

Matter of Ralston v Lepow

2008 NY Slip Op 32137(U)

July 29, 2008

Supreme Court, New York County

Docket Number: 0105295/2007

Judge: Judith J. Gische

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

PRESENT: GISCHE
Justice

PART 10

PETER RALSTON

- v -

HOWARD COPOW

INDEX NO. 105295/07
MOTION DATE _____
MOTION SEQ. NO. 5
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

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

JUL 31 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/29/08

J. GISCHE J.S.C.
HON. JUDITH J. GISCHE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----x

In the Matter of the Arbitration between

PETER A. RALSTON, SUSAN RALSTON,
STEVEN R. LAPIDUS, AMANDA KISSIN
LOW, CARL KISSIN, ALFRED M. TAFFAE
and 88 ASSOCIATES,

Petitioners,

-and-

HOWARD G. LEPOW,

Respondent.

-----x

Decision/Order

Index No.: 105295/07

Seq. No. : 005

Present:

Hon. Judith J. Gische

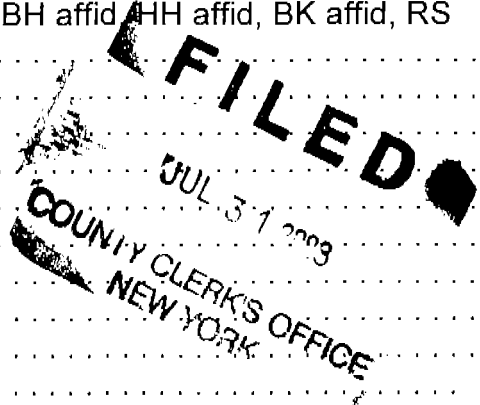
J.S.C

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Numbered

Proposed Interveners' OSC w/ JLB affirm, DH affid, BH affid, HH affid, BK affid, RS affid, exhs	1
Pet's AMT affid in opp, exhs	2
Resp's x-mot [CPLR §§ 5015, 2221], GF affid, exhs	3
Pet's AMT affid in opp, exhs	4
Pet's PIL affirm in opp, exhs	5
Proposed Interveners' JLB reply affirm, exhs	6
Receiver's DR affidavit, exhs	7
Proposed Interveners' JLB reply affirm	8
Court Exhibit	9
7/24/08 Transcript	10



Upon the foregoing papers, the decision and order of the court is as follows:

This proceeding was originally brought pursuant to Article 75 of the Civil Practice Law and Rules. David Hammerman, Benjamin Hammerman, Hillel Hammerman, Beverly Kingsley and Robert Stern (collectively herein referred to as the "proposed interveners") now move by order to show cause to intervene in this proceeding.

Respondent cross-moves to reargue and/or renew his prior motion to modify the judgment.¹

The underlying arbitration arose from a series of disputes amongst members of 88 Associates (the "Partnership"), a partnership.² 88 Associates was formed by a partnership agreement dated December 30, 1986, whereby the parties consented to submit their dispute to arbitration. After an evidentiary hearing was held, the arbitrators ordered: [1] that the Partnership is dissolved as of February 12, 2007; [2] the sale of the real property at 11 East 88th Street, New York, NY (the "Property"); and [3] respondent to pay the Partnership the sum of \$154,800 representing damages caused by Respondent to the Partnership in receiving payments in violation of his obligations to the Partnership.

The complexity of this proceeding is compounded by the structure of the ownership of the Property, to wit, the Partnership is the sole shareholder in 11 East 88 Corp. f/k/a 88 Tenants Corp. (the "Corporation")³ and the Corporation holds fee title to the Property.

Petitioners then commenced this proceeding and sought an order confirming the arbitrators' award and entering judgment thereon. Respondent answered the petition

¹ The instant order to show cause and the cross-motion were orally argued on July 24, 2008. The disposition of this motion sequence has been expedited because of a pending contract for sale of the Property, for \$19,000,000, dated June 27, 2008, between the Corporation and J&N Associates, LLC (the "Buyer") with a closing date of August 7, 2008, time being of the essence (the "Contract").

