

<b>Matter of Olden v Olden</b>
2009 NY Slip Op 31224(U)
May 29, 2009
Supreme Court, New York County
Docket Number: 102522/09
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_

PART **Part 5**

Index Number : 102522/2009  
**OLDEN, ROBERT**  
 vs.  
**OLDEN, JOAN**  
 SEQUENCE NUMBER : 001  
 VACATE OR MODIFY AWARD

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2

3, 4

Cross-Motion:  Yes

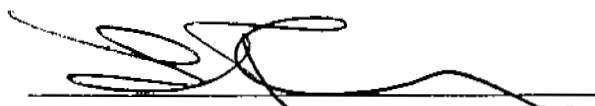
Upon the foregoing papers, it is ordered that this motion

**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).

**RECORDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER**

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

Dated: 5/29/09



**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X

In the Matter of the Application of

ROBERT OLDEN

Index No. 102522/09

Petitioner,

DECISION and  
ORDER

-against-

JOAN OLDEN

Mot. Seq. 001

Respondent.

-----X

HON. EILEEN A. RAKOWER:

Petitioner brings this Petition pursuant to CPLR §7511, seeking an order of the court modifying and/or vacating the arbitration award dated November 24, 2008 of Eric Wrubel, Esq. Respondent has cross-moved for an order (1) dismissing the Petition; and (2) awarding attorney's fees to counsel for Respondent pursuant to the parties' Stipulation of Settlement of January 10, 2007 and 22 NYCRR §130-1.1.

The arbitration at issue in this dispute emanated from a stipulation of settlement of an action for divorce, entered into on the record in open court before the Hon. Sara Lee Evans on January 10, 2007 ("Settlement Agreement"). The Settlement Agreement provided that, to the extent that the parties were unable to agree as to the distribution of tangible personal property, the parties were to enter into binding arbitration. The stipulation further provided that the arbitrator was to be an experienced matrimonial attorney mutually agreed upon by the parties.

The parties retained Eric Wrubel, Esq. ("Wrubel"), an experienced New York matrimonial attorney, on or around July 31, 2007. Under the retainer agreement, the arbitrator's function would be to first determine the parties' claims as to property which they alleged to be separate property, and then to distribute the remaining marital personal property which both parties sought to possess in an equitable fashion.

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On October 3, 2008, Wrubel issued his decision with respect to the parties' separate property claims. This decision is not presently in dispute.

The present controversy instead involves Wrubel's November 24, 2008 decision ("11/24/08 decision") regarding the distribution of marital property. Petitioner alleges that Wrubel exceeded his authority as an arbitrator in apportioning this property. Specifically, Petitioner claims that, in calculating the amount of property to be distributed to both parties, the arbitrator included two Moore Maquettes which were in fact Petitioner's separate, non-marital property. The parties do not dispute that these two pieces were separate property owned by Petitioner. Petitioner notes that, when subtracting these two pieces which were undisputedly his (appraised at a total value of \$44,000) from the total amount of distributed marital property, Petitioner was awarded property whose combined worth was appraised to be \$87,390, while Respondent was awarded property whose combined worth was appraised to be \$143,015.

Petitioner has submitted evidence that Wrubel was made aware that these two Moore Maquettes were undisputedly the separate, non-marital property of Petitioner prior to the 11/24/08 decision. Specifically, on November 17, 2008, Petitioner e-mailed Wrubel to advise him that Respondent had listed the two Moore Maquettes as marital property in her "Marital Wish List," while in actuality they had already been determined to be Petitioner's separate property and had been returned to Petitioner accordingly. By letter dated November 19, 2008 and sent to Wrubel via facsimile and regular mail, Respondent confirmed Petitioner's contentions as to the Moore Maquettes, stating that Petitioner

correctly states that these items were already provided to him and that it was previously agreed that they are his separate property. They were inadvertently included on [Respondent's] marital property list.

Petitioner sent Wrubel an e-mail dated November 28, 2008, wherein Petitioner requested that Wrubel reconsider the 11/24/08 decision, citing to the fact that Wrubel had included the two Moore Maquettes as marital property to be distributed to Petitioner, despite being advised by Petitioner's November 17, 2008 e-mail and Respondent's November 19, 2008 letter, that the two items were Petitioner's separate property. This request was rejected by Wrubel in an e-mail dated December 3, 2008.

