ms. Davis], her counsel and her arbitrator, that if, after I raise my concerns with Rabbi Breitowitz, he declined for whatever reason to sit as the third Rabbinical Arbitrator, [Ms. Davis] agreed that she would choose one of the five Rabbis that I set forth.”

Zilberberg Aff., Ex. 3, at ¶ 27. Rabbi Epstein further states:

“I believe that the Court will be establishing a dangerous precedent by entangling itself in this religious quagmire and appointing the third Rabbinical Arbitrator.

“If, however, the Court is in fact ready to appoint such third Rabbinical [Arbitrator], I respectfully request the Court [grant] a continuance to have this issue properly briefed as a matter of Jewish Law.”

Id., at ¶¶ 30-31.

Because this matter simply involves interpreting the parties’ unambiguous Agreement under New York law, the Court will grant the petition to the extent of appointing a third arbitrator--Rabbi Breitowitz. The Court also continues the temporary restraining order “temporarily [enjoining Mr. Melnicke] from selling or otherwise disposing of any portion of his ownership interest in Caton Park and/or the Assets of Caton Park” pending a hearing, which shall take place at the earliest possible date (unless the parties consent to continuation of this restraining order pending a determination by the rabbinic arbitrators) to ascertain whether a preliminary injunction is appropriate (for example, whether there is a likelihood that Ms. Davis will succeed on the merits).

Analysis

CPLR 7501 provides that a “written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.” Here, the parties agreed in writing to arbitrate their disputes before a three-Rabbi “Rabbinical Court.” Each party was to designate a rabbi and the two rabbis were then to jointly select a third. The Agreement, however, further provides that “either party may apply to a Court of Competent Jurisdiction to appoint a third arbitrator” if the two rabbinical arbitrators cannot agree on a third rabbi “within fifteen (15) days of the appointment of the second Rabbinical arbitrator.” Appoint Aff., Ex. A, at ¶ 17.

“Court of Competent Jurisdiction”

The parties disagree on whether, pursuant to their Agreement, this Court is a “Court of Competent Jurisdiction” authorized to appoint a third rabbinic arbitrator. Ms. Davis presumes that the words “Court of Competent Jurisdiction” mean exactly what they say--any court of competent jurisdiction. Mr. Melnicke submits that the words necessarily must refer to a religious court or *Beth Din*.

Because the words “Court of Competent Jurisdiction” are clear--particularly in the context of the Agreement-- the Court will do what the parties themselves empowered it to do and appoint a third rabbinic arbitrator.

New York law is well settled. Extrinsic “and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face.” See, *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 163 (1990); see also, *R/S Associates v. New York Job Develop. Auth.*, 98 N.Y.2d 29, 33 (2002), *rearg. denied* 98 N.Y.2d 693 (2002). This Court will not entertain evidence from Mr. Melnicke, including Rabbi Epstein’s interpretation of what the words “Court of Competent Jurisdiction” must have meant or excerpts from *A Restatement of Rabbinic Civil Law*, that conflicts with the “complete and clear and unambiguous” contract between the parties. There is no need whatsoever to turn to Jewish law to interpret the parties’ easy-to-understand Arbitration Provision in their commercial agreement.

The words “Court of Competent Jurisdiction,” under the circumstances, must include a New York State court. When the parties intended for a “Rabbinical Court” determination, they explicitly and unambiguously provided for one, stating that disputes relating to interpretation of the Agreement “shall be submitted to and determined by a Rabbinical Court arbitration.” Appoint Aff., Ex. A, Agreement, at ¶ 17. In stark contrast, the parties provided for application to “a Court of Competent Jurisdiction”--without any mention of a religious

court or rabbi--upon encountering difficulty in setting up a rabbinical court arbitration or when ultimately seeking to enforce a rabbinical court arbitration award. The parties unquestionably understood the difference between a rabbinical court and courts generally and are bound by those designations.

It appears, moreover, that Mr. Melnicke's own attorneys previously explained to him that a "Court of Competent Jurisdiction" includes this Court. He acknowledged as such in affirming under penalty of perjury that "the Agreement's arbitration clause is governed by CPLR 7501 *et seq.*, and * * * **this Court** is charged by law to enforce the parties' agreement, which calls for a specific type of rabbinic arbitration." *See*, Affirmation of Michael Melnicke, at ¶ 58 (submitted to address motions sequence number 01 and 02).

There is absolutely no merit to Mr. Melnicke's argument that in upholding the parties' Agreement, this Court is impermissibly entangling itself in religion. The parties' religion or designation of "Rabbinical Court arbitration" does not render the Arbitration Provision unenforceable in a court of law. This dispute "can be decided solely upon the application of neutral principles of contract law, without reference to any religious principle." *See, Avitzur v. Avitzur*, 58 N.Y.2d 108, 114 (1983) (enforcing secular terms of parties' *religious agreement* to refer disputes to a nonjudicial forum), *cert. denied* 464 U.S. 817 (1983).

