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SCANNED ON 3/18/2008

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

PRESENT: EILEEN A. RAKOWER J.S.C. PART 5
Justice

Dr. Howard Kudler

- v -

Dr. Barry Trufelman et al

INDEX NO. 600237/08

MOTION DATE

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 ...	1, 2, 3,
Answering Affidavits — Exhibits	4, 5,
Replying Affidavits	6, 7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
MAR 18 2008
COUNTY CLERK'S OFFICE

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

Dated: March 12, 2008

EILEEN A. RAKOWER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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Dr. HOWARD KUDLER,

Petitioner,

- against -

Dr. BARRY TRUFFELMAN, Dr. JOEL INGBER and Dr. DAVID INGBER,

Respondents.

HON. EILEEN A. RAKOWER,

Index No. 105667/04

DECISION and ORDER

Mot. Seq. 001 & 002

The parties to this action entered into a partnership agreement (the agreement) in January, 1990, which, among other things, dictates their responsibilities in the event of a partner's disability. That agreement contains an arbitration clause.

Petitioner, in June, 2000, became ill and it became apparent that he would not return to the parties' practice. Subsequently, in June, 2001, the parties entered into a Disability Retirement Agreement which was meant to supplement the January 1990 agreement, by which petitioner would accept certain disbursements of funds.

A dispute arose regarding the accounting of monies which came into the partnership. In September, 2005, respondents received petitioner's demand for arbitration before the American Arbitration Association (AAA) regarding the aforementioned issue. In April, 2006, an arbitrator was chosen and a hearing was scheduled for October, 2006. Thereafter, respondents agreed to an adjournment until January, 2007 but rather than going forward then, petitioner sought permission to amend his complaint. Respondents opposed the application but the arbitrator permitted it. A hearing was next scheduled for August, 2007 but respondents requested an adjournment which petitioner agreed to and the matter was adjourned to November, 2007.

The AAA rules require participants in arbitration to advance deposits for administrative fees and the arbitrator's compensation. Respondents' original deposit was $5,000 but by invoice dated October 11, 2007, they were informed that their share of the fees associated with four days of hearings, ninety-two hours of study and the rental fee for a hearing room was an additional $12, 332.83. In a letter dated October 25, 2007, respondents wrote to the AAA Regional Case Manager objecting

to this additional payment. They argued that it was based on the arbitrator's decision that they were required to pay two-thirds of her compensation while petitioner only paid one-third; it reflected an additional seventy hours of study time that they considered excessive; and the parties had previously agreed that the matter would require two days of hearings rather than four days. Respondents stated that they did not initiate the arbitration and had no obligation to pay for any part of it. By order dated November 9, 2007, the arbitrator suspended the matter because deposits were not paid in accordance with the AAA rules, but she permitted the parties an additional thirty days to comply with the AAA's deposit requirements before the matter would be terminated. By letter dated December 6, 2007, petitioner wrote to the case manager requesting an additional thirty day adjournment from AAA to "seek appropriate relief." Respondents then wrote to the case manager objecting to the thirty day adjournment and reiterating their objection to the requirement that they pay any additional fees. Rather than handling the fee dispute as "an internal AAA matter," the case manager forwarded the correspondence to the arbitrator for her determination.

Petitioner filed this Order to Show Cause in January, 2008 (motion sequence 001), requesting that the court ,pursuant to CPLR §7513,order respondents to pay the additional fees invoiced in October, 2007; compel respondents to arbitrate on or before six months of the filing of the petition; or, in the alternative, schedule a hearing or trial on the underlying claims in Supreme Court. Respondents oppose the petition and file a motion (motion sequence 002) seeking to have the arbitrator disqualified.

Respondents, in opposition, argue that the court does not have authority under CPLR§ 7513 to order them to pay the AAA's fees because that section of the CPLR governs how monies are to be paid after arbitration, "as provided for in the award." They also argue, in support of their own motion, that the arbitrator may now be biased by knowledge of the fee dispute. Petitioner opposes the disqualification of the arbitrator arguing that respondents have failed to offer any proof of the arbitrator's bias and failed to exhaust the remedies available to them by AAA rules.

When the parties appeared for oral argument on the Order to Show Cause, respondents stated that there was no need for this court to compel them to arbitrate as they were willing to do so. Indeed, respondents do not challenge the validity of the arbitration clause. Rather, respondents reiterated their position that they and petitioner should bear one-half the costs of arbitration and stated that they were in the midst of discussions with AAA regarding that issue, along with the issues of how many days

the hearing would take and how many hours of study time were reasonable for the arbitrator. Respondents argued that the arbitrator should be disqualified by the court because, knowing of their fee dispute, there is the potential that she would be partial. Petitioner was unaware of respondents' efforts to negotiate different terms for the arbitrator's compensation because AAA rules preclude the parties from discussion between the parties regarding such compensation.

CPLR §7513 states

> Unless otherwise provided in the agreement to arbitrate, the arbitrator's expenses and fees, together with other expenses, not including attorney's fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. The court, on application, may reduce or disallow any fee or expense it finds excessive or allocate it as justice requires. (Emphasis added).

The arbitration clause, signed by all parties, states

> In the event that any dispute arises between or among the parties hereto, such dispute shall be settled by arbitration in New York City in accordance with the rules then obtaining of the American Arbitration Association and judgment upon any award rendered may be entered in any court having jurisdiction thereof.

CPLR §7513 concerns the court's authority with respect to an award after arbitration. Pending an award, the parties are legally bound by the unequivocal arbitration clause in their agreement which states that "dispute[s] shall be settled by arbitration in New York City **in accordance with the rules then obtaining of the American Arbitration Association** . . .." (Emphasis added).

Respondents are concerned that the arbitrator may be influenced by the knowledge that they have questioned her decision regarding her compensation. They urge the court to order her removal because "[w]here a party to an arbitration proceeding becomes aware of the misconduct, or probable partiality of an arbitrator, there would appear to be no reason why the court should not exercise its equitable jurisdiction on the application of the party at any time during the proceeding, rather than require the party to wait for the award, and then to vacate pursuant to CPLR 7511." (*Grendi v. LNL Construction Management, Corp,* 175 AD2d 775 [1st Dept.

1991] (citation omitted)). It is respondents' contention that the AAA case manager violated the organization's rules when she divulged to the arbitrator that there was a fee dispute.

AAA's rules state that "[i]f there is a disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed by the parties." (AAA, Commercial Arbitration Rules and Mediation Procedures, Rule 51(b)). Actual evidence of bias is reason for the court to intervene and remove an arbitrator, but the "potential" for bias is not.

Courts favor permitting consenting parties to submit their disputes to arbitration and "the law has adopted a policy of noninterference, with few exceptions, in this mode of dispute resolution." (*Sprinzen v. Nomberg*, 46 NY2d 623 [1979]). The parties are directed to return to the American Arbitration Association and proceed in accordance with their rules. Wherefore, it is hereby

ORDERED that petitioner's motion for an order from the court pursuant to CPLR §7513, requiring respondents to pay the additional fees invoiced in October, 2007, is denied; and it is further

ORDERED that petitioner's motion to compel respondents to "arbitrate on or before six months of the filing" of his petition is denied; and it is further

ORDERED that petitioner's motion for an order scheduling a hearing or trial on the claims in his arbitration matter in Supreme Court is denied; and it is further

ORDERED that respondents' motion seeking to have the arbitrator disqualified is denied.

Dated: March 12, 2008

Eileen A. Rakower, J.S.C.