

**Matter of Halachic Organ Donor Socy. v Rachsham
Group, Inc.**

2008 NY Slip Op 32584(U)

September 19, 2008

Supreme Court, New York County

Docket Number: 0104855/2008

Judge: Eileen A. Rakower

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

PRESENT: EILEEN A. RAKOWER

PART 5

J.S. Justice

Index Number : 104855/2008

HALACHIC ORGAN DONOR SOCIETY

VS.

RACHSHAM GROUP, INC.,

SEQUENCE NUMBER : # 001

CONFIRM ARBITRATION AWARD

INDEX NO. 104855-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

are read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

1, 2
3, 4
5

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

SEP 24 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/19/08

EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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 5

X

IN THE MATTER OF THE APPLICATION TO
CONFIRM AN ARBITRATION AWARD
UNDER ARTICLE 75, CPLR BY:

HALACHIC ORGAN DONOR SOCIETY,

Index No.
104855/08

Petitioner,
-against-

FILED

RACHSHAM GROUP, INC.,
Respondent

SEP 24 2008

DECISION
and ORDER
Mot. Seq. 001

COUNTY CLERK'S OFFICE
NEW YORK

HON. EILEEN A. RAKOWER:

Petitioner, Halachic Organ Donor Society ("HODS"), brings this petition to confirm an arbitration award as against respondent Rachsham Group, Inc. ("Rachsham"). Rachsham opposes and cross-moves to vacate the award dated and affirmed on November 2, 2007 and vacating the Modification of the Arbitrators, dated December 17, 2007 and the Second Modification of the Award, dated March 14, 2008.

HODS is a not-for-profit organization which exists for the purpose of "educating individuals of the Jewish faith around the world about the different halachic [Jewish religious legal] opinions surrounding organ donation." Rachsham is a company that provides media-related services. On or about November 16, 2006, HODS and Rachsham entered into an oral contract whereby Rachsham was to, according to HODS, convert videotapes into digital downloads, CD-ROMs and DVD-ROMS, and in exchange, Rachsham would receive half of all profits of the sale of the productions. Rachsham, on the other hand, claims that the agreement was for HODS to pay Rachsham one-hundred and twenty dollars per hour and billed HODS twenty five thousand six hundred twelve dollars and ninety two cents for its services. HODS claims that, to date, Rachsham has withheld all of the materials which were the subject of the contract, and those materials have an approximate value of fifty thousand dollars. On June 25, 2007 the parties entered into an Agreement to Arbitrate. The agreement stated that the matter would be submitted to a committee made up of Rabbi Kenneth Auman, Rabbi Howard Jachter and Rabbi Ronald Warburg("the

Arbitrators”), who would resolve the matter in accordance with the rules and procedures of The Beth Din of America and in accordance with Jewish Law. A hearing was held on June 26, 2007.

On November 2, 2007 the Arbitrators decided that Rachsham was entitled to keep the property until payment is made and issued an award which included the following:

1. At the HODS office, Shama Berman will upload the e-commerce site on to the HODS website [including the twelve edited and converted tapes of the HODS conference of November 15-16 2006 which were prepared in multiple formats, i.e. audio for web, video for web, DVD, CD and mp3] with the capacity of the site to purchase all the audio and video presentations of the HODS Conference of November 2006 and transfer exclusive rights of the e-commerce site code to HODS, Upon HODS reviewing the site in Shama Berman’s presence and finding it in satisfactory condition,
2. HODS will pay Rachsham Group, Inc. \$5000.00 in the form of a bank check.
3. Upon receipt of the bank check, Rachsham will release the original twelve conference tapes, the edited and converted tapes of the HODS conference of November 15-16 2006 to HODS.

Rachsham sent an “Application for Modification of Award” dated November 20, 2007 requesting a review and modification of the award. HODS responded to that application and the Arbitrators issued a modification on December 17, 2007 which modified “Implementation of the Award” but did not change the award in accordance with Rachsham’s concerns. The award was modified again on March 14, 2008 which again modified the award but did not address any of Rachsham’s major concerns.

HODS, in support of its petition, argues that it has complied with its obligations under the award and the two modifications and has deposited into escrow two checks in the amount of \$2500.00 each but that Rachsham has failed to comply with the awards. Rachsham, in opposition and in support of its cross-motion, argues that the award should be vacated because it was reached on the basis of numerous breaches of both the Ben Din’s and the State’s rules of conduct. The most serious of these breaches, Rachsham asserts, is that the Panel ordered and proceeded with an independent investigation of the value of Rachsham’s work product without

informing Rachsham or obtaining their permission or participation, in violation of Rule 20(a) of the Ben Din's rules. Further, Rachsham argues that the Arbitrators based its decision on "trade consultations" with four "professionals who were able to ascertain the 'lowest rate' for the website design." Based on this evaluation, Rachsham claims, the Arbitrators decided that its work product was worth Five Thousand Dollars. This amount was reached, Rachsham argues, without the Arbitrators or the outside evaluator, having seen the entire work product.

