

**Herskowitz v VCV Development Corp.**

2006 NY Slip Op 30098(U)

October 20, 2006

Supreme Court, New York County

Docket Number: 0060123/2006

Judge: Joan A. Madden

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**HON. JOAN A. MADDEN**  
**J.S.C.**

PART 11

PRESENT:

Index Number : 601230/2006

HERSKOWITZ, ROBERT

vs

VCV DEVELOPMENT CORP.

Sequence Number : 001

VACATE OR MODIFY AWARD

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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 \_\_\_\_\_

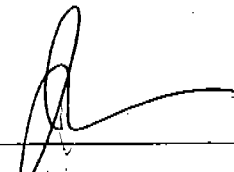
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~

*Article 75 proceeding is determined in accordance with the annexed decision, order and judgment.*

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: October 20, 2006

  
\_\_\_\_\_  
J.S.C.

**HON. JOAN A. MADDEN**  
**J.S.C.**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 11

-----x  
ROBERT HERSKOWITZ and JOHANNA GUTTMANN  
HERSKOWITZ,

Index No. 117604/03

Petitioners,

- against -

VCV DEVELOPMENT CORP., CATSKILL HOME  
BUILDERS and NACHMAN KANOVSKY,

Respondents

**UNFILED JUDGMENT**  
*This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).*

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JOAN A. MADDEN, J.:

Petitioners Robert Herskowitz and Johanna Guttmann Herskowitz petition this court for an order, pursuant to CPLR 7511(b), vacating or modifying an arbitration award rendered on August 18, 2005, in the amount of \$25,000.00, in favor of respondents VCV Development Corp. ("VCV"), Catskill Builders ("Catskill") and Nachman Kanovsky ("Mr. Kanovsky") and against petitioners (the "Award").

Respondents oppose the petition, and cross-petition to confirm the award, pursuant to CPLR 7510. Respondents also seek sanctions against petitioners.

**Background**

This proceeding arises from a dispute involving the sale of real property in a subdivision known as Vacation Village, Loch Sheldrake, New York ("Vacation Village"). Petitioners are the buyers and VCV and Catskill are the sponsors and sellers of the real property. Mr. Kanovsky is the principal of VCV and Catskill. By agreement, dated September 9, 2004, the parties consented to

submit their dispute for resolution under the rules of the American Arbitration Association ("AAA").

In April 2000, petitioners agreed to buy from VCV and Catskill Lot No. 77 in Vacation Village. The written contract, dated April 9, 2000, with various riders dated April 9, 15, and 16, 2000, required VCV and Catskill to construct a townhouse unit on said lot, pursuant to an Offering Plan of the Vacation Village Homeowners Association ("VVHOA"). The total contract price was \$220,000, which included \$120,000 for the construction of the townhouse unit. In addition, paragraph 18 of the contract provided, in part, that the buyers were to receive credit, dollar for dollar, for items which can be separately ascertained and which are not obtained from the sellers, and \$12.00 per square foot for carpeting obtained from the sellers' source.

The contract also required the buyers to close title upon the completion of the townhouse unit. In particular, the buyers were to close title within 14 days after receipt of notice from the sellers that a certificate of occupancy had been issued and there had been a reasonably satisfactory inspection by buyer. Paragraph 7 of the contract further states that "[t]he Purchaser shall accept title such as Seller's title company or any other reputable title company will approve and insure, without exception" (Contract, Notice of Petition, Exh A). The estimated closing date was June 15, 2000.

The sellers' liability for failure to complete the townhouse and deliver good title included the return of any money paid plus

\$25,000, with interest, as well as reimbursement of legal fees and expenses. In the event of a default by the buyers, the sellers were entitled to, among other things, retain \$25,000 as liquidated damages.

The VVHOA Offering Plan was accepted for filing by the State of New York Office of the Attorney General on September 19, 1983. Fourteen amendments to the Offering Plan were filed with the Attorney General's office. The 14<sup>th</sup> amendment, which was accepted for filing on July 21, 1999, extended the plan for one year and expired on July 21, 2000.

