

**Matter of Yalowitz v Prudential Equity Group LLC**

2006 NY Slip Op 30519(U)

March 28, 2006

Supreme Court, New York County

Docket Number: 100594-05

Judge: Rosalyn H. Richter

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: ROSALYN RICHTER

PART 24

*Justice*

Yalowitz, E

INDEX NO. 100594/00

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

MOTION SEQ. NO. 03

MOTION CAL. NO. \_\_\_\_\_

Prudential

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

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~~

*matter is disposed*

*see decision issued in March - seq. 003*

**FILED**  
JUN 15 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/15/06

*R Richter*

HON. ROSALYN RICHTER

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

HON. ROSALYN RICHTER

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

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

HON. ROSALYN RICHTER

PRESENT: \_\_\_\_\_

Justice

PART 24

Yalowitz, E

INDEX NO. 100594/05

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

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

- v -

Prudential

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

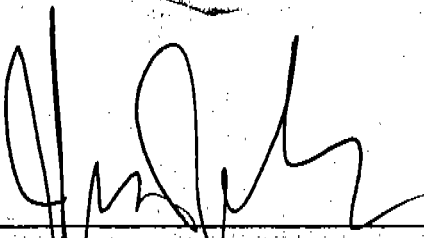
**MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION**

**FILED**

JUN 15 2006

**COUNTY CLERK'S OFFICE  
NEW YORK**

Dated: 3/29/06



HON. ROSALYN RICHTER 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: PART 24

-----X  
In the Matter of the Application of  
EDWARD YALOWITZ and SHARON ZEIDLER,

Petitioners,

For a judgment pursuant to the Federal Arbitration  
Act and CPLR Article 75

DECISION AND ORDER  
Index No. 100594-05  
Motion Sequence No. 3

-against-

PRUDENTIAL EQUITY GROUP LLC, f/k/a  
PRUDENTIAL SECURITIES INC., and  
WACHOVIA SECURITIES LLC, as successor in  
interest to PRUDENTIAL EQUITY GROUP, LLC,  
f/k/a PRUDENTIAL SECURITIES INCORPORATION,

Respondents.

-----X  
RICHTER, J.

JUN 15 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

In this proceeding, petitioners previously moved to vacate that part of an arbitration award that found them liable for breach of their employment agreement with respondents. Respondents cross-moved to confirm the award in its entirety. In June 2005, the Court rendered a decision denying petitioners' motion to vacate and granting respondents' cross-motion to confirm. The Court designated its decision as a final disposition of the proceeding. The Court's decision was affirmed on appeal. In this motion, respondents move for an order awarding them as "costs of collection" the attorneys' fees and costs they incurred in making their cross-motion to confirm and responding to the motion to vacate. Respondents assert that they are entitled to such an award because the underlying promissory notes required petitioners to pay "all costs of collection including reasonable attorneys' fees" incurred by respondents.

Regardless of how it is denominated, respondents' motion is, in fact a motion for leave to reargue the Court's earlier decision. In their cross-motion to confirm the arbitration award, respondents

sought the exact same relief they seek now.<sup>1</sup> The Court's decision, however, did not grant respondents the requested relief and thus denied it *sub silentio*. See *Board of Managers of the Alfred Condominium v. Carol Management*, 214 A.D.2d 380 (1<sup>st</sup> Dept. 1995)(since court's decision did not specifically dismiss cause of action for negligent construction, the motion to dismiss that claim was denied *sub silentio*). Thus, since respondents now seek the same relief sought and denied in the earlier cross-motion, the Court views the present motion as a motion to reargue. See *Steinhardt Group, Inc. v. Citicorp*, 303 A.D.2d 326 (1<sup>st</sup> Dept. 2003)(although not denominated as such, plaintiffs' subsequent motion was properly viewed as one to reargue prior order); *Jones v. Marcy*, 135 A.D.2d 887 (3d Dept. 1987)(a party's characterization of a motion is not determinative of its true nature); *Besicorp Group, Inc. v. Enowitz*, 268 A.D.2d 846 (3d Dept. 2000)(motion seeking essentially the same relief as an earlier motion by the same party may be viewed as a motion to reargue); *Carlton v. Vorosmarty*, 163 A.D.2d 630 (3d Dept. 1990)(defendant's second motion to declare the default judgment null and void was in actuality a motion to reargue Supreme Court's refusal to open the default judgment). Because respondents failed to move within thirty days after service of the earlier order with notice of entry, the motion for leave to reargue is denied as untimely. See C.P.L.R. § 2221[d].<sup>2</sup>

Even if the Court were to consider the merits of respondents' motion, it would nevertheless be denied. Respondents are asking this Court to determine their contractual rights to costs of collection under the promissory notes. However, any disputes arising under those notes are subject to mandatory arbitration due to the broad arbitration clause contained therein. Therefore, even if the Court were to

---

<sup>1</sup> Respondents explicitly asked the Court for their costs of collection in their Notice of Cross-Motion, their Verified Response to the Petition and their Memorandum of Law.

<sup>2</sup> In their brief to the Appellate Division, respondents argued that they were entitled to the same attorneys' fees they seek in this motion. The Appellate Division, however, did not grant the requested relief.

entertain respondents' motion, it would lack jurisdiction to grant the requested relief.' The issues of whether the attorneys' fees sought constitute a cost of collection, the reasonableness of such fees and whether respondents' claim is precluded by *res judicata* are issues to be determined by the arbitrator. See *Fairfield Towers Condominium Association v. Fishman*, 1 A.D.3d 252 (1<sup>st</sup> Dept. 2003)(union's claim for counsel fees incurred in proceeding to confirm arbitration award is subject to arbitration).<sup>3</sup>

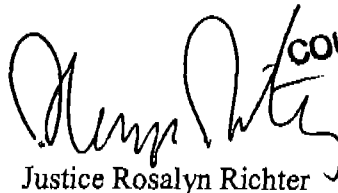
Finally, respondents seek an award of statutory interest from June 15, 2005, the date of the Court's decision confirming the arbitration award, until January 18, 2006, the date petitioners made payment of the arbitration award. See January 24, 2006 Supplemental Affirmation of William E. Goydan, Esq. In Further Support of Motion for Fees and Other Collection Costs, ¶ 22. Respondents' request is granted since an award of interest from the date of the court's decision until the entry of judgment is required under C.P.L.R. § 5002. See *Gizzi v. Hall*, 309 A.D.2d 1140 (3d Dept. 2003)(prejudgment interest in a breach of contract action is mandated under C.P.L.R. § 5002). Accordingly, it is

ORDERED that respondents' motion for leave to reargue, improperly denominated as a motion for attorneys' fees, is denied; and it is further

ORDERED that respondent is directed to settle a judgment on notice

This constitutes the decision and order of the Court.

March 28, 2006

  
Justice Rosalyn Richter

**FILED**  
JUN 15 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

<sup>3</sup> After the earlier decision was affirmed on appeal, the Court asked the parties for additional papers explaining the ramifications of the appellate decision. In those papers, respondents asked for the counsel fees expended in the appellate litigation. Such request is denied because respondents have not moved for such relief. In any event, the claim would be denied since the issue is subject to arbitration. See *Fairfield Towers Condominium Association v. Fishman*, 1 A.D.3d at 252.