Rule 20(a) of the Beth Din of America's Guide to Rules and Procedures states:

Inspection or Investigation. (a) Whenever the Beth Din deems it necessary or appropriate to make an inspection or investigation in connection with the arbitration, the Beth Din shall advise the parties of such intention. The Beth Din shall set the time and the *Av Beth Din* or his designee shall notify the parties thereof. Any party who so desires may be present at such inspection or investigation. If one or both parties are not present at the inspection or investigation, the Beth Din shall make a verbal or written report to the parties and afford them an opportunity to comment.

After the hearing was held the Arbitrators ordered an independent investigation of the value of the work product which was to take place in the presence of the parties in September, 2007. Rachsham claims that it was prepared to participate but that HODS cancelled its participation on the day before the evaluation. A few weeks later Rachsham asserts that HODS changed its mind and agreed to the assessment. Thereafter, Rachsham states that the Arbitrators inquired whether Rachsham wanted it to proceed to judgment based on the evidence already submitted during the hearings. Rachsham submitted its response to the Arbitrators:

In consonance with our initial indication, RACHSHAM Group, Inc. would like to proceed as soon as possible with the professional evaluation which had originally been scheduled to take place on September 7, 2007. Albeit, were the Beit Din to decide that it has enough information before it to decide the matter of value of the work without such an outside evaluation, we would not object to the Dayyanim (Judges/Arbitrators) simply proceeding to make their order.

Rachsham claims that this was not a waiver of its rights to participate in an outside evaluation yet the Arbitrators engaged in the outside evaluation without it. The Arbitrators addressed the issue of their evaluation in its December 17, 2007 modification:

[O]nce both parties had agreed to forgo the actual review of the website, the beth din had the right to seek advice from trade professionals. In defendant's words, "were the Beit Din to decide that it has enough information before it to decide the matter of value of the work without such an outside evaluation . . . we would not object to the Dayyanim simply proceeding to make their order."

Hence, the grounds of the psak[as indicated in the psak] are "Jewish law, New York law and trade consultations." Consequently, upon consideration with four professionals we were able to ascertain the "lowest rate" for website design.

By way of reply and in opposition to the cross-motion, HODS first argues that Rachsham's cross-motion is untimely as it was not brought within 90 days after the award was delivered to it. (*see* CPLR §7511[a]). HODS also argues that the Arbitrators did not violate Rule 20(a) because they merely participated in a "trade consultation", not an inspection or investigation. This was done, HODS argues, "in order to determine their own discovery regarding the practices of the industry, not to illicit an expert affidavit or testimony of the work product produced by respondent RACHSHAM."

CPLR §7510 states:

The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.

The grounds for vacating an award is set out in CPLR §7511(b). That section states:

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds the rights of that party was prejudiced by:

- (i) corruption, fraud or misconduct in procuring award; or
- (ii) partiality of an arbitrator appointed as a neutral; except where the award was by confession; or
- (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
- (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

Initially, HODS' contention that the motion to vacate is untimely is without merit. The 90-day period may be lengthened if the first judicial proceeding addressed to the award is one to confirm and is commenced after the 90-day period. (*Lyden v. Bell*, 232 AD2d 562[2nd Dept. 1996]). Thus, as HODS has petitioned to confirm the award, the cross-motion is timely.

"It is well settled that judicial review of arbitration awards is extremely limited." (*internal citations omitted*). An arbitration award must be upheld when the arbitrator "offers even a barely colorable justification for the outcome reached." (*internal citations omitted, Wien & Malkin LLP v. Helmsley Spear, Inc.*, 6 NY3d 471[2006]). "An arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice." (*Id.* at 479-480).

Wherefore it is hereby

ORDERED that Rachsham's cross-motion to vacate is denied; and it is further

ORDERED that Halachic Organ Donor Society's petition to confirm the Award of the Arbitrators, dated and affirmed November 2, 2007, the Modification of the Award of the Arbitrators, dated December 17, 2007 and the Second Modification of the Award, dated March 14, 2008 is granted.

Dated: September 19, 2008


EILEEN A. RAKOWER, J.S.C.

FILED
SEP 24 2008
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NEW YORK