

**Manhattan Residential, Inc. v Prudential Douglas
Elliman**

2010 NY Slip Op 32125(U)

August 2, 2010

Sup Ct, NY County

Docket Number: 601426-2007

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Justice

Manhattan Residential

INDEX NO. 601426/07

MOTION DATE 7/19/10

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

- v -

Prudential Douglas

The following papers, numbered 1 to _____ were read on this motion to/for VACATE AWARD

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

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 1418).

Upon the foregoing papers, It is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that in light of the above, plaintiffs' application to vacate the arbitration decision dated April 13, 2009 and order on appeal of same, dated January 15, 2010, on the grounds that such decisions were prejudiced by misconduct and partiality of two arbitrators appointed as neutrals, is granted solely on the ground of impartiality pursuant to CPLR 7511(b)(1)(ii); and it is further

ORDERED and ADJUDGED that this action is hereby converted to a special proceeding, the complaint is hereby converted to a petition, and the petition is granted; and it is further

ORDERED that the arbitration decision by the Real Estate Board of New York dated April 13, 2009 and order on appeal of same, dated January 15, 2010 are hereby vacated and annulled; and it is further

ORDERED that the proceeding is remanded for a new arbitration to be conducted before a different panel (CPLR 7511(d); and it is hereby

ORDERED that plaintiffs serve a copy of this decision with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 8/2/10


HON. CAROL EDMEAD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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 35

-----X
MANHATTAN RESIDENTIAL, INC. and
LAURENCE BEAME,

Index No. 601426-2007

Plaintiffs,

-against-

PRUDENTIAL DOUGLAS ELLIMAN and
STANLEY GINSBERG,

Defendants.

----- X
HON. CAROL EDMEAD, J.S.C.

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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
141B).

MEMORANDUM DECISION

In this Article 75 proceeding, Manhattan Residential, Inc. ("MRI") and Laurence Beame ("Beame") (collectively, "plaintiffs") move to vacate an arbitration decision dated April 13, 2009 and an order on appeal of same, dated January 15, 2010 on the grounds that such decisions were prejudiced by misconduct and partiality of two arbitrators appointed as neutrals.

Factual Background

This dispute arises out of a real estate transaction for the sale of a Manhattan apartment (the "Apartment") for which defendants Prudential Douglas Elliman ("Douglas Elliman") and its agent Stanley Ginsberg ("Ginsberg") (collectively "defendants") were the exclusive listing broker/agent. Beame retained MRI, a real estate broker, to show and negotiate the purchase of apartments. Shai Shustik, MRI's principal ("MRI") saw the listing for the Apartment for \$1,495,000, and advised Beame of same.

After two visits to the Apartment, on January 29, 2007, MRI, on behalf of Beame, submitted an all cash offer of \$1,435,000. In response on the same day, Ginsberg informed MRI

that he had another all cash offer "substantially above" Beame's offer; Ginsberg also stated that he would advise the seller of Beame's offer.

The next day on January 30, 2007, Ginsberg asked MRI if Beame would be increasing his offer. MRI then submitted a higher offer of \$1,565,000 (\$70,000 more) on behalf of Beame.

Ginsberg then informed MRI that the seller was looking for a higher price and that there were multiple offers on the table. Beame then increased his offer by \$35,000 to \$1.6 million. According to plaintiffs, MRI failed to inform the seller of any of Beame's offers.

On March 1, 2007, MRI filed a complaint with the Real Estate Board of New York ("REBNY") against defendants for breach of REBNY's and State's rules of ethics in failing to disclose to the seller three separate offers to purchase the Apartment. Ginsberg submitted a personal statement of the facts on March 23, 2007 and a second statement in April 2007, each time admitting that Beame's offers were not presented to the seller. The Ethics Committee of REBNY's Residential Brokerage Division ("Ethics Committee") issued a "draft report," stating that Ginsberg violated three sections of REBNY's Code of Ethics and Professional practices, by failing to convey an offer to his client (the "Ethics Report"). (Plaintiffs claim that they did not receive the Ethics Report until April 27, 2009). One of the members of this committee was Vanessa Kaufman ("Kaufman").

