

<b>Matter of 15 John Corp. v VJHC Dev. Corp.</b>
2008 NY Slip Op 32781(U)
October 6, 2008
Supreme Court, New York County
Docket Number: 100534/08
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

15 JOHN CORP.

INDEX NO. 100534/08

- v -

MOTION DATE 08-27-08

VJHC DEVELOPMENT CORP.

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 2 were read on this motion for Renewal

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

PAPERS NUMBERED

1

Answering Affidavits - Exhibits

2

Replying Affidavits

Cross-Motion:  Yes  No

Upon the foregoing papers, the motion is decided in accordance with the annexed Judgment/Decision.

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

**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).

Dated: October 6, 2008

J.S.C.

Check one:  FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

NON-FINAL DISPOSITION  
 REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 4

-----X  
In the Matter of the Arbitration between

15 JOHN CORP.,

Petitioner,

Index No. 100534/08

-against-

Judgment/Decision

VJHC DEVELOPMENT CORP.

**UNFILED JUDGMENT**  
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Respondent.

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KIBBIE F. PAYNE, J.:

This action was originally commenced by petitioner 15 John Corp. (the "tenant") to vacate an arbitration award pursuant to CPLR 7511. Respondent VJHC Development Corp. ("VJHS" or the "landlord") cross-moved to dismiss the petition and confirm the award.

Petitioner is the lessee of restaurant space on the ground floor of 15 John Street, New York, New York (the "restaurant"), which is owned by respondent VJHS. The lease, executed between the parties, was for a ten-year period beginning on June 1, 1997 and ending on May 31, 2007. The lease provided petitioner with the option to extend the lease for an additional five-year period, commencing on June 1, 2007. Specifically, paragraph 60 of the lease provides that, for the five-year extension:

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 fair market rent during the option period, the arbitrators so appointed shall appoint a third arbitrator.

\* \* \*

(c) 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.

(Handel-Harbour Aff., Ex. C, Lease at ¶ 60)

Pursuant to Paragraph 60, Rafe B. Evans and Christine Emery were appointed as arbitrators by the tenant and landlord, respectively. The arbitrators exchanged valuation figures setting forth their perceived fair market rent for the restaurant, but were unable to reach an agreement. In line with provisions of Paragraph 60, they mutually agreed to appoint Stephen Tarter as the third arbitrator.

On October 15, 2007, Mr. Tarter sent an email to Mr. Evans and Ms. Emery stating:

As the "third broker" for the valuation of the [restaurant], 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 won due diligence but I also want to verify that the information upon which you are each basing your figures is appropriate.

(Id., Ex. E)

Ms. Emery replied to the email on the same day, attaching a memo detailing comparable rents. Two days later, on October 17, 2007, Mr. Tarter again emailed Mr. Evans, copying Ms. Emery, informing Mr. Evans that he had "gathered up [his] own research and visited

the premises and the surrounding area" and had received "raw data" from the landlord. Mr. Tarter then inquired whether Mr. Evans would be forwarding along any information. Mr. Tarter did not set forth any time frame during which he would like to receive that information.

In a letter dated October 18, 2007—prior to receiving any response from Mr. Evans—Mr. Tarter determined that the fair market rent for the subject restaurant was \$160 per square foot. In reaching this determination, he performed an "exhaustive" search of comparable commercial rentals, within two blocks of the restaurant, and also considered materials submitted by the landlord. Mr. Tarter noted that he did not receive any materials from the tenant. Mr. Evans, in his affidavit, acknowledges that he received both the October 15 and 17 emails from Mr. Tarter, and states that he responded to them on October 30, 2007,<sup>1</sup> after he had finished the "time-intensive effort of compiling such information" (Pet., Evans Aff., ¶ 9).

In that email, Mr. Evans refers to the restaurant's location, specifically citing an ongoing Fulton Street Transit Center construction project, which he opines renders the area "war torn," in an effort to convince Mr. Tarter to "reconsider"

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<sup>1</sup> Although, in his affidavit in support of the petition, Mr. Evans avers that he responded to Mr. Tarter's request on October 30, 2007, the evidence demonstrates that the email was first sent to Mr. Tarter on the afternoon November 1, 2007. Additionally, it also appears that Mr. Evans' November 1st email contained an incorrect email address for Mr. Tarter.

his conclusion. Mr. Evans also includes comparable rental data, all listings with lower prices per square foot than the \$160 amount determined by Mr. Tarter. In the absence of a response from Mr. Tarter, petitioner commenced the instant proceeding to vacate Mr. Tarter's determination.

