

<b>Matter of J alas v Halperin</b>
2013 NY Slip Op 34082(U)
December 2, 2013
Supreme Court, Kings County
Docket Number: 42875/07
Judge: Debra Silber
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Order Appealed From of the Hon. Debra Silber, dated December 2, 2013 [8-19]

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2<sup>nd</sup> day of December 2013.

PRESENT:

HON. DEBRA SILBER,  
Justice.  
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In the Matter of the Application of  
SHIMSON JALAS and GOLDMARK INC.,

Petitioners,

- against -

ISRAEL HALPERIN, H.B. INTERNATIONAL LTD,  
AND ADINA S. HALPERIN AS ADMINISTRATOR  
OF THE ESTATE OF RAE RICKY HALPERIN,

Respondents.  
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Index No. 42875/07

Mot. Seq. # 11 & 12  
Submitted: 10/17/13

The following papers numbered 1 to 11 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-3, 4-6 _____
Opposing Affidavits (Affirmations) _____	7-9, 10 _____
Reply Affidavits (Affirmations) _____	_____
Affidavit (Affirmation) of Adina S. Halperin _____	11 _____
Other Papers _____	_____

Upon the foregoing papers, respondent Adina S. Halperin, as Administrator of the Estate of Rae Ricky Halperin (the "Estate") moves for an order 1) restoring this special proceeding to the active calendar, if necessary, 2) pursuant to CPLR 6212 (e), awarding damages, attorneys' fees and interest to the Estate and foreclosing on the undertaking provided by petitioners Shimson Jalas and Goldmark, Inc. (Goldmark) as security for the order of attachment dated February 11, 2008, and 3) pursuant to CPLR 6212 (e), entering an

order directing appropriate proceedings to determine the matter. Petitioners cross-move for an order a) pursuant to CPLR 7503 (a), staying the "instant action" and having the issues raised by the Estate submitted to arbitration, b) compelling respondents Israel Halperin (Israel), H.B. International, Ltd. (H.B.) and the Estate to submit to arbitration *de novo* to adjudicate the petitioners' claims against them, and c) pursuant to CPLR 7504, designating the arbitration panel to hear this matter.

This matter is hereby restored to active status and the motions are decided as follows.

#### Procedural History

Petitioners Goldmark Inc. and its principal, Shimson Jalas, commenced this special proceeding pursuant to CPLR § 7502 to confirm an arbitration award issued by a rabbinical court dated August 27, 2007, rendered in favor of petitioners. The dispute involved Goldmark's claim for money damages arising from certain contracts for the sale of gold between Goldmark and Israel/H.B. The parties have previously agreed to submit the matter to arbitration before the rabbinical court Mechon L'Hoyroa. On July 13, 2006, Israel signed an agreement to arbitrate, individually, on behalf of H.B. and "as agent" for his wife, Rae Ricky Halperin (RRH) pursuant to a power of attorney he claimed to have. It appears the first session of the arbitration was held on that date, July 13, 2006, but the decision of the rabbinical court was not issued for over a year as there were many more arbitration sessions. On July 30, 2006, RRH signed a power of attorney purportedly authorizing Israel to appear for her at the rabbinical court. RRH died intestate on April 18, 2007. On June 13, 2007, Israel executed a renunciation and disclaimer with respect to the Estate, apparently consisting solely of their one-family marital home, which he had previously transferred to RRH in 2002. As a result of the renunciation, RRH's five adult children became owners of the house by operation of law. On September 24, 2007, RRH's children executed a deed transferring the property from themselves as distributees to themselves personally, as tenants in common. Adina S. Halperin was not appointed Administrator of the Estate until May 12, 2009. Since

the Estate had no other assets, the court assumes she obtained Letters of Administration solely for purposes of this litigation.

