

**Johnson v Caputo**

2010 NY Slip Op 31676(U)

June 28, 2010

Supreme Court, New York County

Docket Number: 117063/2007

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD  
*Justice*

PART 61

LEONARD B. JOHNSON,  
Petitioner,

INDEX NO. 117063/07

MOTION DATE April 24, 2010

-against-

MOTION SEQ. NO. 002

MICHELLE CAPUTO,  
Respondent.

MOTION CAL. NO. 58

The following papers, numbered 1 to 3 were read on this motion to confirm an arbitrator's award

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

PAPERS NUMBERED

1-2

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

3

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

Cross-Motion: Yes  No

Upon the foregoing papers, respondent's motion to confirm an arbitrator's award is decided in accordance with the accompanying decision and order.

**FILED**  
JUL 01 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/28/10

O. P. Sherwood  
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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 61

-----X  
LEONARD B. JOHNSON,

Petitioner,

DECISION AND  
ORDER

Index No. 117063/2007

-against-

MICHELLE CAPUTO,

Respondent.

-----X  
O. PETER SHERWOOD, J.:

**FILED**  
JUL 01 2010  
COUNTY CLERK'S OFFICE  
NEW YORK

By Notice of Motion filed January 26, 2010, respondent Michelle Caputo ("Caputo" or "respondent") seeks a judgment pursuant to CPLR § 7510 confirming the award of the arbitrator Philip A. Greenberg ("Greenberg"), dated January 26, 2009, as clarified by an e-mail of the arbitrator dated March 9, 2009, and the further decision of the arbitrator dated November 19, 2009, which determined, *inter alia*, the valuation date of a condominium apartment (the "Apartment") owned jointly by Caputo and petitioner Leonard B. Johnson ("Johnson" or "petitioner") for purposes of a buyout by Johnson of Caputo's interest in the Apartment, the value of the apartment as of the valuation date, and any offsets to the buyout amount.

In or about December 2007, Johnson commenced this special proceeding pursuant to CPLR §§ 7502 and 7503 to stay arbitration and Caputo cross-petitioned to compel arbitration of a dispute between herself and Johnson concerning the determination of a buyout date of the tenancy in common between the parties and the valuation of the Apartment. The petition and cross petition were resolved by stipulation by which the parties were to each submit a list of five potential arbitrators and conduct their respective appraisals of the Apartment and Justice Kibbie F. Payne of this court was to randomly select an arbitrator from those lists which, unless the parties objected within five days to the court selected arbitrator, would be appointed arbitrator of the parties' dispute. By order dated June 19, 2008, Justice Payne appointed Arbitrator Greenberg.

Johnson and Caputo agreed to bifurcate the arbitration. The first part of the arbitration was to determine the buyout date at which Caputo's interest in the Apartment for purposes of Johnson's buyout would be determined and the crediting of the contributions of each party to the "expenses"

of the Apartment in determining the final net amount due Caputo in the buyout. The second phase of the arbitration was to determine the valuation of the Apartment as of the buyout date.

After a hearing and submission of pre- and post-hearing memoranda, Arbitrator Greenberg rendered an award in which he determined the valuation date of the Apartment as April 1, 2007, and further determined the allocation of certain payments and expenses, specifically, that the buyout amount would be determined based upon the value of the Apartment as of the April 1, 2007 date to be determined at the further hearing, reduced by the balance of the mortgage on the Apartment as of that date and the acquisition cost, Johnson's payment of expenses on the Apartment from September 2000 to May 1, 2005, and the amount of equity in the Apartment resulting from Johnson's payments from May 1, 2005 until April 1, 2007. The final payment to Caputo would then be increased by Caputo's \$6,000 contribution toward acquisition of the Apartment, plus interest at 5% per annum from September 29, 2000 until the date of payment. Arbitrator Greenberg indicated further that if the parties could not agree as to the amount of their respective payment of expenses, he would resolve any disputes as to those expenses and would also determine the value of the Apartment.

Apparently, the parties could not resolve their differences as to the amounts to be credited for the payment of expenses as evidenced in a post-decision e-mail communication from Arbitrator Greenberg to the parties' respective attorneys, dated March 4, 2009, in which he refers to "our last conference call" and stated that "the only credits against the final payment to Ms. Caputo were the principal payments made by Mr. Johnson on the mortgage."

After a further hearing limited to the question of the value of the Apartment on the April 1, 2007 valuation date, Arbitrator Greenberg issued a further decision dated November 19, 2009, which determined the value of the Apartment for purposes of determining Caputo's interest in the Apartment for the buyout to be \$500,000.

