

Rosenstein v Kravetz Realty Group, LLC

2010 NY Slip Op 31637(U)

June 28, 2010

Supreme Court, New York County

Docket Number: 103684/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 103684/2010
ROSENSTEIN, ALAN H.
vs.
KRAVETZ REALTY GROUP, LLC
SEQUENCE NUMBER : 001
CONFIRM AWARD

INDEX NO. 103684/10
MOTION DATE 4/24/10
MOTION SEQ. NO. 001
MOTION CAL. NO. 101

his motion to/for confirm award

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

PAPERS NUMBERED
1, 2
3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

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 131B).

Dated: 6-28-10
JUN 28 2010

BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
ALAN H. ROSENSTEIN,

Index No. 103684/10

Petitioner,

Motion Date: 4/22/10
Motion Subm.: 5/4/10
Motion Seq. No.: 001
Calendar No.: 101

-against-

KRAVETZ REALTY GROUP, LLC, EAST
AVON-HRCF II, LLC, and KRG-CB II, LLC,

DECISION AND JUDGMENT

BARBARA JAFFE, JSC:

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 Office (Room
141B).

For petitioner:
Avram Solomon Turkel, Esq.
Borstein & Sheinbaum
420 Lexington Ave., Suite 2920
New York, NY 10170
212-687-1600

For respondent East-Avon:
Jed Weiss, Esq.
Cole, Schotz, Meisel, Forman
& Leonard, P.A.
900 Third Ave., 16th Fl.
New York, NY 10022-4728
212-752-8000

For respondent KRG-CB II:
Donald W. O'Brien, Jr.
Woods Oviatt Gilman, LP
700 Crossroads Building
2 State Street
Rochester, NY 14614

By notice of petition dated March 19, 2010, petitioner moves pursuant to CPLR 7510 for an order confirming the arbitrator's award in the matter of *Alan H. Rosenstein v. Kravetz Realty Group, LLC, East Avon-HRCF II, LLC, and KRG-CB II, LLC*. Respondents East Avon-HRCF II, LLC (East Avon) and KRG-CB II, LLC (KRG) (respondents, herein) oppose the petition and, by notice of cross-motion dated April 14, 2010, move pursuant to CPLR 7511(b)(1)(iii) for an order vacating the award and directing a new hearing. Respondent Kravetz Realty Group, LLC (Kravetz) did not oppose either the petition or the cross-motion.

I. BACKGROUND

On or about February 27, 2006, petitioner and Kravetz and/or its Nominee entered into a brokerage agreement by which Kravetz granted petitioner the right to negotiate the purchase of

certain properties in exchange for a broker's fee. (Affirmation of James T. Kim, Esq., dated Apr. 14, 2010 [Kim Aff.], Exh. B). In June 2007, East Avon was formed as a limited liability company (*id.*, Exh. C), and in March 2008, KRG was formed as a limited liability company (*id.*, Exh. D).

By decision and order dated April 7, 2009, another justice of this court denied East Avon's petition to stay the arbitration between it and petitioner, rejecting its contention that as it was not a party to the brokerage agreement between Kravetz and petitioner, it could not be mandated to arbitrate, finding that East Avon had derived a direct benefit from the agreement and was thus estopped from avoiding the arbitration clause therein. (Affidavit in Opposition, dated Apr. 20, 2010 [Aff. in Opp.], Exh. 3).

On or about October 1, 2009, petitioner commenced the arbitration against respondents and Kravetz by filing and serving a second amended complaint, in which he alleged that Kravetz was a realty company, and that East Avon and KRG were limited liability companies formed to purchase and own certain property. (Kim Aff., Exh. A). Petitioner also claimed that he and Kravetz entered into a brokerage agreement, that he performed his obligations pursuant to the agreement, and that Kravetz and its nominees East Avon and KRG refused to pay his compensation. (*Id.*).

On March 2, 2010, pursuant to the arbitration before the American Arbitration Association (AAA), the arbitrator rendered an award in petitioner's favor as follows:

- (1) Kravetz and East Avon were directed to pay petitioner the sum of \$324,573 plus interest at the statutory rate provided pursuant to CPLR 5004 (statutory rate) commencing 30 days from the date of the award;
- (2) Kravetz and KRG were directed to pay petitioner the sum of \$243,200 plus interest at the statutory rate commencing 30 days from the date of the award; and

- (3) Kravetz, East Avon, and KRG, jointly and severally, were directed to pay petitioner's attorneys the sum of \$81,964.19 for legal fees, costs and expenses incurred in connection with petitioner's claims, plus interest at the statutory rate commencing 30 days from the date of the award.

