Eighty-Eight Bleecker Co., LLC v 88 Bleecker Street Owners, Inc.
2006 NY Slip Op 30026(U)
August 24, 2006
Supreme Court, New York County
Docket Number: 9_30060/1621
Judge: Karen S. Smith
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SCANNED ON 10/31/2006
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAREN S. SMITH, *Justice* PART 44

Application of
EIGHTY-EIGHT BLEECKER CO., LLC,

Petitioner,

- v -

88 BLEECKER STREET OWNERS, INC.,

Respondent.

INDEX NO. 601621/06

MOTION DATE 8/22/06

MOTION SEQ. NO. 001

MOTION CAL. NO. ____

The following papers, numbered 1 to __ were read on this petition to confirm and cross-petition to vacate an arbitration award.

	PAPERS NUMBERED
Notice of Petition - Affidavits - Exhibits	1
Notice of Cross-Petition - Answering Affidavits — Exhibits ... Memorandum	2
Verified Answer to Cross-Petition - Memorandum - Affidavits - Exhibits	3
Reply Affidavits __in support of cross-petition/opp to petition___	4

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ORDERED that this petition to confirm and cross-petition to vacate or modify an arbitration award pursuant to CPLR § 7511 is decided in accordance with the attached memorandum and order.

FILED
OCT 31 2006
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/24/06

Hon. Karen S. Smith, *J.S.C.*

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

---X

Application of
EIGHTY-EIGHT BLEECKER CO., LLC,

Petitioner,

-against-

88 BLEECKER STREET OWNERS, INC.,
Respondent.

---X

Index no.: 601621/06
Motion seq.: 001
Motion date: 8/22/06

DECISION AND ORDER

FILED
OCT 31 2006
NEW YORK
COUNTY CLERK'S OFFICE

PRESENT: KAREN S. SMITH, J.S.C.:

This petition to confirm an arbitration award is denied and the cross-petition to vacate an arbitration award is denied in part and granted in part, for the reasons more fully stated below.

Petitioner, Eighty-Eight Bleecker Company, LLC (hereinafter "petitioner"), brought this proceeding pursuant to Article 75 of the CPLR to confirm an award rendered in its favor in arbitration proceedings. Respondent, 88 Bleecker Street Owners Inc. (hereinafter "respondent") cross-petitioned for an order vacating or, in the alternative, modifying the arbitration award pursuant to Article 75 of the CPLR.

The underlying facts are not in dispute. In 1982, petitioner was the sponsor of respondent, a cooperative corporation with title to the building known as 88 Bleecker Street in New York City. Petitioner entered into a master lease (the "lease") with respondent whereby it would rent the commercial space in the cooperative building, consisting of eight street front stores, a garage, laundry room and storeroom, for a period of 20 years, beginning January 11, 1982 and terminating December 31, 2001. The lease provided that petitioner could renew the

lease up to two times for a period of fifteen years for each renewal. The base rent for the commercial space for the initial term of the lease was $43,000 per year with no provision for rent to increase during the first 20 years. However, the lease also provided that petitioner would be responsible for 10% of any real estate tax increases above the tax level of 1981/1982. Upon renewal, the lease provided for a recalculation of rent for the renewal term to account for the current "cost of maintaining" the commercial space. Upon renewal, if the parties can not agree on what the "cost of maintaining" the commercial space is, the lease provides for the parties to enter into binding arbitration on the question of the cost of maintaining the commercial space.

When petitioner sought to exercise its first option to renew on January 3, 2000 for the period January 1, 2002 to December 31, 2016, respondent notified petitioner that the cost of maintenance for the space had increased dramatically and therefore the annual rent would be increased. The parties apparently attempted to come to an agreement on the cost of maintenance and set the rent for the renewal period, but were unable to do so. The parties then entered the subject arbitration before Arbitrator Irene Zelnick.

