Golub v Board of Mgrs. of Greetree at Murray Hill

2009 NY Slip Op 30631(U)

March 9, 2009

Supreme Court, New York County

Docket Number: 602879/08

Judge: Marilyn Shafer

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SCANNED ON 3/11/2009

[* 1]

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

PRESENT: Marilyn Shafer
Justice

PART 8

Benjamin Golub, Plaintiff

INDEX NO. 602879/08

MOTION DATE

- v -

MOTION SEQ. NO. 001

Board of Managers of Greentree at Murray Hill, Defendant

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accord with the annexed memorandum.

FILED
MAR 11 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/9/09

MARILYN SHAFER
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

---x

Benjamin Golub

Plaintiff,

-against-

Index No. 602879/08

Board of Managers of Greentree at Murray Hill,

Defendant.

---x

FILED
MAR 11 2009
COUNTY CLERK'S OFFICE
NEW YORK

Marilyn Shafer, J.:

In this action for a declaratory judgment and specific performance originally premised upon extensive water damage negligently caused by the defendant Board of Managers of Greentree at Murray Hill (Greentree), a condominium, plaintiff Benjamin Golub (Golub), a unit owner in the condominium, moves for an order, pursuant to CPLR 7503 (b) and 6301, granting him relief by (1) "preliminarily and permanently enjoining" arbitration of "any disputes between the parties on the grounds that the agreement to mediate and then arbitrate has not been complied with" ; (2) "preliminarily and permanently enjoining" arbitration of "any issue with respect to [Greentree]'s claimed entitlement to counsel fees with respect to a Homestead Petition (the Homestead Action) brought by [Greentree] on the grounds that [a May 17, 2007] Order of this Court [from Justice Kapnick] permitted [Greentree] to withdraw the Homestead Action pursuant to a [May 16, 2007] Stipulation of [Discontinuance] which provided that each party was to pay its own costs and expenses in connection with the Homestead Action" (*Id.*, [a] [ii]); and (3) directing that Edward Toptani (Toptani), Greentree's counsel be disqualified because his continued representation of Greentree is in violation of Disciplinary Rule 5-102 and 22 NYCRR

[* 3]

§ 1200.21.

Alleged Negligence and Application of Condominium By-Laws

Golub, an attorney and a former president of the Greentree Board of Manager owns Unit 9A, which was substantially damaged by the intrusion of water into the unit from certain common areas owned by the condominium. According to court records, the water intrusion was continuous over a one-to-three year period, leading to the collapse of ceiling portions, electrical failure of some ceiling fixtures, the buckling of parquet floors, the peeling of paint and the formation of mold. Unit 9A, located on the top floor of the condominium, is estimated to be worth more than $1,000,000.00. Despite repeated requests to Greentree to make necessary repairs to the roof, parapet walls and other portions of the building, Greentree failed to take immediate action to eliminate the intrusion of water into Golub's unit. As a result of Greentree's inaction, Golub made $15,000.00 in repairs on his own and also stopped paying the common charges directly to Greentree, by depositing the common charges into a Signature Bank account identified as #1500689036. By March 2006, Golub had placed $18,114.48 in the Signature Bank account. He informed Greentree of his action. However, Real Property Law § 339-j and the Greentree by-laws prohibit a unilateral decision to stop paying common charges. Section 6 of the Greentree by-laws, entitled "Default in Payment of Common Charges," provides:

> In the event of default by any Unit Owner in paying to the Board of Managers the Common Charges as determined by the Board of Mangers, **such Unit Owner shall be obligated to pay** interest on Common charges at the highest, legal, rate, from the due date thereof until collected, together with **all expenses, including attorneys' fees, incurred by the Board of Managers in any proceeding brought to collect such unpaid Common Charges or otherwise. The Board of Managers shall have the right and duty to attempt to recover** such Common charges, together with interest thereon, and **the expenses of the proceeding, including attorneys' fees, in an action to recover the same brought against such Unit Owner, or by foreclosure of the lien on such Unit** granted by section

[* 4]

> 339-z of the Real Property of the State of New York, in the manner provided in section 339-aa thereof. A Unit Owner defaulting in payment of Common Charges shall not be permitted to vote at any regular or special meeting of the Unit Owners until the default is cured

[emphasis added].

