

**Matter of Douglas Elliman, LLC v Parker Madison
Partners, Inc.**

2007 NY Slip Op 31667(U)

June 12, 2007

Supreme Court, New York County

Docket Number: 0600681/2007

Judge: Kibbie F. Payne

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

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

In the Matter of the Application of

DOUGLAS ELLIMAN, LLC.,

Petitioner,

- against -

PARKER MADISON PARTNERS, INC., and
RE COM PARTNERS, LLC.,

Respondent.

INDEX NO. 600681/07

MOTION DATE 4/16/07

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

Upon the foregoing papers, petitioner's motion to vacate an arbitration award against it is denied and respondents' cross-motion to confirm said award is granted, as indicated in the attached memorandum.

FILED
JUN 18 2007
CLERK OF THE COURT

Dated: June 12, 2007

[Signature]
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 4

DOUGLAS ELLIMAN, LLC.,

Petitioner,

-against-

PARKER MADISON PARTNERS, INC., and RE
COM PARTNERS, LLC,

Respondents.

Index No. 600681/07

Motion Seq. 001

JUDGMENT & ORDER

KIBBIE F. PAYNE, J.:

In this special proceeding, petitioner Douglas Elliman, LLC moves to vacate an arbitration award finding that respondents "Parker Madison Partners, Inc./RE COM Partners LLC is entitled to a portion of the commission paid" to petitioner on the sale of a property known as 54 Thompson Street, New York, New York (see CPLR 7511 [b] [1] [ii]). Petitioner contends that the arbitral tribunal was partial, and the arbitration panel exceeded its powers. Petitioner additionally contends that the award violates public policy. Respondents oppose this application, and cross-move for an order confirming the arbitration award pursuant to CPLR § 7511 (e).

Petitioner Douglas Elliman, LLC (Douglass Elliman) and respondents Parker Madison Partners, Inc. (Parker Madison), and RE COM Partners (RE COM) are real estate service companies. RE COM is an affiliate of Parker Madison, and offers services

through Parker Madison's personnel and salespeople. In April 2002, Parker Madison and non-party Enrique Constante entered an "Independent Contractor Agreement with Salesperson." Pursuant to that agreement, Constante acted as a real estate broker for Parker Madison and RE COM. Paragraph three of the agreement provides, in part:

"[Constante] will not for a period of six (6) months following said termination: (a) render or attempt to render any real estate services or services, directly or indirectly, in connection with any matter pending in [Parker Madison's] office on the date of termination nor (b) solicit or accept any business from any individual or entity that is on the date of termination or was within one (1) years prior thereto, a customer of [Parker Madison] nor (c) divulge any of the above stated confidential information nor make use of such information."

Paragraph seven of the agreement provided that Constante would "cause any pending transaction on the date of termination to be closed through the [Parker Madison] office."

In early 2004, Constante reached an agreement with non-party Capital Z to have RE COM present 54 Thompson Street, New York, New York "to a select few potential buyers" for a commission. The agreement explicitly stated that it was "non-exclusive and Capital Z [was] entitled to market the building itself or engage others to market the building." Shortly thereafter, Constante's employment with Parker Madison ended and he began work as a real estate salesperson for Douglas Elliman. RE COM continued to present 54 Thompson Street. Constante, however, negotiated a

sales agreement with Capital Z in which Capital Z granted Douglas Elliman the right to present 54 Thompson Street. The agreement terms were identical to those in the agreement Constante previously entered on behalf of RE COM. Eventually, Douglas Elliman sold the property and earned a \$275,000 commission.

Respondents filed a statement of claim against Douglas Elliman and Constante with the Real Estate Board of New York, Inc. (Board), alleging breach of contract, tortious interference with contract, unjust enrichment, and disgorgement of the commission. On November 28, 2005, the parties agreed to submit to arbitration before the Board. Following the arbitration hearing, the panel issued an order without setting forth its finding of fact or conclusions of law.

The panel determined that respondents were entitled to a \$170,000 portion of the commission paid on the sale of 54 Thompson Street to Douglas Elliman, and that Douglas Elliman was required to pay such sum to respondents. The panel also found respondents were entitled to costs and disbursements of the arbitration against Douglas Elliman. Douglas Elliman appealed the decision on the grounds that the panel improperly excluded evidence and had a partial arbitrator. Douglas Elliman further argued that the subject matter of the arbitration was inappropriate. On February 26, 2007, the Appeals panel confirmed the arbitration award. Thereafter, petitioner commenced this proceeding seeking to vacate the award.

