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

PRESENT: CAROL EDMEAD J.S.C. Justice PART 35

Metrobuild Associates Inc.

INDEX NO. 602211/06

MOTION DATE 8/25/06

- v -

MOTION SEQ. NO. 001

Nahoum, Kenneth

MOTION CAL. NO. ____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 20 2006
NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED and ADJUDGED that the application of petitioner Metrobuild Associate, Inc., for an order and judgment pursuant to CPLR 7510, confirming the Arbitration Award issued by John J. Krol, Esq., on June 13, 2006 against respondents Kenneth Nahoum and Ken Nahoum Production Enterprises, Inc. and directing that judgment be entered thereon, is denied and the petition is dismissed. It is further

ORDERED that the application of respondents Kenneth Nahoum and Ken Nahoum Production Enterprises, Inc., for an order vacating the Award of Arbitration issued by Arbitrator John J. Krol, Esq., on June 13, 2006 in the arbitration conducted before the American Arbitration Association entitled *Metrobuild Associates, Inc. v Kenneth Nahoum and Ken Nahoum Production Enterprises, Inc.*, is granted, and the Award is hereby vacated. It is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated: 9/12/06

CAROL EDMEAD J.S.C.

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

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: PART 35

x

Application of

METROBUILD ASSOCIATES, INC.,

Petitioner,

For an Order and Judgment Pursuant to Article 75 of the CPLR Confirming an Arbitration Award

-against-

KENNETH NAHOUM and KEN NAHOUM PRODUCTION ENTERPRISES, INC.,

Respondents.

x

Index No. 602211/06

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Metrobuild Associate, Inc. ("petitioner") moves this court for an order and judgment pursuant to CPLR 7510, confirming the Arbitration Award issued by John J. Krol, Esq. (the "Arbitrator") on June 13, 2006 against respondents Kenneth Nahoum ("Nahoum") and Ken Nahoum Production Enterprises, Inc. ("respondents") (the "Award") and directing that judgment be entered thereon.

Respondents cross move for an order pursuant to CPLR 7511(b) (1) vacating the Award; and (2) staying the accrual of interest on this award pending the outcome of the instant application.

Background

On or about June 16, 2003, petitioner and respondent Nahoum entered into a written construction contract, whereby petitioner agreed to perform certain construction work for said

respondent (the "Contract"). The Contract was for extensive home improvements to Nahoum's residence at 95 Greene Street, New York, New York (the "Project"), where Nahoum had lived for seventeen years prior to the commencement of the Contract work. The work to be performed by petitioner consisted of joining three contiguous penthouse units together to form a single residence for Nahoum and his family. Article 4.6.1 of said Contract provides as follows:

> **4.6 Arbitration**
>
> **4.6.1** Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5.

Further, all claims and disputes arising out of or relating to said Contract were to be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA")

Article 4.6.6 of said Contract provides as follows:

> **4.6.6 Judgment on Final Award.** The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

By Amendment-Rider dated June 30, 2004, the Contract was "assigned from Ken Nahoum, individually, and ... assumed by [Ken Nahoum Production Enterprises, Inc.]; however, Ken Nahoum, individually agrees to guarantee payment by [Ken Nahoum Production Enterprises, Inc.], in the event of any default in payment hereunder."

On June 1, 2005, petitioner served and filed its Demand for Arbitration with the AAA. Respondents filed a Counterclaim. The AAA appointed John J. Krol, Esq. as the Arbitrator.

Pre-arbitration conferences by telephone were held with the Case Manager of the AAA, and then with the Arbitrator. An Amended Demand was served and filed with the AAA, adding the corporate respondent as a party. Respondents served and filed an Amended Counterclaim.

The parties had thirteen evidentiary Arbitration hearings before the Arbitrator. Petitioner and respondents submitted evidence and presented witnesses. The parties both submitted post-hearing briefs. The controversy was submitted to the Arbitrator for adjudication and award pursuant to the terms of said agreement, and in accordance with the Rules of the American Arbitration Association.

On June 13, 2006, the Arbitrator, after having taken the oath prescribed by law, having fully considered all of the evidence and arguments submitted to the Arbitrator, and having come to a decision, duly made his Award in writing, signed and acknowledged on the 13th day of June, 2006 whereby the Arbitrator determined and awarded that there is due to Metrobuild Associates Inc., petitioner, from Kenneth Nahoum and Ken Nahoum Production Enterprises, Inc., respondents, the sum of $204,513.00, with interest thereon at 9% from June 21, 2005, until payment.