Following the rabbinical court's issuance of their decision and award on August 27, 2007, but prior to the appointment of the estate administrator, petitioners commenced the instant proceeding to confirm the award, and for an order granting them prejudgment attachment of the assets of Israel, H.B. and RRH. By order dated February 11, 2008, a Justice of this court other than the undersigned granted the petitioners' ex parte application for an order of attachment. The attachment order applied by its terms to the defendants' bank accounts and to the subject marital home, which, by the date of the order of attachment, had been transferred to RRH's five adult children. A bond was purchased by plaintiffs as required by the Order of Attachment, which order states in pertinent part:

"ORDERED that the petitioner's undertaking be and the same is hereby fixed in the sum of \$1,092,532.00, and the petitioner shall pay to respondents all costs and damages including reasonable attorneys fees to be fixed by the court which may be sustained by reason of the attachment, and the plaintiff shall pay to the Sheriff all allowable fees, if the respondents recover judgment, or if it is decided that the petitioner is not entitled to an attachment of the property being so attached."

The petitioners then moved to confirm the order of attachment and the arbitration award. By order dated November 25, 2008, the Justice previously assigned to the matter granted petitioners' motion to confirm the order of attachment and the arbitration award. Ms. Halperin as Administrator later moved to be substituted as respondent and to vacate the arbitration award insofar as it applied to the Estate, alleging it was issued in violation of CPLR 7512.<sup>1</sup> Israel and H.B. cross-moved, in effect, to vacate the arbitration award and the

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<sup>1</sup>This statute provides, inter alia, that where a party dies after making a written agreement to submit a controversy to arbitration, the proceedings may be continued upon the application of, or upon notice to, the decedent's executor or administrator or, where it relates to real property, the decedent's distributee or devisee who has succeeded to the decedent's interest in the real property.

attachment insofar as it applied to them on the grounds of misconduct or prejudice by the arbitrators, and, once the award was vacated, to direct the parties to re-litigate the action in an arbitration before the American Arbitration Association (AAA), or, in the alternative, in the Supreme Court, New York County.

By order dated November 6, 2009, the prior Justice issued a decision and order for motion seq. #2-7. In pertinent part, the order granted petitioner's motion to substitute Ms. Halperin as Administrator of the Estate in place of "The Estate" as initially named, as a respondent, and granted the estate's motion to vacate the arbitration award of August 27, 2007. The court granted the petitioners' motion to the extent that matter would be remitted to the rabbinical court after notice was provided to Ms. Halperin and the distributees of the Estate. The court recognized that, assuming a valid agreement to arbitrate was made on behalf of RRH, notice had to be given to the administrator and/or the distributees under CPLR 7512. No such notice was given in the underlying arbitration proceeding, although it seems that there were arbitration sessions held after she had died. Additionally, the court granted that branch of the cross motion of Israel and H.B. which was to vacate the court's order dated November 25, 2008, but only to the extent of "holding that order in abeyance" pending a new determination by the rabbinical court and a new motion to confirm it. The court denied the branch of the cross motion of Israel and H.B. which sought to vacate the arbitration award and the attachment and to refer the matter to the AAA or the Supreme Court.

Respondents thereafter appealed certain parts of the November 25, 2008 and November 6, 2009 orders. Israel, H.B. and the Estate appealed that part of the November 25, 2008 order which granted petitioners' motion to confirm the February 11, 2008 order of attachment and to confirm the arbitration award. Israel and H.B. appealed that part of the November 6, 2009 order which denied their cross motion to vacate the arbitration award and the attachment insofar as it applied to them and to continue the matter before another

arbitration body or the Supreme Court, New York County, and granted that branch of their separate cross motion which was to vacate the November 25, 2008 order only to the extent of holding the order in abeyance pending a new determination by the rabbinical court concerning the Estate. The Estate separately appealed the part of the November 6, 2009 order which granted that branch of petitioners' motion to remit the matter to the rabbinical court for further proceedings. Petitioners cross-appealed that part of the November 6, 2009 order which granted the cross motion of the Estate to vacate the arbitration award insofar as it applied to the Estate.

On October 8, 2010, an Interim Order was issued on motions 8 and 9, which states that the motions were submitted, with a week for additional papers to be submitted, the stay of the arbitration as concerned the Estate would continue pending decision on the motions, and the Estate's application to reinstate the bond for the attachment was granted. The reinstated bond was filed with the County Clerk on October 29, 2010, and remains in effect. It is this bond which is the subject of the instant motion.