(Verified Petition, dated Mar. 19, 2010 [Petition], Exh. A).

The arbitrator also directed that the AAA's administrative fees totaling \$6,000 and the arbitrator's compensation totaling \$3,400 be shared equally among the parties to the extent that Kravetz was directed to reimburse petitioner \$2,566.90 and East Avon was directed to reimburse petitioner \$1,999.74 representing the portion of the fees in excess of the costs previously incurred by petitioner. (*Id.*). Finally, the arbitrator noted in his award that Kravetz had failed to appear for the arbitration. (*Id.*).

On March 22, 2010, petitioner filed his verified petition seeking to confirm the award.

II. CONTENTIONS

Relying on the award, and as petitioner filed his instant petition within a year of the award, he argues that the award should be confirmed. (Petition).

Respondents oppose the petition and argue that the award must be vacated as they were not parties to the brokerage agreement, having been formed after the agreement was made. (Kim Aff.). They thus argue that the arbitrator materially misconstrued the agreement by imposing liability on them even though they were not parties to the agreement and that the award is totally irrational. Respondents also contend that the award is irrational as the arbitrator failed to provide any justification for or analysis in support of the award. (Memorandum of Law, dated Apr. 14, 2010).

Petitioner opposes the cross-motion, arguing that respondents' argument has been

rejected twice already, first by the Supreme Court in denying East Avon's petition to stay the arbitration and a second time by the arbitrator. (Aff. in Opp.). He contends that the award is not irrational as it is supported by the text of the agreement.

III. ANALYSIS

Pursuant to CPLR 7510, the court shall confirm an arbitration award upon the application of a party made within one year of the award's delivery to the party, unless the award is vacated or modified pursuant to CPLR 7511. As petitioner filed his petition to confirm the award within a year of its delivery, the award must be confirmed unless it is vacated or modified.

Pursuant to CPLR 7511(b)(1)(iii), an arbitration award may be vacated if, as pertinent here, the arbitrator "exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made." An award will not be vacated on this ground unless it violates a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on the arbitrator's power. (*New York City Tr. Auth. v Transp. Workers Union of Am., Inc., Local 100, et al.*, 14 NY3d 119 [2010]; *Matter of Silverman*, 61 NY2d 299 [1984]). Even if the arbitrator, in interpreting the agreement, "misconstrues or disregards its plain meaning or misapplies substantive rules of law," the award may not be vacated. (*Matter of Silverman*, 61 NY2d 299). An arbitrator "may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement . . ." (*Id.*). "In short, an arbitration award cannot be vacated if there exists any plausible basis for it." (*Matter of Brown & Williamson Tobacco Corp.*, 7 AD3d 368, 372 [1st Dept 2004]).

The scope of judicial review of an arbitration proceeding is extremely limited (*Matter of*

Campbell v New York City Tr. Auth., 32 AD3d 350 [1st Dept 2006]), and the court must give deference to the arbitrator's decision (*Matter of New York City Tr. Auth. v Transp. Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332 [2005]). In reviewing an award, the court is bound by the arbitrator's factual findings and interpretations of the agreement at issue (*Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368 [1st Dept 2004]), and may not "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." (*Matter of New York State Correctional Officers and Police Benev. Assn., Inc. v State of New York*, 94 NY2d 321 [1999]).

An award is "rational" if "any basis for [its] conclusion is apparent to the court" (*Caso v Coffey*, 41 NY2d 153 [1976]), and may be found irrational only if there is no proof to justify it (*Matter of Jadhav v Ackerman*, 62 AD3d 797 [2d Dept 2009]). An award is irrational if the arbitrator gives a construction to the parties' agreement that effectively rewrites it, or rewrites a collective bargaining agreement by adding a provision not negotiated by the parties. (5 NY Jur 2d, Arbitration and Award § 227 [2010]). The party moving to vacate an arbitrator's award as irrational has the burden of establishing its irrationality by clear and convincing evidence. (5 NY Jur 2d, Arbitration and Award § 227; *Muriel Siebert & Co., Inc. v Ponmany*, 190 AD2d 544 [1st Dept 1993]).

Here, while the arbitrator did not set forth his findings, it is undisputed that respondents argued before him that they were not parties to the brokerage agreement, and that the arbitrator clearly rejected the argument upon finding them liable to petitioner. Moreover, not only does the agreement bind Kravetz and its nominees, but as Supreme Court recognized, respondents could also have been found liable under the agreement pursuant to an estoppel theory. Respondents

have thus failed to prove that there was no evidence to justify the award. (*See eg Sarhank Group v Oracle Corp.*, NYLJ, Oct. 21, 2002, at 28, col 5 [Dist Ct, SD NY] [arbitrator's conclusion that respondent was party to or bound by underlying agreement constituted arbitrator's construction of agreement and would not be reviewed]).