The Offering Plan provides, in part, that "owners shall receive fee title to the unit and the land upon which it is situated" (Certificate of Incorporation of VVHOA, Not of Petition, Exh B, p. 1). The Offering Plan further states that "[e]ach purchaser of a Home in this Development will, upon conveyance of a deed, thereof become an owner of his individual unit and the land upon which it is constructed, subject to a primary and supplemental Declaration" (*id.*).

Petitioners made payments totaling \$170,000 under the contract. In August 2000, respondents allowed petitioners to occupy the premises pending the closing. Thereafter, petitioners reportedly discovered that their townhouse unit extended 1.5 feet onto a common area. Petitioners assert that they were ready, willing, and able to close under the contract, but requested that respondents resolve the issue of the encroachment of the townhouse

unit onto a common area. Petitioners also claim to have informed respondents of their dissatisfaction with specific aspects of the workmanship during the construction. Respondents paid the taxes on the real property prior to the arbitration.

On September 9, 2004, after several unsuccessful attempts at resolution, the parties submitted their dispute under the contract to arbitration. Respondents sought specific performance and damages for breach of contract. In addition to the \$50,000 balance due under the contract, respondents sought \$20,000 in extras contracted for, \$27,000 in real estate taxes for the period of occupancy by petitioners, and \$100,000 for petitioner's use and occupancy of the since August 1, 2000. In response, petitioners sought various credits. They claimed that they spent large sums to make the townhouse unit habitable, and that they would have to spend additional funds to properly complete the house. In addition, petitioners rejected as deficient respondents' offer to tender insurable title.

At the request of the arbitrator, the parties submitted briefs in letter form addressing the issue of whether the tender insurable title by respondents satisfied the terms of the contract. Petitioners argued, in essence, that the 1.5-foot encroachment of the townhouse unit onto a common area of the VVHOA precluded them from receiving fee title to the unit and the land upon which it is situated "free and clear of all ... encumbrances," as required by the Offering Plan. Petitioners also asserted that the fact that respondents procured title insurance

does not guarantee that they will receive fee title to the real property.

Citing General Business Law § 352-e,<sup>1</sup> petitioners further argued that VVHOA Offering Plan expired on July 21, 2000, and that respondents were required to amend said Offering Plan and obtain approval from the Attorney General in order to sell the real property in its current condition. Petitioners speculated that the Attorney General would not accept any amendment for filing given the cloud on title stemming from the encroachment of the townhouse unit onto a common area.

However, respondents argued that the contract requires only that they tender insurable title to the real property, and that they satisfied that contractual requirement. In response to petitioners' assertion that the VVHOA Offering Plan has expired, respondents note that the Offering Plan in effect on April 9, 2000, when the contract was executed.

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<sup>1</sup>General Business Law §352-e, commonly referred to as the Martin Act, states, in part:

1. (a) It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association .. To make or take part in a public offering or sale in or from the state of New York of securities constituted or participation interests or investments in real estate ..., unless and until there shall have been filed with the department of law, prior to such offering, a written statement or statements, to be known as an "offering statement" ....

5. No offering or sale whatever of securities described in subdivision one of this section shall be made except on the basis of information, statements, literature, or representations constituting the offering statement or statements or prospectus  
....

Following an arbitration hearing on the dispute on June 20, 21, and 22, 2005, the arbitrator granted respondents' request for specific performance and directed petitioners to close title and accept a deed to the property upon certain specified conditions (Award, Not of Cross Motion, Ech C). The arbitrator determined that petitioners were "required to accept such title as a Title Company will insure" and that a proposed title policy adequately insured the property (*id.*). The arbitrator also reduced to \$25,000 the balance due to respondents under the contract to offset payments made by petitioners for repairs. In addition, the arbitrator directed the parties to close title within 30 days of service of the award, presentation of the deed by respondents, and payment of the \$25,000 balance due under the contract. The arbitrator further instructed petitioners to accept the real property "as is" with no further offsets (*id.*).

Thereafter, the arbitrator denied respondents' request for modification of the award to recover real estate taxes paid prior to the arbitration. Respondents made several attempts to schedule a closing for the transaction, but the parties could not agree on who was responsible for paying open real estate taxes. By letter, dated November 21, 2005, respondents sought clarification from the arbitrator on the issue of the open real estate taxes. Petitioners sought further modification of the award. By Disposition for Application of Clarification of Award, dated January 11, 2006, the arbitrator expressly declined to modify the

award, determined that petitioners were responsible for all open real estate taxes, and directed the parties to proceed to closing as previously ruled (Disposition, Not of Cross Mot, Exh D).