Caputo now seeks to confirm the arbitrator's awards and the entry of judgment. Annexed to the Affirmation in Support of Caputo's attorney is a calculation, alleged to be based upon the arbitrator's two decisions, in which the amount due Caputo based upon the \$500,000 valuation is computed to be \$112,293.43. In reaching this determination, respondent deducted the amount of \$7,000 as the gain in equity between May 2005 and April 2007, and attributed the mortgage and

Caputo - \$21,393.33 for a total of \$91,965.82 and each party responsible for \$45,982.91 of the total and Johnson credited with an overpayment of \$24,589.58.

Petitioner Johnson's attorney submits an affirmation in partial opposition in which he disputes part of respondent's calculation and submits as an exhibit his own computation in which the amount due Caputo in the buyout is determined to be \$104,157.93. In reaching this calculation, petitioner states the amount of equity for the relevant period between May 2005 and April 2007 to be \$13,000, the total amount of expenses paid from September 2000 to May 2005 to be \$96,236.83, with each party responsible for \$48,118.42, Johnson having paid \$74,843.50 and Caputo \$21,393.33, and Johnson receiving a credit for his overpayment in the sum of \$26,725.08. Annexed to the opposing affirmation as Exhibit "C" is a list of the mortgage and common charge payments Johnson allegedly made during the relevant time period and which petitioner claims was submitted in the arbitration proceeding.

It is well settled that the scope of judicial review of an arbitration proceeding is extremely limited (*see*, CPLR § 7511 [b]; *Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. Of City School Dist. of City of New York*, 1 NY3d 72 [2003]; *Elul Diamonds Co. Ltd. v Z Kor Diamonds*, 50 AD3d 293 [1<sup>st</sup> Dept. 2008]). Accordingly, an arbitrator's award will not be vacated "unless it is violative of a strong public policy, or it is totally irrational, or exceeds a specifically enumerated limitation on his power" (*Matter of Silverman [Benmor Coats, Inc.]*, 61 NY2d 299, 308 [1984]). In reviewing an award, the court is bound by the arbitrator's factual findings and interpretations of the contract (*see*, *Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]).

The awards of an arbitrator which are subject to judicial examination under CPLR Article 75 are final determinations made at the conclusion of the arbitration proceedings (*see*, *Mobil Oil v Asamera Oil*, 43 NY2d 276, 281 [1977]; *Matter of Snyder-Plax v American Arbitration Association*, 196 AD2d 872, 874 [2d Dept 1993]). An award is not "final and definite" when "it leaves the parties unable to determine their rights and obligations \* \* \* it does not resolve the controversy submitted, or \* \* \* it creates a new controversy" (*Matter of Meisels v Uhr*, 79 NY2d 526, 536 [1992]; *see*, *Matter of Board of Educ. of Amityville Union Free School Dist. v Amityville Teacher's Assoc.*, 62 AD3d 992, 993 [2d Dept 2009]). Under such circumstances, an award is deficient and subject to

vacatur. However, where an award contains a clear and definite determination of the rights and obligations of the parties, it will be final and enforceable as a final determination notwithstanding the need for any further calculation as to any amount due under the award, where the computation of the award is so clear and specific that the determination of the amount owing is merely an accounting calculation involving no more than a ministerial act (see, *Morgan Guaranty Trust Co. v. Solow*, 114 AD2d 818, 821 [1<sup>st</sup> Dept 1985], *aff'd* 68 NY2d 779 [1986]; see also *Matter of Civil Service Employees Assn. v. County of Nassau*, 305 AD2d 498 [2d Dept 2003]; *Matter of Snyder-Plax*, 196 AD2d at 874).

Upon review of the record and the arbitrator's decisions, this court is of the opinion that the subject awards are not sufficiently specific and definite to constitute a final award, and, for enforcement purposes, warrants more than a ministerial act or arithmetic calculation to arrive at the buyout amount due to Caputo. Accordingly, a rehearing before the arbitrator solely to determine the buyout amount is warranted (see, *Matter of Thompson v S.L.T. Ready-Mix Div. of Torrington Indus.*, 216 AD2d 656, 658 [3d Dept 1995]; *Matter of Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 2007 WL 3234726 [Sup Ct, NY Co. 2007]).

Accordingly, it is hereby

**ORDERED** that respondent's motion to confirm the arbitrator's awards and for entry of judgment is denied; and it is further

**ORDERED** that the matter is remitted to the arbitrator for a hearing solely on the issue of the calculation of the buyout amount; and it is further

**ORDERED** that petitioner shall serve a copy of this order with notice of entry upon respondent and upon Arbitrator Philip A. Greenberg within twenty (20) days of entry.

This constitutes the decision and order of the court.

DATED: 6/28/10

**FILED**  
JUL 01 2010  
NEW YORK  
COUNTY CLERK'S OFFICE  
O. PETER SHERWOOD  
J.S.C.