Procedural History

Three separate Supreme Court actions are related to the motion currently before the court. The first action was commenced by Golub against Greentree under Index No. 603441/05 (a/k/a the Repairs Action, hereinafter, the Damages Action) on or about September 2005. The causes of action under that index number alleged bad faith failure to comply with the condominium by-laws and a breach of fiduciary duty on the part of the defendants. It was during this period that Golub stopped paying his common charges as a result of Greentree's alleged bad faith and breach of fiduciary duty. After Golub's failure to pay eight months of his common charges, Greentree commenced a collection action against Golub in the Civil Court of the City of New York before the Honorable Matos, under Index No. 12259CVN2006 (the Common Charges Action). Golub appeared pro se in the Common Charges Action. Golub moved to have the Common Charges action consolidated with his Damages Action. Before a decision was rendered on his motion, Judge Matos issued an order on July 19, 2006, which granted Greentree summary judgment, following *Frisch v Bellmarc Management, Inc.* (190 AD2d 383, 389 [1st Dept 1993]), which held that the warranty of habitability "does not apply to an individual unit within a condominium," and awarded Greentree the sum of $21,746.84 in common charges. Justice Matos severed Greentree's claim for attorneys' fees, and set that matter down at a later date for an assessment hearing on those fees. Following the July 19, 2006 Civil Court decision, on September 8, 2006, Judge Kapnick denied Golub's Damages Action

motion to consolidate as moot. The assessment hearing was held on September 12, 2006, after which Judge Matos issued an order, on default, awarding Greentree $9,672.50 in attorneys' fees plus $140.00 in disbursements. Golub claimed that he was never notified about the Civil Court hearing date.

Golub did not immediately pay the common charges or attorneys' fees, but instead, appealed both of Judge Matos's orders to the Appellate Term. On October 9, 2006, Greentree placed a lien on Signature Bank account #1500689036. Golub then moved in the Damages Action for a preliminary injunction, for a restraining order, and for leave to reargue Judge Kapnick's September 8, 2006 order. On October 31, 2006, Judge Kapnick declined to grant the relief sought in that Damages Action motion, indicating that Golub had to seek a stay of the enforcement of Judge Matos' orders from the Appellate Term. Golub moved to have the Appellate Term prevent Greentree from executing on its lien. On November 15, 2006, the Appellate Term granted Golub's motion to the extent of staying the removal of the assets in account pending a determination of the Civil Court appeals. The freeze was premised upon the condition that the appeals be perfected by February 2007, at which time, if not perfected, Greentree would be permitted to move to vacate the stay. The Appellate Term order further provided that its decision was issued without prejudice to Golub's posting a bond pursuant to CPLR 5519 (a) (2), which would have the effect of automatically staying any further efforts by Greentree to enforce Justice Matos's July 19, 2006 order, by allowing Golub to move in trial court to vacate the restraining notice after the bond was posted. Golub did not post a bond.

Greentree, thereafter, served an information subpoena on Golub on December 12, 2006,

and commenced the second related Supreme Court action, the Homestead Action, an enforcement action under Index No. 117794/06. In response, on May 14, 2007, Golub paid Greentree $30,157.56 from the Signature Bank account in satisfaction of the accrued common charges. Subsequent to that payment, the Stipulation of Discontinuance for the Homestead Action was prepared by Golub's associate, Gregory Koerner, and presented to Greentree.

After its preparation but before it was signed and presented to Justice Kapnick, Toptani allegedly made revisions to the Stipulation of Discontinuance in the Homestead Action and returned the revised version to Golub. Paragraph 8 of the Greentree's proposed draft, as presented in Exhibit K, provides, in pertinent part, that Greentree reserves "its rights to institute any action or other legal proceeding against Golub, subject to the terms hereof, for any unpaid portions of the Judgments (including any interest that has accrued thereon), as well as any and all other attorneys' fees, disbursements and costs it has incurred in connection with the enforcement of the Judgments, including without limitation, the Enforcement Action, [and] Golub's efforts to prevent Greentree's enforcement of the Judgments and Golub's appeal of the Judgments."

