

**Matter of Bowery Residents' Committee, Inc. v
Lance Capital LLC**

2013 NY Slip Op 31199(U)

June 3, 2013

Sup Ct, NY County

Docket Number: 651184/13

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN Justice
J.S.C.

PART _____

Index Number : 651184/2013
BOWERY RESIDENTS' COMMITTEE,
vs
LANCE CAPITAL, LLC
Sequence Number : 001
VACATE AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/3/13

CK, J.S.C.

CYNTHIA S. KERN

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
In the Matter of the Application of

BOWERY RESIDENTS' COMMITTEE, INC.,

Petitioner,

Index No. 651184/13

-against-

DECISION/ORDER

LANCE CAPITAL LLC.,

Respondent.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmation in Opposition	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>

Petitioner Bowery Residents' Committee, Inc. has brought the present petition for an order vacating that portion of the final award in the underlying arbitration (the "Award") which provides that each party shall bear its own legal expenses incurred therein. In the alternative, it requests that the order be modified to provide that petitioner as the prevailing party shall be entitled to receive its commercially reasonable attorneys' fees, costs and disbursements incurred in the arbitration proceeding. Petitioner also seeks to vacate the arbitrator's disposition of the application for modification of the Award, which denied petitioner's application to modify the Award to award reasonable attorneys' fees, costs and disbursements to petitioner as the

prevailing party. Finally, petitioner seeks to remand this matter for a determination of petitioner's entitlement as the prevailing party to its commercially reasonable attorneys' fees, costs and disbursements incurred in connection with the underlying arbitration and the amount of such fees, costs and disbursements and that these issues be remanded to an arbitrator other than the arbitrator who issued the initial Award. Respondent Lance Capital, LLC has brought a cross-motion to dismiss the petition.

The relevant facts are as follows. Petitioner is a not-for-profit organization that was formed to provide interim housing and other services for the homeless and others in need. In February of 2010, it signed a long term lease for an entire building at 127 West 25th Street in Manhattan. The building was in need of extensive renovations, which were estimated to cost over \$13 million. Originally, the landlord of the building agreed to contribute \$4,180,000 to the costs of renovating the building and to provide petitioner with financing for an additional \$8,360,000 of the renovation cost. After entering into the lease, petitioner retained J.T. Magen & Co., Inc. ("Magen") as its contractor and the renovation work commenced in July 2010. The landlord did contribute \$4,180,000 for the costs of the renovation but did not provide the \$8,360,000 financing. As a result, petitioner needed additional funds to pay for the costs of renovating the leased premises.

Petitioner then entered into a "Tenant Improvements Lending and Advisory Services Agreement" with respondent (the "Agreement"), a firm which specialized in the financing of leasehold investments. Pursuant to the Agreement, respondent undertook to obtain financing for petitioner and petitioner agreed to pay respondent five percent of the financing that it procured for petitioner. The Agreement expired on February 28, 2011 but the parties entered into a

Restatement and Modification Agreement, which extended the Agreement to April 15, 2011 and modified it in some respects.

On June 30, 2011, petitioner issued a promissory note in the amount of \$10,432,629.04 to its contractor Magen to pay for the costs of renovating the leased premises. As a result of the issuance of the note by petitioner to Magen, respondent claimed that it was due \$521,631.45 pursuant to the Agreement, as modified. Petitioner took the position that respondent was not entitled to any compensation under the Agreement as a result of the issuance of the promissory note on the ground, inter alia, that respondent did not have any communication with Magen or any involvement in any way with Magen's acceptance of petitioner's promissory note.

On November 15, 2011, respondent commenced an arbitration proceeding against petitioner to recover its financing fee. The arbitration provision in the Agreement between the parties provided as follows:

[T]he Parties agree that any disputes under this Agreement will be governed and settled by an impartial independent arbitrator...and the determination of the arbitrator shall be final and binding (except to the extent there exists grounds for vacation of an award under applicable arbitration statutes)...The arbitrator will have no authority to make any ruling, finding or award that does not conform to the terms of this Agreement. Each party shall bear its own costs in any arbitration, with the prevailing party entitled to recover its commercially reasonable attorneys' fees, costs and disbursements....