Plaintiffs then commenced this action against defendants alleging, *inter alia*, fraud, breach of fiduciary responsibility, and tortious interference with contract.¹ However, upon

¹ According to plaintiffs, defendants admitted to REBNY that they never relayed Beame's offers to the seller, with Ginsberg admitting that he "made a mistake" and should have relayed the offers to the seller. Ginsberg also allegedly admitted that because of his failure to relay Beame's offers, MRI was prevented from receiving any broker commissions and Beame was prevented from purchasing his "dream" home. Further, Ginsberg also admitted that he and Douglas Elliman entered into a settlement agreement with the seller in March 2007, where defendants gave the seller \$74,750, waived any rights to a commission and released all claims.

motion by Douglas Elliman, the Court directed MRI to submit this dispute to arbitration before REBNY, and stayed this action pending the resolution of the arbitration.

At plaintiffs' request, on February 5, 2008 REBNY issued a legal opinion, stating that it had the ability to litigate the causes of action in the complaint so long as no final determination was promulgated by the Ethics Committee.

Plaintiffs later submitted a second formal complaint to REBNY on April 21, 2008, specifying the plaintiffs' cause of action.

Thereafter, at REBNY's request, plaintiffs provided a statement of facts, legal claims, witness list and exhibits, including the pleadings, emails, admissions and Ginsberg's statements and REBNY accepted such submissions. Plaintiffs then requested that defendants provide a statement of their position and exchange discovery, including the Ethics Report referenced in Ginsberg's submission to the arbitration Panel. On March 24, 2009, REBNY denied plaintiffs' request to exchange the Ethics Report, agreements, emails, and statements between the parties.

An arbitration hearing was held on April 13, 2009 before a panel consisting of three members of the Arbitration Committee of REBNY (the "Panel"), one of which was Kaufman. The Panel dismissed "the claims of all parties" (the "April 2009 decision"). Plaintiffs appealed the April 2009 decision on the grounds of procedural defects, partiality of two of the Panel members, and improper exclusion of evidence. The April 2009 decision was confirmed.

Plaintiffs complain that they were denied a fundamentally fair hearing because (1) REBNY failed to allow testimony about or submission of defendants' first and second statements; (2) REBNY refused to allow plaintiffs to submit the summons and complaint and other exhibits, rendering it legally impossible for the Panel to rule of any of plaintiffs' various

causes of action; (3) the February 5, 2008 legal opinion was not shared with the arbitrators; (4) notwithstanding the full disclosure scheme under New York law, REBNY did not permit the Ethics Report, exclusive broker agreement, New York State Regulations, draft contract between the seller and another buyer,² and emails, to be exchanged prior to the hearing (and in turn, exchanged to the Panel), while allowing the exhibits of the Ethics's complaint to be allowed in arbitration; (5) REBNY never provided to the arbitrator Panel plaintiffs' submissions of facts, legal claims, witness list and attached exhibits, which included the pleadings, emails, admissions and Ginsberg's previous statements; and (6) REBNY did not exchange plaintiffs' second formal complaint to the Panel. Indeed, the same discovery rejected by the Panel, was then allowed by the same Panel to be submitted by defendants at the arbitration.

Further, REBNY's February 5, 2008 opinion was procedurally defective; since such opinion stated that the parties could arbitrate the dispute if no final determination was made by the Ethics Committee, REBNY should have instead denied the arbitration request, given that the Ethics Committee did make a final determination prior to REBNY's opinion.

REBNY also refused to grant a first time adjournment of the hearing from Easter Monday, which first time adjournments shall be granted pursuant to Rule 7 of REBNY's Arbitration Procedure.

Plaintiffs further claim that the none of the arbitrators had any formal training, experience or preparation in deciding the legal issues, thereby depriving plaintiff of a fundamentally fair

²According to plaintiff, the draft contract demonstrated that Ginsberg lied in his email communications to plaintiff and at the hearing as to his dates and facts. And, while Ginsberg claimed that financial documents were necessary in order for him to present Beame's offer, such draft contract proved that defendants submitted the other buyer's offer without any financial documents.

[* 6]

hearing. The determination by the Panel, which failed to state specific causes of action, facts, laws, and opinion violated CPLR Article 75.

Plaintiffs also argue that the Panel wrongfully allowed the President of Douglas Elliman, who lacked any personal knowledge, to testify, even though Douglas Elliman did not submit a witness list prior to the hearing. The President of Douglas Elliman possibly influenced the arbitrator by showing how important this case was to Douglas Elliman. Yet, plaintiffs' request to cross-examine Douglas Elliman's President and a continuance to produce plaintiffs' own expert witness was denied.

