

Matter of 15 John Corp. v VJHC Dev. Corp.
2008 NY Slip Op 31786(U)
June 24, 2008
Supreme Court, New York County
Docket Number: 0100534/2008
Judge: Kibbie F. Payne
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

In the Matter of the Arbitration between
15 JOHN CORP.,

INDEX NO. 100534/08

MOTION DATE 02-22-08

- v -

MOTION SEQ. NO. 001

VJHC DEVELOPMENT CORP.,

MOTION CAL. NO. _____

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

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

These proceedings are decided as indicated.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: June 24, 2008

ZPV
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 4

-----X
In the Matter of the Application between
15 JOHN CORP.,

Petitioner,

For a Judgment Pursuant to Article 75 of Index No.
the Civil Practice Law and Rules

-against-

Judgment/Decision

VJHC DEVELOPMENT CORP.

UNFILED JUDGMENT
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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
141B).

KIBBIE F. PAYNE, J.

In this article 75 proceeding, petitioner, VJHC Development Corp., ("tenant") seeks an order, pursuant to CPLR 7511, vacating an October 18, 2007 arbitration award which set the fair market rent for a restaurant located at 15 John Street in Manhattan (the "restaurant"). Petitioner contends that the award results from arbitrator partiality and misconduct. Respondent VJHC Development Corp. ("landlord") cross moves to dismiss the petition and for an order, pursuant to CPLR 7510 confirming the arbitrator's award.

Petitioner is the lessee of the restaurant space on the ground floor of a building owned and operated by respondent. Pursuant to paragraph 60 of the lease, petitioner exercised its option to extend the lease for a period of five years commencing on June 1, 2007. Paragraph 60 of the lease further provides:

The basic rental payment shall be the fair market rent to be determined....The market rent shall be determined by arbitration,

pursuant to the commercial arbitration rules of the American arbitration Association as follows:

(A) The landlord shall appoint an arbitrator and the tenant shall appoint an arbitrator. If the two arbitrators cannot agree on the fair market rent during the option period, the arbitrators so appointed shall appoint a third arbitrator. If the two arbitrators cannot agree on the third, the third shall be appointed by the American Arbitration Association.

* * * *

The decision of the arbitrators shall be final and binding upon both parties as to the fair market rent at the beginning of the option period.

(Petitioner's Exhibit A-1, para 60)

In accordance with paragraph 60, petitioner appointed Rafe B. Evans ("Evans") as its arbitrator and respondent selected Christine Emery ("Emery") as its arbitrator. Although the arbitrators exchanged valuation figures regarding the fair market rent, they were unable to reach an agreement on the fair market rent. Accordingly, they mutually agreed to the appointment of Stephen Tarter as the third arbitrator. On October 15, 2007 the third arbitrator sent the designated arbitrators an email stating:

As the "third broker" for the valuation of the store at the captioned premises, I would appreciate it if you would send me your comparables [sic], raw data, listings, etc. upon which you have based your numbers. I will undertake to do my own due diligence but I also want to verify that the information upon which your are each basing your figures is appropriate.

(Respondent's Exhibit E)

On October 15, 2007, Emery replied to the email and attached a memo with comparable rents. Evans did not respond to the email. Two days later, on October 17, 2007, Tarter emailed Evans, stating: "I have gathered up my own research and visited the premises and the surrounding area. I have gotten the raw data from Lansco. Am I to expect anything from you?"

(Respondent's Ex G) It appears that, once again Evans did not respond to Tarter's email. On October 18, 2007, Tarter issued his determination finding a fair market rent of \$160.00 per square foot. In reaching this determination tarter noted that he reviewed materials submitted by the landlord; that he was not given any materials by the tenant and that he searched comparable stores that were recently rented factoring in the necessary variables. (Petitioner's Ex D)

thereafter, by email, dated November 1, 2007, Evans submitted a list of comparables to Tarter and called his attention to several factors in the neighborhood (i.e., long term construction of the Fulton Street Transit Center) that would potentially reduce the \$160.00 per sq. ft. fair market rent valuation. Tarter did not respond to Evans email and this proceeding to set aside the arbitration award followed.

In support of the petition to vacate the award, petitioner contends that Tarter's refusal to consider his November 1, 2007, submission constitutes misconduct because the neutral was

required to consider the submissions from both of the parties; that Tarter's rush to conclude the matter constituted misconduct because the parties had not set a deadline for the submission of materials to the neutral arbitrator and that Tarter's refusal to reopen the arbitration to consider his submission constituted a lack of impartiality. Petitioner further maintains that the award is invalid because it is neither "signed nor affirmed by the arbitrator making it" as required by CPLR 7507.

Respondent, on the other hand, in opposition to the petition to vacate and to set aside the award and in support of the cross-motion to dismiss the petition and to confirm the award maintains that the petition is untimely. Respondent further claims that the neutral arbitrator followed procedures. The third arbitrator was provided with fair market rent figures and the parties waived their rights to hearing and the neutral arbitrator had the right to make the final determination on the fair market rental for the premises. Respondent, further, maintains that while Tarter did request documentation to support the arbitrators' positions, the third arbitrator was under no obligation to review or accept any additional information submitted by the parties. Respondent additionally, argues despite Tarter's request for the arbitrators/brokers' documentation to support their positions as to the different valuations of the premises, the neutral arbitrator's determination should stand as the agreed upon third

arbitrator who conducted his own investigation as an expert in the field.

It is undisputed that petitioner was obligated to commence this proceeding by January 16, 2008. A special proceeding is commenced when the petition is filed with the clerk of the court in which the action is triable (CPLR 304[a], also see CPLR 2102). Here, the petition was filed with the New York County Clerk on January 15, 2008. (see Ferrari's Aff Ex H) Moreover, the petition and notice of petition were served upon respondent through the Secretary of State on January 17, 2008, twenty-one days before the February 7, 2008 return date and well within the required limitation period. (See CPLR 306-b and 403[b]¹) Accordingly, the petition was timely filed.

CPLR 7507 expressly provides that: ". . . the award shall be in writing; signed and affirmed by the arbitrator making it within the time fixed by the agreement, or, if the time is not fixed, within such time as the court orders." Petitioner claims that the award it received was defective because it was neither

¹ CPLR 306-b in pertinent part that where as here the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. In addition CPLR 403(b) requires the petition and notice of petition to be served on the adverse party at least eight days before the date on which the petition is noticed to be heard.

signed nor affirmed². Although the parties dispute the signing of the award, it is undisputed that the award was not affirmed.

Accordingly, it is

ORDERED and ADJUDGED that petitioner's motion to vacate the award on the grounds the award was not affirmed is granted and it is further

ORDERED and ADJUDGED that the cross motion to confirm the arbitration award is denied with leave to renew with proper papers not limited to a copy of the affirmed arbitration award.

The foregoing constitute the decision and judgment of this court.

Date June 24, 2008

ENTER



KIBBIE F. PAYNE
J.S.C.

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 141B).

² This court does not reach the question of whether the arbitrator's determination and award should be set aside on the basis of partiality or misconduct.