Petitioner first argues that the award should be vacated because its "rights were prejudiced by . . . partiality of an arbitrator appointed as neutral" (see CPLR 7511 [b] [1] [ii]). This argument is unavailing. The parties underwent arbitration before the REBNY with arbitrators James Saunders, Freda Green and Robert Knakel presiding over the hearing. Joseph Barbaccia, Edward A. Riguardi and Kevin Wang made up the Appeals Panel, which confirmed the award. Petitioner makes no claim that any of these arbitrators were actually biased or appeared biased toward respondents. Instead, petitioner argues that REBNY organization as a whole is impartial because respondents' principal Sam Irlander is an arbitrator with and sits on the board of governors of REBNY.

This allegation alone does not equal evidentiary proof of actual bias or the appearance of bias" on the part of any of the sitting arbitrators for purposes of vacatur pursuant to section 7511 (b) (1) (ii) (see Matter of Kornit v Plainview-Old Bethpage Cent. School Dist., 49 NY2d 842, 843 [1980]; see also Artists & Craftsman Bldr, Ltd. v Schapiro, 232 AD2d 265, 266 [1st Dept. 1996] [providing that "a party seeking vacatur of the arbitration award must meet a heavy burden"]). In any event, petitioner's claim relating to REBNY's alleged prejudice have been waived (see Matter of Namdar v Mirzoeff, 161 AD2d 348, 349 [1st Dept. 1990] [citation omitted]). Petitioner knew of Sam Irlander's connection to REBNY prior to the arbitration proceeding and did

not seek to disqualify the REBNY from hearing the subject controversy. Petitioner requested assurance that the arbitration panel members not have previously served on a panel with Sam Irlander, which it received.

Petitioner's next argument that the arbitration award be vacated on public policy grounds is also unavailing. "[O]ur jurisprudence has carefully limited the invocation of public policy concerns as a basis for usurping the role of the arbitrator and determining a dispute on the merits" (Matter of New York State Correctional Officers & Police Benevolent Assoc. v State of New York, 94 NY2d 321, 326 [1999]; see generally Matter of New York City Trans. Auth. v Transport Workers Union of Am., 99 NY2d 1, 7 [2002]). "A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator . . . even in circumstances where an arbitrator makes errors of law or fact" (Matter of New York State Correctional Officers, 94 NY2d at 326 [citations omitted]). Vacatur is available "where strong and well-defined policy considerations embodied in constitutional, statutory or common law prohibit" arbitrators from deciding a particular matter or granting certain relief (id. at 327 [citations omitted]). "The focus of the inquiry is on the result, the award itself" (id. [emphasis in original]). "Courts shed their cloak of noninterference . . . if the award intrudes into areas reserved for others to resolve; or if, because of its reach, the award

violates an explicit law of this State" (id. [citations omitted]; see also Matter of New York City Trans. Auth., 99 NY2d at 7 [providing that "the courts must be able to examine . . . an award on its face without engaging in extended factfinding or legal analysis]).

Petitioner has failed to meet this strict standard. The subject award does not, as petitioner contends, plainly disregard the public policy described in Reed, Roberts Assocs., Inc. v Strauman (40 NY2d 303, 307 [1976]). There, the court discussed the "powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood," stating that no restrictive covenants "should fetter an employee's right to apply to his own best advantage the skills and knowledge acquired by the overall experience of his previous employment" (id. [citations omitted]). The arbitration award does not enjoin petitioner or Constante from utilizing their general knowledge and talents in real estate services or otherwise.

The court has reviewed petitioner's remaining contentions and find them without merit. Accordingly, it is

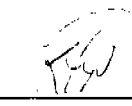
ORDERED that the motion to vacate the arbitration award is denied; and it is further

ORDERED that the cross-motion to confirm the arbitration award is granted, and the arbitration award in favor of

petitioner and against respondent is confirmed.

This foregoing constitutes the judgment and order of the court.

Date: June 12, 2007



Kibbie F. Payne, J.S.C.

FILED

JUN 18 2007

CLERK OF DISTRICT COURT
NEW YORK