

<b>Matter of Gutterman v Caliguiri</b>
2011 NY Slip Op 30855(U)
April 4, 2011
Supreme Court, New York County
Docket Number: 112237/10
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN  
Justice

PART 17

Index Number : 112237/2010  
GUTTERMAN, ALLEN  
vs.  
CALIGURI, EDWARD  
SEQUENCE NUMBER : 001  
VACATE OR MODIFY AWARD

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

notice of motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion *petition is decided*  
*per attached*

**FILED**  
APR 08 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/4/11

*[Signature]*  
EMILY JANE GOODMAN 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 17

-----X  
In the Matter of the Application to Vacate  
an Arbitration Award Pursuant to CPLR Section  
7511 in an Arbitration Held between

ALLEN GUTTERMAN et al

Petitioners,

Index No. 112237/10

-against-

EDWARD CALIGUIRI and BARRY COHEN,

Respondents.

**FILED**  
APR 08 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

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Emily Jane Goodman, J.S.C:

The parties were formally all principals in several high end recruitment/search firms (the Recruitment Firms). Petitioner move to vacate an arbitration award, as irrational, because the arbitrator failed to find that Respondents breached Section 3.3 (a) (ii) of the parties' agreement, when Respondents formed a new company and engaged a New Jersey company named Hosted I.T. Solutions (HITS) to set up email accounts, install televisions, arrange for the purchase and installation of computers and provide technology consulting services because HITS was co-owned by the former IT director of the Recruitment Firms, Robert Peterson. As a result of this finding, Respondents were entitled to sums Petitioners had withheld due to Respondents' purported breach Section 3.3 (a) (ii). That section prohibited (during September 1, 2007 through April 1, 2008) the "hire or employ...in

any fashion directly or indirectly (whether as an employee, independent contractor or consultant or otherwise), (A) any individual who is then a employee, independent contractor or consultant of the Companies..." Petitioners also argue that it was irrational for the arbitrator to determine that they failed to meet their burden to demonstrate that the agreement was violated by Respondents because there may have been wrongdoing by other individuals associated with the new company, where the activities were not tied to Respondents.

The Petition is opposed on the basis that the arbitrator heard the above arguments many times, rejected them, and, it was not irrational for him to do so.

"An arbitration award may be vacated on three narrow grounds: 'it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power.'" *Matter of United Federation of Teachers, Local 2, AFT, AFL-CIO v Board of Education of City School District of City of New York*, 1 NY3d 72, 79 (2003), quoting *Matter of Board of Education of Arlington Central School District v Arlington Teachers' Association*, 78 NY2d 33, 37 (1991). An award is irrational "'if there is no proof whatever to justify the award ... [citation omitted].'" *Matter of Matra Building Corp. v Kucker*, 2 AD3d 732, 734 (2d Dept 2003); see also *Matter of Erin Construction Co., Inc. v Meltzer*, 58 AD3d 729 (2d Dept

2009).

Nor will an award be vacated merely because the arbitrator misapplied the law or made an error of fact, unless one of the above three grounds is met. *Id.*; see also *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471 (2006). The award will be upheld "when the arbitrator offers even a barely colorable justification for the outcome reached [interior quotation marks and citation omitted]." *Wien & Malkin LLP*. 6 NY3d at 479.

Although the arbitrator did not explain his reasoning, the court cannot find that the award is totally irrational. Although Petitioners point out that the agreement applies to hiring/employment "directly or indirectly" the arbitrator could have rationally found that Respondents did not breach the agreement by engaging the services of HITS, a New Jersey company, because the agreement prohibited the hire or employ of an employee of the Recruitment Firms, and Peterson, not HITS was an employee of the Recruitment Firms. It was within the province of the arbitrator to strictly construe the agreement, especially where the provision might result in forfeiture under circumstances not contemplated by the parties given the nature of the services provided by HITS. Further, it was not irrational for the arbitrator to determine that Petitioners failed to meet their burden to demonstrate that the agreement was violated by Respondents merely because there may have been wrongdoing by

other individuals associated with the new company, where the activities were not tied to Respondents. Nor do Petitioners' complaints about the arbitrator failing to crediting their testimony over Respondents, or the arbitrators concerns about evidence not presented by Petitioners result in a conclusion that the award was irrational, given that the arbitrator is the finder of fact. The Petition amounts to nothing more than Petitioners' dissatisfaction with the arbitration decision, which is not a ground to vacate it.

Accordingly, it is

ORDERED that the motion to vacate the arbitration award is denied, the award is confirmed pursuant to CPLR 7511 (e), and the proceeding is dismissed; and it is further

ORDERED that Respondents submit a proposed Judgment on notice.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: April 4, 2011

**FILED**  
 APR 08 2011  
 NEW YORK  
 COUNTY CLERK'S OFFICE  
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 J.S.C.  
**EMILY JANE GOODMAN**