The Homestead Action was thereafter resolved in May 2007, via the submission to Judge Kapnick of a Stipulation of Discontinuance Without Prejudice, dated May 16, 2007. Certain May 16, 2007 e-mails between Simy Wolf, a Golub associate, and Toptani make reference to an "original stip" and a "proposed stip." The stipulation was signed on behalf of both parties by a Golub associate, but did not include the section 8 language addressing attorneys' fees from Greentree's revision. The decretal paragraph of the stipulation provided in pertinent part that "**the above-entitled action be and the same is hereby discontinued without prejudice, with each party to bear its own costs and expenses**" [emphasis added]. The stipulation further

provided that if the Damages Action was not resolved, then Greentree had the right to "replace" the discontinued Homestead Action back onto the Court's calendar. On May 17, 2007, Justice Kapnick issued an order which provided that the "petition for a judgment pursuant to CPLR § 5206 (e) directing the sale of certain real property belonging to [Golub] is permitted to be withdrawn, this proceeding having been settled between the parties"

On October 5, 2007, the Appellate Term upheld Judge Matos's July 19, 2006 and September 12, 2006 judgment and orders, and it awarded $10.00 in costs to Greentree on the July 19, 2006 judgment only. The court notes that, despite the Appellate Term, First Department's affirmation of the Civil Court's judgment and orders, to date, Golub has not paid the $9,672.50 in attorneys' fees plus $140.00 in disbursements awarded by Judge Matos, nor the $10.00 in costs awarded by the Appellate Term.

The Damages Action was thereafter partially resolved at a JAMS session, with Golub being awarded a significant settlement of $225,000.00, and the award being deemed "an admission of liability by the Defendants," those being Greentree and the various insurances (*see* October 3, 2008 Golub affidavit, ¶ 12). Subsequent to the JAMS session, the Damages Action was settled and memorialized in the Settlement Agreement, dated October 30, 2007. The Settlement Agreement provided, in pertinent part, the following in paragraph five:

> This General Release shall not apply to: (i) Greentree's obligation to reimburse Golub for his actual costs and expenses in performing certain roof repairs on portions of the common area roof and wall of the building adjacent to Golub's Unit over portions of which Golub has an exclusive easement; or (ii) any claims by Greentree against Golub with respect to water damage to the ninth floor common area hallway; (iii) any claims by Greentree for legal fees and interest with respect to the matter of Greentree v Golub, Civil Court New York County, Index No.: 12259 CVN 2006, or the appeal thereof or the action in Supreme Court, New York County for possession, Index No.: 117794/06 (the "Homestead Action") and ***in the event those claims pursuant to this sub-paragraph (iii)***

> ***cannot be amicably resolved*** then ***Greentree and Golub agree to mediate*** same before the American Arbitration Association ("AAA") ***and if still unresolved will arbitrate any dispute before the AAA*** in New York City, New York before an arbitrator ***pursuant to the commercial arbitration rules***

[emphases added]. Section 12 of the Settlement Agreement provided that a stipulation of discontinuance with prejudice would be filed in the New York County Supreme Court. Section 13 of the same provided that the parties would submit the Settlement Agreement to the court to be "so ordered," but if it were not "so ordered" it would remain binding on the parties. A review of the court file showed that it did not contain a "so ordered" stipulation, though there was a November 20, 2007 letter in the file from Gregory Koerner stating that the Damages Action was settled and requesting Judge Kapnick to mark the matter as settled.

Neither a mediation nor arbitration occurred subsequent to submission of the Settlement Agreement, though various letter exhibits indicate that there was some attempt to commence a mediation and an arbitration. On May 14, 2008, Greentree submitted a mediation request to the AAA. A May 20, 2008 letter from the AAA indicated that if the parties did not both choose a mediator, the AAA would. It did not ever do so.

Instead, on August 19, 2008, Greentree made a demand for an arbitration, whereupon, on October 6, 2008, Golub commenced this third related Supreme Court action and moved for the motion relief now before the court. The first cause of action in the complaint seeks a judgment (1) "preliminarily and permanently enjoining" any pending arbitration until after a mediation occurs, pursuant to paragraph 5 of the Settlement Agreement; (2) "preliminarily and permanently enjoining" any arbitration until Greentree properly commences an AAA arbitration; (3) "preliminarily and permanently enjoining" Greentree from including at an arbitration any claim for legal fees incurred in the prosecution of the Homestead action; (4) directing that Greentree is

not entitled to recover any legal fees from the Homestead action because the stipulation of discontinuance in the Homestead Action provided that "each party would bear its own costs;" and (5) disqualifying Toptani from continuing as Greentree's attorney. The second cause of action seeks specific performance by the defendant of its obligation, pursuant to the Stipulation Agreement, to mediate the dispute. The motion relief being sought, *supra*, closely mimics the relief sought in Golub's complaint.