² The arbitration was entitled *Peter A. Ralston, Susan Ralston, Steven R. Lapidus, Amanda Kissin Low, Carl Kissin, Alfred M. Taffae and 88 Associates and Howard G. Lepow.*, Case No. 13 180 Y 00155 06.

³ Respondent previously represented to the court that his wife is a "nominal shareholder." However, throughout this proceeding, there has been no indication that Respondent's wife has any real interest in the Partnership, the Corporation or the Property.

and cross-moved for an order modifying or vacating that award. The court confirmed the arbitrator's award and denied respondent's cross-motion in its entirety by decision and order dated October 3, 2007. Petitioners were directed to settle judgment on notice.

Petitioners thereafter moved by order to show cause (motion sequence number 002) to appoint a receiver of the Partnership and submitted a proposed judgment in accordance therewith and with the court's decision and order dated October 3, 2007. Respondent submitted a proposed counter-judgment. In the court's decision and order dated December 14, 2007, the court granted petitioner's motion for a receiver and signed a judgment in the form consented to by all parties as per the parties' stipulation dated December 13, 2007 and filed with the court.⁴ In accordance therewith, David Rosenberg, Esq. was appointed receiver of the Partnership. Judgment was entered thereon on January 3, 2007 (the "judgment"). The judgment specifically provided, in pertinent part, as follows:

ORDERED ADJUDGED AND DECLARED that the receiver shall have the duty and authority to retain one or more real estate brokers independent in their ownership and control of all of the partners of the Partnership, to market and sell the Property to a third party, who is independent of the ownership or control of any of the partners of the Partnership, within a reasonable time period, with a closing of sale to be no later than August 12, 2008

The receiver thereafter moved by order to show cause (motion sequence

⁴ In the court's decision and order dated December 14, 2007, the court set down for an inquest before a Special Referred the issue of what attorneys' fees petitioners' were entitled to recover from respondent. That reference was settled on March 25, 2008 (motion sequence number 003).

number 004), wherein he requested a modification of the judgment to clarify and include additional powers. Respondent cross-moved to modify the judgment to delete the above-quoted paragraph and replace it with the following:

ORDERED ADJUDGED AND DECLARED that the receiver shall have the duty and authority to retain one or more real estate brokers independent in their ownership and control of all partners of the Partnership to market and sell the Property to a third party, within a reasonable time period, with a closing of sale to be no later than August 12, 2008.

Respondent argued on the cross-motion that “[t]here was no legitimate purpose to the sale restriction at issue.”

On May 8, 2008⁵, the court granted the receiver's application, on consent of all parties but denied respondent's cross-motion.

The Instant Motion and Cross-Motion

The proposed interveners now seek to intervene in this proceeding, pursuant to CPLR § 1012 (a) (2) and (3); CPLR § 1013, “for the limited purpose of modifying the judgment.” The proposed interveners seek to modify the judgment to: [1] eliminate the provision that disqualifies current partners in the Partnership from acquiring assets of the Partnership upon and in connection with the Partnership's liquidation and winding up; and [2] make clear that the receiver is authorized to liquidate the Partnership's assets by selling the Partnership's shares of stock in 11 East 88th Street Corp. (the “Corporation”) rather than by selling the Property, if it is in the best interests of the Partnership's partners to do so. CPLR § 5015.

⁵ The court's decision and order is dated 5/08/07 in error.

Respondent cross-moves pursuant to CPLR § 2221 granting renewal and reargument of the court's decision and order dated May 8, 2008, and upon renewal and/or reargument, for an order pursuant to CPLR § 5015 modifying the judgment. Respondent's motion to reargue is based on the court's "misapprehension of what transpired in earlier proceedings and also this Court's misapplication of the law to the extent that the [judgment] contains an additional restriction on the parties' right to purchase the [Property] that is not contained in the Arbitration Award." Respondent's renewal motion is based on "the facts set forth in the application of the [proposed interveners]."

Petitioners oppose the relief sought in both the motion to intervene and respondent's cross-motion.

Discussion

The court will address respondent's cross-motion first, since its disposition will directly bear on the motion in-chief.