After arbitration commenced, petitioner sought to limit the scope of arbitration through a special proceeding in Supreme Court, New York County. The court ordered that the arbitrator had jurisdiction to determine the scope of the proceedings, except that the issues of legal fees and interest were to be decided after the conclusion of arbitration. On appeal, the Appellate Division narrowed the scope of the arbitration to exclude the issue of back rent. The arbitrator determined that the purpose of the proceedings was to determine respondent's annual cost of maintaining those portions of the building leased by petitioner in the year 2000. That amount would form the basis for the base rent to be paid by petitioner for the renewal period of fifteen years. The

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arbitrator reviewed evidence and heard testimony on the subject and issued a decision dated May 1, 2006. In her decision, the arbitrator concluded that building improvements, mortgage interest and principal, and real estate taxes should be excluded from the cost of maintaining the commercial space. The cost of maintaining the space, rather, includes the following: payroll and related costs, heating expenses, gas and electric, repairs/maintenance, maintenance supplies, insurance, management fees, legal fees, accounting, consulting, corporation taxes, water/sewer, and administrative costs. Such costs, she found, were included in the original computation and were allocated based on the petitioner's actual percentage of square feet occupied under the lease, which the arbitrator determined to be 15.462%. With those expenses in mind, the arbitrator found that the total "cost of maintaining" the commercial space during the year 2000 was $52,289.

"[I]t is well settled that an arbitrator need not justify his award by setting forth the reasons for his determination. All that is required is that the record contain a rational basis for the award." (*In Re Commercial Unison Ins. Co. v. Ewall*, 168 AD2d 247 [1st Dept 1990]). "'Arbitrators may do justice' and 'are not bound by principles of substantive law or rules of evidence.'" (*Aeneas McDonald Police Benevolent Ass'n v. City of Geneva*, 92 NY2d 326 [1998], internal citations omitted).

On a motion to confirm an arbitration award pursuant to CPLR § 7510, "[t]he court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." The Court's role is to review the award and records of the arbitration proceedings and, "if a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed."

(*Sobel v. Hertz Warner & Co.*, 469 F2d 1211, 1212 [2d Cir 1972]). Where a party seeks vacatur of an award claiming to be aggrieved by an arbitration award and having participated in the arbitration proceedings, CPLR § 7511 provides four grounds for vacatur: misconduct, bias, excess of power and procedural defects. (CPLR § 7511, Practice Commentary C7511:2). Where the claim is that the arbitrator exceeded her power (CPLR § 7511(b)(1)(iii)), it must be shown that "the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power." (*New York City Transit Authority v. Transport Workers' Union of America, Local 100, et al.*, 6 NY3d 332, 336 [2005]).

Here, respondent urges this Court to vacate the arbitration award on two grounds: (1) the award violates a strong public policy, and (2) the decision was a completely irrational construction of the lease terms. Respondent also argues, in the alternative, that the award should be modified pursuant to CPLR § 7511(c). Petitioner contends that the award should be confirmed in its entirety pursuant to CPLR § 7511(e).

Violation of Public Policy

Respondent argues, in seeking vacatur of the arbitration award, that the arbitration award is absolutely precluded by strong and well-defined statute and public policy of New York. New York courts have established a two-prong test by which to determine whether an arbitration award violates public policy. "First, where a court can conclude without engaging in any extended fact-finding or legal analysis that a law prohibits in an absolute sense, the particular matters to be decided by arbitration, an arbitrator cannot act. Second, an arbitrator cannot issue an award where the award itself violates a well-defined constitutional, statutory or common law of this State." (*In re United Fed'n of Teachers, Local 2 v. Bd. of Educ. of the City School*

District of the City of New York, 1 NY3d 72, 80 [2003]).

Specifically, respondent points to the strong public policy embodied in the Martin Act (General Business Law §352(e)(1)(b)), which requires that certain information be included in a cooperative corporation's offering plan policy. To that end, the respondent erroneously argues that the Act "requires that the rent for a sponsor-controlled commercial lease '<u>must</u>' include certain expenses attributable to the leased space – specifically, real estate taxes and interest on the mortgage that was placed on the building by the sponsor at the time of the cooperative conversion, and have 'escalator clauses which ensure that rent payable for the term of the leased space'" takes into account certain expenses, '"[including mortgage interest] and real estate taxes, labor, insurance, heating and utilities.'" (Citing to 13 NYCRR § 18.3(bb)(5)(v)(a)).

