

**Landa v Bais Din Tzedek Umishpot, Inc.**

2009 NY Slip Op 32190(U)

September 18, 2009

Supreme Court, Nassau County

Docket Number: 014870/09

Judge: Daniel R. Palmieri

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

**TRIAL TERM PART: 47**

-----X  
**BENJAMIN LANDA and OHEL HARAV YEHOASHUA  
BORUCH FOUNDATION,**

**INDEX NO.: 014870/09**

**Petitioners,**

**MOTION DATE:8-7-09  
SUBMIT DATE:8-20-09  
SEQ. NUMBER - 001**

**-against-**

**BAIS DIN TZEDEK UMISHPOT, INC.,  
MENACHEM MARKOWITS, CONGREGATION  
BE'ER MENACHEM and CHAIM MUSKAT,**

**Respondents.**

-----X

**The following papers have been read on this motion:**

- Order to Show Cause, dated 7-27-09.....1**
- Verified Petition, dated 7-23-09.....2**
- Petitioner's Memorandum in Support, dated 7-27-09.....3**
- Affirmation in Opposition, dated 8-6-09.....4**
- Memorandum in Opposition, dated 8-6-09.....5**
- Affidavit of Respondent, dated 8-6-09.....6**
- Reply Affirmation, dated 8-13-09.....7**
- Petitioners' Reply Memorandum, dated 8-18-09.....8**

This is a proceeding pursuant to CPLR Article 75 to permanently stay the arbitration pending before Bais Din Tzedek Umishpot, Inc. (hereinafter referred to as "Bais Din").

Petitioners commenced this proceeding seeking to stay the arbitration before the Bais Din on the grounds that: a) they were fraudulently induced to enter into an agreement to submit their dispute with respondents to rabbinic arbitration; and b) the Bais Din is "so egregiously biased against petitioners that to compel petitioners to proceed to arbitration would run afoul of every fundamental notion of fundamental notice of justice and fair play" (Paragraph 2 of petitioner's Reply Memo).

In 2008, a dispute arose between the parties concerning certain life insurance trusts. In January 2009, Ohel Harav Yehoshua Boruch Foundation ("Ohel Harav") commenced an action in Supreme Court, Nassau County against Menachem Markowits ("Markowits"), Chaim Muskat ("Muskat") and others seeking, among other things, a declaratory judgment concerning Ohel Harav's status as a beneficiary of the trusts and Landa's status as a trustee of the trusts. In February 2009, Ohel Harav discontinued the Supreme Court action without prejudice. In March 2009, Muskat summoned Benjamin Landa ("Landa") to participate in a rabbinic arbitration before the Bais Din wherein Muskat alleged that he had suffered damages in the amount of \$500,000 as a result of Ohel Harav's commencement of a Supreme Court action. Thereafter, the parties agreed to submit their dispute before the Bais Din.

On April 22, 2009, the first binding arbitration was scheduled and held at 141 Livingston Street, Brooklyn, New York. An "Agreement to Submit to Arbitrator" was executed at this hearing. At the hearing, the parties agreed that the first session would be dedicated to Landa's claims about the disputed life insurance policy and at the conclusion thereof, it was agreed that the parties would meet for a second arbitration