Petitioner now asserts that the court should modify the 11/24/08 arbitration award because Wrubel's erroneous factoring in of property which was undisputedly Petitioner's separate non-marital property as marital property constitutes a miscalculation in figures warranting judicial modification pursuant to CPLR §7511(c)(1). In addition, Petitioner contends that the court has authority to vacate the 11/24/08 award in whole or in part pursuant to CPLR §7511(b)(i)(iii) on the grounds that Wrubel exceeded his authority as arbitrator by making a determination beyond the subject matter submitted (*i.e.*, that Wrubel made a determination as to the distribution of the two Moore Maquettes which he was not entitled to make, as these pieces were non-marital property undisputedly owned by Petitioner).

Petitioner has submitted a Verified Petition and Attorney's Affirmation. Annexed to the Affirmation as exhibits are the 11/24/08 decision; portions of the transcript of proceedings held on January 10, 2007 in the matrimonial action; Wrubel's July 31, 2007 retention letter; Wrubel's October 3, 2007 determination with respect to the parties' separate property claims; Petitioner's November 17, 2008 e-mail to Wrubel; a November 18, 2008 letter from Petitioner to Wrubel; Respondent's November 19, 2008 letter to Wrubel; Petitioner's November 28, 2008 e-mail to Wrubel; and Wrubel's December 3, 2008 response to Petitioner's request for reconsideration.

Respondent has submitted an Affirmation in Support of her cross-motion. Annexed to the Affirmation as exhibits are a copy of the transcript of proceedings held on January 10, 2007 in the matrimonial action; Wrubel's retention letter; and Wrubel's 11/24/08 decision.

Petitioner has submitted an Affirmation in further support of the Petition and in opposition to Respondent's cross-motion. Respondent has submitted a Reply Affirmation in further support of its cross motion.

CPLR §7511 provides, in pertinent part,

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who... participated in the arbitration... if the court finds that the rights of that party were prejudiced by:

- (iii) an arbitrator... exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made...

(c) Grounds for modifying. The court shall modify the award if:

- 1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award...

Judicial disturbance of an arbitration award on the grounds that an arbitrator exceeded his powers is appropriate “only if the award violated a strong public policy, was totally irrational, or the arbitrator in making the award clearly exceeded a limitation on [his] power specifically enumerated under CPLR 7511(b)(1)” (*Rice v. Jamaica Energy Partners, L.P.*, 13 A.D.3d 255 [1st Dept. 2004]) (citing *New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 N.Y.2d 321, 326 [1999]). Moreover, “[a]n arbitrator’s award, so long as it stays within the bounds of rationality, may not be vacated for errors of law or fact” (*Szabados v. Pepsi Cola Bottling Co.*, 191 A.D.2d 367 [1st Dept. 1993]).

The arbitrator’s decision lists property in five categories: A represents property distributed to Ms. Olden which she requested and to which there was no dispute; B represents property distributed to Mr. Olden which he requested and to which there was no dispute; C and D represent property requested by both parties and distributed in accordance with the arbitrator’s findings; and E represents the remaining items to be sold, with the net proceeds of the sale to be divided equally between the parties. The Moore Marquettes are contained in List B, consistent with the representations of the parties that these were items to go to Mr. Olden and not subject to dispute. Even if their categorization as property *distributed* pursuant to the arbitrator’s decision represents a mistake of fact, it does not constitute a basis for this court to disturb the award.

Nor does this purported error authorize the court to modify the award pursuant to CPLR §7511(c)(1) (see *Ververs & Schueller Co. v. Emory Mach. & Tool Co.*, 190 A.D.2d 1079 [4th Dept. 1993]) (holding that respondents’ attack on arbitrator’s adding of the same figures twice in determining award “challeng[ed] the figures the arbitrator chose to use in the exercise of his judgment, not his computation,” and thus §7511(c)(1) was inapplicable); see also *Israel Aircraft Indus. v. DDY-Wing Aviation Ltd.*, 284 A.D.2d 281 [1st Dept. 2001] (“Although

[\* 6 ]

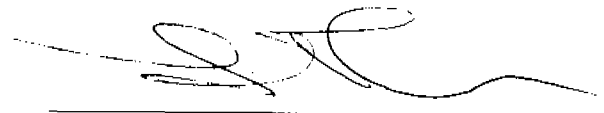
respondents purport to argue that the award is affected by miscalculation, their challenge to the award actually focuses on the arbitrator's legal and factual conclusions rather than his arithmetic, and thus does not present a proper ground for modification.”).

Wherefore, it is hereby

ORDERED and ADJUDGED the Petition and cross-motion are resolve to the extent that the arbitration award dated November 24, 2008 is hereby confirmed pursuant to CPLR §7511(e).

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: May 29, 2009



EILEEN A. RAKOWER, J.S.C.

**UNFILED JUDGMENT**

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