

Birnbaum v Van Der Linden

2007 NY Slip Op 31580(U)

June 7, 2007

Supreme Court, New York County

Docket Number: 0101686/2005

Judge: Marilyn Shafer

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

PRESENT: Marilyn Shafer
Justice

PART 8

Index Number : 101686/2005

BIRNBAUM, DAVID

vs

KLEIN, ISAAC

Sequence Number : 004

CONFIRM/REJECT REFEREE REPORT

INDEX NO. 101686/05
MOTION DATE 2/28/2007
MOTION SEQ. NO. 4
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

BYRON

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is granted

FILED
JUN 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/7/07

HON. MARILYN SHAFER, JSC ^{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 — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER
Justice

PART 8

DAVID BIRNBAUM,

Petitioner,

-against-

RONNIE VAN DER LINDEN a/k/a/
RONALD VAN DER LINDEN,

Respondent.

INDEX NO. 101687/05

MOTION DATE Feb. 28, 2007

MOTION SEQ. NO. 04 & 05

The following papers, numbered 1 to 8, were read on this motion:

	PAPERS NUMBERED
Notice of Motion — Affidavits — Exhibits	1, 2
Notice of Cross Motion — Affidavit — Memorandum of Law	3, 4, 5, 6
Answering Affidavits	7, 8

FILED
JUN 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that motion sequence nos. 04 & 05 herein are consolidated with motion sequence nos. 04 & 05 in the special proceeding entitled *David Birnbaum v Isaac Klein*, bearing the index number 101686-05, for disposition of the motions.

Respondents bring these motions for an order, pursuant to CPLR §4403, to confirm the report of the Honorable Lancelot B. Hewitt, Special Referee, dated January 16, 2007, finding that petitioner's applications to stay the arbitrations commenced by respondents were untimely,

pursuant to CPLR § 7503¹ (the “referee’s report”). Petitioner cross-moves to reject the referee’s report.

The parties are all members of the Diamond Dealers Club (“DDC”) and bound by its by-laws which provide, *inter alia*, that all disputes between members arising out of the diamond business will be arbitrated before the DCC arbitration panel. The petitioner was served, at the same time, with two demands for arbitration regarding apparently unrelated disputes. The demands were served by DDC, at petitioner’s business address, by certified mail, return receipt requested, by regular mail and by Federal Express. The Federal Express envelope, sent to the wrong address, was received several days after the certified mailings. Petitioner initiated two separate actions to stay the arbitrations. The court has consolidated all parallel motion practice in the two cases.

DDC rejected petitioner’s requests for a stay, served more than twenty (20) days after receipt of the certified mailings, as untimely. Petitioner argued they were served less than twenty (20) days after his receipt of the Federal Express mailings and were, therefore, timely. Since the service of a demand for arbitration is a threshold issue, this Court referenced the question of when petitioner received the demands to a referee to hear and report.

Following a hearing, the referee issued his report, finding that the respondents and DDC had established by a fair preponderance of the credible evidence that the petitioner had received the demands for arbitration and other relevant materials by certified mail, return receipt requested, on January 13, 2005. Consequently, his application to stay the arbitrations, made by

¹ CPLR § 7503 (c) requires that a motion to stay arbitration be made within twenty (20) days of receipt of the demand.

Order to Show Cause on Feb. 7, 2005, was untimely. Respondents move to confirm the report.

Petitioner opposes confirmation of the Referee's report because it is based upon a misrepresentation of petitioner's testimony.

New York Courts generally look favorably upon a referee's report, since the referee, as trier of fact, is considered to be in the best position to determine the issues presented. (*Poster v Poster*, 4 AD3d 145 [1st Dept 2000]; *Matter of Holy Spirit Assoc v Tax Commission*, 81 AD2d 64 [2d Dept 1981]). The determination of a referee appointed to hear and report is entitled to great weight (*Slater v Links at North Hills*, 262 AD2d 299 [2d Dept 1999]). This is particularly true where conflicting testimony and matters of credibility are at issue, since the referee, as the trier of fact, had the opportunity to see and hear the witnesses and to observe them on the stand (*Frater v Lavine*, 229 AD2d 564 [2d Dept 1996]; *Schwartz v Meisner*, 198 AD2d 634 [3d Dept 1993]). The findings of such a referee will not be disturbed if supported by the evidence in the record (*Kaplan v Einy*, 209 AD2d 248 [1st Dept 1994]; *Namer v 152-54-56 W 15th St. Realty Corp*, 108 AD2d 705 [1st Dept 1985]; *Freédman v Freedman*, 211 AD2d 580 [1st Dept 1995]).

This Court finds that the referee's report is fully supported by the record. The referee credited the testimony of the DDC employee who personally served the demands for arbitration on the petitioner on January 11, 2005 and received the return receipts, acknowledged by the petitioner, that delivery was effected on January 13, 2005. Petitioner did not deny that he received certified mailings from the DDC on January 13, 2005, but testified that they contained requests for membership dues, not demands for arbitration. The referee rejected, as not credible, petitioner's testimony. Since this finding is based upon the referee's evaluation of the credibility of the witness, it will not be disturbed.

Petitioner additionally argues that (1) the DDC should be equitably estopped from arguing that petitioner received the demands for arbitration prior to his receipt of them by Federal Express; and (2) the DDC is an inherently biased forum. This Court finds these arguments to be without merit.

Accordingly, it is ORDERED, that the motion to confirm the referee's report is granted; and it is further

ORDERED that the petition to stay the arbitrations is dismissed; and it is further ORDERED that respondents will submit a proposed order on notice to respondent. This reflects the decision and order of this Court.

Dated: 6/7/07

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