SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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ERIN CONSTRUCTION AND DEVELOPMENT CO. INC.,

Petitioner,

- against -

CLYDE LLOYD MELTZER,

Respondent.

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MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 18
Index No.: 06/011343
Motion Seq. No.: 02
DECISION & ORDER

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The petitioner Erin Construction and Development move by Notice of Motion for an order pursuant to CPLR §2221 granting Petitioner leave to renew and reargue the portion of the Court's April 10, 2007 Order which ordered a Hearing on the issue as to whether Respondent was an owner/investor or an owner/resident of the subject property.

In April of 2002, in order to fund reconstruction of his fire-damaged, two-unit Brooklyn property, MR. MELTZER applied for, and received funding from, the "Small Homes Loan Program." This program is administered by the New York City Department of Housing Preservation and Development, also referred to as "HPD", aimed at improving blighted New York City neighborhoods by providing, *inter alia*, funding for one to twenty unit properties owned by both homeowners and investors, (*see* Kensky Dep., 5-6).

ERIN CONSTRUCTION, which is a "pre qualified" HPD contractor, (*see* Murnane Aff., ¶ 3), was the lowest bidder and was awarded the contract which was prepared by HPD and also refers to a total contract price of two hundred forty-nine thousand four hundred and seventy

four dollars ($249, 474.00), (*see* Pet.,¶¶ 3-4; AIA Contract, ¶ 3.1).

A dispute subsequently arose between ERIN CONSTRUCTION and MR. MELTZER, (*see* Murnane Aff., ¶ 16; Meltzer Aff., ¶ 13), which resulted in ERIN CONSTRUCTION demanding Arbitration pursuant to the contract's mandatory arbitration provision, (*see* Murnane Aff., Exh., "M"; AIA Contract, ¶ 10.8)

MR. MELTZER opposed the demand based upon the premise that since ERIN CONSTRUCTION did not possess a home improvement contractor's license, both the contract and ERIN CONSTRUCTION's demand for Arbitration were void and unenforceable, *see*, New York City Administrative Code §20-387; *see also*, General Business Law §399-c .

Although Meltzer subsequently retained counsel and moved to stay arbitration on the foregoing legal theory (Murnane Aff., Exh., "O", "S"), his application was "denied in its entirety" by the Supreme Court, Kings County (*see, e.g.*, Meltzer [Kings County] Mem. of Law, dated May 25, 2006; Murnane Aff., Exh., "V").

The Arbitrator ruled in favor of ERIN CONSTRUCTION, concluding, *inter alia* , that: (1) MR. MELTZER had violated the contract; and (2) that since MR. MELTZER had acted as an owner/developer "with the intent of making a profit from rental income", he was not a person to whom the protections of the New York City licensing requirements were applicable, (*see* Murnane Aff., Exh., "W").

Thereafter, ERIN CONSTRUCTION commenced the within proceeding and moved by Order to Show Cause to confirm the Arbitrator's Award.

Upon review of ERIN CONSTRUCTION's motion to confirm and MR. MELTZER's opposing claims, this Court issued an Order dated April 10, 2007, in which it determined, *inter*

alia, that a factual question requiring a Hearing had been presented – albeit a Hearing limited solely to the issue of whether MR. MELTZER "was an owner/investor or an owner/resident of the subject property" to whom the protections of the New York City Administrative Code and General Business Law §399-c might apply, (Order at 10-11), *see generally, Ragucci v. Professional Const. Services*, 25 AD3d 43 (2d Dept 2005), 46 *cf.*; *Baronoff v. Kean Development Co., Inc.*, 12 Misc.3d 627, 629-630 (Supreme Court, Nassau County 2006).

The parties have since agreed to forego the Hearing referenced in the Court's Order and have further stipulated that the issue identified by the Court in its April 10, 2007 Order should be decided based on previously submitted motion papers and memorandums of law.

Based on a review of those papers, the Court finds that the available evidence supports ERIN CONSTRUCTION's contentions and that the motion to confirm should be granted.

Although MR. MELTZER asserts that before the fire destroyed the property in 2001, the premises constituted his exclusive, long-term residence, the Court notes, and the record confirms, that he has not resided there since 2001 and that a different address is listed as his residence on the contract and certain financing and loan documents submitted in conjunction with the project, (*see* Murnane Aff., Exhs., "C").

Moreover, ERIN CONSTRUCTION asserts, and MR. MELTZER has not disputed in any material respect, that during the construction process, MR. MELTZER asked ERIN CONSTRUCTION to depart from the HPD-authorized plans by adding an additional, arguably illegal apartment to the property over and above the two-unit rehabilitation actually contemplated by the approved plans, (*see* J. Murnane Aff., ¶¶ 17-18; Wright [May 8] Aff. in Opp,¶ 15).