On January 7, 2013, the arbitrator issued the Award in which he found that "Lance failed to establish its entitlement to a fee" and in which he denied respondent any fee in connection with the Magen note. He also held that each party shall bear its own legal expenses in connection with the arbitration. Petitioner then applied to the arbitrator for a modification of the Award to award legal fees to petitioner as the prevailing party. The arbitrator issued a decision in which he reaffirmed his denial of legal fees to petitioner and ruled that he was not required to award legal

fees under the terms of the Agreement to petitioner. He further ruled that equity would not be served if petitioner were awarded legal fees for its defense of the proceeding. As a result of this determination, petitioner commenced the present proceeding to vacate that portion of the Award which denied it attorneys' fees incurred in connection with the arbitration.

A party aggrieved by an arbitration award may move to vacate the award pursuant to Article 75 of the CPLR. Pursuant to CPLR § 7511(b)(iii), the award of an arbitrator shall be vacated if the court finds that "an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made...." An arbitrator "exceeds his power under the meaning of the statute where his award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power." *Matter of Kowaleski*, 16 N.Y.3d 85 (2010).

In the present case, the court finds that the arbitrator has exceeded a specifically enumerated limitation on his power by not ordering that petitioner be granted attorneys' fees in this action. The Agreement between the parties unambiguously provides that the prevailing party is entitled to recover its commercially reasonable attorneys' fees, costs and disbursements and that the arbitrator does not have the authority to make any ruling, finding or award that does not conform to the terms of the Agreement. It is undisputed that petitioner was the prevailing party in the arbitration based on the determination of the arbitrator that respondent was not entitled to recover any fee pursuant to the Agreement. Therefore, the arbitrator did not have the authority to exercise his discretion to not award attorneys' fees pursuant to the Agreement as petitioner was entitled to such fees pursuant to the express terms of the Agreement.

This conclusion is supported by the relevant case law interpreting an arbitrator's authority

with respect to an award of attorneys' fees. See *Matter of Gleason*, 284 A.D.2d 666 (3d Dept 2001); *Cohen v Ark Asset Holdings, Inc.*, 2001 WL 36168559 (Sup. Ct. N.Y. Cty). In *Gleason*, the court held that the arbitrator did not exceed his authority when he modified his earlier decision which had not awarded attorneys' fees. According to the court:

The contract expressly required that the successful party in any arbitration proceeding recover reasonable counsel fees. Therefore, this issue was squarely presented to the arbitrator and his initial determination refusing to award the successful party counsel fees was a decision in excess of his powers. Thus, the modification of the award simply represented the correction of an erroneous determination.

Similarly, in *Cohen*, the court held that the arbitrator did not exceed her powers when she modified the initial award to provide for attorneys' fees. According to the court, an arbitrator exceeds her powers "when she refuses to award requested attorneys' fees where a contract expressly provides that the successful party in an arbitration will be awarded reasonable attorneys' fees, and such an award may be modified pursuant to CPLR 7511." *Id.*, citing to *Gleason, supra*. Thus, the arbitrator's decision that the award should be modified to provide attorneys' fees to the successful party pursuant to the terms of the agreement between the parties did not exceed her powers. *Id.* In the present case, as in *Gleason* and *Cohen*, the Agreement between the parties clearly provides that the prevailing party is entitled to recover attorneys' fees and the arbitrator exceeded his power by refusing to award attorneys' fees as provided for in the Agreement between the parties to the prevailing party.

The decision primarily relied upon by respondent to support its argument that the arbitrator had discretion under the Agreement as to whether to award attorneys' fees to the prevailing party is inapposite. See *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818 (2d Cir. 1997). The issue in that case was whether the determination of the arbitrator to not award