Further, two of the presiding arbitrators had inherent conflicts of interests, which they were required, but failed to disclose. Arbitrator Paul Massey, a partner at real estate broker firm, Massey Knakel, entered into co-exclusive deals on numerous real estate transactions and other financial ventures with Douglas Elliman. Massey's partner Knakel, and Douglas Elliman's CEO Dottie Herman, are financial and business partners and news contributors to the Real Estate Channel. Knakel and Herman serve on the Advisory Board for at NYU, the MANN Foundation, and REBNY of Governors of REBNY, the organization who conducted the arbitration. Likewise, arbitrator Kaufman, founded a company which had many prior business dealings and co-exclusive agreements with Douglas Elliman. Kaufman served on the Ethics Committee and as a member of REBNY when the ethics complaint was filed and the decided by REBNY in 2007. While Kaufman's ethics committee found that defendants breached their duty, Kaufman, while serving as an arbitrator on the same case, made a contradictory and partial decision two years that defendants did not act wrongfully. Had these prior and current relationships been disclosed, plaintiffs would have requested that Massey be excluded from the Panel.

In opposition, Douglas Elliman argues that plaintiffs' application is procedurally improper, as it was brought as a regular motion instead of a special proceeding pursuant to Article 75. Further, plaintiffs cannot reargue the arbitration, complain of lack of discovery, or allege procedural inconsistencies in REBNY in order to vacate an award. Nor is there any clear and convincing evidence showing that plaintiffs were denied the right of discovery.

As to the alleged partiality, Douglas Elliman contends that plaintiffs could have easily ascertained the alleged facts prior to the arbitration as they did after the fact. REBNY provided each party an opportunity to strike those arbitrators found objectionable, and plaintiffs only found the two arbitrators objectionable after losing the arbitration. Also, the mere occasional associations and professional interactions between an arbitrator and those appearing before him or her will not warrant disqualification of the arbitrator on the grounds of the appearance of bias or partiality. REBNY is a professional organization where all members are either brokers or members of the real estate industry who have agreed to mandatory arbitration by their peers. Vacatur of the award based on the facts alleged by plaintiffs would vitiate the organization and its agreed purpose.

Additionally, plaintiffs' claim that REBNY violated their procedures in making an ethics determination before deciding the arbitration lacks merit; the Ethics Report is dated April 27, 2009, after the Award dated April 13, 2009.

Douglas Elliman also asserts that virtually all of plaintiffs' evidence submitted to the arbitrators was received and considered. And, plaintiffs exercised their right to an appeal, to no avail. The scope of review of an arbitration proceeding is very limited, and court's are obligated to give great deference to the decision of the arbitrators.

[* 8]

Ginsberg cross moves for sanctions on the ground that plaintiffs' action is frivolous, and lacking any legal, equitable, logical or known basis. Ginsberg maintains that plaintiffs' harassment by the intentional publication of the Ethics Report through this action, a report that should be private unless made public by REBNY, is an attempt to harm Ginsberg publically. Beame's malicious animus is demonstrated in his email indicating that he hopes Ginsberg loses his license and will spend everything he has to "make sure this keeps going." Plaintiffs' refusal to acknowledge the facts or law controlling this case warrants sanctions.

Ginsberg argues that plaintiffs were given the opportunity, prior to arbitration, to excise 41 of 82 arbitrators and chose to excise only 33 of those names; plaintiffs could have struck an additional eight. Plaintiffs must have known who the individuals were and that each of the real estate companies has, had and will have some business relationship with Douglass Elliman. Plaintiffs' new research about the two arbitrators could have been performed prior to the arbitration. Plaintiff waived their right to complain about partiality. Nor is there any evidence that any of the arbitrators knew or had any relationship with Ginsberg. And, neither defendant recovered a commission; the seller did not sell the Apartment, meaning that there is no recovery for plaintiffs, and Beame never persuaded the seller to sell him the Apartment. Essentially, Ginsberg argues, it was plaintiffs' fault that there was no commission.