The Mediation and Arbitration of Attorneys' Fees:

The Civil Court's and Appellate Term's Attorneys' Fee Awards

As a matter of public policy and as a matter of law, a losing party, herein Golub, may not unilaterally decide to ignore prior court judgments and orders which have definitively determined certain issues presented to the court. Golub, an attorney and officer of the court, has failed to comply with the Civil Court's and the Appellate Term's award of attorneys' fees and costs to Greentree. The damages awarded by the court are not negotiable, nor, as matter of public policy, a proper subject for arbitration. "[T]he preclusive effect of a court's judgment on a subsequent arbitration is a matter to be determined by the court" (*see Merrill Lynch, Pierce, Fenner & Smith v Benjamin*, 1 AD3d 39, 43 [1st Dept 2003]).

> The courts' gatekeeping role is delineated in CPLR 7503, which sets forth three specific issues a court must decide, if called upon to do so, before compelling or staying arbitration. These threshold issues are whether a valid agreement was made, whether the agreement was complied with, and whether the claim sought to be arbitrated is barred by a statute of limitations. While not specifically enumerated in the statute, there is another threshold issue which is reserved for decision by the court-that is, whether public policy precludes arbitration of the subject matter of a particular dispute (*see Alexander, supra* at 287; *Matter of City of New York v Uniformed Fire Officers Assn.*, 95 NY2d 273, 281 [2000] ["We have recognized limited instances where arbitration is prohibited on public policy grounds alone"]).

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[T]he preclusive effect of court judgments on subsequent arbitrations is another subject "so interlaced with strong public policy considerations that [it must be] placed beyond the reach of the arbitrators' discretion' " (*Matter of Associated Teachers v Board of Educ.*, 33 NY2d 229, 235 [1973], quoted in Glauber, 192 AD2d at 97). The doctrine of res judicata is "the law's recognition of the fact that it is to the interest of the State that there should be an end to litigation" (*Israel v Wood Dolson Co.*, 1 NY2d 116, 118 [1956]). In the interest of protecting their judgments, "[c]ourts should not have to stand by while parties re-assert claims that have already been resolved" (*Kelly v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F2d 1067, 1069 [1993], *cert denied* 510 US 1011 [1993]). "No matter what, courts have the power to defend their judgments as res judicata, including the power to enjoin or stay subsequent arbitrations" (*In re Y & A Group Sec. Litig.*, 38 F3d 380, 382 [1994], *reh denied sub nom. Dean Witter Reynolds v Valk*, 1994 US App LEXIS 36524 [8th Cir, Oct. 21, 1994]).

It is one thing for an arbitrator to make a determination of the preclusive effect of an arbitration award on a subsequent arbitration arising from the same arbitration agreement (*see e.g. Matter of City School Dist. of City of Tonawanda v Tonawanda Educ. Assn.*, 63 NY2d 846 [1984]; *Matter of Port Auth. of N.Y. & N.J. v Office of Contract Arbitrator*, 254 AD2d 194 [1998]). It is something quite different for an arbitrator to make a determination of the preclusive effect of a court's judgment on a subsequent arbitration. That involves the interpretation of statutory law and judicial decisions in areas likely to be both outside the scope of the arbitration and beyond the arbitrator's competence. The undesirability of such an exercise is particularly apparent in the instant appeal, where an arbitrator selected for expertise in securities could be making a determination of the preclusive effect of a divorce judgment on a securities arbitration. Where a court's judgment is at issue, policy considerations mandate that it be left to the court in the first instance to decide the preclusive effect. Parenthetically, it may be noted that, even though an arbitration award cannot be vacated for errors of law, courts have interceded to protect parties from arbitrators' erroneous determinations of the preclusive effect of earlier arbitration awards, vacating the subsequent awards on the ground that the arbitrators exceeded their authority (*see e.g. Motor Veh. Acc. Indem. Corp. v Travelers Ins. Co.*, 246 AD2d 420 [1998]; *Casey v Country-Wide Ins. Co.*, 240 AD2d 232 [1997]).

