

**Elul Diamonds Co. Ltd. v Z Kor Diamonds, Inc.**

2007 NY Slip Op 31643(U)

June 6, 2007

Supreme Court, New York County

Docket Number: 0115640/2006

Judge: Emily Jane Goodman

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: EMILY JANE GOODMAN

PART 17

Justice

ELUI DIAMONDS Co., LTD.

INDEX NO.

115640/06

MOTION DATE

- v -

Z KOR DIAMONDS, Inc. & G.I. TRADING, Inc.

MOTION SEQ. NO.

001

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

*petition and cross motion*

Upon the foregoing papers, it is ordered that this motion *decided per attached*

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

Dated: 6/8/07

*[Signature]*  
EMILY JANE GOODMAN <sup>J.S.C.</sup>

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 17

-----x  
ELUL DIAMONDS CO. LTD., AMOS FOUZAILOV,  
and EITAN MOUSAIUF,

Petitioners,

Index No. 115640/06

-against-

Z KOR DIAMONDS, INC., ISRAEL KORNBLUH, G.I.  
TRADING, INC., and HAGUY IDAN,

Respondents.

-----x  
**Emily Jane Goodman, J.S.C.:**

Petitioners Elul Diamonds Co. Ltd. (Elul), Eitan Mousaiuf, and Amos Fouzailov move, pursuant to CPLR 7511 (b) (1) (iii), to vacate an arbitration award rendered by the Diamond Dealers Club (the DDC) arbitration tribunal on August 4, 2006 in favor of Respondent Z Kor Diamonds, Inc. (Z Kor), a diamond dealer, and its principal Israel Kornbluh. Petitioners maintain that the award should be vacated on ground that the arbitrators exceeded their power because the DDC lacked jurisdiction to arbitrate in New York under the by-laws of the World Federation of Diamond Bourses (WFDB), because Z Kor waived its right to arbitrate by filing a third party claim in a California court, and because Z Kor's "forum shopping" violated public policy.

Z Kor and Israel Kornbluh cross-move, pursuant to CPLR 7510, for an order confirming the arbitration award and for entry of a money judgment.

**BACKGROUND**

On January 12, 2006, Elul, an Israeli company which sells diamonds, brought an action in the Superior Court of California against G.I. Trading, Inc. (GI) a diamond dealer, for monies it

was owed and filed an application for a writ of attachment against GI and Haguy Idan, its principal. On February 22, 2006, Elul obtained a judgment and writ of attachment in the amount of \$962,480.00 against GI. The following month, Elul filed papers with the Los Angeles County Sheriff's Department seeking to levy upon the assets of GI pursuant to the writ of attachment.

On March 23, 2006, Israel Kornbluh met with Haguy Idan at Z Kor's New York City office and reached an agreement to consign diamonds to GI. On March 28, 2006, Z Kor shipped \$185,226.65 worth of diamonds to GI's office in Los Angeles, California. On May 9, 2006, pursuant to the Elul levy, the Los Angeles County Sheriff's Department levied upon GI's office and seized all of the diamonds in the office, including those belonging to Z Kor.

Elul, Z Kor, and GI are members of diamond bourses<sup>1</sup> affiliated with the WFDB. Pursuant to the rules of the WFDB, all disputes relating to the diamond business among members of the affiliated bourses, must be decided exclusively through arbitration. Upon learning that its diamonds were seized by the Los Angeles County Sheriff's Department, Israel Kornbluh filed a demand for arbitration on May 18, 2006 with the DDC, an arbitration tribunal based in New York, to arbitrate the dispute concerning Elul's seizure of Z Kor's diamonds.

On May 18, 2006, Z Kor notified Elul that the seizure of the diamonds included diamonds which were owned by Z Kor. By letter dated May 22, 2006, Elul instructed Z Kor to file a third-party claim in the California action so that the Sheriff's Department would release the diamonds to Z Kor rather than to GI. In the correspondence, Elul's counsel further stated that Elul would not oppose Z Kor's claim or file an undertaking.

Upon the instructions of Elul, Z Kor filed the third-party ownership claim on May 25,

---

<sup>1</sup> A bourse is an organization of diamond dealers.

2006. However, to Z Kor's surprise, Elul filed opposition and posted a \$10,000 bond with the Los Angeles Superior Court. Elul argued to the California court that Z Kor failed to perfect a security interest in the diamonds under California law by filing a UCC-1 with the Secretary of State, and that, therefore Elul's right to the diamonds was superior to the rights of Z Kor.

On June 14, 2006, the DDC served a demand for arbitration on Elul and GI's principals, as well as on Elul's bourse, the Israel Diamond Exchange, Ltd. (IDE). GI's bourse, the Diamond Club West Coast, Inc. (DCWC) was also served. Neither the IDE nor the DCWC objected to the jurisdiction of the DDC. On June 26, 2006, Z Kor filed an ex parte application in California for an order compelling arbitration. The application was dismissed on the same day on the ground that an order to compel arbitration may not be made ex parte and because there was insufficient evidence of an exigency.

