

Benishai v Benishai

2011 NY Slip Op 31471(U)

June 2, 2011

Supreme Court, New York County

Docket Number: 101972/2011

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER

- PART 15

Index Number : 101972/2011
BENISHAI, JACK
VS.
BENISHAI, DAVID
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 2

3, 4

5

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

**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 141B).

Dated: 6/2/11



HON. EILEEN A. RAKOWER

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 15

-----X

JACK BENISHAI and BMC, LLC,

Index No.
101972/11

Petitioners,

**DECISION
and ORDER**

- against -

DAVID BENISHAI and RICHARD COHN,

Mot. Seq.
001 & 002

Respondents.

-----X

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

On March 31, 2009, David Benishai (“David”), Jack Benishai (“Jack”), the Estate of Bella Benishai and Ilan Properties, Inc. (“Ilan”) entered into a Settlement 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 the Settlement Agreement, the parties stipulated that “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 is a building located in New York County. As part of the Agreement, Jack and David agreed that, “simultaneously with the execution of this Agreement, they will enter into a separate and independent management agreement with an independent management company.”

On March 31, 2009, Ilan entered into a Management Agreement with BMC LLC (“BMC”). David signed the Management Agreement as President, and on behalf of Ilan. Jack signed the Management Agreement on behalf of BMC in his capacity as Manager of BMC. David and Jack subsequently began to disagree about the management of the building owned by Ilan, and David sought to have Ilan terminate the Management Agreement. Jack did not want Ilan to terminate the management agreement. Accordingly, David commenced an arbitration proceeding. In response, Jack and BMC petitioned this court to stay the arbitration, or alternatively, to disqualify Richard Cohn as arbitrator.

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By order dated September 3, 2010, this court granted Jack's petition to the extent that it stayed arbitration as to BMC, finding that nowhere in the Management Agreement did the parties to that Agreement (BMC and Ilan) agree to arbitrate disputes arising thereunder.

On December 24, 2010, Cohn issued a decision resolving the issue of (1) whether Ilan should terminate BMC as its managing agent; and (2) the completion of filing of outstanding tax returns of Ilan properties. With respect to the first issue, Cohn directed that Ilan terminate the Management Agreement with BMC. In so holding, Cohn found that "BMC LLC [was] not a licensed real estate broker in the State of New York and has not provided documentation indicating that BMC LLC is authorized to do business in New York." Cohn further noted that "[c]ontinued retention of BMC LLC by Ilan Properties, LLC could expose Ilan Properties to unknown liabilities. As to the second issue, Cohn directed that income tax returns up to and including the tax year 2009 be filed not later than January 31, 2011."¹

By letter dated January 6, 2011, Jack (through counsel) communicated his objection to Cohn's December 24, 2010 decision. First, Jack claimed that Cohn's decision was improper based upon his failure to conduct an evidentiary hearing on the matters addressed therein. In addition, Jack claimed that Cohn's decision violated this court's September 3, 2010 order "by making a determination that the Management Contract is to be terminated."

Cohn responded by letter dated January 21, 2011, wherein he stated that his decision was based upon Jack's December 7, 2010 submission papers, since Jack "chose not to submit any defenses to the claims of David Benishai," and "[t]here was no basis for a hearing to be held." Notwithstanding Cohn's position, Cohn offered Jack another opportunity "to provide pertinent and material documentary evidence or any other statements of Jack Benishai to rebut the claims made by David Benishai." Cohn further stated that he would conduct a hearing if one was warranted, based on the evidence submitted.

¹ Cohn's December 24, 2010 decision also directed Jack to reimburse ILAN \$10,225 "for improperly signing documents and authorizing checks to be issued on behalf of Ilan Properties." However, in his subsequent decision (discussed below), Cohn vacates this directive. Accordingly, this directive is moot.

In Jack's December 7, 2010 submission, Jack's position as to BMC's alleged unlawful operation without a license was that the issue "is beyond the scope of this arbitration as per the Settlement Agreement, the Management Agreement, and Justice Rakower's [September 3, 2010] Decision and Order." No substantive opposition to the termination of BMC was advanced. Nor was the issue of filing tax returns addressed, other than to allege that David failed to file corporate tax returns on behalf of ILAN during the period in which David "effectively controlled" the company.

In a two-page letter from counsel dated January 28, 2011, Jack responded to Cohn's letter. In it, Jack reiterated his position that "David Benishai's claims regarding the conduct of BMC is beyond your authority to arbitrate." Jack further stated that, "[w]ith respect to the issue of the BMC broker's license, based upon David Benishai's January 26, 2011 email, there is a question of fact with respect to the parties' understanding regarding that issue." The court notes that this e-mail was not included in Jack's December 7, 2010 submission, and has not been made part of the record herein. Jack further noted that, with respect to the tax returns issue, "you must remember that it is not an easy job to reconstruct the over twenty years during which David Benishai failed to file corporate returns, Federal and State, for Ilan Properties, Inc.