Further, the issue of plaintiff's non compliance with the Administrative Code[1] was addressed by the Arbitrator:

> "Respondents' motion, upon reargument, to dismiss Claimant's affirmative claim for failure to comply with the New York City Administrative Code is denied."

. . . . . .

[1] The Administrative Code of the City of New York requires that home improvement contractors obtain licenses before contracting for or performing home improvement work. Section 20-387 of the Administrative Code of the City of New York provides that "No person shall solicit, canvass, sell, perform, or obtain a home improvement contract as a contractor without a license therefor." Unlicensed contractors are barred from collecting damages on breach of contract or *quantum merult* claims against homeowners.

Furthermore, individual Respondent does not escape liability pursuant to the New York City Administrative Code, since the individual Respondent independently guaranteed payment in the eventuality of any payment default by the corporate Respondent, which is found to have intended to pursue its commercial interests in the premises at 95 Greene Street, New York City.

Respondents' Cross Motion

Respondents argue that two well founded legal principles apply to this court's ability to vacate an arbitration award, namely, (a) that the Arbitrator's denial of Nahoum's motion to dismiss petitioner's claim due to petitioner's admitted failure to obtain a Home Improvement Contractor ("HIC") license as required by New York City Administrative Code § 20-387 is violative of public policy; and (b) the Award is "irrational" since it "rewrites" the contract between the parties in violation of CPLR § 7511(b)(1).

The evidence adduced at the arbitration hearings is overwhelming that the Project was residential in nature. During the arbitration, Nahoum testified that in calendar year 2000 he began the project of adjoining three units together to "make a beautiful home," and that he never had any intention of developing the space for use as his place of business (*See* 2/2/06 transcript, pp. 1036-39 and p. 1100). Petitioner was well aware that Nahoum conducted his business at another location on Van Dam Street in New York City based on the fact that numerous project-related meetings were held at the business location both before and during construction. When asked during testimony at the arbitration by his own counsel to describe the project, petitioner's principal, Domenic Carapella, stated that it entailed taking "...three existing apartments, individual units and combin[ing] them on the main level on the sixth floor," and he further acknowledged that the renovated space was to include one or more bedrooms, bathrooms, living

rooms and dining rooms (*See* 11/14/05 transcript, p. 37). Petitioner understood this to be a residential project based on petitioner's statement on petitioner's payment requisition #11 as follows: "This pay requisition covers the last portion of the work completed in early May on your residence." Finally the reference to "Commercial" on the architect's drawings refers to the mixed use zoning of the building and the area.

During the time that the work was being performed by petitioner on the Project, petitioner admittedly did not possess a valid New York City HIC license as required by New York City Administrative Code § 20-387, because of petitioner's ignorance of that licensing requirement.

At the close of approximately thirteen (13) evidentiary hearings before the Arbitrator, Nahoum moved to dismiss petitioner's claim in light of petitioner's admitted failure to obtain an HIC license as required by New York City Administrative Code § 20-387. In concluding that Nahoum's motion to dismiss should be denied, the Arbitrator stated as follows:

> Pursuant to the amendment of June 30, 2004...., the agreement was '...assigned from Ken Nahoum [individual Respondent], individually, and ... assumed by [Ken Nahoum Production Enterprises, Inc....; however, Ken Nahoum, individually, agrees to guarantee payment by [corporate Respondent], in the event of any default in payment hereunder.'...This effected an assignment to the corporate Respondent, a corporate enterprise with commercial interests in the premises subject to this arbitration at 95 Greene Street, New York City.
>
> . . . . . .
>
> The *bona fides* of both the individual Respondent and the corporate Respondent were compromised by testimony that Respondent intended to perform work beyond the scope of the New York City Building Department permit including a screening room, the floor of which was contemplated by Respondents to be installed after New York City had issued its Certificate of Occupancy (Transcript 348-349).

Even assuming, as the Arbitrator concluded, that Nahoum intended to perform work

beyond the scope of the New York City Building Department permit, petitioner was still obligated to obtain an HIC license. To the extent that the Arbitrator relied on this factual finding to conclude as a matter of law that petitioner did not have to procure an HIC license, that conclusion violate well-established New York public policy.

Finally, the Arbitrator's determination was irrational because the Arbitrator ignored Article 5.1.6.1 of the Contract and failed to consider the fact that even though petitioner may have completed work having a value of $839,848. by May 12, 2005, it was only entitled to be paid $755,469. As a result, the Arbitrator concluded that Metrobuild was due $88,352. On that date (not $4,367.20 after applying retainage), and found Nahoum to be in breach of the Contract.