Ginsberg also argues that not only have plaintiffs failed to specify the discovery sought and how such discovery would have helped plaintiffs' case, but plaintiffs failed to establish any extraordinary circumstances to have warranted discovery, which was meaningless in any event. And, plaintiff did not seek redress when their application for discovery was denied prior to the arbitration hearing. Nor is there any legal support for the proposition that the arbitrators should

have written a more detailed award.

Thus, argues Ginsberg, the Court should also confirm the Award.

In reply, plaintiffs argue that defendants admit that arbitrators Massey and Kaufman, and defendants had a prior and ongoing business relationship. It is also uncontested that these relationships were not disclosed to plaintiff. REBNY and defendants, and not the plaintiffs, have a duty to disclose potential bias and such conflicts of interest. If, as defendants argue, every single case adjudicated by REBNY has a similar conflict of interest as the arbitrators and the parties are all members of the same real estate industry, then REBNY's compulsory arbitration is a "kangaroo" adjudication process, and plaintiffs should not have been compelled to adjudicate their claims with REBNY. In any event, argue plaintiffs, not all REBNY arbitration panel members have a business and financial relationship with the parties.

Further, not all of plaintiffs' evidence was submitted to the Panel.

And, the Ethics Report was not dated April 27, 2009, but was mailed on this date notwithstanding that it was decided two years prior. Indeed, REBNY admitted that the Ethics Committee rendered a final determination, but that the determination was not yet "promulgated." Douglas Elliman's opposition also acknowledges that the Ethics Committee issued its decision against defendants on March 4, 2007.

Finally, plaintiffs oppose Ginsberg's request for sanctions, arguing that they have the right to appeal the arbitrators' decisions, and that the evidence in support of sanctions is inadmissible.

Discussion

At the outset, Douglas Elliman's contention that plaintiffs' application to vacate the

arbitration award is procedurally defective lacks merit. This action was initially commenced as a plenary action for damages based on, *inter alia*, fraud and breach of fiduciary duty. While a special proceeding under Article 75 must be initiated with the filing of a petition (see CPLR 304, providing that “action is commenced by filing a summons and complaint or summons with notice,” whereas a “special proceeding is commenced by filing a petition”), at the time this action was commenced, the parties had not yet submitted their dispute to arbitration. Having submitted the dispute underlying the complaint to arbitration during the pendency of this action, and plaintiffs having moved to vacate the ensuing award, the instant action is converted to a proceeding (see *Scaduto v DT Indus., Inc.*, 266 AD2d 149, 699 NYS2d 36 [1st Dept 1999] citing CPLR 103 [b]; see also, *First Nat. City Bank v City of New York Finance First Nat. City Bank v City of New York Finance Adm.*, 36 NY2d 87 [1975] [stating that under CPLR 103(c), the courts are empowered and indeed directed to convert a civil judicial proceeding not brought in the proper form into one which would be in proper form, rather than to grant a dismissal, making whatever order is necessary for its proper prosecution)).

Turning to the merits of plaintiffs’ request, CPLR 7511(b)(1) articulates the exclusive grounds a court may consider when reviewing an application to vacate an arbitration award: (i) corruption, fraud or misconduct in procuring the award; (ii) partiality of an arbitrator; (iii) the arbitrators exceeded their power or executed their power so imperfectly that a final and definite award was not made; and (iv) failure to follow appropriate procedures (*Roberts v Finger*, 15 Misc 3d 1118, 839 NYS2d 436 [Sup Ct, New York County 2007]), of which only two sections are relevant herein: misconduct (7511(b)(1)(i) and impartiality (7511(b)(1)(ii)).