The Cross-Motion to Reargue and/or Renew

A motion to reargue is addressed to the discretion of the court and is intended to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any principle of law (CPLR § 2221 [d] [2]). Its purpose is not, however, to enable the unsuccessful party to argue once again the very questions decided against him or her (Foley v. Roche, 68 AD2d 558, 567 [1st Dept 1979]). Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application (id.).

The cross-motion cannot be properly considered a motion to reargue since

respondent, in seeking to vacate the judgment, advances the new argument that the parties' stipulation dated December 13, 2007 was "arrived at by fraud, collusion, mistake, accident or some other ground of the same nature" and therefore "should be set aside."

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR § 2221 [e] [2]). Such motion "shall contain reasonable justification for the failure to present such facts on the prior motion" (*id.* [e][3]).

The cross-motion is not properly one to renew, either, because respondent has not provided any justification whatsoever for its failure to present the alleged "new" facts on the prior motion. Moreover, respondent has not demonstrated any merit with respect to these "new" factual allegations. Respondent claims that petitioners' counsel inserted this provision into the judgment "without informing the court or [respondent's] counsel." The provision of the judgment restricting the sale of the Property to a third-party was clear and unambiguous on its face. It was provided to respondent's counsel in advance of the court date. On the return date of petitioners' order to show cause, respondent withdrew its proposed judgment and unequivocally consented to the form of the judgment submitted by the petitioners. Respondent now claims wrong-doing on the part of petitioners, despite having had a full and fair opportunity to review the proposed judgment, the disputed provision being clear and unambiguous, and for whatever reason, having consented to entry thereof. Respondent has no legal basis to support his claim that the December 13, 2007 stipulation was the product of fraud, collusion,

mistake or accident.

For the foregoing reasons, respondent's cross-motion to renew and/or reargue the court's May 8, 2008 decision and order is denied in its entirety.

The Motion to Intervene

The proposed interveners seek to intervene pursuant to CPLR § 1012 (a) (2) and (3), which provides for intervention as of right, as well as CPLR § 1013, which provides for intervention by permission.

The proposed interveners all hold an ownership interest in the Partnership.⁶ The proposed interveners were not parties to the underlying arbitration. Nonetheless, in motion sequence number 001, where petitioners moved to confirm the arbitration award, and respondent cross-moved to vacate or modify the arbitrator's award, each of the proposed interveners submitted an affidavit in support of respondent's cross-motion. In these affidavits, the proposed interveners made the same arguments that the respondent did in his cross-motion, namely, that the award: [1] constituted a judgment against the Corporation, which did not take part in the arbitration proceeding; [2] violated public policy; and [3] exceeded the arbitrators' authority.

Under CPLR § 1012 (a) (2), "upon timely motion", the proposed interveners must show that their interest is or may be inadequately represented by an existing party to the action and that it would be bound by the judgment rendered therein (see i.e. New York ex. Rel. Field v. Cronshaw, 139 Misc2d 470 [Sup Ct Nassau Co 1988]). The fact that the proposed interveners may, in some manner, be affected by the outcome of this

⁶ David Hammerman holds an 8.59% interest, Benjamin Hammerman and Hillel Hammerman each hold a 3.33% interest, and Beverly Kingsley and Robert Stern each hold a 1.5% interest.

proceeding, is insufficient to form the basis for intervention (New York ex. Rel. Field v. Cronshaw, *supra* at 473). A third party may also intervene in an action which “involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment” [CPLR § 1012 (a) (3)].

CPLR § 1013 also provides in pertinent part as follows:

Upon timely motion, any person may be permitted to intervene in any action when ... the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

The court should also consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party [Teichman v. Community Hospital, *supra*]. If the proposed interveners delay in bringing the motion, intervention must be denied (see Chang v. Liu, 1 AD3d 156 [1st Dept 2003]; Oparaji v. Weston, 293 AD2d 592 [2d Dept 2002]; B.U.D. Sheetmetal Inc. v. Massachusetts Bay Ins. Co., 248 AD2d 857 [3d Dept 1998]; Rectory Realty Assoc. v. Town of Southampton, 151 AD2d 737 [2d Dept 1989]).