Petitioner's Opposition to Cross Motion
and Further Support of Petition

Petitioner argues that since respondents do not contest that the Arbitrator correctly awarded the $88,352 to petitioner, the only issue is the loss of anticipated profit claim. The Arbitrator took into account the 10% retainage. Further this issue was reargued by respondents in their Application to modify the Award, which the Arbitrator denied in its entirety.

Further, the issue of petitioner's failure to possess a New York City license was fully briefed and argued before the Arbitrator, twice. The project was Commercial and not residential.

- R.I.P. Construction Consultants, Inc. Drawing C-1 dated August 3, 2003 and filed with the Building Department, the Zoning Information Section identified the occupancy use as "Commercial";

- Franke, Gottsegan, Cox Architects by Drawing A001, dated December 21, 2004 and filed with the Building Depart ent, the Zoning Information Block confirmed the occupancy use as "Commercial;

- representations were made to petitioner's principals that Nehoum intended to use the space for shooting commercials; Nahoum is a fine photographer.

Respondents' Further Reply

Respondents further argue that even assuming that Nahoum did intend to pursue a commercial use of the premises, he is still entitled to the protection of the HIC license requirement. New York courts have consistently held that an HIC license is required for construction that involves a mix of residential and commercial space.

Further, since the Arbitrator was authorized to determine the amount due petitioner, for work performed, Mahoum is not seeking to vacate that portion of the Award which awards petitioner the sum of $88,352.00. However, the Arbitrator's failure to apply the retainage provisions contained in the Contract mandates vacating that portion of the Award which assesses damages against Nahoum for loss of anticipated profits in the amount of $116,161. Those damages against Nahoum could only be assessed against Nahoum if he was in breach of the Contract on May 12, 2005 when petitioner walked off the job due to the supposed failure of Nahoum to pay petitioner for the value of work in place, less retainage.

Analysis

It has long been settled that New York State public policy favors the enforcement of arbitration agreements (*Matter of Weinrott [Carp]* 32 N.Y.2d 190, 199, 344 N.Y.S.2d 848, 298 N.E.2d 42 [1973]; *Matter of Smith Barney Shearson Inc. v Sacharow,* 91 N.Y.2d 39, 49, 666 N.Y.S.2d 990, 689 N.E.2d 884 [1997]), for arbitration serves "as a means of conserving the time and resources of the courts and the contracting parties" (*Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.,* 37 N.Y.2d 91, 95, 371 N.Y.S.2d 463, 332 N.E.2d 333 [1975], *see also Maross Constr., Inc. v Central N.Y. Regional Transp. Auth.,* 66 N.Y.2d 341, 345, 497 N.Y.S.2d

321, 488 N.E.2d 67 [1985] [arbitration "is now well recognized as an effective and expeditious means of resolving disputes between willing parties desirous of avoiding the expense and delay frequently attendant to the judicial process"]; *Matter of Siegel [Lewis],* 40 N.Y.2d 687, 689, 389 N.Y.S.2d 800, 358 N.E.2d 484 [1976] ["[i]t has long been the policy of the law to interfere as little as possible with the freedom of consenting parties to achieve that objective"]).

Judicial review of an arbitration award is limited, and an award will not be vacated "unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on [the arbitrator's] power" (*Matter of Silverman [Benmor Coats],* 61 N.Y.2d 299, 308, 473 N.Y.S.2d 774, 461 N.E.2d 1261 [1984]; *see also Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.,* 1 N.Y.3d 72, 83, 769 N.Y.S.2d 451, 801 N.E.2d 827 [2003]). Moreover, courts are obligated to give deference to the decision of the arbitrator (*see Matter of Sprinzen [Nomberg],* 46 N.Y.2d 623, 629, 415 N.Y.S.2d 974, 389 N.E.2d 456 [1979] ["An arbitrator's paramount responsibility is to reach an equitable result, and the courts will not assume the role of overseers to mold the award to conform to their sense of justice"]). This is true even if the arbitrator misapplied the substantive law in the area of the contract (*see Matter of Associated Teachers of Huntington v Board of Educ., Union Free School Dist. No. 3, Town of Huntington,* 33 N.Y.2d 229, 235, 351 N.Y.S.2d 670, 306 N.E.2d 791 [1973]; *see also Rochester City School Dist. v Rochester Teachers Assn.,* 41 N.Y.2d 578, 581, 394 N.Y.S.2d 179, 362 N.E.2d 977 [1977]).