Misconduct

Arbitration panels are afforded great latitude in determining what evidence they will hear, and need only receive evidence that is pertinent and material (*Kaminsky v Segura*, 26 AD3d 188, 810 NYS2d 25 [1st Dept 2006]; *Coty Inc. v Anchor Const. Inc.*, 2003 WL 139551 [Sup Ct, New York County 2003]). An arbitrator's determination of what is pertinent and material will be set aside only if it deprives a party of a fundamentally fair hearing (*id. citing Da Silva v First Union Securities, Inc.*, 249 F Supp 2d 286, 290 [Dist Ct SD NY 2003]). Further, while it is true that arbitrators are guilty of affirmative misconduct when they refuse to hear evidence pertinent and material to the controversy in "bad faith" (*Coty Inc. citing United Paperworkers Intern. Union v Misco, Inc.*, 484 US 29, 39-40 [1987] and *Professional Staff Congress/City University of New York v Bd. of Higher Ed.*, 39 NY2d 319, 323 [1976] (holding "One form of misconduct is the refusal to hear pertinent and material evidence.")). To establish that an arbitrator engaged in misconduct, the petitioner bears the heavy burden of showing with clear and convincing proof that the proposed evidence was indeed pertinent and material (*Kaminsky v Segura*, 4 Misc 3d 1019, 798 NYS2d 345 [Sup Ct, New York County 2004] *citing Matter of Solartechnik, Ges., M.B.H (Besicorp Group, Inc.)*, 227 AD2d 94, 652 NYS2d 654 [3d Dept 1997], *revd on other grds* 91 NY2d 482 [1998]; *Matter of Wiener Furniture Co., Inc.*, 90 AD2d 875, 456 NYS2d 474 [3d Dept 1982]; *Matter of Reale*, 54 AD2d 1039, 1040, 388 NYS2d 688 [3d Dept 1976]).

As to plaintiffs' claim of misconduct arising from the arbitration Panel's denial of plaintiffs' request for discovery, plaintiffs must show "by clear and convincing proof" that the materials sought were necessary to prove their claims (*Financial Clearing & Services Corp. v Katz*, 172 AD2d 290, 568 NYS2d 382 [1st Dept 1991]).

It is well settled that a party's right to discovery in an arbitration proceeding is limited. In this regard, it has been held that "Procedural matters regarding pleadings, disclosure and the manner in which the hearing is conducted are generally left to the discretion of the arbitrator (*Matter of Sobel v Charles Schwab & Co.*, 37 AD3d 877, 878 [2007]). Further, under the CPLR, arbiters do not have the power to direct the parties to engage in disclosure proceedings' (*Berg v Berg*, 20 Misc 3d 1142, 873 NYS2d 231[2008]), and it was instead incumbent upon the plaintiffs to seek an order directing disclosure in the Supreme Court based upon a showing of extraordinary circumstances (see, CPLR 3102(c); *Kahn v New York Times Co.*, 122 AD2d 655, 663 [1986] [arbitrators do not have the power to direct that parties engage in disclosure proceedings, and only under exceptional circumstances will a court order disclosure in arbitration]; *State Farm Mut. Auto. Ins. Co. v Wernick*, 90 AD2d 519 [1982] (where a dispute has been submitted to arbitration, a party may obtain disclosure only by court order)).

It is unclear from the record whether the Panel considered the arbitration submissions of the plaintiffs, notwithstanding the fact that REBNY received same from plaintiffs. The arbitration award indicates that "proofs" and arguments were considered, and the appeal decision indicates that testimony and "emails" were considered (appeal decision, page 11). Further, the Panel's failure to consider the Ethics Report was consistent with "REBNY [']s custom and practice" since Ethics Committees "deliberations and the documents submitted to the Ethics Committee by the parties to disputes are customarily confidential and for use in any other proceedings" (appeal decision, page 6). And, as noted by the appeal decision (page 10), the Opinion Letter permitting arbitration since "no final determination has been promulgated by the Ethics Committee" was not inaccurate, since the Ethics Committee's decision had not been

circulated or distributed at the time the Opinion Letter was issued. Although the Panel allegedly did not have before it the Complaint in this action to determine the claims plaintiffs made herein, REBNY heard plaintiffs' statement of their claims, and considered the emails memorializing the parties' dealings with each other (see appeal decision, page 11)). More importantly, any alleged failure to admit the evidence proffered by plaintiffs was of no moment, since "in sworn testimony Mr. Ginsberg admitted that he had not submitted Mr. Beame's offers to the seller" (see page 11 appeals letter). Thus, the Panel's failure to consider such evidence, and well as its decision to hear testimony from Douglas Elliman's President, fell within the discretion of the Panel, and there is no showing that the Panel's decisions in regard to the consideration of such evidence was made in bad faith. The caselaw and factors above, coupled with the confirmation by plaintiffs that they were "given a full and complete opportunity to present their case," militate against a finding that the arbitrators engaged in misconduct.

