

**Matter of 645 E. 11th St. Assoc.
Condominium v RAE Realty Holdings, LLC**

2007 NY Slip Op 33319(U)

October 9, 2007

Supreme Court, New York County

Docket Number: 0104560/2007

Judge: Lewis Bart Stone

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: Hon. - Lewis Bart Stone
HON. LEWIS BART STONE Justice

PART 505

Board of Mgrs.

INDEX NO. 104560607

MOTION DATE _____

- v -

MOTION SEQ. NO. 01

Rae Realty

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted, in accordance with the annexed Decision and Order

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

FILED
OCT 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9 Oct 07

Lewis Bart Stone
HON. LEWIS BART STONE, S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50S

----- X

RAE REALTY HOLDINGS, LLC AND EAST
VILLAGE DENTAL ASSOCIATES, PLLC,

Petitioner,

DECISION AND
ORDER

- against-

645 EAST 11TH STREET ASSOCIATES
CONDOMINIUM,

Index Number
104946/07

Respondent.

----- X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50S

----- X

In the Matter of Arbitration of Certain Controversies
Between The Board of Managers of
645 East 11th Street Associates Condominium

Petitioner,

DECISION AND
ORDER

- and-

RAE REALTY HOLDINGS, LLC, EAST VILLAGE
DENTAL ASSOCIATES, PLLC and
JEFFREY KRANTZ,

Index Number
104560/07

Respondents.

----- X

Hon. Lewis Bart Stone, J

On March 21, 2007, an arbitrator (the "Arbitrator") designated by the American
Arbitration Association rendered an arbitration award (the "Award") in favor of RAE

Arbitration

FILED
OCT 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

Realty Holdings, LLC (“RAE”) and East Village Dental Associates, PLLC (“Dental”), against 645 East 11th Street Associates Condominium (the “Condominium”).

On April 2, 2007, the Condominium, by Notice of Petition, commenced a proceeding (New York County Index No. 104560/07) (the “First Proceeding”) against RAE, Dental and Jeffrey Krantz (“Krantz”), a principal of Dental, pursuant to Civil Practice Law and Rules (“CPLR”) Article 75, to vacate and set aside the Award. On April 16, 2007, RAE and Dental commenced, by Notice of Petition, a separate proceeding, (New York County Index No. 104946/07 (the “Second Proceeding”), against the Condominium, pursuant to CPLR Article 75, to confirm the Award.

Subsequently, the parties to both proceedings stipulated on May 30, 2007 that the two proceedings should be consolidated for all purposes. Because the two proceedings were initially assigned to separate part of the Court, this Court did not receive the motion to vacate or the stipulation to consolidate until September 11, 2007, at which time the proceeding not before this Part was transferred to this Part.

RAE, the owner of condominium Unit 1C of the Condominium (the “Unit”), in which Dental operates its dental practice through Krantz, a dentist, objected to the placement of refuse dumpsters and a spiked metal fence in front of the Unit, and commenced an arbitration proceeding, allegedly pursuant to the bylaws of the

Condominium (the By-Laws), to remedy the situation and for prior damages as a result of the Condominium's alleged actions. The Condominium advised RAE, Dental and the AAA, that the Condominium was not required to arbitrate and declined to participate in the arbitration. The Arbitrator ruled in its interim order dated October 13, 2006, that "the proper forum in which to 'contest' the jurisdiction of the AAA and the Arbitrator would be in a Court of competent jurisdiction," and that absent a stay by such court, the Arbitrator would proceed with the arbitration. The Condominium did not apply for such stay, and the arbitration proceeding continued, with the Condominium not participating. At the end of such proceeding the Award was issued.

While the Condominium interposed a series of procedural objections to the arbitration, most of such issues could be properly addressed by the Arbitrator. The only matters which are to be addressed by a Court are the "three threshold questions; whether the parties made a valid agreement, if so whether they complied with the agreement; and whether the claim sought to be arbitrated is barred by the statute of limitations." Cooper v. Bruckner, 21 AD3d 758 (1st Dept. 2005).

