

**Matter of 271 Mulberry St. Co., LLC v R.C.
Dolner Inc.**

2007 NY Slip Op 33291(U)

October 9, 2007

Supreme Court, New York County

Docket Number: 0109180/2007

Judge: Walter Tolub

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

PRESENT: _____

PART 15

Index Number : 109180/2007

271 MULBERRY STREET COMPANY

vs

R.C.DOLNER INC

Sequence Number : 001

CONFIRM AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

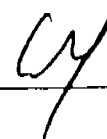
IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 148)

Dated: 10/9/07



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 15

----- X
In the Matter of the Application of
271 MULBERRY STREET COMPANY, LLC

Petitioner, Index No. 109180/07

Pursuant to Article 75 of the CPLR
For Confirmation of an Arbitration
Award and Judgment

-against-

R. C. DOLNER INC., RCDOLNER LLC and
LIBERTY MUTUAL INSURANCE COMPANY,

Respondents.

----- X

WALTER B. TOLUB, J.:

Petitioner moves for a judgment confirming an arbitration award (the "Award) pursuant to CPLR 7510 and directing judgment to be entered thereon pursuant to CPLR 7514.

Respondents R. C. Dolner Inc. ("Dolner Inc.") and RCDolner LLC ("Dolner LLC") cross-move for a judgment amending or vacating the Award.

The underlying arbitration was brought by petitioner based on allegedly defective construction work by Dolner Inc. On December 8, 1997 petitioner (through its managing member ABEJ LLC), as owner, and Dolner Inc., as the general contractor, entered into a Standard Form of Agreement between Owner and Contractor (the "Contract") for all of the construction work to be performed in connection with the conversion of 285 Lafayette

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Street, New York, New York from a manufacturing/commercial building to a residential condominium. After construction was completed petitioner and individual unit owners discovered leaks and cracked mortar and bricks. On or about June 27, 2004 petitioner and the Condominium's Board of Managers on the one hand and Dolner Inc. on the other entered into a Settlement Agreement pursuant to which Dolner Inc. agreed to correct the problems. According to petitioner, it failed to do so. On November 10, 2005 petitioner commenced the underlying arbitration proceeding by filing a Notice of Claim with JAMS End Dispute alleging that Dolner Inc. did not fulfill its obligations under the Contract and Settlement Agreement. The response to the Notice was served by Dolner LLC. Eight months thereafter, shortly before the hearing, an amended response substituting Dolner Inc. for Dolner LLC was served. At the hearing and in its post-hearing brief petitioner argued that a de facto merger of Dolner Inc. into Dolner LLC had occurred. The Dolner respondents opposed this argument. On May 8, 2007 the arbitrator, Michael Young, issued a Partial Final Award and Statement of Reasons in which he made the following findings: petitioner had no viable claims against Liberty Mutual; a de facto merger between Dolner Inc. and Dolner LLC had occurred; Dolner LLC was responsible for the claims asserted by petitioner against Dolner Inc.; and, petitioner had standing by virtue of being a signatory on the

Contract and Settlement Agreement (see petition, exhibit A, second document). On June 11, 2007 the arbitrator issued a Final Award in which he incorporated the Partial Final Award and awarded petitioner \$2,428,909.47 (id., first document). By letter dated July 9, 2007, 28 days after the Final Award, the Dolner respondents requested the arbitrator to reconsider his findings that petitioner had standing and that a de facto merger had occurred (see Farkas affirmation, exhibit E). By e-mail dated July 17, 2007 the arbitrator rejected respondents' request as untimely but invited them to address the timeliness issue (id., exhibit F). The Dolner respondents addressed the timeliness issue by letter dated July 24, 2007 (id., exhibit G). The arbitrator responded by e-mail dated July 27, 2007 that he no longer had jurisdiction "particularly when said motion [the July 9 letter] was filed twenty-eight days after issuance of the Final Award" (id., exhibit H).

