

2 S. Ave. Partners, LLC v Battery Park City Auth.

2006 NY Slip Op 30725(U)

August 11, 2006

Supreme Court, New York County

Docket Number: 107777/06

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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2 SOUTH AVENUE PARTNERS, LLC,

Petitioner,

Index No.107777/06
Mtn Seq.001, 002

-against-

BATTERY PARK CITY AUTHORITY

Respondent.

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WALTER B. TOLUB, J.:

Motion sequence 001 and 002 are consolidated for disposition with this memorandum decision. By motion sequence 001, petitioner 2 South Avenue Partners, LLC ("2SAP" or "Landlord") seeks a stay in the arbitrator selection proceeding pending before the American Arbitration Association ("AAA"). By motion sequence 002, 2SAP seeks an order compelling Battery Park City Authority ("BPCA" or "Tenant") to arbitrate disputes before arbitrator Jerome N. Block.

Facts

Landlord and tenant entered into a lease agreement for the lease of a commercial condominium unit in the building located at 2 South End Avenue, New York. Under the terms of the lease, Tenant had the option to extend the lease term for an additional five years at a "Market Value Rent" to be determined pursuant to Article 40G of the lease. Tenant exercised its option to extend the term of the lease of an additional five year period.

In accordance with Article 40G(iii)(a) of the lease, the annual base rent for the five year renewal period shall be the

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"Market Value Rent" for the premises defined as:

". . .the annual fair market rental value of the Demised Premises as of the Determination Date, taking into account the fact that the escalation bases provided herein are not being changed. . . For purposes hereof, the "Determination Date" shall mean the first day of the eleventh Lease year."

Article 40G(iii)(b) of the lease ("Arbitration Clause") sets forth the procedure for determining the "Market Value Rent" as follows:

The initial determination of Market Value Rent shall be made by Landlord. . .If the Landlord and Tenant shall fail to agree of the upon the Market Value Rent proposed by Landlord within thirty (30) days. . .then Landlord and Tenant each shall give notice to the other setting forth the name and address of an arbitrator designated by the party giving such notice. . .If two arbitrators shall have been designated, such two arbitrators shall, prior to the Determination Date, make their determination of the Market Value Rent in writing and give notice thereof to each other and to Landlord and Tenant. Such two arbitrators shall have thirty(30) days after the receipt of notice of each other's determinations to confer with each other and to attempt to reach agreement as to the determination of Market Value Rent. . .If such two arbitrators shall concur as to the determination of Market Value Rent, such concurrence shall be final and binding upon Landlord and tenant. If such two (2) arbitrators shall fail to concur, then such two arbitrators shall immediately designate a third arbitrator. If such two (2) arbitrators shall fail to concur, then the parties to this Lease shall immediately designate a third arbitrator. If the parties shall fail to agree upon the designation of such third arbitrator within five (5) days,

then either party may apply to the American Arbitration Association...

In accordance with the provision, Landlord gave Tenant notice of the proposed Market Value Rent. Then, Landlord and Tenant failed to agree upon the a proposed Market Value Rent. Pursuant to the Arbitration Clause, Landlord designated James Levy to arbitrate on his behalf and Tenant designated Timothy Sheehan. The arbitrators could not agree on the Market Value Rent and agreed upon a procedure to select a third arbitrator as required by the Arbitration Clause. The arbitrators agreed that they would each prepare a list containing the names of three arbitrator candidates. They then agreed to disclose the lists and if a proposed arbitrator was included on both lists, that person would be designated as the third arbitrator. Jerome N. Block, MAI, the President of Wilrock Appraisal and Consulting, Inc., was the only name included in both Mr. Levy's and Mr. Sheehan's list of acceptable arbitrators. Full disclosure by Mr. Block of any past relationship with the parties did not occur until after a couple of months of his appointment by the two party appointed arbitrators.

Tenant opposes Mr. Block arbitrating the matter arguing that the Landlord and his "whole team" in this matter have contacts with Mr. Block and have appointed him as their arbitrator in other arbitrations. Since Tenant opposed Mr. Block, it applied to the AAA for the appointment of an arbitrator. Tenant argues

that the essence of the Arbitration Clause is that both sides concur in the appointment of a neutral. Landlord argues that according to the Arbitration Clause, if the two party-appointed arbitrators decide on a third arbitrator, then that person is the third arbitrator. Landlord further argues that there are no conflicts with Mr. Block and that therefore the arbitration should proceed before Mr. Block and the AAA should not appoint an arbitrator.

Discussion

When a contract is ambiguous, it must be interpreted against the drafter. (BT Commercial Corp. v. Blum, 175 AD2d 43 [1st Dept 1991]). Moreover, the court is required to arrive at a construction of the contract that will give "fair meaning to all of the language employed by the parties to reach a practical interpretation of the expression of the parties so that their reasonable expectations will be realized." (See Joseph v. Creek & Pines, 217 AD2d 534 [2d Dept 1995]; citing Patrick v. Guarniere 204 AD2d 702 [2d Dept 1994]).

Contracts are interpreted to give effect to the intentions of the parties. Judge Learned Hand wrote that in reading a contract, one must not read the words literally "forgetting the object which the document as a whole is meant to secure." (See Central Hanover Bank & Trust Co. v. Commissioner of Internal Revenue, 159 F.2d 167, 169 (2d Cir.) cert denied, 331 US 836

[1947])). The intent of the parties is of paramount consideration. A fair reading of the language of the contract expresses that the parties intended that any third arbitrator selected by the party appointed arbitrators be neutral. Therefore there could not have been an agreement and a meeting of the minds to appoint Mr. Block as an arbitrator until there was full disclosure of Mr. Block's pre-existing relationship with any of the parties.

Cannon II.A(2) of the Code of Ethics states that people who are requested to serve as arbitrators, before accepting to serve, shall disclose existing or past relationships of any nature which might reasonably affect impartiality or the lack of independence in the eyes of any of the parties. Once BPCA found out that Mr. Block had been appointed as an arbitrator by Landlord's counsel in the past, BPCA felt that he was not a neutral. BPCA believes that based on all the disclosures made by Mr. Block, that there did not appear to be a level playing field and that Mr. Block could not serve as a neutral arbitrator even though his qualifications and competence to adjudicate the dispute are not in question. BPCA is entitled to an arbitrator free from an appearance of bias. (Cannon II.A(2) Code of Ethics).

Furthermore, since the arbitration proceeding has not started, there would be no prejudice to either party if the AAA selects the arbitrator. The Landlord has not suffered any prejudice because it has been collecting full rent from the Tenant.


Accordingly it is

ORDERED that the stay and restraining order are lifted and the arbitrator selection proceeding before the AAA may continue; and it is further

ORDERED that the Landlord's Petition to compel Battery Park City Authority to arbitrate disputes before Jerome N. Block is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/11/06



HON. WALTER B. TOLUB, J.S.C.

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