(*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Benjamin*, 1 AD3d 39, 43 - 45).

Golub must pay those attorneys' fees awarded by Judge Matos on September 12, 2006, and the de minimus costs awarded by the Appellate Term on October 5, 2007, plus interest as

delineated by those orders, to the appropriate Clerks of the Court, within seven days from service of this order with notice of entry.

Outstanding Matters That are Subject to Mediation and Arbitration

There are still three matters, pursuant to subsections 5 (i), 5 (ii) and 5 (iii) of the Settlement Agreement, which may be subject to the mediation and arbitration clause in the Settlement Agreement. Pursuant to subsection 5 (i), one matter is the $15,000.00 in costs and expenses which were incurred by Golub in performing certain roof and wall repairs on portions of the common area in those sections where Golub had exclusive easement. That amount was not included in the $225,000.00 awarded to Golub by JAMS. Pursuant to subsection 5 (ii), another matter is any claims by Greentree against Golub with respect to water damages in the ninth floor common area hallway. The third matter still subject to the mediation and arbitration clause, pursuant to subsection 5 (iii), is that of all remaining attorneys' fees incurred by Greentree, other than those awarded in Judge Matos' September 12, 2006 order. The court notes that both the May 14, 2008 mediation request, and the August 19, 2008 arbitration demand, sought mediation and arbitration of subsection 5 (iii) only. Greentree's opposition papers are silent on subsection 5 (ii). Golub's motion papers are not silent on subsection 5 (i), in that he also seeks mediation of subsection 5 (i). Golub desires mediation of his $15,000.00 expenditure (*see* November 13, 2008 Golub Reply affidavit, ¶ 27). The court reminds the parties, that, subject to the May 16, 2007 Stipulation of Discontinuance in the Homestead Action, if the Damages Action is not resolved, Greentree has the right to replace the Homestead Action back onto the Court's calendar.

Golub's Personal Repair Expenses

The record reflects that Golub incurred $15,000.00 in personal repair expenses but was offered only $7,000.00 as a reimbursement for his expenses. Golub indicates that the $15,000.00 in dispute is in a counterclaim that he would like to be addressed at the mediation. The record reflects that the extensive damages to his unit occurred via the common elements owned by and under the control of Greentree. The court reiterates that, as result of the JAMS hearing, Greentree admitted liability for the damages to Unit 9A and payed Golub $225,000.00 for the damages to his unit. The court acknowledges Golub's personal repair efforts, and assumes the implication that they were done as an ameliorative effort on behalf of both the condominium and Unit 9A. Common sense dictates that, but for Golub's $15,000.00 in repairs, the damages to his unit and the amount awarded to him via the JAMS resolution might have been significantly higher.

Attorneys' Fees Arising Subsequent to the September 12, 2006 Civil Court Decision

Section 6 of the Greentree by-laws provide that the Board of Mangers has the right and the duty to attempt to recover attorneys' fees in an action to foreclose the lien on a Unit granted by section 339-z of the Real Property of the State of New York, in the manner provided in section 339-aa thereof where there has been a default on the payment of the Common Charges. Pursuant to the Condominium Act, "[e]ach Unit owner shall comply strictly with the by-laws and with rules, regulations, resolutions, and decisions adopted pursuant thereto" (Real Property Law § 339-j). Golub, as a former president of the Greentree Board of the Managers is, or should have been, aware of Greentree's right and obligation to seek all attorneys' fees related to the common charges litigation.

The court notes that Golub estimates that Greentree is seeking to collect approximately

$15,000.00 in attorneys' fees. Greentree's May 14, 2008 request for mediation listed approximately $35,000.00 in attorneys' fees, while the August 19, 2008 demand for arbitration submitted by Toptani lists damages for attorneys' fees as $40,000.00. A time sheet from Toptani, listing his attorney work product on behalf of Greentree is attached as Exhibit O to Golub's October 3, 2008 affidavit.

