

**Board of Mgrs. of the Paladin Condominium v
Schwartz**

2009 NY Slip Op 31971(U)

August 27, 2009

Supreme Court, New York County

Docket Number: 110352/09

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER
Justice

PART 5

THE BOARD OF MANAGERS OF THE PALADIN CONDOMINIUM, ET AL

INDEX NO. 110352/09

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

MURRAY SCHWARTZ

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	
Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...	<u>1</u>
Answering Affidavits -- Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

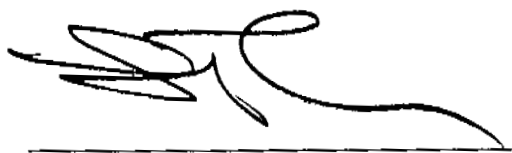
FILED
AUG 31 2009

COUNTY CLERK'S OFFICE
NEW YORK

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

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

Dated: 8/27/09



HON. EILEEN A. RAKOWER ^{LSG}

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----X
THE BOARD OF MANAGERS OF THE PALADIN
CONDOMINIUM AND LAWRENCE PROPERTIES,
INC.,

Index. No.
110352/09

Petitioners,

DECISION
and ORDER

- against -

Mot. Seq.
001

MURRAY SCHWARTZ,

Respondents.

-----X
HON. EILEEN A. RAKOWER, J.

Petitioners bring this proceeding by order to show cause seeking an order staying and barring arbitration pursuant to CPLR Article 75. On July 1, 2009, Murray Schwartz ("Respondent"), by counsel, filed an online request for arbitration with the American Arbitration Association ("AAA"). The subject arbitration is captioned *Murray Schwartz and the Paladin Condominium, Lawrence Properties, Case No. 13-115-01796-09*. Respondent's arbitration demand seeks \$150,000 and alleges the following:

... [Petitioners] failed to accurately report the conditions of [Respondent's] property, concealing the true facts and misrepresenting the conditions. [Petitioners] chose to inject themselves into [Respondent's] affairs, entering [his] unit on numerous occasions and reporting that the unit was being properly maintained when, in fact, it was uninhabitable. The false reports given by [Petitioners] to [Respondent] caused him to believe he had no reason to inspect the property on his own. As a result of the conditions, which deteriorated over the years, [Respondent] is required to expend in excess of \$100,000 to repair his property.

[* 3]

Respondent claims in his arbitration demand, and maintains herein, that his claim is arbitrable pursuant to Article 10 (titled "Arbitration"), §10.1 of the Paladin Condominium by-laws ("by-laws"), which states the following:

Section 10.1 **Procedure.** Any matter required or permitted to be determined by arbitration pursuant to the terms of the Condominium Documents shall be submitted for resolution by a single arbitrator in a proceeding held in the City of New York in accordance with the then existing rules of the American Arbitration Association or any successor organization thereto. In the event that the American Arbitration Association shall not then be in existence and has no successor organization, any such arbitration shall be held in the City of New York before one arbitrator appointed, upon the application of any party, by a Justice of the highest court of appellate jurisdiction then located in the City of New York. The decision of the arbitrator so chosen shall be given within ten (10) days after his selection or appointment. Any arbitrator appointed or selected in connection with any arbitration to be conducted hereunder shall be a member of a law firm having at least five (5) members whose principal office is located in the City of New York.

Petitioners commenced the instant petition by purchasing an index number and filing their order to show cause on July 22, 2009. Petitioners submit a petition, an affirmation, and a memorandum of law in support of the petition. Annexed to the affirmation as exhibits are copies of Respondent's arbitration demand; an e-mail from the AAA acknowledging receipt of Respondent's on-line request for arbitration; a 7/7/09 introductory letter from AAA to the parties; e-mails between Petitioners and the AAA wherein Petitioners request a copy of the arbitration demand; the condominium by-laws; and an e-mail from Petitioners' counsel to Respondent's counsel advising the latter as to Petitioners' intention to make the instant application.

Respondent has submitted an affirmation in opposition, and Petitioners have submitted a memorandum of law in reply thereto.

[* 4]

CPLR §7503(b) provides that

a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.

As the Court of Appeals has observed,

If the court determines that the parties had not made an agreement to arbitrate, that concludes the matter and a stay of arbitration will be granted or the application to compel arbitration will be denied. Similarly, if the court concludes that, while the parties may have made a valid agreement to arbitrate, the particular agreement that they made was of limited or restricted scope and the particular claim sought to be arbitrated is outside that scope, there will likewise be a stay of arbitration or a denial of the motion to compel arbitration.

(*County of Rockland v. Primiano Constr. Co.*, 51 N.Y.2d 1, 7 [1980]) (citations omitted). Although New York courts look favorably upon arbitration, the court will not effect a party's forfeiture of its rights to protect its interests in a court of law, and all the protections afforded therein, unless a clear indication of that party's intent to be bound by an arbitration agreement can be discerned. (*TNS Holdings Inc. V. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 [1998]).

Here, the court finds that Respondent has failed to proffer sufficient evidence that Petitioners agreed to arbitrate the subject matter of the underlying arbitration action. Article 10, §10.1 of the by-laws, the provision Petitioner asserts renders the dispute arbitrable, merely sets forth the procedural parameters for the arbitration of disputes if and when a matter comes to arbitration. Respondent cites no provision in the by-laws which states that the alleged conduct complained of by Respondent (*i.e.*, misrepresenting the condition of the property) is a matter which is subject to arbitration; nor does Respondent provide any other evidence that the parties agreed to arbitrate such a dispute. That "virtually no disputes" are explicitly subject to

arbitration under the by-laws, as Respondent claims, does not lend support to Respondent's assertion that Article 10, §10.1 renders *all* disputes arbitrable. Such a proposition is flatly contradicted by the plain language of the provision, which sets forth the procedure for "[a]ny matter required or permitted to be determined by arbitration pursuant to the terms of the Condominium Documents" (emphasis added).

Wherefore it is hereby

ORDERED that Petitioners' motion to stay arbitration is granted and the subject arbitration is hereby stayed pending any further court order.

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

Dated: August 27, 2009


EILEEN A. RAKOWER, J.S.C.

FILED
AUG 31 2009
COUNTY CLERK'S OFFICE
NEW YORK