

Benishai v Benishai

2010 NY Slip Op 32450(U)

September 3, 2010

Supreme Court, New York County

Docket Number: 105669/10

Judge: Eileen A. Rakower

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

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 15

JACK BENISHAI and BMC LLC ,

INDEX NO. 105662/10
440420/10

Petitioner,

MOTION DATE _____

- v -

MOTION SEQ. NO. 1-3

MOTION CAL. NO. _____

DAVID BENISHAI,

Respondents.

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

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

PAPERS NUMBERED

1-10

Answer — Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes X No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

J.S.C.

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING DECISION AND 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 (R-1417).

Dated: September 3, 2010

Eileen A. Rakower
HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
JACK BENISHAI and BMC, LLC,

Index No.
105669/10

Petitioners,

**DECISION
and ORDER**

- against -

DAVID BENISHAI,

Mot. Seq.
001, 002, &003

Respondents.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

The parties, David and Jack Benishai as well as BMC LLC, appeared before the Court on August 5, 2010 (wherein the parties were heard on the record) and entered into a stipulation and briefing schedule. The parties appeared again August 31, 2010.

On March 31, 2009, David Benishai, Jack Benishai, the Estate of Bella Benishai and Ilan Properties, Inc. (ILAN) entered into a Settlement Agreement ("Agreement") whereby the aforementioned parties agreed to discontinue a number of actions, both in New York and in Israel, pursuant to the terms and conditions set forth therein. Pursuant to this Agreement, the parties named an arbitrator: "any disputes, controversies or claims arising out of or relating to the transactions contemplated herein, or the breach thereof, shall be referred to Richard Cohn." The primary asset of ILAN was a building located in New York County. As part of the Agreement, Jack Benishai and David Benishai agreed that, "simultaneously with the execution of this Agreement, they will enter into a separate and independent management agreement with an independent management company. A copy of this Management Agreement is annexed hereto as Exhibit 'B'".

ILAN, by agreement dated March 31, 2009, entered into a management agreement with BMC LLC ("BMC"). Such agreement was signed by David Benishai, President, on behalf of ILAN and Jack Benishai, Manager, on behalf of BMC. The term of the management agreement extends to May 2011. The Benishai brothers disagree about the management of the building owned by ILAN. David Benishai now seeks to have ILAN terminate the management agreement. Jack Benishai does

not want ILAN to terminate the management agreement. David Benishai served a demand for arbitration, and Jack Benishai and BMC seek to stay the arbitration. Alternatively, Jack Benishai and BMC seek to disqualify Richard Cohn as arbitrator.

The business decision to have ILAN terminate the Management Agreement is a decision properly before the arbitrator. The duties and responsibilities of BMC articulated in the Management Agreement, and issues regarding BMC's proper performance of those duties are not subject to the arbitration clause in the Settlement Agreement.

As a preliminary matter, contrary to Petitioners' claim that David Benishai's failure to include the 20-day notice provision mandated by CPLR 7503(c) renders his demand for arbitration invalid, the First Department has held that such an omission is not fatal where the respondent still timely moved for a stay of arbitration and was not prejudiced by the lack of notice (*see Diamond Waterproofing Co. v. 55 Liberty Owners Corp.*, 6 A.D.3d 101, 105-06 [1st Dept. 2004]).

However, the court finds that BMC cannot be made a party to the arbitration because it did not agree to arbitrate. "It is well settled that a party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties' clear, explicit and unequivocal agreement to arbitrate" (*Fiveco, Inc. v. Haber*, 2008 NY Slip Op 5958, 3 [2008]) (citations and internal quotations omitted). As noted above, the Settlement Agreement provides that Jack Benishai and David Benishai agreed to contemporaneously enter into "a separate and independent management agreement with an independent management company." The parties negotiated and carefully constructed the Settlement Agreement. BMC is not mentioned once in the eleven-page Settlement Agreement, and the Management Contract is not incorporated by reference.

The Management Contract between ILAN and BMC does not contain an arbitration provision. To the extent that David Benishai claims that BMC is subject to arbitration under the Settlement Agreement due to the contemporaneous execution of the Management Contract, and its annexation to the Settlement Agreement, the court rejects this argument.

An alternate dispute resolution agreement like an arbitration agreement, 'must be clear, explicit and unequivocal and must not depend upon implication or subtlety'. . . parties consenting to arbitration surrender many of their 'normal rights under the procedural and substantive law

of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent.’ (Internal citations omitted) *Thomas Crimmins Contracting Co. v. City of New York*, 74 NY2d 166.