The DDC notified the parties that it would be conducting the arbitration on July 12, 2006. On July 6, 2006, Daniella Levi, counsel for Elul, wrote to Martin Hochbaum, Managing Director of the DDC. Ms. Levi informed Mr. Houchbaum that her clients would not be appearing at the arbitration, recited a litany of facts surrounding litigation between Z Kor and Elul in California, alleged that Z Kor waived its right to arbitration under California law by participating in the California litigation, and concluded that the DDC lacked jurisdiction over the matter. The same week, Elul's California counsel also sent a letter to the DDC objecting to the arbitrators' jurisdiction in favor of resolution in the California court.

Despite all the above, no stay of arbitration was ever sought by Petitioners in New York. After being adjourned at the request of Elul's attorney, the arbitration took place on July 31, 2006, in New York City. On August 4, 2006, the DDC issued its arbitration award which stated

in part that the “diamonds consigned to GI Trading by Z Kor and seized by the Sheriff of Los Angeles County are the property of Z Kor Diamonds. Z Kor retains title and is entitled to possession of these diamonds from consignment memos 36882 and 36883 from Z Kor to GI Trading dated 03/28/06” (Soniker Affirm., ex. J). The award further provides that, in the event the diamonds are not returned to Israel Kornbluh, on behalf of Z Kor, within 90 days, Israel Kornbluh, on behalf of Z Kor, is awarded the sum of \$185,226.65 plus legal fees in the amount of \$10,000. The award further provides, that in the event Israel Kornbluh is required to apply to a court to confirm the award, he shall be entitled to recover additional legal fees in the amount of 15% of the award or \$1,500, whichever is greater.

Following the issuance of the arbitration award, counsel for Z Kor attempted to have the award confirmed in California, however the court declined to rule on the confirmation motion, suggesting that it should be refiled as a petition. Prior to the filing of Z Kor’s petition to confirm, Elul filed this application to vacate the arbitration award.

#### DISCUSSION

“[W]hen a dispute has moved to arbitration, a party seeking to vacate the ultimate award must meet a heavy burden ... .” *North Syracuse Cent. School Dist. v North Syracuse Educ. Assn.*, 45 NY2d 195, 200 (1978). CPLR 7511 (b) (iii) states that an arbitration award can be vacated when “an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made” (*id.*). “Only where an award is totally irrational or exceeds a specifically enumerated limitation on the arbitrator’s power may it be vacated by the court.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Benjamin*, 1 AD3d 39, 43 (1<sup>st</sup> Dept 2003).

Article 4, Section A of the WFDB's Inner Rules states that "[a]ny member of a Bourse affiliated to the WFDB shall submit to exclusive adjudication of a dispute involving a member of different Bourse affiliated to the WFDB, as set out hereunder" (Soniker Affirm., ex E). Elul maintains that the DDC lacked jurisdiction because, contrary to Z Kor's and Israel Kornbluh's position, no "transaction" occurred between Elul and Z Kor under Article 4, Section B (2) (a). That provision provides that "[i]f the dispute arises from a transaction concluded not on any trading floor but in a city where a Bourse exists, such Bourse shall have jurisdiction. The place where a transaction has been concluded shall deem to be the place where the buyer's offer has been accepted" (*id.*).

It is not disputed that on March 23, 2006, Israel Kornbluh met with Haguy Idan at Z Kor's New York City office and reached an agreement to consign the diamonds at issue to GI. Thereafter, on March 28, 2006, Z Kor shipped the diamonds from its New York City office to GI in Los Angeles, California. Although a direct transaction did not occur between Elul and Z Kor, but rather occurred between Z Kor and GI, the Court cannot find that the arbitrators did not have jurisdiction over this matter. It would not be irrational for the arbitrators to have determined that the "dispute arises from a transaction concluded" in New York. The term transaction is not defined to include only direct transactions between the parties involved in the dispute. New York was the place where GI's offer had been accepted, which enabled the diamonds to come into the possession of GI, and then Elul. The dispute between Petitioners and Elul and Kornbluh arose from, and would not have existed, but for the transaction which concluded in New York.<sup>2</sup>

---

<sup>2</sup>Z Kor further argues that the DDC's jurisdiction over the dispute is found in Article 4, Section B (2) (b) which provides that where a "dispute arises from an import and export transaction concluded not on any trading floor and the export is due to take place from a city

Furthermore, even assuming that Article 4, Section B (2) (a) did not apply, the arbitrators could have found that Article 4, Section 5 (a) supported jurisdiction. That provision provides that if none of the enumerated jurisdictional grounds are present “the governing bodies of the parties’ Bourses shall together designate the Bourse which shall have jurisdiction” (*id.*). Z Kor and Kornbluh submit the affidavit of both the DDC and the DCWC (the bourse to which GI was affiliated) stating that it is the common practices of the bourses to consent to the jurisdiction of another bourse by not objecting, as happened here.