Respondents' subsequent attempts to schedule a closing for the transaction resulted in a series of adjournments and cancellations.

On May 30, 2006, petitioners filed the instant petition to vacate or modify the award. Respondents oppose the petition and cross-petition to confirm the award. Respondents also seek sanctions against petitioners.

#### DISCUSSION

Preliminarily, respondents argue that the petition should be dismissed as untimely since it was not made within 90 days after it was delivered to them, as required by CPLR 7511(a). Respondents assert that since the Disposition for Application of Clarification of Award was issued on January 11, 2006, the 90-day limitations period for petitioners to seek vacatur of the award expired on April 11, 2006. Respondents note that the petition, dated April 7, 2006, was not served on them until May 30, 2006.

In response, petitioners do not dispute that they failed to seek vacatur or modification of the award within the 90-day limitations period. Instead, petitioners rely on a Stipulation, dated June 9, 2006, in which respondents agreed "not to raise as defenses defects in service of process or the Court's lack of jurisdiction over the[m]" (Stipulation, Reply Affirm, Exh A).

However, respondents' waiver of jurisdictional defenses, as evidenced by the proffered Stipulation, has no bearing on their ability to raise a separate defense based on the Statute of Limitations (see *Rubino v City of New York*, 145 AD2d 285, 288-289 [1<sup>st</sup> Dept 1989]).

Petitioners' attempt to use CPLR 306-b to extend the limitations period for filing the petition is unavailing. CPLR 306-b states, in part, that "where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires." The statute further states that if service is not made within the time provided therein, "the court, upon motion, shall dismiss the action without prejudice ..., or upon good cause shown or in the interest of justice, extend the time for service (*id.*). However, it is undisputed that petitioners failed to serve the petition 15 days after the expiration of the 90-day limitations period in CPLR 7511(a). Moreover, petitioners offer little to support their position that the court should entertain the untimely petition upon good cause shown or in the interest of justice. In fact, they assert only that the delay in serving the petition was occasioned by their attempt to secure action by the board of the VVHOA to facilitate a lawful closing, which would have rendered the petition moot. As stated, the arbitrator, among other things, directed petitioners to close title and accept a deed to the property since the title

proffered by respondents satisfied the requirements of the parties' contract. Instead of complying with the award or filing a timely petition to vacate, petitioners admittedly sought to circumvent the award by negotiating directly with the VVHOA board. Clearly, such action does not constitute good cause or foster the interests of justice. Thus, the petition to vacate or modify the award is dismissed as untimely.

Turning to the cross petition to confirm the award, respondents urge that the Federal Arbitration Act should apply since the disputed real estate affects interstate commerce. In particular, petitioners assert that construction materials were supplied from, *inter alia*, out-of-state and Canada. However, the contract, executed in New York and involving New York residents, concerns the sale of real property in New York. "The great body of law in this country which controls the acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state" (*Davies Warehouse Co. v Bowles*, 321 US 144, 155 [1944]).

Under New York law, courts are statutorily mandated to "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" (CPLR 7510). CPLR 7511 limits the grounds for vacating or modifying an arbitration award to (1) corruption, fraud, or misconduct in procuring the award;

(2) partiality of the arbitrator; (3) the arbitrator exceeding his power or failing to make a final and definite award; or (4) a procedural failure that was not waived (CPLR 7511[b][1]; see also *Silverman v Benmor Coats, Inc.*, 61 NY2d 299, 307 [1984]). As a matter of public policy, the merits of arbitration are beyond judicial review (*Integrated Sales, Inc. v Maxell Corp. of America*, 94 AD2d 221, 224 [1<sup>st</sup> Dept 1983]).

Here, petitioners fail to establish any of the grounds for vacatur or modification of the award. There simply is no showing that the rights of any of the parties to the arbitration were prejudiced by corruption, fraud, or misconduct in procuring the award, or that the arbitrator demonstrated partiality.