Impartiality

"The appearance of impropriety or partiality is sufficient to warrant vacature of an award. Furthermore, it is only necessary to demonstrate the potential for bias to find misconduct" (*Coty Inc., citing Kern v 303 East 57th St. Corp.*, 204 AD2d 152, 153, 611 NYS2d 547 [1st Dept 1994]; see also *Matter of Catalyst Waste-to-Energy Corp. v City of Long Beach*, 164 AD2d 817, 560 NYS2d 22 [1st Dept 1995]; *Matter of Fischer*, 106 AD2d 314, 482 NYS2d 761 [1st Dept 1984]). Indeed, where there are undisclosed dealings between a party and an arbitrator which impart a lack of impartiality and fairness, the award made is subject to vacatur (*Cross Properties, Inc. v Gimbel Bros., Inc.*, 15 AD2d 913, 225 NYS2d 1014 [1st Dept 1962] citing *Matter of Friedman*, 215 AD 130, 137, 213 NYS 369, 376).

However, not every undisclosed relationship compels vacatur of an award. The occasional associations between an arbitrator and a party or witness will not warrant disqualification of the arbitrator on the ground of the appearance of bias or partiality (*Artists & Craftsmen Builders, Ltd. v Schapiro*, 232 AD2d 265, 648 NYS2d 550 [1st Dept 1996] citing *Matter of Henry Quentzel Plumbing Supply Co. v Paul Quentzel*, 193 AD2d 678, 679, 598 NYS2d 23). Notably, courts “are loath to sustain belated claims of disqualification after an adverse award’ (*Cross Properties, Inc., supra citing Matter of Atlantic Rayon Corp. [Goldsmith]*, 277 AD 554, 556, 100 NYS2d 849, 850)).

Instead, it must be shown that the arbitrator and the party or witness have some ongoing relationship (*Artists & Craftsmen Builders, Ltd. v Schapiro*). Further, an application seeking vacatur of an arbitration finding for bias may be granted only if the court finds that the rights of the moving party were prejudiced by partiality of the arbitrator (*id.*). Consequently, a party seeking vacatur of the arbitration award must meet a heavy burden (*id.*).

It cannot be disputed that all arbitrators with REBNY work in the real estate business in New York. However, the record does not contain a mere reference to the arbitrators as having worked in the real estate business in New York.

J. P. Stevens & Co., Inc. v Rytex Corp. (34 NY2d 123, 356 NYS2d 278 [1974]) is instructive. In *J.P. Stevens*, the AAA appointed Philip J. Kaplan (“Kaplan”) and Gerard Jerry Lincer (“Lincer”). AAA advised that Lincer was employed by Kenyon Piece Dyeworks (“Kenyon”), and that another arbitrator, James T. Burnish (“Burnish”), chosen previously by the parties, was employed by Deering Milliken, Inc. (“Deering”). Respondent Rytex Corp. did not object to Burnish or Lincer until after the award was rendered, which was in favor of Stevens. It

was only after receipt of the adverse award that respondent claimed that the arbitrators were not impartial. The Court of Appeals noted that the Appellate Division found that respondent's claim of bias based on the substantial business relationships between the two arbitrators and Stevens, the successful party in the arbitration, was adequately supported by the record. It was undisputed that "both Deering and Kenyon, the respective employers of arbitrators Burnish and Lincer, had business dealings with Stevens." Stevens' vice-president's affidavit indicated that

the Deering and Kenyon firms between them did some \$2.5 million in business with Stevens annually. Moreover, Lincer was the sales manager of Kenyon, and . . . it could reasonably be inferred that a person in his position might not have been acceptable as an arbitrator if the facts had been disclosed to [respondent].

The Appellate Division held that the relationship between Lincer, his employer Kenyon, and Stevens (the successful party in arbitration), was "alone adequate to justify the vacation of the award." Thus, the Court of Appeals affirmed vacatur of the award.