Golub's argument, that the phrase "each party to bear its own costs and expenses," found in the May 16, 2007 Stipulation of Discontinuance, includes attorneys' fees, and, thus, is not subject to mediation and arbitration, is misplaced. Ordinarily, the terms "costs" and "expenses" do not include attorneys' fees in the absence of express language in a contract or statute (*see Royal Discount Corp. v Luxor Motor Sales Corp.*, 9 Misc 2d 307, 308 [App Term, 1st Dept 1957]; *Nacional Financiera, S.N.C. v Americom Airlease, Inc.*, 803 F Supp 886, 893 [SD NY 1992]; *but see Berkman v Robert's Am. Gourmet Food, Inc.*, 16 Misc 3d 1104[A], *3, NYSlip Op 51261 [Sup Ct, NY County 2007] [pursuant to proposed stipulation, wherein the parties agreed that the action was to be conditionally certified as a class action, costs and expenses included attorneys' fees]; *Merrill Lynch, Pierce, Fenner & Smith Inc. v Savino*, 2007 WL 895767, *18, [SD NY 2007] [the terms "other costs and expenses" include attorneys' fees in an arbitration determination]; *compare Bank of NY v Fleet Bank, N.A.*, 176 Misc 2d 21, 26 [Sup Ct, NY County 1998] [omission of the terms "attorneys' fees" in Uniform Commercial Code section indicates a lack of intention to authorize attorneys' fees]; *Diamond v Mutual Life Ins. Co. of NY*, 75 Misc 2d, 443, 445 [Civ Ct, NY County 1973] [citing to Royal Discount for the proposition that absent an express contract provision or statutory language, attorneys' fees are not recoverable] *revd* 77 Misc 2d 528 [App Term, 1st Dept 1974]). The inclusion of the "costs and

expenses" terms in the May 16, 2007 Homestead Action's stipulation of discontinuance, upon which Justice Kapnick's May 17, 2007 order is based, did not explicitly provide that attorney's fees were encompassed in those terms. The issue of attorneys' fees arising from the Homestead Action is not *res judicata* as a result of the May 17, 2007 order (*see Merrill Lynch, Pierce, Fenner & Smith v Benjamin*, 1 AD3d at 45). Only those outstanding attorneys' fees which have not already been judicially decided may be the subject of further mediation and arbitration.

CPLR 6301

CPLR 6301 provides for the granting of a preliminary injunction where appropriate. It is well established that a preliminary injunction should not be granted where there is an adequate remedy at law (*see Knower v Atkins*, 273 App Div 356, 359 [1st Dept 1948], *affd* 298 NY 750 [1948]), or where the action is for money damages only (*see Halmar Distribs. v Approved Mfg. Corp.*, 49 AD2d 841, 842 [1st Dept 1975]). Golub is seeking a reimbursement of $15,000.00. Greentree is seeking reimbursement for attorneys' fees in the approximate amounts of either $15,000.00, $30,000.00 or $40,000.00. Pursuant to the Real Property Law and the Greentree by-laws connected with Golub's purchase of Unit 9A, Greentree is entitled to reasonable attorneys' fees arising from litigation related to the common charges litigation.

The language in the May 15, 2007 stipulation of discontinuance, providing that all parties are to bear their own "costs and expenses," is superceded by the language in section (5) (iii) of the latter October 30, 2007 Settlement Agreement related to attorneys' fees incurred according to section six of the Greentree by-laws, but not awarded subsequent to the Civil Court's September 12, 2006 order. Furthermore, the October 30, 2007 Settlement Agreement reflects that a valid agreement to arbitrate exists (*see Brown v Bussey*, 245 AD2d 255, 255-256 [2d Dept 1997]).

"New York public policy favors enforcement of contracts for arbitration" (*Cooper v Bruckner*, 21 AD3d 758, 758 [1st Dept 2005]), "as a means of conserving the time and resources of the courts and the contracting parties" (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007]).