The petition alleges, inter alia, that Mr. Tarter's refusal to consider Mr. Evans' November 1st email constituted misconduct, as Mr. Tarter was required to consider submissions from both landlord and tenant, and no deadline had been set for the submission of materials to Mr. Tarter. Respondent, on the other hand, claims that the neutral arbitrator followed procedure and was provided with fair market rent figures. Further, the parties had waived their right to a hearing, giving the neutral arbitrator the right to make a final determination as to the fair market rental value of the restaurant. According to the landlord, Mr. Tarter was not obligated to review or accept any additional information submitted by the parties.

In its June 24, 2008 decision, the court vacated the arbitration award solely "on the grounds the award was not affirmed" but did "not reach the question of whether the arbitrator's determination and award should be set aside on the basis of partiality or misconduct"<sup>2</sup> (Decision dated June 24,

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<sup>2</sup> While, in its papers, respondent claims that in the June 24 decision the court "rejected a challenge to the merits of the award itself[,]" this interpretation is clearly contradicted by

2008, at 6). Upon respondent's motion for renewal, the court will now address that issue.

Initially, respondent has now demonstrated that the award has been affirmed by submitting a copy of the October 18, 2007 arbitration award along with an executed affirmation and petitioner has not challenged this submission. Since the lease executed between the parties did not set a limitation by which the award must be affirmed, the newly submitted affirmation is sufficient to preserve the award for enforcement (*Alava v. Consolidated Edison Co.*, 183 AD2d 713, 714 [2d Dept 1992]). Nor does the lateness of the affirmation—a ministerial act—bar the court from enforcing the award (*Alava*, 183 AD2d at 714).

Addressing the petition's arguments seeking vacatur of the award due to Mr. Tarter's misconduct, CPLR 7511(b)(1), provides that, where a party participated in an arbitration, it may apply to have the award vacated where its rights were prejudiced by: "(i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) [the fact that] 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[.]" These are the exclusive grounds for vacating an arbitration award

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the decision, which specifically *did not address the merits*.

\*7]

(*Blamowski v. Munson Trans.*, 91 NY2d 190, 194 [1997]; *Austin v. Board of Education of the City School Dist. Of the City of N.Y.*, 280 AD2d 365 [1st Dept 2001]). An arbitration award will not be set aside de to an arbitrator's error in judgment either upon the facts or the law (*Goldfinger v. Lisker*, 68 NY2d 225, 230 [1986]). However, "[o]ne form of misconduct is the [arbitrator's] refusal to hear pertinent and material evidence" (*Professional Staff Congress/City Univ. of New York v. Bd. of Higher Educ.*, 39 NY2d 319, 321-322 [1976]).

Here, petitioner has demonstrated that the neutral arbitrator, Mr. Tarter, entirely failed to hear or consider Mr. Evans submissions, which are undisputedly material and pertinent to determining the issue of the restaurant's fair market rent. While Mr. Tarter heard and considered evidence submitted by respondent, he refused to consider the same from petitioner.

Although respondent argues that Mr. Tarter was not required to hear such evidence, the cases it cites in support are inapposite.<sup>3</sup> In the case at bar, it is undisputed that no

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<sup>3</sup> *Nadalen Full Fashion Knitting Mills, Inc. v. Barbizon Knitwear Corp.*, 206 Misc 757, 758 [Sup Ct, NY County 1954] [certain evidence was found to be "inadmissible under the submission agreement"]; *Institute of Intl. Educ. v. Permanent Mission of Spain to United Nations*, 118 AD2d 433, 435 [1st Dept 1986] [three arbitrators-selected by petitioner, respondent and a thrid neutral arbitrator-held meeting at which petitioner "not only had the opportunity, but, in fact, presented everything it deemed significant," prior to the neutral arbitrator's determination])

meeting among the arbitrators was ever held. Nor does respondent demonstrate or even claim that the third arbitrator considered any submission from petitioner or its arbitrator in rendering its determination (*cf. Raisler Corp. v. New York City Housing Authority*, 32 NY2d 274, 282-283 [1973]). This is not a case where petitioner-by any wilful or contumacious conduct-flouted deadlines or failed to appear at a hearing. Indeed, well within three weeks of first being contacted by the third arbitrator, petitioner's arbitrator provided the requested information. In the absence of a deadline for the submission of evidence, provided neither by the arbitrator or by the lease's own provisions, Mr. Tarter's failure to consider any evidence submitted by petitioner serves a ground to vacate the subject determination. Accordingly, it is

ORDERED and ADJUDGED that the petition is granted and the arbitration award dated October 18, 2007 is vacated; and it is further

ORDERED that respondent's cross-motion to confirm is denied.

The foregoing constitutes the judgment and order of this court.

Dated: October 6, 2008

ENTER:

**UNFILED JUDGMENT**  
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 KERRIE E. PAYNE  
 S.C.