The Condominium raises one of these three threshold questions, i.e., whether the parties had agreed to arbitrate. RAE, Dental and Krantz base their claim that the Condominium had agreed to arbitrate in Section 10.1 of the By-Laws which provides:

“Any matter required or permitted to be determined by arbitration pursuant to the terms of the Condominium Documents shall be submitted for resolution by a single arbitrator in a proceeding held in the City of New York in accordance with the then existing rules of the American Arbitration Association or any successor organization thereto.”

The Condominium argues that such provision does not constitute an agreement to arbitrate and that, “aside for Article 10 of the By-Laws there is absolutely no reference to arbitration anywhere in the Condominium Documents” (First Proceeding, Gordon Aff. Par. 26). Accordingly, the Condominium argues that no agreement may be found by implication that Section 10.1 is generally applicable to all disputes.

Apparently, neither counsel for the Condominium nor its president, who verified the petition, read the portion of the By-Laws relating to condemnation,¹ which expressly provides in Section 5.5(H) that:

“Any dispute that may arise under this Section 5.5 between Unit Owners or between any Unit Owner(s) and the Condominium Board shall be resolved by arbitration pursuant to the terms of Article 10 hereof.” (First Proceeding, Petition Ex. F).

Thus, under generally applicable cannons of contract construction the inclusion of the specific reference to Article 10 in one portion of the By-Laws and the failure

¹ RAE, Dental and Krantz also apparently failed to read the By-Laws, and did not comment or dispute Gordon’s affidavit.

to require arbitration elsewhere in the By-laws requires the conclusion that for other matters, arbitration was not agreed to. Accordingly, this Court finds that the parties did not agree to arbitrate this dispute.

Because RAE and Dental failed to include in their Demand for Arbitration (See First Proceeding, Petition Ex. A), the required statutorily recitation under CPLR §7503(c) “stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made,” the Condominium was not precluded from raising the “threshold issue” as to whether there had been an agreement to arbitrate at this time. Cooper v. Bruckner, supra, Blamowski (Munson Transp.), 91 NY2d 190 (1997).² While the “threshold question” whether an arbitration agreement existed may also be waived by participation in the arbitration proceeding, the Condominium did not participate and thus did not so waive its right to claim in this proceeding that it had not agreed to arbitrate.

While the construction of contract terms, including whether the parties had agreed to arbitrate is ordinarily a matter for the Court to determine, had the Notice of Arbitration included the statutory notice or had the parties agreed to arbitrate after

² Had the statutory notice been given, the Condominium would have been required to raise the claim there was no agreement to arbitrate by a motion under CPLR Art. 75 to stay arbitration, or waive such claim.

the dispute arose or waived their objections to arbitration by participation, the finding of the Arbitrator in the Award that the By-laws required the parties to arbitrate would have bound the Court. A decision of an arbitrator who errs in a matter of law or fact in an arbitration properly before it is nonetheless enforceable absent rare circumstances. Because this Court finds that the issue of whether an agreement to arbitrate which is initially for a court to determine has been preserved for this Court's consideration at this time, the finding of the Arbitrator that the parties agreed to arbitrate does not bind this Court.

Although the Award may not stand, such decision does not by itself preclude RAE, Dental or Krantz from proceeding in an appropriate court to assert its claims against Condominium, as it appears to be doing at this time.

Accordingly, the Condominium's motion to set aside the Award and stay any arbitration of the issues which are the subject matter of this proceeding is hereby granted and such Award is hereby set aside and such arbitration is hereby permanently stayed and RAE, Dental and Krantz's motion to confirm the Award is denied, and their petition is hereby dismissed.

This the Decision and Order of the Court.

DATED: OCTOBER 9, 2007
NEW YORK, NEW YORK



Hon. Lewis Bart Stone
Justice of the Supreme Court

FILED
OCT 16 2007
NEW YORK
COUNTY CLERK'S OFFICE