In any event, this jurisdictional argument, as well as the argument that Z Kor waived the right to arbitrate by filing a third party claim in a California court, was waived by Elul’s participation in the arbitration.<sup>3</sup> The First Department has held that “a party otherwise entitled to a judicial determination of the arbitrability of a dispute may waive that right by actively participating in the arbitration without seeking a stay pursuant to CPLR § 7503 (b) or otherwise preserving their right to have the issue of arbitrability judicially determined.” *Smullyan v SIBJET S.A.*, 201 AD2d 335, 336 (1<sup>st</sup> Dept 1994). Issues of jurisdiction are also waived by participation in the arbitration. *See Matter of Naroor v Gondal*, 17 AD3d 142 (1<sup>st</sup> Dept 2005).

Elul never sought a stay of the arbitration in New York, the location where the arbitration

---

where a Bourse exists, such Bourse shall have jurisdiction” (Soniker Affirm., ex E). However, this provision does not apply to the present situation as the rule clarifies that an export is defined as “a direct exportation of goods from one country to a specified buyer in another country” (*id.*). Here, the goods were not being shipped between countries, but were shipped between New York and California.

<sup>3</sup>Accordingly, the Court will not discuss Elul’s argument that Z Kor waived the right to arbitrate this claim by filing a third party claim in a California court, nor Z Kor’s contention that the filing did not waive arbitration because Elul’s counsel, Rochelle Herzog, instructed Z Kor to file the claim, by letter dated May 22, 2006, and because the filing was merely a “formality” to retrieve Z Kor’s diamonds from the Sheriff.

was to take place. If Petitioners believed that the DDC did not have jurisdiction over the parties, it is unclear why they did not seek a stay, other than perhaps for tactical reasons. Instead, counsel Daniella Levi appeared on behalf of Elul for the entire duration of the arbitration, but maintains that she only did so “to inform the arbitrators themselves, in person, of the objection that we had [sic] the jurisdiction” (Levi Affirm., attached to Order to Show Cause). However, both counsel for Z Kor and his client, who were also present at the arbitration, maintain that at the hearing, Ms. Levi not only argued that the arbitrators lacked jurisdiction, but further argued that because Z Kor did not file a UCC form, Elul had a superior right to the diamonds. In her Affirmation In Opposition To Cross Motion and In Reply To Motion To Vacate/Modify, Ms. Levi does not address--nor dispute, this allegation. Instead, she reiterates that she “made a limited appearance at the arbitration proceeding to object, again, to jurisdiction.” Without a transcript of the proceedings, the Court can only assume the truth of the statements made by Z Kor and its counsel, who were both present at the hearing, when those statements are not denied by Ms. Levi. Thus, this is not a case where an attorney merely appears at a hearing to ask for an adjournment (*see e.g., Mix Centre, Ltd. v Butler*, 221 AD2d 182 (1<sup>st</sup> Dept 1995) (arbitration award could be vacated because an appearance to request an adjournment did not constitute participation)). Accordingly, as Elul participated in the hearing, and failed to move for a stay of arbitration from this Court, it waived its right to object to the arbitrators’ jurisdiction. *See Matter of Sims v Siegelson*, 246 AD2d 374 (1<sup>st</sup> Dept 1998) (arbitration award by DDC could not be vacated because petitioner participated in the hearing). Petitioners’ argument that a preliminary injunction should be granted to enjoin Z Kor and Israel Kornbluh from confirming the arbitration

award is denied as moot.<sup>4</sup>

It is hereby

ORDERED that Petitioners' motion to vacate the arbitration pursuant to CPLR 7511 (b)

(1) (iii) is denied; and it is further

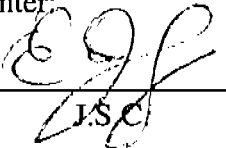
ORDERED that Respondents' cross motion for an order confirming the arbitration award is granted; and it is further

ORDERED that the parties settle judgment.

**This Constitutes the Decision and Order of the Court.**

Dated: June 6, 2007

Enter:



A handwritten signature in black ink, appearing to read 'EJG', is written over a horizontal line. Below the line, the letters 'J.S.C.' are printed in a small, serif font.

**EMILY JANE GOODMAN**

---

<sup>4</sup>As jurisdictional grounds existed to support the arbitration award, Petitioners' argument that Z Kor's acts amounted to forum shopping, which violated public policy, need not be addressed.