CPLR 7503

CPLR 7503 includes the statutory provisions dealing with an application to compel or stay arbitration. A review of the court file and motion exhibits reflects that there was an attempt to first mediate and then to subsequently arbitrate. The papers also reflect that there was mis-communication regarding the commencement of the mediation process and the selection of a mediator (*see* October 3, 2008 Golub affidavit, Exhibits D, E, F, G, H, I and J; October 27, 2008 Toptani affirmation, Exhibits L, M, N, O, P and R). Greentree made a timely selection for its choice of mediators. The court notes that Golub notified Greentree that he would be out of town on the date that the parties were initially required to choose a mediator and that he also claims that he had not received the mediator's resumes. Golub requested and received an extension of time to submit his choice for a mediator. Greentree refused to grant a second extension of time for Golub to make his mediation selection. Golub argues that the closure of the mediation process and commencement of the arbitration was done in violation of the American Arbitration Association (AAA) rules, more specifically, sections M-2 (i), M4 (ii), M4 (iii), M-4C and M-12 of the mediation procedures, and R4 (a) (i) and RE (2) of the arbitration procedures. Topani submits that arbitration was properly commenced "as permitted under Rule R-4, 5 and 39 of the Commercial Rules". Toptani concedes that the demand for arbitration was not served in accordance with the manner provided for in CPLR 7503 (c), hence the 20-day period for seeking

a stay of the arbitration did not begin to run (*compare Matter of Woodcrest Fabrics* [*Taritex, Inc.*] 98 AD2d 52 [1st Dept 1983]). Golub submits a copy of the AAA rules as Exhibit J attached to his affidavit. Golub is still open to the recommencement of mediation as long as the proper AAA procedures are followed. Toptani counter-argues that a valid arbitration was commenced..

The record, as a whole, reflects that a valid agreement to arbitrate exists (*see Brown v Bussey*, 245 AD2d at 255), and that the issues in subsections 5 (i), (ii) and (iii) of the Settlement Agreement are matters that fall within the scope of that portion of that agreement to arbitrate (*Schenkers Intl. Forwarders, Inc. v Meyer*, 164 AD2d 541, 543 [1st Dept 1991]).

Attorney Disqualification

Golub seeks to have Toptani disqualified as Greentree's attorney on the basis that he will have to give testimony regarding the fees he has charged Greentree. The court notes that 22 NYCRR § 1200.21 [DR 5-102] (a) (3), entitled "Lawyers as Witnesses," provides that attorneys are permitted to act as both advocates and give testimony on the nature and value of legal services rendered in a case on behalf of a client. In light of the nature of the testimony that Mr. Toptani might have to give, the court sees no need to disqualify him.

Based on the aforesaid, and premised on the fact that public policy favors dispute resolution through mediation and arbitration, this court, as an exercise of its discretion, declines to grant all of the relief being sought by the movant.

Accordingly, due deliberation having been had, and it appearing to this Court that a cause of action exists in favor of the plaintiff and against the defendant and that the plaintiff is entitled to a preliminary injunction on the ground that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting

the subject of the action and tending to render the judgment ineffectual, it is

ORDERED that an undertaking, pursuant to CPLR 6312 (b) is fixed in the sum of $20,327.50 conditioned that the plaintiff, if it is finally determined that he was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, the following act:

> completion of the arbitration commenced as a result of the demand for arbitration submitted to the American Arbitration Association on August 19, 2008;

and it is further

ORDERED that Golub is to pay within seven days from service of this order with notice of entry, those attorneys' fees and costs previously awarded to Greentree pursuant to the orders of the New York City Civil Court and Appellate Term, First Department, totaling $9,912.50 (not including interest) in accordance with the directives of this court, and it is further

ORDERED that those parts of Golub's motion seeking to permanently stay any arbitration is denied; and it is further

ORDERED that that part of Golub's motion, pursuant to CPLR 7503 (b), permanently staying arbitration is granted to the extent of staying any arbitration currently scheduled, pursuant to Greentree's August 19, 2008 demand for arbitration, in order to allow the parties to first attempt a mediation in compliance with the Settlement Agreement, said mediation to

commence within forty five days from service of this order with notice of entry, thus requiring Golub and Greentree to submit their chosen list of mediators in a timely fashion, whereupon, if after the parties cannot agree on a mediator, the AAA may choose a mediator in accordance with its rules, after which, upon such failure to achieve a successful mediation to resolve the outstanding issues as discussed in this order, either party is free to commence an arbitration of the same in accordance with the AAA rules; and it is further

ORDERED that that part of Golub's motion seeking to remove Edward Toptani as counsel for Greentree is denied.

This constitutes the decision and order of this court.

Dated:
3/9/09

ENTER: **MARILYN SHAFER**

J.S.C.

FILED
MAR 11 2009
COUNTY CLERK'S OFFICE
NEW YORK