Petitioners argue that the award disregards the law and violates public policy because it directs them to purchase an interest in the VVHOA in violation of the governing Offering Plan. Specifically, petitioners maintain that the 1.5-foot encroachment of the townhouse unit onto a common area of the VVHOA precludes them from receiving fee title to the unit and the land upon which it is situated "free and clear of all ... encumbrances," as required by the Offering Plan. Petitioners also claim that since the Offering Plan expired on July 21, 2000, the award directing the parties to close title violates the contractual provision requiring the sellers to construct the townhouse on Lot # 77, pursuant to a VVHOA Offering Plan. Petitioners further contend that the arbitrator exceeded his authority in rewriting the

contract to justify denying their requests for credit for items not obtained from the sellers, liquidated damages, and substantial and satisfactory completion of the construction. In addition, petitioners challenge the arbitrator's determination that they are responsible for certain real estate taxes prior to the closing, and that they accept insurable title to a parcel of real property which includes a common area.

However, the arbitrator rejected similar arguments by petitioners during the arbitration proceeding, essentially concluding that the contract merely required respondents to convey insurable title. The court finds no basis for disturbing the arbitrator's determination. "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" (*Integrated Sales, Inc. v Maxell Corp. of America, supra*). "Thus, an arbitrator's award will not be vacated for errors of law and fact committed by the arbitrator ... and '[e]ven where the arbitrator states an intention to apply law, and then misapplies it'" (*id.*, quoting *Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 629 [1979]). Furthermore, "[c]ourts may not overturn an award because they believe the arbitrator has misconstrued the apparent, or even the obvious, meaning of the contract" (*Rochester City School Dist. v Rochester Teachers Assn.*, 41 NY2d 578, 582 [1980]). "The path of analysis, proof and persuasion by which the arbitrator reached his conclusion is

beyond judicial scrutiny. The issue resolved having been the issue tendered, and the resolution not being wholly irrational, there is no occasion for judicial intervention" (*Central Square Teachers Assn. v Board of Educ.*, 52 NY2d 918, 919 [1981]).

In addition, petitioners argue that the award was improperly modified by the January 11, 2006 Disposition for Application of Clarification of Award. In particular, petitioners challenge the determination that they are responsible for all open taxes. It is well established that "[a]fter an arbitrator renders an award, the arbitrator is without power to render a new award or to modify the original award, except as provided in CPLR 7509" (*Silber v Silber*, 204 AD2d 527, 529 [2d Dept 1994]). CPLR 7509 permits the arbitrator to modify a final award upon the limited grounds set forth in CPLR 7511(c) on application by a party with written notice to the other parties. CPLR 7511(c) essentially permits modification where (1) there has been a miscalculation of figures or a mistake in the description of any person, thing, or property referred to in the award; (2) the arbitrator has awarded upon a matter not submitted and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) the award is imperfect in a matter of form, not affecting the merits of the controversy.

In the January 11, 2006 Disposition for Application of Clarification of Award, the arbitrator expressly declined to modify the award, reaffirmed the award granting respondents the

net sum of \$25,000, and merely clarified that petitioners are responsible for all open taxes. The power to clarify an award rests clearly with the arbitrator, and such clarification does not violate or otherwise involve the modification provisions of CPLR article 75 (*Beleggingsmaatschappij Wolfje, B.V. v AES Ecotek Europe Holdings, B.V.*, 21 AD3d 858, 858 [1<sup>st</sup> Dept 2005]).

The request for sanctions against petitioners for filing a frivolous petition is denied (22 NYCRR 130-1.1).

Accordingly, it is

ORDERED that the petition to vacate or modify the award rendered on August 18, 2005, in favor of respondents and against petitioners is denied; and it is further

ORDERED that the cross petition is granted to the extent that the award is confirmed, and it is otherwise denied; and it is further

ORDERED and ADJUDGED that respondents have judgment and recover against petitioners in the amount of \$25,000, plus interest at the statutory rate as computed by the Clerk, together with costs and disbursements as taxed by the Clerk, and that the respondents have execution therefor.

Dated:

*October 20, 2006*

ENTER:

**UNENFORCEMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).