So, even where the arbitrator makes a mistake of fact or law, or disregards the plain words of the parties' agreement, the award is not subject to vacatur "unless the court concludes that it is totally irrational or violative of a strong public policy" and thus in excess of the

arbitrator's powers (*Hackett v Milbank, Tweed, Hadley & McCloy,* 86 N.Y.2d 146, 155, 630 N.Y.S.2d 274, 654 N.E.2d 95 [1995]). *See also Maross Constr. v Central N.Y. Regional Transp. Auth.,* 66 N.Y.2d 341, 346, 497 N.Y.S.2d 321, 488 N.E.2d 67 [1985]; *Matter of Silverman [Benmor Coats],* 61 N.Y.2d 299, 308, 473 N.Y.S.2d 774, 461 N.E.2d 1261 [1984]; *Matter of Sprinzen [Nomberg],* 46 N.Y.2d 623, 631, 415 N.Y.S.2d 974, 389 N.E.2d 456 [1979]; *Garrity v Lyle Stuart, Inc.,* 40 N.Y.2d 354, 357, 386 N.Y.S.2d 831, 353 N.E.2d 793 [1976]).

The two grounds asserted herein by respondents for vacatur of the Arbitrator's determination are that said decision was irrational and contrary to public policy.

Irrationality

While the term "irrationality" is oft bandied about in arbitration decisions and finds its way, almost inexorably, as the last of the losing litigator's long litany of laments in actions to vacate an arbitration award, there is precious little precedent to delineate in this context what "irrational" means.

The New York Court of Appeals recognizes "irrationality" as a non-statutory ground for setting aside an arbitral award under New York law. As recently as November 20, 2003, the Court of Appeals reiterated this principal in *United Federation of Teachers v Board of Education,* 1 N.Y.3d 72, 79, 769 N.Y.S.2d 451, 801 N.E.2d 827 [2003]). In that case, the Court considered public policy grounds for the vacation of an arbitration award, and found such grounds not present in the case. In the course of its decision, however, the Court in listing the grounds for vacation of a New York arbitration award, again included "irrationality."

An arbitrator's determination is "irrational" if it gives a completely baseless construction

to the provisions of the parties' contract in dispute and, in effect, makes a new contract or misconstrues the contract agreed to by the parties (*see Matter of Pine Plains Cent. School Dist. v Kimball,* 272 A.D.2d 332, 333, 708 N.Y.S.2d 306 [2000], quoting *Matter of National Cash Register Co. [Wilson],* 8 N.Y.2d 377, 383, 208 N.Y.S.2d 951, 171 N.E.2d 302 [1960]).

Contrary to Public Policy

Absent provision to the contrary arbitrators are not bound by principles of substantive law or rules of evidence. Their duty is to reach a just result regardless of technicalities (*Associated Teachers of Huntington v Board of Education, Union Free School District No. 3, Town of Huntington,* 33 N.Y.2d 229, 235, 351 N.Y.S.2d 670, 306 N.E.2d 791 [1973]). However, where certain issues are interlaced with public policy, considerations should not be left to the discretion of arbitration. *Id.*

The issue of public policy may be raised for the first time following the arbitration award. However, the public policy ground is a narrow one, and setting aside an award on this basis is predicated on a two prong test. First, a court must be able to conclude, without fact finding or legal analysis, that a law absolutely prohibits the particular matters to be decided. Second, the award itself must violate a well defined constitutional, statutory or common law of the state (*see United Federation of Teachers, Local 2, AFT, AFL-CIO v City of New York,* 1 N.Y.3d 72, 80, 769 N.Y.S.2d 451, 801 N.E.2d 827 [2003]).

Home Improvement Contract; Licensing Requirements

It is axiomatic that an unlicensed home improvement contractor cannot recover for breach of contract or quantum meruit (*see Blake Elec. Contr. Co., Inc. v Paschall,* 222 A.D.2d 264, 266,

635 N.Y.S.2d 205 [1st Dept. 1995]).

The licensing requirements for home improvement contractors is to be strictly construed (*Chosen Const. Corp. v. Syz,* 138 A.D.2d 284, 286, 525 N.Y.S.2d 848 [1st Dept. 1988]), even when the work was satisfactorily performed or where the homeowner, knowing the contractor was unlicensed, had no intention of paying (*Millington v Rapoport,* 98 A.D.2d 765, 766, 469 N.Y.S.2d 787 [2d Dept. 1983]).