On November 18, 2010, the prior Justice on this matter issued a 10-page decision on motions 8 and 9. Therein, *inter alia*, the petitioners' motion was granted to the extent that the attachment was confirmed as against the Administrator of the Estate, and the Administrator's motion for permission to sell the house was granted, with several provisions, including one which required the amount of the undertaking to be deposited with the court out of the proceeds of the sale.

Before the house could be sold, just a few weeks later, the Appellate Division issued its decision on the appeals. In its decision dated December 28, 2010 (*Jalas v Halperin*, 79 AD3d 1126 [2010]), the Appellate Division, Second Department, modified the November 6, 2009 order by, *inter alia*, substituting a provision holding that the Estate was not bound by the arbitration award since neither RRH nor the Estate was a signatory to any arbitration agreement. The Appellate Division further dismissed the appeal from the order dated

November 25, 2008 as academic. In its decision, the Appellate Division noted that Israel was not empowered to sign the consent to arbitrate "as agent" of RRH, since the power of attorney he relied upon was signed on July 30, 2006, seventeen days after the date of the arbitration agreement.

The Appellate Division further noted that:

"the Supreme Court was without jurisdiction to issue the order dated November 25, 2008, insofar as it applied to the estate before an administrator was appointed to represent the estate. Moreover, since the decedent was not a proper party to the arbitration, the Supreme Court was without jurisdiction over the estate to issue the order dated November 25, 2008 granting the petitioners' motion to confirm the arbitration award and the attachment."

By order dated April 1, 2011, the prior Justice granted a motion (Seq. #10) filed by the Estate to strike the order of attachment from the records of the City Register as applied to the house. The legal effect of the Appellate Division decision was to dismiss this proceeding in its entirety as against RRH and the Estate, nunc pro tunc to its commencement. This annulled the attachment by operation of law, if it ever was effective as against a house owned by five people not named or served in this proceeding.

Petitioners brought a motion before the Appellate Division to reargue the December 28, 2010 order. At issue was the submission of "new evidence," an additional power of attorney, dated July 12, 2006, the day before the consent to arbitrate was signed, and bearing RRH's purported signature. The Appellate Division granted the motion to reargue, vacated and recalled its prior decision and order and substituted a new decision and order dated June 28, 2011 (*Jalas v Halperin*, 85 AD3d 1178 [2011]). In the new decision, the Appellate Division adds two sentences to its earlier decision, and states that the record did not support petitioner's contention that the earlier power of attorney was ever submitted to or considered valid by the rabbinical court, and pointed to Israel's affidavit in the record in connection with his first motion to vacate the arbitration award and attachment as applied to Israel and H.B.,

wherein he averred that he did not have a power of attorney from his wife when he signed the arbitration agreement on July 13, 2006. The Appellate Division thus adhered to its prior determination. Petitioners' motion for leave to appeal was denied by the Court of Appeals by order dated November 21, 2011. 17 NY3d 717. None of the parties obtained a stay of the proceedings in connection with any of the appeals.

#### **Damages Resulting from Attachment**

The Estate now moves for an order foreclosing on petitioners' undertaking and awarding the Estate certain damages, pursuant to CPLR 6212 (e) which provides:

“(e) Damages. The plaintiff shall be liable to the defendant for all costs and damages, including reasonable attorneys' fees, which may be sustained by reason of the attachment if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property. Plaintiff's liability shall not be limited by the amount of the undertaking.”

“[A]n attaching party is strictly liable for all damages resulting from a wrongful attachment, without regard to fault” (*Eichberg v Maisano*, 2 AD3d 444, 444 [2003]). “CPLR 6212 (e) recognizes that ‘attachment is a drastic provisional remedy to be used with care’” (*id.* at 444, quoting *Ford Motor Credit Co. v Hickey Ford Sales*, 62 NY2d 291, 303 [1984], quoting 22nd Ann Report of Jud Conf on CPLR, at 256). In her affirmation, Adina S. Halperin outlines various expenses incurred by the Estate during the alleged “attachment period” between February 11, 2008 and November 21, 2011, including attorneys' fees and costs, interest payments on mortgages encumbering the subject property, real estate taxes, insurance payments, utility payments, maintenance and reduced value. Ms. Halperin avers that these damages were incurred “because a serious and interested buyer abandoned their interest in purchasing the property, due to the cloud on title and the uncertainty of the lengthy appellate proceedings.” Ms. Halperin states that the property would have been “routinely sold” by the heirs-at-law shortly after RRH's death, thus avoiding the subsequent attorneys' fees, expenses and loss of value during the period the attachment encumbered the property.