Petitioner has now moved to confirm the Award and the Dolner respondents have cross-moved to vacate the Award. Respondents make the following arguments: the arbitrator exceeded his authority by issuing an award against Dolner LLC because it was not a party to the Contract which contained the arbitration provision; the issue of whether there was a de facto merger between Dolner Inc. and Dolner LLC is not a "controversy, claim or dispute arising out of or related to the Contract or breach

thereof" and therefore outside the scope of the arbitration provision; the question of whether a third-party should be bound by the arbitration award, although not formally a party to the arbitration provision, is to be determined by the court, not the arbitrator; the Award constitutes a manifest disregard of the law and facts because it awards damages against Dolner LLC for claims that were asserted against Dolner Inc.

The law is well settled that an arbitrator's power is ordinarily plenary and an arbitration award will not be disturbed unless it is totally irrational, violative of strong public policy or exceeds a specifically enumerated limitation on his power (see Matter of Silverman [Benmor Coats], 61 NY2d 299, 308 [1984]). "He may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement ..." (id.). The thrust of respondents' argument is that the arbitrator exceeded his power by determining that a de facto merger between Dolner Inc. and Dolner LLC occurred and that Dolner LLC was responsible for claims asserted against Dolner Inc. The merger issue was addressed by both sides in the arbitration proceeding and discussed by the arbitrator in the Partial Final Award and Statement of Reasons (see petition, exhibit A [second document] pp7-8). Dolner LLC was not a stranger to the proceeding. It filed the response to

petitioner's Notice of Claim. Its president, who is also the president of Dolner Inc., testified during the course of the arbitration. Dolner Inc. and Dolner LLC are both represented by the same law firm in this proceeding and presumably were represented by the same law firm in the arbitration proceeding where Dolner LLC sought to avoid liability for claims asserted against Dolner Inc. A party who participated in the arbitration cannot later seek to vacate the award on the ground that the agreement to arbitrate was invalid (see Matter of Meisels v Uhr, 79 NY2d 426, 538 [1992]). The arbitrator's determination (which with the court agrees) that a merger occurred is well within his powers as set forth in Silverman, supra, at 308 (cf. Matter of Rice v Jamaica Energy Partners, 13 AD3d 255 [1st Dept 2004] [Silverman criteria apply to claim that arbitrator exceeded his power]). Respondents have cited Orion Shipping & Trading Co. v Eastern States Petroleum Corporation (312 F2d 299, 301 [2nd Cir 1963] cert den 373 US 949 [1963]) for the proposition that a decision as to whether non-signatories to the arbitration clause may have their rights and obligations determined by an arbitrator when that issue has not been submitted to him is within the province of the court, not the arbitrator. Here, the merger issue was submitted to the arbitrator and is now being reviewed by the court. While Orion Shipping, supra, states the general rule, there are exceptions. For example, the First Department

has determined that arbitrators were "fully within their authority" in joining a non-signatory in an arbitration proceeding where the non-signatory was a successor to the signatory (see Lubin & Schlesinger v Scheinberg, 234 AD2d 203, 203-204 [1st Dept 1996] lv den 89 NY2d 814 [1997]). The court concludes that, under the circumstances herein, the arbitrator's determination that a merger occurred is well within his plenary powers. Accordingly, it is hereby

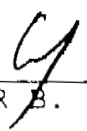
ORDERED that the petition is granted and the award rendered in favor of petitioner and against respondent is confirmed; and it is further

ORDERED that the Dolner respondents cross-motion to vacate the Award is denied; and it is further

ORDERED and ADJUDGED that petitioner 271 Mulberry Street Company LLC have judgment and recover against respondent RCDolner LLC, in the amount of \$2,428,909.47 plus interest from June 1, 2007 as computed by the Clerk together with costs and disbursements as taxed by the Clerk.

This constitutes the decision and judgment of the court.

DATED: 10/9, 2007


WALTER B. TOLUB J.S.C.

UNFILED JUDGMENT
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 and notice of entry cannot be served based hereon. To
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 11B)