Appointment of Third Rabbinic Arbitrator

Ms. Davis, furthermore, has established that the Agreement's conditions for judicial appointment of a third rabbinical arbitrator have been satisfied. She demonstrated that the designated rabbinical arbitrators could not select a third rabbi within fifteen days of the appointment of the second and petitioned this Court, which is of competent jurisdiction, to appoint a third rabbinic arbitrator.

This Court has carefully considered both parties' lists of potential rabbinic arbitrators. Provided that Rabbi Breitowitz agrees to serve, this Court appoints him as the third rabbinic arbitrator. Rabbi Breitowitz was ordained at a well-respected Yeshiva and serves as the rabbi of a community. Importantly, this Court need not make any religious "ecclesiastical" determinations in appointing Rabbi Breitowitz. Mr. Melnicke did not call Rabbi Breitowitz's religious credentials or qualifications into question. Indeed, his rabbinic designee, Rabbi Epstein, affirmed that he conditionally agreed to arbitrate--albeit "very reluctantly"--alongside Rabbi Breitowitz. (The reason for any reluctance or the imposition of any conditions was not submitted to the Court in response to Ms. Davis' motion.) Nowhere in the parties' submissions is there any reason why Rabbi Breitowitz would be unsuitable. Mr. Melnicke does not claim that Rabbi Breitowitz does not have sufficient "command of the *Shulchan Arukh*, mastery of the complex and intricate laws of *Choshen Mishpat*, [or] ample experience" as a rabbinical arbitrator. *See*, Zilberberg Aff., Ex. 3, Epstein Aff. (listing

important credentials of rabbinic arbitrators). To the contrary, Rabbi Epstein implied that he has every confidence that Rabbi Breitowitz would be capable. Hopefully, Rabbi Breitowitz will play an integral role in expeditiously resolving the parties' disputes.

If Rabbi Breitowitz refuses to serve as an arbitrator, then either party may move for appointment of a different third rabbinic arbitrator (or perhaps--in the interests of offering the litigants a fair, speedy and less costly resolution--the designated Rabbis can reach an agreement on a third rabbinical panelist). This Court, however, will not alter the parties' Agreement or impose any additional conditions on either party with regard to selection of a third rabbinic arbitrator.

The Court reminds the parties that pursuant to the Arbitration Provision, the "arbitrators shall hear the dispute within thirty (30) days of the appointment of the third arbitrator." Appoint Aff., Ex. A, at ¶ 17. Those 30 days will begin to run from the date of service of this Decision and Order with notice of entry by petitioner on respondent.

Because nothing in the Agreement gives Ms. Davis the right to arbitration before the Beth Din of America, her application to compel arbitration before that body is denied.

Injunctive Relief

Finally, although a temporary restraining order precluding Mr. Melnicke from "selling or otherwise disposing of any portion of his ownership interest in Caton Park and/or the

assets of Caton Park” is an appropriate *interim* measure (absent the remedy an arbitration award may well be rendered ineffectual, *see*, CPLR 7502[c]), the Court cannot continue such extraordinary relief indefinitely. Ms. Davis must do more to convince the Court that she has a likelihood of success on the merits of the dispute that is to be arbitrated if injunctive relief is to be continued. *See, Erber v. Catalyst Trading, LLC*, 303 A.D.2d 165 (1st Dept. 2003) (petitioner must demonstrate likelihood of success on the merits as a prerequisite to injunctive relief). Accordingly, the parties must proceed to a hearing before a referee who will hear and report to this Court on whether Ms. Davis has a likelihood of success on the merits and is entitled to injunctive relief pending an arbitral determination. The Court acknowledges the unfortunate effect that this will have on the parties, who will now have to address the merits of their dispute in a judicial forum, but the law mandates further inquiry. If Mr. Melnicke stipulates to forgo sale of any of his interests in Caton Park and its assets pending a determination by the rabbinic arbitrators (which the Court anticipates will take place within 60 days of service of this determination with notice of entry as contemplated in the Agreement, *see*, Appoint Aff., Ex. A, Agreement, at ¶ 17), a hearing is unnecessary.

Accordingly, it is

ORDERED that the petition is granted to the limited extent that (1) the Court appoints Rabbi Breitowitz as the third rabbinical arbitrator to resolve the parties’ dispute, and (2) the temporary restraining order currently in effect is continued pending a preliminary injunction

hearing to be conducted before a Special Referee who will hear and report with recommendations concerning whether petitioner is entitled to a preliminary injunction, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; it is further

ORDERED that this proceeding is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determinations of the Special Referee or the designated referee; and it is further


ORDERED that petitioner is to serve a copy of this order with notice of entry on the Clerk of the Judicial Support Office (Room 311) **within 20 days of the date of this Decision and Order** to enable arrangement of a date--for the earliest possible time--for the appearance to a Special Referee.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
August 11, 2005

FILED
AUG 15 2005
NEW YORK
COUNTY CLERK'S OFFICE

ENTER


Hon. Eileen Bransten