

Merkin v Born

2014 NY Slip Op 30206(U)

January 23, 2014

Sup Ct, New York County

Docket Number: 652417/2012

Judge: Richard B. Lowe III

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ Justice

PART 56

Index Number : 652417/2012
MERKIN, J.EZRA
vs.
BORN, RICHARD
SEQUENCE NUMBER : 003
VACATE AWARD



INDEX NO.
MOTION DATE 1/1/13
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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

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

Dated: 1/23/14

[Signature] J.S.C.

- 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

-----X
J. EZRA MERKIN,

Petitioner,

Index No. 652417/2012

-against-

RICHARD BORN, RICHARD BORN TRUST and
BORN REALTY, L.P.,

Respondents.

-----X
Hon. Richard B. Lowe, III:

Respondents/Cross-Petitioners Richard Born, Richard Born Trust and Born Realty L.P. (“Born”), move to renew pursuant to CPLR 2221(e) and CPLR 406 seeking an order approving and enforcing a Settlement Agreement between the parties dated August 31, 2011 and vacating an arbitration award dated January 24, 2012.

Background

Born was an investor in Ascot Partners, L.P. (“Ascot”) and Gabriel Capital, L.P. (“Gabriel”, together with Ascot, the “Funds”). The General Manager of the Funds was Petitioner J. Ezra Merkin (“Merkin”). Merkin invested a substantial amount of the Funds assets with Bernard L. Madoff Investment Securities LLC (“Madoff”). It was later revealed that Madoff conducted a massive Ponzi scheme and Born was a victim by virute of his having invested in the Funds.

An action was commenced by the New York Attorney General bearing the caption *Cuomo v Merkin* [Index No. 450879/090] (the “AG’s action) Rather than participating in the

AG's action against Merkin, Born chose to bring an arbitration against Merkin pursuant to the Fund's governing documents. Under the terms of those documents, an investor who chose to arbitrate would forego an opportunity to participate in the AG's action.

In July 2010, Born commenced the arbitration against Merkin. After seven days of evidentiary hearings, the parties suspended the arbitration proceedings in an attempt to settle the matter.

A Settlement Agreement was executed by the parties on August 31, 2011 (the "Born/Merkin Settlement"). The Born/Merkin Settlement provided that it was expressly subject to this Court's "approval or confirmation that approval is not required" and gave Born the right to terminate the settlement and reactivate the arbitration in the event such approval was not obtained on or before October 31, 2011. At a hearing held on September 27, 2011, this Court rejected the Born/Merkin Settlement.

Born then recommenced the arbitration proceedings. On January 24, 2012, the arbitration panel issued an award and later denied Born's motion for a modification of the award on March 19, 2012.

Born brings this motion to renew alleging material errors made by this Court during the September 27, 2011 conference. The relief requested is the reinstatement of the Born/Merkin Settlement.

Discussion

A motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination," and the moving party must provide "reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221(e)(3)). "A

motion to renew is properly granted where new information arises *which existed at the time the prior motion was made* and is relevant to the moving party's claim, but which was unavailable or unknown to that party at the time of the original motion (*Lee v Ogden allied Maint. Corp.* 226 AD2d 226,227 [1st Dept 1996])(emphasis added).

Born's counsel argues that at the time the Court refused to approve the settlement, both he and the Court had been "snookered" by the AG (Tr. 12/17/2013 at 16:21). Born alleges that statements made by the AG, prior to September 27, 2011, within litigation or otherwise public statements as to how he intended to litigate the AG action, were misleading. He also argues that he relied on those statements when deciding to continue with his arbitration after the September 27, 2011 hearing. He argues that had this Court known those statements would not ultimately prove true when the AG's Settlement was executed, the Court would have approved the Born/Merkin Settlement.

Settlement negotiations in the AG action, a complex Martin Law matter, were protracted. At the time of the September 27, 2011 hearing there had been discussions. The first time an agreement was reached with the AG was December 2011, long after the Court rejected the Born/Merkin Settlement. However, that agreement continued to be subject to discussions and it was not ultimately implemented until June of 2012. In conjunction with the AG's pre settlement statements, Born seeks to rely on the terms of the AG's Settlement as grounds for this renewal motion. However, those terms are facts which were not in existence at the time of the motion and renewal is not appropriate.

Born also argues that prior statements by the Court on September 27, 2011 as to whether it would approve related settlements in arbitration actions were misleading. Born points to

settlements of arbitrations which were approved by this Court after the AG's Settlement was executed. The circumstances under which the Court approved those settlements were much different than they were on September 27, 2011. Born argues that had he been aware the Court would approve a settlement under those terms, he would have formulated his settlement accordingly. However, all of these facts upon which Born relies post date the September 27, 2011 hearing and, in addition to not being relevant on a motion to renew, if accepted would do nothing to change the outcome of this court's decision as they were not in existence at the time of the September 27, 2011 hearing.

If counsel believed the court erred on September 27, 2011 when it refused to enforce the settlement agreement, than Born should have either appealed this Court's ruling or moved to reargue. This renewal motion, based on new facts and made two years later, is procedurally improper.

Born, with the advice of counsel, chose the course of arbitration. He had alternatives such as participating in the AG Settlement, but chose to forego that course aware that going through with arbitration would bar him from participating in the AG Settlement. Born and his counsel speculated as to the outcome of the AG Settlement, believed arbitration to be the better strategy, and they are now unhappy with the outcome. These are not grounds for reinstating the Born/Merkin settlement or for allowing Born to participate in the AG's settlement.


Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED that the motion to renew is denied.

This shall constitute the Order and Decision of the Court.

Dated: January 23, 2014

ENTER:


J.S.C.

HON. RICHARD S. LEVINE III