There is no question that it was “finally decided that [petitioners were] not entitled to an attachment of the [Estate’s] property” (CPLR 6212 [e]). However, the court does not find that the Estate may recover damages up until November 21, 2011, when leave was denied by the Court of Appeals. Under CPLR 6224, an order of attachment “is annulled when the action in which it was granted abates or is discontinued, or a judgment entered therein in favor of the plaintiff is fully satisfied, or a judgment is entered therein in favor of the defendant.” When the Appellate Division determined that the Supreme Court did not have jurisdiction over either RRH or the Estate, it effectively ruled that the entire proceeding was void nunc pro tunc as to the Estate and the proceeding was thus abated as against the Estate. It was petitioners’ contention throughout the proceedings that the subject property, which had been transferred to RRH, was attachable as a fraudulent conveyance from Israel to his wife. Because the Appellate Division specifically vacated the attachment as it applied to Israel and H.B. and further found that neither RRH nor the Estate could be bound by the arbitration award, the court effectively determined that there was no basis to maintain the attachment against the Estate’s property either. While the Appellate Division did not expressly so state, the attachment must be deemed vacated and annulled as against the Estate’s property as well as against Israel and H.B. Since the attachment was annulled by operation of law when the Appellate Division issued its order on December 28, 2010, the Estate cannot claim that it suffered damages by reason of an attachment beyond this date.<sup>2</sup> In addition, the order of the prior Justice dated November 18, 2010 granted the Estate permission to sell the house pursuant to the terms therein, which became moot a few weeks later when the appeals were decided.

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<sup>2</sup>If the petitioners wish to pursue a claim that they were deceived by Israel and H.B. as to the power of attorney from RRH, if otherwise permitted by the statute of limitations, petitioners may choose to commence a separate action to recover from Israel and/or H.B. any damages which resulted from said misrepresentation.

As is relevant herein, the Administrator of the Estate, on behalf of RRH and Israel's children, is demanding, and is entitled to, any damages which they can prove, as well as reasonable attorneys' fees "sustained by reason of the attachment." When petitioners sought the order of attachment, they took the risk they would incur this liability. It is irrelevant, as regards the application of CPLR 6212(e), who is at fault for the lack of jurisdiction over RRH and the Estate, but the court notes it was caused by a perfect storm of errors<sup>3</sup> at best, or their father's negligence at worst.

#### **Petitioners' Cross Motion to Compel Arbitration**

While it is now settled that the Estate is not bound by the June 13, 2006 arbitration agreement between petitioners, Israel and H.B., petitioners nonetheless move to compel the Estate to arbitrate petitioners' claims before a rabbinical court based on an alleged agreement subsequently formed between the petitioners and the Estate. There is no singular written document signed on behalf of the Estate and by petitioners wherein the parties agreed to submit to arbitration before a rabbinical panel. Instead, petitioners rely on two summonses from a rabbinical court and a letter from Ms. Halperin dated May 19, 2013, and claim that when read together, they constitute the Estate's consent. The court disagrees, but for the reasons which follows, this issue is academic.

The first summons, dated March 4, 2013, was addressed to Ms. Halperin "for personal (sic) and as adm[inistrator] of the estate" of RRH and requested that she appear at a "Din Torah" at the courtroom of the Central Rabbinical Congress on March 12, 2013. Counsel for the Estate sent a letter to the rabbinical court which issued the summons and informed the court that Ms. Halperin and the Estate were declining to appear. A subsequent summons, dated May 13, 2013, was issued to Ms. Halperin and requested that she appear before the

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<sup>3</sup>By Israel, his representative (or "advocate") before the rabbinical court, the rabbinical court and the Supreme Court.

rabbinical court or else be subject to a "siruv."<sup>4</sup> This summons was issued to Adina Halperin individually, and is not expressly addressed to the Estate. In response to the latter summons, Ms. Halperin sent a letter to the rabbinical court, dated May 19, 2013 which stated that after consulting with her rabbi, she would comply with the summons. However, Ms. Halperin requested that she appear before a different rabbinical court, the Rabbinical court of the Union of Orthodox Rabbis. Her request to go to this different rabbinical court was rejected by petitioners.