The Martin Act (General Business Law § 352(e)(1)(b)) does not address what provisions must be in a lease of this kind. Rather, it governs an offering plan by a cooperative corporation, and therefore has no applicability where, as here, the arbitrator was charged with giving meaning to a term in the parties' lease.

The regulations promulgated pursuant to the Martin Act (13 NYCRR § 18.3(bb)(5)(v)(a))[1] do not have the same *force* of law as the Act itself. The arbitrator found that

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[1] Additionally, 13 NYCRR § 18.3(bb)(5)(v) does not read as respondent would have the Court believe. The Section actually states, in pertinent part:

(v) When the lessee or sublessee is the sponsor . . ., the following provisions shall apply:

(a) The lease may not contain any unconscionable terms, including but not limited to any provision pursuant to which the rent payable may be less than expenses fairly attributable to the leased space.

(b) The lease must contain escalator clauses which ensure that the rent payable by the lessee for the term of the lease will be sufficient to cover the expenses fairly attributable to the leased space, such as expenses for real estate taxes, labor, insurance, heating and utilities.

. . .

While, as will be discussed, the regulations are not applicable because they were passed after the subject lease was executed, to the extent that they might be considered applicable, the purpose of the arbitration - to determine the cost of maintaining the commercial space - is completely aligned with the purpose of (a) above. With regard to (b), the

those regulations are inapplicable, as they were passed *after* the instant lease was entered into. Respondent argues that they are applicable and submits a letter, written by Assistant Attorney General Kenneth E. Demario of the New York State Attorney General's Office (which was also submitted to the arbitrator), in which Demario takes the position that the Attorney General's regulations, § 18.3 *et seq.*, apply to petitioner's offering plan because the original offering plan has been amended since the regulations took effect. That argument was rejected by the arbitrator and need not be evaluated here, as an arbitrator may make a mistake of law unless it is completely irrational, which is not the case here.

The scope of this arbitration - and therefore the scope of review in the instant proceeding - was simply to determine what expenses are included in determining the "cost of maintaining" the commercial space, and what proportion of the building's expenses are fairly attributable to petitioner under the lease. The offering plan is not a subject of these proceedings and therefore it is inappropriate to challenge the contents of the documents which make up the offering plan in the instant proceeding. Further, as the Attorney General's office is charged with regulating and enforcing cooperative corporation offering plans, there is no private right of action under the Martin Act (*see Eagle Tenants Corp. v. Fishbein*, 182 AD2d 610 [2nd Dept 1992]), and therefore respondent is not the proper entity to challenge the contents of the offering plan in this forum. Finally, the validity of the lease and any of its terms was not within the scope of the arbitrator's determination. For the arbitrator to re-write the lease to conform to now-existing regulations, as

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scope of the arbitration, as defined by the Court of Appeals, did not include revisiting the validity of the lease, including adding in additional escalator clauses to conform to later-instituted regulations. Finally, it should be noted that (b) requires escalator clauses, but lists real estate taxes, labor, insurance, heating and utilities as examples, not mandatory expenses that "must" be included in the base rent, as respondent submits.

the arbitrator's decision acknowledged, would itself have exceeded the arbitrator's powers. (*See National Cash Register Co. v. Wilson*, 8 NY2d 377 [1960]). Based on the evidence submitted by the respondent, the Court finds no basis to conclude that the arbitrator's award violates a strong public policy.

Irrational Construction

Respondent also argues that the arbitrator's award was a completely irrational construction of the subject lease term, and thereby exceeds the arbitrator's powers.

An arbitrator may be said to have exceeded her power where she "gave a completely irrational construction to the provisions in dispute and, in effect, made a new contract for the parties," (*National Cash Register Co. v. Wilson*, 8 NY2d 377, 383 [1960]), or where there is "no proof whatever to justify the award" (*In re Matra Bldg. Corp. v. Kucker*, 2 AD3d 732, 734 [2003]).