Buttressing the veracity of this assertion – and further supporting the Arbitrator's factual

finding that MR. MELTZER was primarily an owner/investor in connection with the project and its future use – are certain key submissions made by ERIN CONSTRUCTION.

Specifically, ERIN CONSTRUCTION has produced a Verified Answer/Third-Party Complaint submitted by MR. MELTZER in a related action arising out of the same contract commenced by the Neighborhood Housing Services of New York City, (Mot., Exh., "A"), an entity which assisted HPD in overseeing, supervising and administering the subject contract, (Murnane Aff., ¶ 8).

In his Verified Pleading, MR. MELTZER repeatedly alleged that "[a]s a result my property remains uninhabitable and I have not been able to rent out the two unfinished apartments as anticipated", (*see* MELTZER Ans/TP Cmplt.,¶¶ 25, 27, 28, 30-31, 45-46; 57-58). MR. MELTZER further alleged that "[w]ithout the rental income, I have no means to maker my mortgage payments to plaintiff NHS", (*see* MELTZER Ans/TP Cmplt.,¶ 26). The Sworn Pleading also makes frequent reference to the loss of "rental income scheduled to be derived * * * [from the property]", (*see* MELTZER Ans/TP Cmplt.,¶¶ 23, 28, 43, 54).

Significantly, Courts have held that the term "owner" as defined in the New York City Administrative Code (§20-386[6]), applies to individuals who reside in the subject premises and/or those who intend to reside in the subject premises after the home improvements are completed – not to speculators and real estate investors, *see generally*, *Ayres v. Dunhill Interiors, Ltd.*, 138 AD2d 303, 305 (1st Dept 1988); *Jack A. Corcoran Marble Co., Inc. v. Clark Const. Corp.,* 155 Misc.2d 49, 50-52 (Supreme Court, Appellate Term 1993); *Kuchar v. Baker,* 261 AD2d 402, 403 (2d Dept 1999); *In re Migdal Plumbing & Heating Corp.,* 232 AD2d 62, 66 (1st Dept 1997); *Routier v. Waldeck*, 184 Misc.2d 487, 490, 2000 WL 911407 [Nassau County

District Court 1st Dist. 2000]; General Business Law §399-c(a) *cf., Liberty Management and Const. Ltd. v. Wasserman*, ___F.Supp___, 1996 WL 164490 (S.D.N.Y. 1996); *Mortise v. 55 Liberty Owners Corp.*, 102 AD2d 719, *affd,* 63 NY2d 743 (1984); *Veltri v. Platzner Intern. Group, Ltd.*, 7 Misc.3d 131(A) (Supreme Court, Appellate Term, 2d Dept 2005).

Additionally, while this Court did direct a Hearing with respect to MR. MELTZER's purported consumer status, the Arbitrator considered this factually grounded issue and rationally resolved that dispute by concluding that MR. MELTZER was not, in fact, a consumer, *see cf., Kuchar v. Baker, supra.*

It is settled that, "[c]ourts are bound by an arbitrator's factual findings * * *" may not "re-weigh or re-examine the evidence", *see McMahan & Co. v. Dunn Newfund I, Ltd.*, 230 AD2d 1, 5 (1st Dept 1997); *TC Contracting, Inc. v. 72-02 Northern Blvd. Realty,* 39 AD3d 762 (2d Dept 2007); *Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 NY2d 321, 326 (1999).

Alternatively, the Court views as persuasive, the additional finding made by the Arbitrator to the effect that the extensive supervisory control, input, and, ultimately the decisive municipal authority exercised by HPD, materially distinguishes the subject contract from the typical home improvement agreement, (*see* Award, ¶ 2 [Murnane Exh., "W"]). Lastly, it is true that "[a] challenge to the arbitrability of an issue on public policy grounds" may be raised on a motion to stay * * * [or] raised for the *first time* on a motion to vacate", *see United Federation of Teachers, Local 2, AFT, AFL-CIO v. Board of Educ. of City School Dist. of City of New York*, 1 NY3d 72, 79 (2003) [emphasis supplied]; *Hirsch v. Hirsch*, 37 NY2d 312, 315 (1975). Here, however, MR. MELTZER has already made a stay application before the Supreme Court in

Kings County based upon essentially the same theories and claims raised here – which the Court denied "in its entirety", (*see* Murnane Aff., Exh., "V").

The Court has considered the remaining contentions interposed by MR. MELTZER and concludes that they are insufficient to defeat ERIN CONSTRUCTION's Motion to Confirm.

Accordingly, it is,

ORDERED that the Motion by petitioner ERIN CONSTRUCTION AND DEVELOPMENT CO., pursuant to CPLR Article 75 for an Order confirming an Arbitration Award dated June 6, 2006, is **GRANTED**.

The foregoing constitutes the **DECISION** and **ORDER** of the Court.

Settle Judgement.

DATED: August 30, 2007
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

ENTERED
SEP 06 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE