

Dunn v Goldman

2013 NY Slip Op 33579(U)

April 9, 2013

Sup Ct, NY County

Docket Number: 152349/12

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK
Justice

PART 39

KEVIN DONN, et al.

INDEX NO. 152349/12

-v-

Matt Goldman, et al.

MOTION DATE

MOTION SEQ. NO. 001

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

and cross-motion are decided in accordance with the accompanying memorandum decision.

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

Dated: 4/9/13

Signature of Barbara R. Kapnick, J.S.C.

- 1. CHECK ONE: CASE DISPOSED
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: IA PART 39

-----x
KEVIN DUNN, MAKATO DEGUCHI and
BMGT, LP,

DECISION/JUDGMENT
Index No. 152349/12
Motion Seq. No. 001

Petitioners,

-against-

MATT GOLDMAN, CHRIS WINK, PHIL
STANTON, and ASTOR SHOW
PRODUCTIONS, LLC,

Respondents.

-----x
BARBARA R. KAPNICK, J.:

The instant petition arises out of respondents' alleged failure to pay royalties related to performances and merchandising of Blue Man Group, a live stage production running in New York, Boston and Japan.

Respondents Matt Goldman ("Goldman"), Chris Wink ("Wink") and Phil Stanton ("Stanton") together are the Blue Man Group ("Blue Man Group").

Background

In or about 1990, after attending a performance of the Blue Man Group at the La Mama Theatre in New York City, petitioner Makato Deguchi ("Deguchi") approached Blue Man Group to propose an arrangement in which he and Mark Dunn ("Dunn") - who is now deceased and succeeded by his brother petitioner Kevin Dunn ("Kevin Dunn") -

would become the producers of the Blue Man Group show and would provide capital for it to open an exclusive engagement at the Astor Place Theater in 1991. Blue Man Group and Dunn and Deguchi entered into a written agreement (the "Agreement")¹ under which Dunn and Deguchi would produce the show and, in return, earn producer royalties.² (Petition, ¶ 15).

In 1996, Dunn, Deguchi and BMGT, LP ("BMGT")³ commenced an arbitration (the "1996 Arbitration") before the American Arbitration Association asserting claims against Blue Man Group, Astor and other Blue Man Group entities for the payment of royalties and other sums due under the Agreement. The parties settled their dispute and entered into a Settlement and Release Agreement, dated July 3, 1997 (the "1997 Settlement Agreement").

¹ As stated in the 1997 Settlement Agreement, discussed *infra*, the parties' "Agreement" is comprised of an agreement between Blue Man Group and Dunn, dated August 1, 1991 (the "Option Agreement"); an amendment to the Option Agreement, dated September 26, 1991 (the "Japan Rider"); an assignment of certain rights in the Option Agreement by Dunn to Deguchi, dated August 8, 1991 (the "Deguchi Assignment"); an assignment of certain rights in the Option Agreement and the Japan Rider by Dunn to BMGT, dated November 7, 1991 (the "BMGT Assignment"); an agreement between Blue Man Group and Dunn and BMGT, dated April 20, 1994 (the "Mirinda Agreement"); and an agreement between Blue Man Group, Astor Show Productions, Inc. ("Astor"), Dunn and BMGT, dated August 18, 1994 (the "Licensing Agreement").

² The show was a major success and a second production was soon opened in Boston. (Petition, ¶ 16).

³ The General Partner of BMGT is Mak Entertainment, Inc., of which Deguchi is the President. (Petition, ¶ 8).

(Petition, ¶ 16).

Paragraph 20 of the 1997 Settlement Agreement contains an arbitration clause (the "Arbitration Clause") which provides that:

Any controversy or claim arising out of, or relating to, this Settlement and Release Agreement, or any alleged breach hereof, shall be settled by arbitration in New York in accordance with the rules then obtaining of the American Arbitration Association and judgment upon the award rendered by the arbitrator may be entered in the highest court in New York having jurisdiction thereof. The parties agree that their rights and remedies in the event of any breach of this Settlement and Release Agreement shall be limited to enforcement of the terms hereof.

Once the 1997 Settlement Agreement was in place, the show continued to run successfully in New York and Boston, and a production opened in Japan in December of 2007. In 2008, respondents again stopped sending royalty statements and stopped paying some of the royalties purportedly due to petitioners under the 1997 Settlement Agreement. (Petition, ¶¶ 21-22).

On February 22, 2010, BMGT filed a demand for arbitration (the "2010 Arbitration") under the 1997 Settlement Agreement with the AAA, naming Goldman, Stanton, Wink and Astor as respondents. (Petition, ¶ 24). The 2010 Arbitration was commenced by BMGT alone because BMGT sought only to collect past-due royalties under the 1997 Settlement Agreement, payment of which ran through BMGT in

accordance with the terms of the Agreement. As a result, petitioners assert that BMGT was the only necessary claimant, since it was entitled to collect the full 6% royalty due from respondents for the New York production, and then to allocate these funds to BMGT, Dunn, Deguchi and non-party Akie Kimura in accordance with the 1997 Settlement Agreement. (Petition, ¶ 25).

Respondents responded to BMGT's arbitration demand, asserting the defense that they no longer owed BMGT any royalties because the Blue Man Group productions currently running - which petitioners contend have run continuously since opening in New York and Boston - are not the same show that was originally produced by Deguchi, Dunn and BMGT. (Petition, ¶ 26).

Before the 2010 Arbitration hearing took place, the parties agreed to try to mediate their dispute (the "Mediation"). The Mediation took place over two days, on September 16, 2010 and October 7, 2010. Deguchi allegedly attended the Mediation only in his capacity as President of the general partner of BMGT, not in his individual capacity. Dunn, who was not a party to the 2010 Arbitration, did not appear at the Mediation at all. (Petition, ¶ 27).

However, during the course of the Mediation on the afternoon

of October 7, 2010, Dunn received a telephone call while working in his office in California from then-counsel for BMGT, Victor Bushell ("Bushell"). (Dunn Affidavit, ¶ 12). Bushell, with whom Dunn had never previously met or spoken, advised Dunn that he was at the Mediation in New York, that a memorandum of understanding was being negotiated to resolve the 2010 Arbitration, and that the parties to the Mediation were preparing to execute it that same evening. (*Id.*, ¶¶ 12-13). Bushell further informed Dunn that the proposed memorandum of understanding would require the further negotiation of a long-form agreement which would supply many of the material terms that had been left out of the memorandum of understanding in the interest of reaching an agreement that day. (*Id.*, ¶ 13). Dunn was given a brief time that afternoon to review the draft memorandum of understanding, which he did without the assistance of counsel. (*Id.*, ¶¶ 14-15). He understood that the proposed terms would affect his overall royalty percentages payable to BMGT, but insists the memorandum of understanding was silent as to his independent interest in royalty payments. (*Id.*, ¶ 14).

At the end of the second day of the Mediation, a tentative understanding was reached between BMGT and Astor regarding certain terms, including payment of past-due royalties, reducing the royalty percentages due under the 1997 Settlement Agreement on a sliding scale for the New York and Boston shows for the years 2010-

2017, and payment of a buyout amount for BMGT to cover all fees and royalties relating to two productions of the Blue Man Group show that had taken place in Japan. (Petition, ¶ 29).

The forgoing points were memorialized in an undated, two-page memorandum of understanding that was entitled "Agreement" (the "2010 Agreement") and signed by Astor, Goldman, BMGT and the mediator; it was not, however, signed by petitioners Deguchi or Dunn, or by Respondents Wink or Stanton, or by the other Blue Man Group entities which are signatories to the 1997 Agreement. The 2010 Agreement provides that the signatories "intend and agree to be bound by the following terms pending execution and delivery of a long-form contract." (Petition, ¶¶ 29-30).

Deguchi claims that he believed the 2010 Agreement was only a tentative understanding which the parties would have an opportunity to revisit before a long-form agreement was signed, and that if no long-form agreement was ever signed by all necessary parties after a reasonable period of time, BMGT could recommence the Arbitration. Further, to the extent the 2010 Agreement purported to amend the terms of the 1997 Settlement Agreement, Deguchi claims to have believed that it could not be binding since Dunn, and Deguchi in his individual capacity, needed to approve and sign any agreement that would amend the 1997 Settlement Agreement. (Petition, ¶¶ 31,

32, 34).

Petitioners further assert that in addition to the lack of necessary written consent, many material issues were not addressed in the 2010 Agreement including, *inter alia*, the timing of royalty payments, what was to happen to the royalty payments after 2017, the parties' representations, warranties and indemnifications, the method for further amendments, the governing law, the deadline to execute a long-form agreement, payment of cast album royalties, and the profitability basis used for royalty computation. (Petition, ¶ 33).

BMGT and Astor exchanged long-form draft agreements, but petitioners assert that no meeting of the minds was ever achieved and no agreement was ever signed by any of the parties. Thus, on March 18, 2011, counsel for BMGT wrote to the AAA Panel requesting that the Arbitration be recommenced. (Petition, ¶¶ 35-36).

On March 21, 2011, the AAA Panel held a telephone conference with counsel for BMGT and counsel for Astor and the Blue Man Group. During the conference call, it was suggested that the AAA Panel could be authorized to determine if the 2010 Agreement was a valid, enforceable agreement. Petitioners contend that Dunn and Deguchi (in his individual capacity), not being parties to the Arbitration,

did not participate in and were not represented on this teleconference, and did not agree to allow the AAA Panel to determine any of their rights under the 1997 Settlement Agreement. (Petition, ¶ 37).

On March 31, 2011, counsel for the parties to the Arbitration (i.e., BMGT, Goldman, Stanton, Wink and Astor) entered into a stipulation (the "Stipulation") which provided that "[a]ll disputes concerning or relating to the enforceability and effect of the [2010 Agreement] shall be subject to arbitration before the Panel in the above-named matter" and which set forth a briefing schedule. Pursuant to the Stipulation, on April 18, 2011, the Blue Man Group and Astor moved the AAA Panel to enforce the settlement of the 2010 Arbitration under the 2010 Agreement. (Petition, ¶¶ 38-39).

On May 16, 2011, BMGT responded to the AAA Panel, asserting that the terms of the 2010 Agreement could not be valid and enforced because, *inter alia*, (a) the 2010 Agreement violated the terms of the 1997 Settlement Agreement by purporting to amend the Settlement Agreement without the written consent of all signatories thereto; (b) the 2010 Agreement purported to amend the rights of all signatories to the 1997 Settlement Agreement, even though Dunn and Deguchi were not parties to the Arbitration; and (c) the 2010 Agreement did not address a number of material issues and terms

that were necessary to have a complete agreement, but upon which the parties to the Arbitration were unable to agree. BMGT repeated its request that the Arbitration proceed upon the issues raised in BMGT's demand. (Petition, ¶ 40).

On August 1, 2011, the AAA Panel issued an order (the "August 2011 Order"), which stated that the 2010 Agreement between BMGT and Astor was valid and that all terms addressed and memorialized in the 2010 Agreement would be deemed "settled." (Petition, ¶ 41).

On September 20, 2011, BMGT asked the AAA Panel to clarify and revise the August 2011 Order as to whether it was intended to amend the 1997 Settlement Agreement, even though the Settlement Agreement required the signatures of all parties for any amendment, and whether the AAA Panel was deeming the 2010 Agreement to be binding, including on those parties to the 1997 Settlement Agreement who had not participated in the Arbitration or the Mediation and who had not signed the 2010 Agreement. BMGT's position was that, to the extent the August 2011 Order purported to amend the 1997 Settlement Agreement, the Order exceeded the AAA Panel's authority. (Petition, ¶ 42).

On March 2, 2012, the AAA Panel issued an order (the "March 2012 Order") which provides, in pertinent part, that "[i]n finding

that the 2010 Agreement is valid, the Panel also finds that to the extent that the 2010 Agreement modifies and amends the 1997 Agreement, it does so in accordance with the terms of the 1997 Agreement and no other signatories are necessary." The AAA Panel reasoned that since BMGT had filed the Arbitration on its own, Deguchi had the authority to negotiate on behalf of BMGT and the absent limited partners and to settle the issues which were the subject of the Arbitration. (Petition, ¶¶ 43-44).

Petitioners now bring the instant petition pursuant to CPLR Article 4 and sections 7502 and 7511 to vacate the August 2011 Order and the March 2012 Order, and seek a judicial declaration that these Orders be vacated, that the 2010 Agreement be deemed a nullity, and directing that the Arbitration proceed before a new panel of arbitrators upon the issues raised on BMGT's arbitration demand. Petitioners also seek a judgment awarding costs and fees to petitioners.

Respondents cross-move to dismiss the instant petition.

Discussion

Under CPLR 7511(b) an arbitration award must be vacated if, as relevant here, a party's rights were impaired by an arbitrator who exceeded his power or so imperfectly executed it that a final and definite award upon the

subject matter submitted was not made. It is well-settled that 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. Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where an arbitrator has made an error of law or fact.

In re Kowalski (New York State Dept. of Correctional Services), 16 NY3d 85, 90-91 (2010) (internal quotation marks and citations omitted); see also *Matter of Falzone (New York Cent. Mut. Fire Ins. Co.)*, 15 NY3d 530, 534 (2010).

The petitioners do not allege that the arbitral award violated a strong public policy or was irrational. Rather, they assert that the August 2011 and March 2012 Orders exceed the AAA Panel's authority for two reasons. First, they allege that while BMGT had the right to collect past due royalties and to distribute them to the other signatories to the 1997 Settlement Agreement, it had no authority to revise the Settlement Agreement going forward without the express written consent of all of the other signatories. In particular, petitioners contend that written consent on behalf of Dunn, and Deguchi in his individual capacity, is required to amend the 1997 Settlement Agreement and, without such consent, BMGT had no right or authority to bind them to the 2010 Agreement. (Petition, ¶¶ 42, 45).

Second, petitioners argue that the March 2012 Order exceeded the AAA Panel's authority by ruling on issues not put before it, including (a) the date of termination of royalties payable to Petitioners under the 1997 Settlement Agreement, as deemed modified by the 2010 Agreement by the AAA Panel; and (b) limiting the terms to be negotiated in any subsequent long form agreement to "standard terms most commonly found in Off Broadway musical theater production agreements." (Petition, ¶ 46).

Where there is a question as to whether an award exceeds an arbitrator's power

[a]n award may not be vacated at the instance of a participant...unless the limitation on the arbitrator's powers is contained, explicitly or by reference, in the arbitration clause itself, and the particular aspect of the award which, it is claimed, the arbitrator lacked power to make has been brought to the attention of the court requested to confirm (or vacate) the award, or it is clear that the opposing party has not been prejudiced by the failure to do so.

Matter of Silverman (Benmor Coats), 61 NY2d 299, 302-303 (1984).

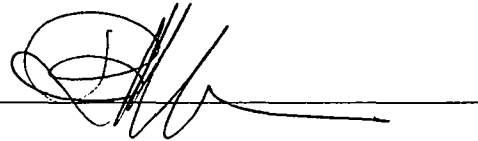
The Arbitration Clause, found in the 1997 Settlement Agreement and cited *supra* at 3, does not contain a limitation on the arbitrator's powers, either explicitly or by reference, necessary to support the petitioners' position. As such, the Court finds that the August 2011 and March 2012 Orders do not exceed the

authority of the AAA Panel and, therefore, will not be vacated.

Accordingly, the relief sought in the Petition is denied and the cross-motion to dismiss the Petition is granted. The Petition is dismissed with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Date: April 9, 2013



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C