Here, it is undisputed that one the arbitrators, Massey, co-brokered transactions and had served on joint committees with Douglas Elliman. Plaintiffs' submissions indicate that arbitrator Massey's real estate firm engaged in several multi-million dollars real estate deals over the past few years. These reported transactions were those that plaintiffs were able to uncover; there is no indication that these instances represent the extent of Massey's and Douglas Elliman's transactional relationship in the real estate market. Additionally, Massey and Douglas Elliman's President are both members of the advisory board at the NYU Shack Institute of Real Estate. Massey's partner and Douglas Elliman's President CEO are both contributors to the Real Estate Channel, and serve on the Board of Governors of REBNY. It cannot be said that such real estate deals and current relationships between Massey or Massey's partner and Douglas Elliman were

or are “at most, remote, peripheral, superficial or insignificant” (*J. P. Stevens & Co., Inc. v Rytex Corp.*, 41 AD2d 15, 340 NYS2d 933 [1st Dept 1973] *affd*, 34 NY2d 123 [1974]), and the cases cited by respondents are wholly distinguishable from the facts at bar (*see e.g., Elias Eleni Restaurant Corp. v 8430 New Utrecht Corp.*, 282 AD2d 705, 724 NYS2d 322 [2d Dept 2001] (“the nature of the contacts between the appraiser/arbitrator and the plaintiff’s president, arising from a single, isolated business transaction involving third parties, was too remote and speculative to support a finding that there was an appearance of bias or partiality”); *Matter of Infosafe Systems, Inc.*, 228 AD2d 272, 643 NYS2d 585 [1st Dept 1996] (holding that petitioner’s showing that one of the three arbitrators actively questioned witnesses during the proceeding in a manner displaying skepticism of petitioner’s position in the underlying contractual dispute, fails to satisfy petitioner’s heavy burden of demonstrating bias)).³

As to whether plaintiffs could have ascertained the alleged partiality or bias prior to the hearing, a party to an arbitration may not sit idly back and rely exclusively upon the arbitrator’s disclosure. If a party goes forward with arbitration, having actual knowledge of the arbitrator’s bias, or of facts that reasonably should have prompted further, limited inquiry, it may not later claim bias based upon the failure to disclose such facts (*J. P. Stevens & Co., Inc. v Rytex Corp.*, 34 NY2d 123, 129 [1974]). While such responsibility to ascertain potentially disqualifying facts does rest upon the parties, the major burden of disclosure properly falls upon the arbitrator (*id.*) After all, the arbitrator is in a far better position than the parties to determine and reveal those facts that might give rise to an inference of bias (*id.*).

³ The Court notes that there is no indication that Kaufman had any similar connections with Douglas Elliman. And, plaintiffs provide no legal or factual support for the proposition that Kaufman’s role in the Ethics Committee decision concerning the underlying disputer gave rise to an inference of bias.

There is no indication in the record that plaintiffs had actual knowledge of the arbitrators' potential for bias or of any facts that reasonably should have prompted further inquiry, prior to the arbitration hearing. Although plaintiffs could have ascertained the substantial relationships between two of the arbitrators and Douglas Elliman, that plaintiffs' complaint as to the arbitrators' bias was not presented until after the award was issued should "not deter the court from exercising the undoubted power of vacating the award and removing the arbitrator in the event that justice required it" (*Nadalen Full Fashion Knitting Mills v Barbizon Knitwear Corp.*, 206 Misc 757, 134 NYS2d 612 [Sup Ct, New York County 1954]). Further, that plaintiffs "confirmed before the Panel that they were given a full and complete opportunity to present their case" did not obviate Massey's duty to disclose the substantial nature of his and his firm's relationship with Douglas Elliman. And, that plaintiffs could have struck eight remaining arbitrators misses the point; had Massey revealed his past and current direct and indirect relationship with Douglas Elliman, plaintiffs could have exercised its right to use one of the eight strikes against Massey.

Sanctions

22 NYCRR § 130-1.1 gives the Court, in its discretion, authority to award costs "in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" and/or the imposition of financial sanctions upon a party or attorney who engages in frivolous conduct." 22 NYCRR § 130-1.1(c) states that conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to

harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

Notwithstanding any alleged animus Beame may have toward defendants, given the merit of plaintiffs' motion, the cross-motion by Ginsberg for sanctions is unwarranted.

Conclusion

ORDERED that in light of the above, plaintiffs' application to vacate the arbitration decision dated April 13, 2009 and order on appeal of same, dated January 15, 2010, on the grounds that such decisions were prejudiced by misconduct and partiality of two arbitrators appointed as neutrals, is granted solely on the ground of impartiality pursuant to CPLR 7511(b)(1)(ii); and it is further

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Dated: August 2, 2010


Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMOAD

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