The proposed interveners argue that their rights are not being protected by the parties to this proceeding. The proposed interveners seek to have the judgment modified to allow the receiver to structure the liquidation of the Partnership's assets in any way which provides the most benefit to the partners individually. The proposed interveners also challenge the provision of the judgment which prohibits them from purchasing the property.

The court finds that the motion to intervene must be denied because it is

untimely and, in any event, the proposed interveners are not entitled to the relief that they seek if the intervention were to be granted.

The proposed interveners have known about this proceeding for more than thirteen months before making the instant motion. Each of the proposed interveners submitted an affidavit in support of respondent's original cross-motion to vacate or modify the arbitration award. In those affidavits, all of which were sworn to in May 2007, the proposed interveners argued that the arbitration award "should be vacated and/or modified to the extent the [Arbitration] Award orders the sale of the [Property]." Each of the proposed interveners argued in relevant part that the Corporation was denied due process in the underlying arbitration and that arbitrators exceeding their authority by ordering the sale of the Property. The proposed interveners explicitly stated that the tax consequences of the sale of the property, as opposed to the sale of the Corporation, "would have *enormous detrimental financial consequences*" (emphasis in original).

In fact, although they were not parties to the underlying arbitration, counsel for the proposed interveners, Jeffrey Braun Esq., represented in court that one of the proposed interveners even gave testimony as a non-party witness at the arbitration. Attorney Braun also admitted at oral argument that the proposed interveners made legal arguments in their affidavits. The proposed interveners were aware of the underlying arbitration and meaningfully participated in the instant proceeding by executing affidavits in support of respondent's attempt to vacate or modify the arbitration award. It is clear that the proposed interveners chose to align themselves with respondent, for their own strategic reasons.

The proposed interveners' proffered excuse for their delay in seeking to intervene is unreasonable. The proposed interveners admit that they were aware of the judgment in February 2008. It is of no moment that the proposed interveners argue there was a delay in reviewing the judgment and/or fully appreciating the plain meaning of the terms therein. Petitioners' counsel had no duty to explain the judgment to each of the partners. Further, the proposed interveners admit that once they learned of the provision of the judgment which prohibited them from purchasing the property, they again made a strategic decision to rely on respondent efforts to "move to have the court correct [the judgment]."

Now, more than thirteen months after the proposed interveners learned of this proceeding, the proposed interveners seek to play a greater role in this proceeding than they had originally intended to, in order to effectuate a different outcome. Post-judgment intervention would certainly prejudice petitioners' rights and unduly delay the final resolution of this proceeding. There is a pending contract for sale of the Property set for August 7, 2008, time being of the essence. Moreover, the proposed interveners arguments are without merit. They essentially make the same arguments which were rejected by the court at the outset of this proceeding. The proposed interveners' claims with respect to their proposed purchase of the shares of the Corporation are irrelevant as the arbitrators specifically ordered that the Property, and not the Corporation's stock be sold.⁷ This court specifically held that such relief was within the province of the

⁷ Moreover, although the proposed interveners argue that they will suffer severe tax consequences as a result of the sale of the Property rather than the sale of the Corporation's stock, this conclusion is not inevitable. The receiver corroborated in his affidavit and at oral argument, that attempts to sell the corporation rather than the Property did not result in the same purchase price because there are different market considerations for the sale of the Corporation's stock (i.e. successor liability attendant

arbitrators' authority and was not irrational or otherwise challengeable (Gische, J., 10/3/07)

As for the proposed interveners' contention that they are entitled to a right to buy the Property, they have not even demonstrated an ability to exceed, or even match, the purchase price of \$19,000,000 in the pending contract for sale. Therefore, the proposed interveners have not even offered a reason for this court to postpone or otherwise set aside the pending contract for sale of the Property.

Accordingly, the proposed interveners' motion to intervene is denied in its entirety.

Conclusion

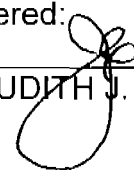
In accordance herewith, it is hereby:

ORDERED that motion to intervene and the cross-motion to renew and/or reargue are both denied in their entirety

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
July 29, 2008

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.

FILED
JUL 31 2008
COUNTY CLERK'S OFFICE
NEW YORK

with the purchase of a corporation and title insurance on the real property versus no insurance relative to the purchase of the corporation's stock).