That respondents disagree with the arbitrator's conclusion does not prove that the decision is irrational. (*See Maross Constr. v Cent. New York Regional Transp. Auth.*, 66 NY2d 341, 346 [1985] [arbitrator's interpretation of contract may not be challenged even if she disregarded apparent or plain meaning of terms]; *Matter of Natl. Cash Register Co. [Wilson]*, 8 NY2d 377, 383 [1960] [mere fact that different construction could have been accorded provisions and different conclusion reached does not mean that arbitrators so misread provisions as to empower court to set aside award]; *Eighty Eight Bleecker Co., LLC v 88 Bleecker St. Owners, Inc.*, 51 AD3d 507 [1st Dept 2008] [lease agreement could have been reasonably construed as arbitrator construed it]).

Moreover, absent any proof that the arbitrator was required, by AAA rules or any other authority, to set forth a justification or analysis in support of the award, respondents have not shown that his failure to do so rendered the award irrational. (*See Nationwide Mut. Ins. Co. v Steiner*, 227 AD2d 563 [2d Dept 1996] [arbitrator is not required to give any reasons for decision]; *Banc of Am. Securities v Knight*, 4 Misc 3d 756 [Sup Ct, New York County 2004] [lack of written rationale did not render the award irrational, especially as governing rules of NASD allow arbitrators to submit award in summary form and do not require written opinion]).

Respondents have thus failed to meet their burden of proving, by clear and convincing evidence, that the award was irrational.

IV. CONCLUSION

Accordingly, it is hereby

ADJUDGED, that the petition is granted and the award rendered in favor of petitioner and against respondents is confirmed; it is further

ADJUDGED, that petitioner Alan H. Rosenstein, having an address at 245 West 104th Street, New York, New York, recover from respondent Kravetz Realty Group, having an address at 1275 First Ave. #155, New York, New York 10065, and respondent East Avon-HRCF II, LLC, having an address at 875 Avenue of the Americas, Ste. 2400, New York, NY 10001, the amount of \$324,573, plus interest at the rate of 9% per annum from the date of April 1, 2010, as computed by the Clerk in the amount of \$ _____, together with costs and disbursements in the amount of \$ _____ as taxed by the Clerk, for the total amount of \$ _____, and that the petitioner have execution therefor; it is further

ADJUDGED, that petitioner Alan H. Rosenstein, having an address at 245 West 104th Street, New York, New York, recover from respondent Kravetz Realty Group, having an address at 1275 First Ave. #155, New York, New York 10065, and respondent KRG-CB II, LLC, having an address at 875 Avenue of the Americas, Ste. 2400, New York, NY 10001, the amount of \$243,000, plus interest at the rate of 9% per annum from the date of April 1, 2010, as computed by the Clerk in the amount of \$ _____, together with costs and disbursements in the amount of \$ _____ as taxed by the Clerk, for the total amount of \$ _____, and that the petitioner have execution therefor; it is further

ADJUDGED, that petitioner's attorneys, Bornstein & Sheinbaum, having an address at 420 Lexington Avenue, Suite 2920, New York, New York 10170-0002, recover, jointly and


severally, from respondent Kravetz Realty Group, having an address at 1275 First Ave. #155, New York, New York 10065, and respondents East Avon-HRCF II, LLC and KRG-CB II, LLC, having an address at 875 Avenue of the Americas, Ste. 2400, New York, NY 10001, the amount of \$81,964.19 as legal fees, costs and expenses, plus interest at the rate of 9% per annum from the date of April 1, 2010, as computed by the Clerk in the amount of \$ _____, together with costs and disbursements in the amount of \$ _____ as taxed by the Clerk, for the total amount of \$ _____, and that the petitioner have execution therefor; it is further

ADJUDGED, that petitioner Alan H. Rosenstein, having an address at 245 West 104th Street, New York, New York, recover from respondent Kravetz Realty Group, having an address at 1275 First Ave. #155, New York, New York 10065, the amount of \$2,566.90 as reimbursement for his arbitration costs, and that the petitioner have execution therefor; it is further

ADJUDGED, that petitioner Alan H. Rosenstein, having an address at 245 West 104th Street, New York, New York, do recover from respondent East Avon-HRCF II, LLC, having an address at 875 Avenue of the Americas, Ste. 2400, New York, NY 10001, the amount of \$1,999.74 as reimbursement for his arbitration costs, and that the petitioner have execution therefor; and it is further

ORDERED, that respondents' cross-motion for an order vacating the award is denied.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: June 28, 2010
New York, New York

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).