“While an agreement to arbitrate can be incorporated by reference, any such reference must show such an intent to arbitrate.” *Aerotech World Trade Ltd. v Excalibure Systems, Inc.*, 236 AD2d 609, 611 (2nd Dept. 1997). Here, the language of the Management Agreement fails to incorporate either explicitly or by reference, the provision of the Settlement Agreement to submit disputes to arbitration. Nor does the language of the Settlement Agreement “incorporate by reference” any provisions of the Management Agreement. Instead, the Settlement Agreement acknowledges the execution of a separate and independent management agreement and annexes it as an exhibit thereto (*New York Telephone Company v. Alvord & Swift*, 49 A.D.2d 726 [1st Dept. 1975]; *see also Cohen v. Bovino*, 2007 N.Y. Misc. Lexis 8801 [Sup. Ct. NY Co. 2007]).

Looking at the Management Contract, there are a number of provisions where an intent to arbitrate is not consistent with the language of the Management Contract. First, with respect to paragraph 9, it provides that the “parties endeavor to cooperate with each other should there be any issues.” There is no mention of an alternative means to dispute resolution should the parties not cooperate. In Paragraph 11, it states that the parties “herein waive trial by jury and agree to submit to the personal jurisdiction and venue of a court of subject matter jurisdiction located in New York County, State of New York.” Finally, in Paragraph 12, it provides “should litigation arise hereunder, service of process therefor may be obtained by certified mail, return receipt requested; the parties hereto waiving any and all rights they may have to object to the method by which service was perfected.”

With respect to Respondents’ motion to disqualify Mr. Cohn as arbitrator, irrespective of whether federal or state law applies, the court finds that disqualification is unwarranted. As the First Department stated in *Bronx Lebanon Hospital v. Signature Medical Management Group*, 6 A.D.3d 261 [1st Dept. 2004],

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 Ins. Plan of Greater N.Y.], 11 N.Y.2d 128, 132, 182 N.E.2d 85, 227 N.Y.S.2d 401 [1962][citations omitted]), that extraordinary relief should only be employed where ‘there exists a

real possibility that injustice will result' (*Matter of Lipschutz [Gutwirth]*, 304 N.Y. 58, 64, 106 N.E.2d 8 [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.*, 11 N.Y.2d at 137). And, while the appearance of bias may suffice (*see Rabinowitz v Olewski*, 100 A.D.2d 539, 540, 473 N.Y.S.2d 232 [1984]), that bias must be clearly apparent based upon established facts, not merely supported by unproved and disputed assertions.

Here, most of Petitioners' allegations are unsupported and conclusory, and are thus rejected accordingly. With respect to a February 5, 2010 telephone conversation between Jack Benishai and Mr. Cohn, wherein Mr. Cohn allegedly threatened to rule that BMC be removed as management company in the event that Jack Benishai did not pay Mr. Cohn's fees, the court finds this to be an improper basis for disqualification. It cannot be said that a threat to find a party in default for his failure to pay the arbitrator's fees evidences bias on the part of Mr. Cohn. Moreover, the record indicates that Cohn subsequently apologized for this prior conversation, and explained that he was under a great deal of stress at the time due to the recent hospitalization of both his parents.

Lastly, the court has considered the parties' arguments in support of the imposition of sanctions against one another and denies both applications.

Wherefore, it is hereby

ADJUDGED that Respondent's petition to stay arbitration pursuant to CPLR 7503(b) is granted to the extent that the arbitration is hereby stayed against Petitioner BMC; and it is further

ADJUDGED that the petition to stay the subject arbitration is denied as to Jack Benishai; and it is further

ORDERED that Jack Beneshai and David Beneshai shall proceed to arbitration forthwith and respondent's counsel shall serve a copy of this judgment upon the arbitral tribunal; and it is further

ORDERED that Respondent's motion for sanctions against Petitioners and their counsel, and for an order enjoining BMC LLC from acting as the managing agent for the properties owned by Ilan Properties, Inc. is denied; and it is further

ORDERED that Petitioner's motion for an order further enjoining arbitration proceedings brought by the Respondent is denied.

All other relief requested is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: September 3, 2010



EILEEN A. RAKOWER, J.S.C.

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 141B).