hearing where Muskat's counterclaims would be heard. On May 6, 2009, a second arbitration hearing was scheduled and held. The hearing was conducted at a synagogue at 1643 45<sup>th</sup> Street in the Boro Park section of Brooklyn. At the beginning of the May 6, 2009 hearing, the Bais Din asked the parties to re-execute an "Agreement to Submit to Arbitration." At the conclusion of this seven-hour arbitration hearing, the parties agreed to continue the hearing on May 11, 2009. No objection was raised by Landa to the jurisdiction of Bais Din or the manner of the proceedings. On May 11, 2009 a third arbitration hearing was held and Landa attended. The hearing again addressed Landa's claim of ownership and Muskat's counterclaims. At the conclusion of the May 11, 2009 hearing, the Bais Din asked that certain documentation be prepared for the next hearing. The parties (including Landa) agreed to come to a hearing May 18, 2009, but at the last moment Landa cancelled. Subsequently, the parties (including Landa) agreed to attend hearings on May 25, 2009, June 15, 2009, July 1, 2009, July 27, 2009. These hearings, however, were cancelled by Landa at the last moment. Thereafter, Muskat received notice from Landa's counsel that Landa and Ohel Harav intended to file for a Stay of Arbitration. On July 27, 2009, the Order to Show Cause was presented to the Honorable Arthur Diamond. Petitioners sought a stay arguing, *inter alia*, that they were fraudulently induced into agreeing to arbitrate before Bais Din and that the agreement to arbitrate is unenforceable.

Respondent Bais Din Tzedek has defaulted in responding to the merits of the petition in this proceeding. Respondent Menachem Markowits ("Markowits") who also "speaks" for respondent Congregation Be'er Menachem has no objection to the relief sought by the petition. Only respondent Chaim Muskat opposes the relief sought.

In opposition to the motion, Muskat argues that the Court's limited role here is to determine whether petitioners are bound by their agreement to submit to arbitration and that petitioners have failed to raise an issue of fact as to the validity of the Agreement. Muskat alternatively argues that if the Court were to involve itself in the minutiae of this arbitration proceeding, it would conclude that: (a) the religious condemnation of a litigant does not invalidate the arbitration; (b) the arbitrators' characterization of Landa's truthfulness does not invalidate the proceeding; and (c) Landa and Ohel Harav were the Nitvos/Defendants and that Muskat's claims were appropriately heard first.

CPLR 7503(b) states in pertinent part 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."

By actively participating in the arbitration process, petitioners manifested a preference inconsistent with their present effort to stay arbitration. *Matter of Tucker Anthony, Inc. v Blunt, Ellis & Loew, Inc.*, 260 AD2d 386 (2<sup>nd</sup> Dept. 1999). Further, petitioners adjourned the arbitration hearings on several occasions without any reservation of rights. *Matter of Allstate v Khait*, 227 AD2d 551 (2<sup>nd</sup> Dept. 1996). Hence, petitioners' right to a stay of arbitration was waived. *Id*; *Morfopoulos v Lundquist*, 191 AD2d 197 (1<sup>st</sup> Dept. 1993).

While "in an appropriate case, the courts have inherent power to disqualify an arbitrator before an award has been rendered" (*see Matter of Astoria Med. Group [Health*

injustice will result. *Matter of Lipschutz [Gutwirth]*, 304 NY 58, 64 [1952]. An application to disqualify an arbitrator during the course of the arbitration must be based on misconduct on the part of the arbitrator (*Astoria Med. Group [Health Ins. Plan of Greater N.Y.]*, *supra* at 137. And, while the appearance of bias may suffice (*see Rabinowitz v Olewski*, 100 AD2d 539, 540 [1984]), that bias must be clearly apparent based upon established facts, not merely supported by unproved and disputed assertions. *Bronx-Lebanon Hospital Center v Signature Medical Management Group, LLC*, 6 AD3d 261 (1<sup>st</sup> Dept. 2004).

We conclude that the statements allegedly made by two of the rabbis on the arbitration panel standing alone (i.e., Landa was a liar and would go to Hell) are insufficient to support an appearance of bias. *Bronx Lebanon Hospital v Signature Medical Management Group, LLC*, *supra*. These comments were apparently directed at the circumstance that petitioners had begun an action in this Court on essentially the same facts, rather than having taken the route of the Bais Din. The comments do not go to the merits of the dispute or foretell the outcome but rather express disapproval of the selection of the courts as the initial forum for resolution.

In view of the foregoing, the temporary restraining order is vacated and the petition is dismissed.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: September 18, 2009

**ENTERED**

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

SEP 22 2009

**NASSAU COUNTY**  
COUNTY CLERK'S OFFICE

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