As an initial matter, the court finds that the cross motion to compel is procedurally improper. CPLR 7503(a) provides that "[i]f an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action." The instant cross motion to compel is not being made in an "action" but rather in a special proceeding to confirm a prior arbitration award— a proceeding in which the Estate is no longer a party and which the Estate was retroactively freed from. If petitioners are seeking to compel arbitration under a separate arbitration agreement allegedly entered into in 2013 by the Estate or by Ms. Halperin individually, they must commence a separate special proceeding (CPLR 7502 [a]) ["A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action"].

Moreover, when presented with a motion to compel arbitration, "the court must determine, in the first instance, whether the parties made a valid agreement to arbitrate" (*Brown v Busey*, 245 AD2d 255, 255 [1997]), "and if so, whether the issue sought to be submitted to arbitration falls within the scope of that agreement" (*Schenkers, Intl. v Meyer*, 164 AD2d 541, 543 [1991]). "An agreement to arbitrate must be clear, explicit and

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<sup>4</sup>The threat of a "siruv," which entails a type of ostracism from the religious community, issued by a rabbinical court, and is a permitted enforcement mechanism pursuant to religious law (*Berg v Berg*, 85 AD3d 950, 952 [2011]).

unequivocal, and must not depend upon implication or subtlety" (*Messiah's Covenant Community Church v Weinbaum*, 74 AD3d 916, 918 [2010]; see *God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006]; *Matter of Waldron [Goddess]*, 61 NY2d 181, 183-184 [1984]).

Despite petitioners' argument to the contrary, Ms. Halperin's May 19, 2013 letter cannot be deemed an agreement to arbitrate petitioners' claims against the Estate. Significantly, the letter is in response to a summons to appear before a rabbinical court addressed only to Ms. Halperin as an individual, and not as an estate representative. There is nothing in either the summons or the letter in response which indicates that Ms. Halperin agreed to arbitrate any claims petitioners may have against the Estate. Further, all that can be gleaned from the responding letter is that Ms. Halperin would agree to appear before a rabbinical court, but one which is different from the court issuing the summons. It is not clear from the summons and responding letter that Ms. Halperin, in agreeing to appear before a different rabbinical court, was merely seeking to avoid a siruv or was in fact agreeing to arbitrate any claims petitioner has against the Estate.

Thus, insofar as there is no unequivocal agreement to arbitrate between petitioners and the Estate, and in any event the instant application is an improper one to make in 2013 within a special proceeding to confirm an arbitration award issued in 2007. The cross motion of petitioner is denied to the extent it seeks to compel the Estate to submit to arbitration. The cross motion is granted to the extent that this matter, as it concerns Israel and H.B. as respondents, shall be promptly remitted, within 60 days, to the rabbinical court pursuant to the directives of the November 9, 2009 order and the order of the Appellate Division. That is, before the Rabbinical Court Mechon L'Hoyroa, 4533 16<sup>th</sup> Avenue, Brooklyn, New York 11204.

An order referring this matter to a Special Referee to hear and report on the Estate's claim for damages, expenses and attorneys' fees resulting from the attachment is issued

simultaneously herewith. The assessment of damages is limited to those proven to have occurred after the date of the order of attachment (February 11, 2008) and before the date of the first decision of the Appellate Division (December 28, 2010) which annulled the attachment by operation of law. The court declines to award the attorneys' fees requested on the papers, and finds that a hearing is necessary to establish that the fees and expenses were incurred on behalf of the Estate and were related solely to the damages caused by the attachment, as provided in CPLR 6212(e) and were not previously reimbursed pursuant to an award of costs which may have been issued following the appeals.

The foregoing constitutes the decision and order of the court.

E N T E R,



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Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber  
Justice Supreme Court