Here, respondent argues that "the [a]ward gave a completely irrational construction to the provisions in dispute, which is dehors[2] the Martin Act and the Attorney General's Position Paper." This Court finds respondent's argument unavailing. Respondent misunderstands the standard as stated in *National Cash Register Co. v. Wilson, supra*. Arbitrators, as pointed out earlier, are not charged with enforcing the law; the fact that the arbitrator's construction of the lease provisions may be contrary to or beyond the limits of the Martin Act, its regulations, or the informal opinion of the Attorney General's office is immaterial. The arbitrator would only have

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[2] Black's Law Dictionary defines dehors as "Out of; without; beyond; foreign to; unconnected with." (4th Edition). In the context in which respondent uses the term, the Court presumes respondent is arguing that the arbitrator's decision is contrary to or goes beyond what the Martin Act and Attorney General's position might require of the petitioner's offering plan and/or lease. It would be counter to respondent's own position to read the sentence as arguing that the Martin Act and Attorney General's position are unconnected with or foreign to the arbitrator's construction of the lease.

exceeded her powers by giving a completely irrational construction to the terms in the lease that apply to the "cost of maintaining" the commercial space. Had the arbitrator attempted to reform the lease to be in conformity with the letter from the Attorney General's office or the Martin Act, she would have exceeded her powers as described in *National Cash Register Co. v. Wilson, supra.*

Real Estate Taxes

Respondent's contention that the arbitrator's decision to exclude real estate taxes in the computation of the base rent was irrational and should be vacated, has merit. When the lease was executed, the base rent included the real estate taxes for 1981/1982. That figure was not to change throughout the term of the lease. However, under paragraph 41 of the lease, petitioner is also charged with paying 10% of all increases in real estate taxes above and beyond that amount. Upon renewal of the lease, the rent increases to account for the difference between the existing base rent and the current cost of maintaining the commercial space. The arbitrator found that paragraph 41 of the lease was the operative provision to account for increases in real estate taxes, and that to charge petitioner with 10% of all real estate taxes above the 1981/1982 level *and* include real estate taxes in the base rent would be double charging petitioner for real estate taxes.

The arbitrator did not include the original real estate taxes at the 1981/1982 level in the newly computed base rent. The lease requires the petitioner to pay the 1981/1982 level of taxes **plus** 10% of any increase in real estate taxes for the life of the lease. If the arbitrator concluded, as it appears she did, that *no* real estate taxes should be included in the base rent, it would decrease the amount of base rent significantly, which is tantamount to giving "a completely irrational construction to the provisions in dispute and, in effect, [making] a new contract for the

parties," (*National Cash Register Co. v. Wilson*, 8 NY2d 377, 383 [1960]). Because this appears not to be a computational error, the Court cannot modify the award pursuant to CPLR § 7511(c)(1). Rather, the portion of the decision calculating the amount of real estate taxes petitioner must pay during the fifteen year renewal period must be vacated and remanded back to the arbitrator for further proceedings and a determination of the base rent, including the level of real estate taxes which formed part of the original base rent, pursuant to CPLR § 7511(d).

Accordingly, it is;

ORDERED that petitioner Eighty-Eight Bleecker Co., LLC's petition to confirm the arbitration award is denied; it is further

ORDERED that respondent 88 Bleecker Street Owners, Inc.'s cross-petition to vacate the arbitration award is granted solely to the extent that the arbitrator's decision to exclude any real estate taxes from the base rent is vacated and remanded to the arbitrator for further proceedings and determination on that issue alone; it is further

ORDERED that respondent 88 Bleecker Street Owners, Inc.'s cross-petition to vacate the arbitration award is denied in all other respects.

The foregoing constitutes the decision and order of this court.

FILED
OCT 3 1 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 24, 2006
New York, New York

ENTER:

Hon. Karen S. Smith, J.S.C.