Even assuming that Nahoum did intend to pursue a commercial use of the premises, he is still entitled to the protection of the home improvement license requirement.

The case of *Smith v Wagner* 1/23/2003 N.Y.L.J. 18, (col. 1), is on point with the instant case. In *Smith*, defendant's motion for summary judgment dismissing the complaint and discharging the mechanic's lien was granted, because plaintiff was not licensed to perform the home improvement work which comprised the principal part of the work entailed by the construction contract between the parties. Plaintiff concede that he was not licensed to perform home improvement work when he performed the work required by the Contract. Further, the parties stipulated to confirm a Referee's report, dated February 13, 2003, in which the Referee found that, of the total Contract price of $1,120,505.39 claimed by plaintiff, approximately 85 percent, or $948,689.52, was attributable to home improvement work, performed on the residential portion of the Building, and approximately 15 percent, or $171,815.87, was attributable to non-home improvement or work performed on the portion of the Building which defendant leased to a commercial tenant. Plaintiff contended that he was not required to have a home improvement license to perform any of the work under the Contract, because the building

was a mixed-use, commercial and residential, building, and because the Contract included work on the commercial portion of the Building. The court concluded that this argument was, in fact, refuted by Administrative Code §20-386 (2). The court opined: "As previously stated, that section defines 'home improvement' to mean 'the construction, ... renovation, modernization, improvement, or addition to any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place' (Administrative Code §20-386 [2] [emphasis added]). The provision's language clearly contemplates that a license shall be required for work performed in or upon a residential space, even where that space is only part of a building which is also used for non-residential purposes.

The recent decision in *Young's L & M Const., Inc. v Kelley*, --- N.Y.S.2d ----, 2006 WL 1985441, is further instructive. In *Young's L & M Const., Inc.*, the contractor's failure to obtain a home improvement license, as required under city's administrative code to perform home improvement contract, barred the contractor's recovery in an action in which it sought payment for work performed under non-severable contract for both residential and commercial work on tenant's premises, notwithstanding the contractor's contention that, since the residential portion of the work was a minor part of project and had already been paid for, it did not have to be licensed as a home improvement contractor (McKinney's CPLR 3015(e); New York City Administrative Code, §§20-102(a-c), 20-104(a), 20-386(2, 4, 6), 20-387(a), 20-390(1)).

Conclusion

Assuming that the Arbitrator was correct and that part of the work at the subject premises was to be commercial, it is equally clear that part of the work was residential. According to the Contract, the "Project is:...Penthouse Addition." As such, plaintiff's failure to obtain a home

improvement license bars plaintiff from recovering in this action (cf. *Mortise v 55 Liberty Owners Corp.*, 102 A.D.2d 719, 720, 477 N.Y.S.2d 2 [1st Dept. 1984] [where a contractor was converting an office building into dwelling units, the contractor had to be licensed as a home improvement contractor under the predecessor home improvement provisions of the Administrative Code of the City of New York, and because of the lack of a license, the action was dismissed]).

Thus, the Arbitrator's denial of respondents' motion for dismissal of petitioner's claim, concluding that since he found that Nahoum "...intended to pursue its commercial interests in the premises at 95 Greene Street, New York, New York City," was a sufficient basis to deny respondents' motion, was violative of public policy. The Arbitrator's determination was in contravention of the clear public policy behind the regulation requiring a home improvement contractor to have a license, which is to safeguard and protect a homeowner against abuses and fraudulent practices by licensing persons engaged in the home improvement, remodeling and repair business (Administrative Code § 20-285; *see also, Matter of Heller,* 178 AD2d 195, 577 NYS2d 263 [1st Dept 1991]).

In light of this court's determination on the issue of public policy, this court does not reach the issue of "rationality."

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of petitioner Metrobuild Associate, Inc., for an order and judgment pursuant to CPLR 7510, confirming the Arbitration Award issued by John J. Krol, Esq., on June 13, 2006 against respondents Kenneth Nahoum and Ken Nahoum Production Enterprises, Inc. and directing that judgment be entered thereon, is denied and the

petition is dismissed. It is further

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ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated: September 12, 2006

Carol Robinson Edmead, J.S.C.

CAROL EDMEAD
J.S.C.

FILED
SEP 20 2006
NEW YORK
COUNTY CLERK'S OFFICE