

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

2007 NY Slip Op 32821(U)

September 7, 2007

Supreme Court, New York County

Docket Number: 0115640/2006

Judge: Emily Jane Goodman

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

PRESENT: GOODMAN  
Justice

PART 17

ELUX DIAMONDS CO. LTD.,  
ETAL.

INDEX NO. 115640/06

MOTION DATE \_\_\_\_\_

- v -

Z KOR DIAMONDS, INC.,  
ETAL.

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

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

**FILED**  
SEP 12 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 9/7/07

*[Signature]*  
**EMILY JANE GOODMAN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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 to renew/reargue the Court's Decision and Order, dated June 6, 2007, maintaining that the Court erred in confirming the arbitration award rendered by the Diamond Dealers Club of New York, (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. The Court grants renewal/reargument, and upon renewal/reargument, adheres to its prior decision.

Petitioners argue that the Court erred when it determined that the DDC tribunal did not act irrationally when they determined they had jurisdiction because the "dispute arises from a transaction concluded" in New York, as required by Article 4, Section B (2) (a) of the World Federation of Diamond Bourses (WFDB) by-laws. The Court noted that the term transaction was not defined to include only direct transactions between the parties to the dispute. New York was the place where Z-Kor and GI Trading Inc. (GI) agreed to consign Z-Kor's diamonds, which agreement enabled the diamonds to come into the possession of GI in California, and then into the possession of Elul, who seized the diamonds as judgment creditor of GI. Accordingly, the

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Court properly found that it was not irrational for the DDC arbitrators to have concluded that the dispute between Petitioners and Z-Kor and Kornbluh arose from, and would not have existed, but for the transaction which concluded in New York, thereby conferring jurisdiction. Although Petitioner claims that the proper reading of that provision is a narrower one, the issue before this Court is whether a broader reading is irrational, which the Court properly concluded that it was not.

Petitioners also seek renewal based upon a letter of November 27, 2006 from David Woolf, Honorary Legal Counsel to the WFDB, addressed to the President of the DDC. The letter reflects Woolf's legal opinion that the DDC did not have jurisdiction over this dispute under the by-laws. According to the affidavit of Amos Fouzailov, dated July 5, 2007, this letter was not previously submitted because the diamond bourse in Israel would not allow Fouzailov access until after the Court decided the petition, even though Fouzailov states he made attempts to obtain access before the matter was decided.

Even if this Court were to accept the letter as newly discovered evidence, not previously available (see Mejia v Nanni, 307 AD2d 870 [1st Dept 2003]), the letter does not change the Court's determination. Although the letter reflects Mr. Wolf's legal opinion that the DDC did not have jurisdiction over the dispute pursuant to WFDB's by-laws, the issue before this Court is limited to whether the DDC tribunal's finding that jurisdiction existed in New York, was irrational.<sup>1</sup> In any event, the Court found that the jurisdictional argument was waived by Elul's

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<sup>1</sup>The Court also noted that 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." As noted by the Court, Z Kor and Kornbluh previously submitted the affidavit of

counsel's participation in the arbitration. Petitioners maintain that the Court erred in this regard because counsel did not present or cross-examine witnesses, or object to, or present evidence, citing Smullyan v Sibject, S.A., 210 AD2d 335 [1st Dept 1994 ] [right to object to lack of agreement to arbitrate waived by submission of an appearance, participation in the selection of the arbitrator and presentation of witnesses and evidence]). However, Smullyan does not confine a finding of participation to those facts. Based upon the affidavit and affirmation previously submitted by Z-Kor and its counsel, who were present at the arbitration (which was not disputed by Elul's counsel, Daniella Levi), Levi advanced a substantive legal argument on behalf of Elul unrelated to jurisdiction-i.e., that because Z-Kor did not file the proper UCC-form, Elul had a superior right to the diamonds. Thus, as correctly noted by this Court, Petitioners did more than appear for the limited purpose of objecting to the tribunal's jurisdiction, as they maintain. Petitioners cannot have it both ways. Although Levi did not present witnesses or evidence or cross examine witnesses or object to evidence, she still propounded the central, most important legal argument made by Petitioners to support their claim that they were entitled to diamonds admittedly belonging to Z-Kor. Accordingly, Petitioners' thereby waived its jurisdictional objections, as well as the claim that Z-Kor waived its right to arbitrate by litigating in California.

It is hereby

ORDERED that Petitioners' motion to renew/reargue is granted, and upon

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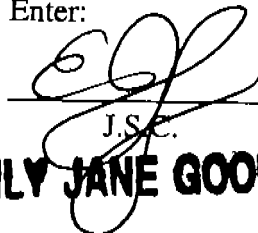
both the DDC and the DCWC (the bourse to which GI was affiliated) stating that it is the common practices of the bourses to consent to the jurisdiction of another bourse by not objecting. The letter from Woolf reflects his opinion that consent requires an affirmative act, and cannot be deemed to exist based upon a failure to object. However, as noted, the Court correctly found that the DDC tribunal's award was not irrational. Although the WFDB appears unhappy with the actions taken by the DDC, the Court did not err in its determination.

renewal/reargument, the Court adheres to its prior decision.

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

Dated: September 7, 2007

Enter:



J.S.C.

**EMILY JANE GOODMAN**

**[ FILED ]**

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