Cohn issued another decision by letter dated February 10, 2011. Cohn reaffirmed his prior decision with respect to directing that ILAN terminate the Management Agreement with BMC based upon "the fact that BMC LLC is not permitted by the State of New York Division of Licensing Services to perform the functions required in the management agreement." In so holding, Cohn noted that Jack's counsel provided "a license of BMC Realty LLC, which is not a party to the management contract between Ilan Properties, Inc. and BMC LLC," and that BMC "therefore should not be operating the properties owned by Ilan Properties." With respect to the filing of tax returns, Cohn extended the deadline for the returns to be filed.

Presently before the court is a petition by Jack for an order, pursuant to CPLR §§7506 and 7511(a)(b)(1) & (2), vacating Cohn's December 24, 2010 and February 10, 2011 decisions. Jack claims that these decisions must be vacated because Cohn was duty-bound to conduct an evidentiary hearing on the matters resolved therein. Jack also submits the affidavit of Isaac Benishai, a principal of BMC. Isaac states that "BMC is a d/b/a and thus the real estate brokerage license utilized by BMC whether

if be BMC, LLC or BMC Realty, LLC, is of no significance.” In addition to vacatur of Cohn’s decisions, Jack also seeks an order removing Cohn as arbitrator. David opposes.

It is well settled that a party seeking to vacate an arbitration award bears the “heavy burden” of demonstrating that the award “violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator’s power under CPLR 7511(b)(1)” (*Scollar v. Cece*, 2006 NY Slip Op 2814 [1st Dept. 2006]). “Even where an arbitrator has made an error of law or fact, courts generally may not disturb the arbitrator’s decision” (*Falzone v. New York Cent. Mut. Fire Ins. Co.*, 15 N.Y.3d 530, 534 [2010]). Moreover, a party moving to set aside an arbitration award on the basis of the arbitrator’s bias must substantiate his or claim with “clear and convincing proof” (*Infosafe Sys. v. Int’l Dev. Partners*, 228 A.D.2d 272, 273 [1st Dept. 1996]).

Here, the court finds that Cohn’s February 10, 2011 decision cannot be disturbed by the court. As a preliminary matter, Cohn’s resolution of termination issue without first conducting an evidentiary hearing does not constitute a basis for vacatur by the court. Since Jack did not present any substantive defense in his papers, but rather made a legal argument that the issue was not an arbitrable controversy based upon this court’s prior order, the court does not find that Cohn engaged in corruption, fraud or misconduct (*see Brooks v. BDO Seidman, LLP*, 2011 NY Slip Op 21075 [Sup. Ct., N.Y. County 2011]) (holding that arbitrators are not barred from awarding summary relief, and that such action does not *per se* constitute misconduct). Jack was afforded two separate opportunities to present evidence concerning the allegation that BMC could not legally perform its duties under the Management Agreement because it was not properly licensed.

Second, Cohn was fully empowered to render a decision to terminate the Management Agreement. In its prior order, the court noted that “[t]he business decision to have ILAN terminate the Management Agreement is a decision properly before the arbitrator.” Inasmuch as David and Jack, in their capacities as 50% owners of ILAN, reached an impasse as to the management of ILAN, such impasse was to be resolved by Richard Cohn, the arbitrator designated by name in the Settlement Agreement. Nothing in this court’s prior decision precluded the arbitration of business disputes within Ilan merely because they would effect BMC. Rather, the gravamen of the court’s prior decision was that any dispute arising out of the

Management Agreement between BMC and ILAN (which would include whether BMC's termination was lawful) was not subject to the arbitration provision in the Settlement Agreement.

As for Cohn's decision to terminate BMC based on its alleged unlicensed status, the determination is beyond the court's review. There is nothing in the record to indicate that Cohn either disregarded evidence submitted by Jack, or improperly prevented him from offering evidence as to BMC's status. What Jack is challenging is a legal conclusion that, even if flawed², could not be disturbed by the court.

Lastly, Jack fails to adduce clear and convincing evidence of bias on the part of Cohn. Therefore, vacatur of Cohn's decision and removal of Cohn from the remaining matters pending in the arbitration before David and Jack are inappropriate.³

Wherefore, it is hereby

ADJUDGED that Jack Benishai's motion to vacate Cohn's February 10, 2011 decision is denied; and it is further

ORDERED that Cohn's February 10, 2011 decision is confirmed.

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

Dated: June 2, 2011



UNFILED JUDGMENT

EILEEN A. RAKOWER, J.S.C.

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² As noted above, the petition challenges Cohn's determination on the grounds that BMC LLC (the party to the Management Agreement) is merely the d/b/a of BMC Realty, LLC, which is duly licensed. However, Jack's written submissions to Cohn did not contain - much less supply any evidence of - this assertion.

³ On June 1, 2011, Jack sought and obtained an order staying and enjoining Cohn from contracting with a new real estate management company to manage the properties owned by Ilan pending determination of the instant petition. In light of this decision, that stay is hereby lifted.