

Flagship Mktg. Group, Inc. v Frank

2009 NY Slip Op 33047(U)

December 22, 2009

Supreme Court, New York County

Docket Number: 107165/09

Judge: Joan B. Lobis

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

PRESENT: LOBLS
Justice

PART 20

FLASHPOINT MARKETING GROUP INC
- v -
SITARON FRANK

INDEX NO. 107165/09
MOTION DATE 9/28/09
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

The following papers, numbered 1 to 27 were read on this motion to vacate

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-8
9-20
21-22; 23-27

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion decided in accordance
with accompanying decision and order.

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

FILED
DEC 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/22/09 YBH J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----X
FLAGSHIP MARKETING GROUP, INC.,

Petitioner,

Index No. 107165/09

-against-

Decision and Order

SHARON FRANK

FILED

DEC 30 2009

Respondent.

-----X
JOAN B. LOBIS, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Respondent Sharon Frank moves, by order to show cause, for an order vacating the fourteen thousand dollar (\$14,000.00) judgment assessed against her as the result of an arbitration award (the "Award") in favor of petitioner Flagship Marketing Group, Inc. ("Flagship"), regarding a contract to purchase vending machines. Prior to respondent's order to show cause, petitioner had brought a motion to confirm the arbitration award. The motion was granted on default on June 26, 2009, with a direction that Flagship settle judgment. The judgment had been submitted to chambers two (2) days after Ms. Frank's order to show cause was returnable and has not yet been signed.

On the return date of respondent's order to show cause, the parties entered into a stipulation vacating the June 26, 2009 order. In the stipulation, respondent agreed to waive any defenses regarding improper service, and petitioner waived the defense that respondent failed to move within the ninety (90) day time period to modify or vacate the Award.

This is an action for breach of contract resulting from an agreement between petitioner and respondent to purchase vending machines. In or about February 2008, respondent was solicited by petitioner to purchase vending machines as a financial investment. On or about July 9,

2008, respondent entered into an agreement to purchase five (5) vending machines and signed a Credit Authorization, Order Form & Purchase Agreement, and Purchase Order Agreement in the amount of \$15,000.00. Petitioner secured financing for respondent in the amount of \$15,000.00. However, respondent wanted increased financing, so petitioner began to secure an additional amount, totaling approximately \$25,000.00. Thereafter, respondent reconsidered her purchase, concluding she would rather buy a different type of vending machine. On or about July 23, 2009, the parties entered into a new agreement (the "Agreement") for five (5) vending machines for \$14,900.00. Based on the Agreement, respondent tendered an initial \$500.00 deposit. On August 5, 2008, respondent gave notice of cancellation and attempted to retract the Agreement and reclaim her \$500 deposit.¹ Petitioner did not respond to respondent and went forward with the transaction; on or about September 12, 2008, petitioner secured financing for respondent in the amount of \$25,000.00 through Success Resource Group, Inc. Ultimately, the financing was not accepted by respondent and petitioner never delivered the vending machines.

A dispute arose regarding the fulfillment of the contract. Pursuant to the arbitration clause in the contract, the parties commenced an arbitration proceeding on or about March 20, 2009. Arbitrator John F. Byrne, Esq., issued the Award on March 25, 2009, requiring petitioner to pay the balance of the purchase price, \$14,400, plus interest, and a share in the costs of the arbitration.

Respondent contests the validity of the Award. "Courts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined."

¹ Respondent alleges that she sent a formal letter dated August 5, 2008 to petitioner, notifying them of her intent to cancel the contract. However, the letter is not attached or annexed to the motion papers.

Goldfinger v. Lisker, 68 N.Y.2d 225, 230 (1986) (citations omitted). Judicial authority to set aside an arbitration award is limited. Azrielant v. Azrielant, 301 A.D.2d 269, 275 (1st Dep't 2002), appeal denied, 99 N.Y.2d 509 (2003). An arbitration award will not be vacated

even though the court concludes that his interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on his power.

Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 308 (1984).

Respondent has not established any statutory grounds under C.P.L.R. § 7511 sufficient to disturb the arbitrator's determination that the buyer owed the contract price. During the arbitration proceedings on March 20, 2009, Arbitrator Bryne considered all the facts and legal arguments, examined all relevant documents, and heard testimony from four (4) witnesses. "A court is bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies, and cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one." Azrielant, 301 A.D.2d at 275 (citations omitted); see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benjamin, 1 A.D.3d 39 (1st Dep't 2003).

However, the arbitrator did not consider the question of what happens to the property. While there is no basis to vacate the decision in its entirety, under C.P.L.R. § 7111(d), the matter can be remanded for a rehearing. Without a provision to account for the property, the Award is imperfect. The matter is remanded for a consideration of how the property shall be transferred or held until payment is made or other provisions made for its disposition.

Unless the parties stipulate to a mechanism for delivery of the machines, respondent's request to modify the Award is granted solely to remand for a consideration of the disposition of the machines. In lieu of delivery, they may stipulate to some offset of the contract price if the seller retains the property and the property is capable of resale. This constitutes the decision and order of the court.

Date: December 22, 2009



JOAN B. LOBIS, J.S.C.

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DEC 30 2009
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