Matter of Levy v Sne
2014 NY Slip Op 30741(U)
March 24, 2014
Supreme Court, New York County
Docket Number: 150096/13
Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS **PART** 58
Justice

In the Matter of the Arbitration of Certain controversies between, ISSAC LEVY, YOSEF BENHAMO, PITA EXPRESS BAKERY, INC.
Petitioners,

-v-

SHLOMO SNE, ESHKOL LEVY, et al.,

Respondents.

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MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this petition to confirm award.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1
Answering Affidavits– Exhibits	2-5, 8
Replying Affidavits	6, 7

CROSS-MOTION: _____ YES ___✓___ NO

Upon the foregoing papers, Petitioner's motion to confirm an arbitration award is decided as follows:

Petitioners Issac Levy, Yosef Benhamo and Pita Express Bakery, Inc. ("Pita Express") move to confirm parts of the Arbitration Award that was signed on October 15, 2012. Respondents Shlomo Sne and Liberio Rodriguez oppose the motion.

Petitioner Issac Levy is the sole shareholder of the petitioner corporation, Pita Express, while petitioner Yosef Benhamo is an officer of Pita Express. Pita Express is engaged in the business of baking, selling and distributing all forms of pita and lafa bread in New York City, New Jersey, Boston, Philadelphia and Baltimore.

Respondents Shlomo Sne and Liberio Rodriguez were former employees of petitioner Pita Express. Respondent Eshkol Levy was a former partner with petitioner Issac Levy. A business dispute arose between Eshkol Levy and Issac Levy which resulted eventually in respondents Shlomo Sne and Liberio Rodriguez being fired by Pita Express. Sne and Rodriguez thereafter became partners in a business competing against their former employer Pita Express.

On September 11, 2012, petitioners Yosef Benhamo, Isaac Levy and respondent Shlomo Sne, individually and on behalf of the respective corporations, entered into a written agreement, whereby they agreed to submit their controversies to the arbitrations of the Rabbinical Court of Machone L'Hoyroa.

Petitioners seek to confirm that branch of the Arbitration Award that directed respondent Shlomo Sne from not pursuing the customers of petitioner Pita Express according to a list attached to the Arbitration Award listing the customers of Pita Express.

"Courts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]). A court reviewing an arbitration award may not "re-weigh or re-examine the evidence " (*Matter of McMahan & Co. [Dunn NewFund I]*, 230 AD2d 1, 5 [1997]), or otherwise "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one" (*Matter of Associated Gen. Contrs., N.Y. State Ch. [Savin Bros.]*, 36 NY2d 957, 958-959 [1975]). The Court of Appeals has "stated time and again that an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479-480 [2006]).

"An arbitration award can be vacated by a court pursuant to CPLR 7511 (b) (1) (iii) on only three narrow grounds: if it is clearly violative of a strong public policy, if it is totally or completely irrational, or if it manifestly exceeds a specific, enumerated limitation on the arbitrator's power" (*Matter of Erin Constr. & Dev. Co., Inc. v Meltzer*, 58 AD3d 729, 729 [2009]).

"In order to be enforceable, an anticompetitive covenant ancillary to an employment agreement must be reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the public, and not unreasonably burdensome to the employee." (*Crown IT Servs., Inc. v Koval-Olsen*, 11 aD3d 263, 264 [1st Dept 2004], citing *BDO Seidman v Hirshberg*, 93 NY2d 382 [1999]). The Court of Appeals has "limited the cognizable employer interests under the [reasonableness prong] to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary." (BDO Seidman, 93 NY2d at 389) A restriction on a former employee's ability to work for competitor is invalid unless the employee's services were "unique or extraordinary" or if the job is considered a "learned profession" (such as law or accounting). (Id. at 389-390.)

It is well settled that where an employer's customer lists "are readily ascertainable from sources outside its business, trade secret protection will not attach and their solicitation by the employee will not be enjoined" (*Columbia Ribbon & Carbon Mfg. Co. v. A–1–A Corp., supra,* 42 N.Y.2d at 499, 398 N.Y.S.2d 1004, 369 N.E.2d 4; *Leo Silfen, Inc. v. Cream,* 29 N.Y.2d 387, 392, 328 N.Y.S.2d 423, 278 N.E.2d 636; *Walter Karl, Inc. v. Wood,* 137 A.D.2d 22, 27, 528 N.Y.S.2d 94).

Analyzing the case at bar according to the foregoing principles of law, the conclusion is inescapable that the Arbitrator erred in applying a restrictive covenant as it pertains to Shlomo Sne. Mr. Sne never had an employment contract in which he agreed

to not compete against his former employer in the event his employment ended. It is clear from the record, petitioners' customer lists do not qualify for trade secret protection. Lists of customers who might be interested in purchasing the baked items that is the subject of this dispute are readily ascertainable from many sources, including the yellow pages of telephone directories and lists of businesses prepared by chambers of commerce.

This Court finds that the provision in the Arbitration Award regarding Shlomo Sne, an ordinary employee, unreasonably limiting his right to follow his occupation in the future violates public policy pursuant to CPLR 7511 (b) (1) (iii).

Accordingly, it is

ORDERED that petitioners' motion to confirm the Arbitrator's Award dated October 15, 2012 is denied in its entirety.

Dated: 3/24/14

DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION ___ NON-FINAL DISPOSITION