Goldstein v Gross
2014 NY Slip Op 31125(U)
March 20, 2014
Supreme Court, Kings County
Docket Number: 10989/13
Judge: Mark I. Partnow
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At an IAS Part 43 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 20th day of March, 2014

P R E S E N T:

HON. MARK I. PARTNOW,
Justice.

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SAN (SHIMSHON) GOLDSTEIN,

Petitioner,

- against -

Index No. 10989/13

MOSES GROSS, et ano,

Respondents.

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The following papers numbered 1 to 13 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 9
Opposing Affidavits (Affirmations)	10 - 12
Reply Affidavits (Affirmations)	13
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, motion sequence numbers 4 and 2 are consolidated for disposition. Plaintiff Sam (Shimshon) Goldstein moves for an order: (1) pursuant to CPLR 7510, confirming the arbitration award of the Rabbinical Court of Givas Hamorah (the Rabbinical Court) dated May 30, 2013 (the Arbitration Award); (2) pursuant to CPLR 7511(c)(3), modifying the Arbitration Award to correct the spelling and address of the

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property at issue, 100 Luquer Street, Brooklyn, New York 11231 (the Property), which is erroneously referred to as 100 Laquer Street; (3) pursuant to CPLR 7514, entering a judgment in the amount of $325,000, jointly and severally, against respondents Moses Gross and 100 Luquer Towers LLC (100 LT); (4) pursuant to CPLR 6301 et seq., temporarily and permanently enjoining respondents, their attorneys, agents, employees, representatives and/or servants, and/or any other person or entities acting by or on their behalf, or under their direction or supervision, from alienating, selling, transferring title, encumbering, mortgaging or alienating, selling or transferring title of the Property unless respondents satisfy the $325,000 obligation in full prior to the sale or make arrangements to satisfy the judgment in full out of the proceeds of any sale or loan secured by the Property or, in the alternative, (5) pursuant to CPLR 6201(a)(3), ordering that if respondents close on the sale of the Property, the amount awarded to petitioner by the Rabbinical Court shall be deducted from the proceeds and be held in escrow by the court or by petitioner's counsel pending determination of the petition. Respondents cross-move for an order: (1) pursuant to CPLR 7511, vacating the Arbitration Award; (2) pursuant to CPLR 3211(a)(3), dismissing the petition on the ground that petitioner lacks standing to sue and therefore lacks the legal capacity to commence this action on the obligations owed by 100 LT, so that this court therefore lacks subject jurisdiction over the action; (3) pursuant to CPLR 3211(a)(5), dismissing this proceeding since the note evidencing the loan that petitioner made to 100 LT was assigned and the obligations relating to a note executed by 168-172 Meserole Towers,

LLC (Meserole), were fully paid, as admitted in the petition; and (4) pursuant to CPLR 3211(a)(1), dismissing the petition on the ground that respondents have documentary evidence of the assignment and the admitted payment of the 100 LT note.

Petitioner's Contentions

Petitioner commenced this proceeding seeking an order confirming the Arbitration Award which provided that respondents are jointly and severally obligated to pay $325,000 to petitioner and enjoining them from alienating, altering or in any way encumbering the Property until that amount is paid in full.

Petitioner alleges that on July 3, 2007, he lent $400,000 to 100 LT. By agreement dated July 3, 1007, petitioner and Mr. Gross executed an agreement entitled "Cancellation of Promissory Note and New Lending Agreement" in which Mr. Gross acknowledged the receipt of $400,000 that was then due and owing on loans to Mr. Gross' other companies, i.e., 158 Manhattan Towers LLC and 160 Manhattan Towers LLC, and stated that said amount would be loaned to 100 LT. The agreement also acknowledged another $200,000 debt owed by another venture managed by Mr. Gross, 199 Humbolt Towers, LLC, and pushed back the maturity date to February 1, 2010; that money was subsequently loaned to yet another venture under the control of Mr. Gross, Meserole. Pursuant to a note bearing the same date, Mr. Gross acknowledged the debt of $400,000 and promised to repay it, with interest in the amount of 15% per year, by monthly payments beginning on August 1, 2007 (the Note); the Note was secured by a mortgage and was personally guaranteed by Mr. Gross.

On January 12, 2008, Mr. Gross acknowledged personally receiving $600,000 from petitioner in a Hebrew document entitled "Standard Isska Agreement" (the Isska Agreement); the funds were invested in two of Mr. Gross' real estate ventures, 100 LT and Meserole.

Until August 11, 2009, 100 LT paid monthly interest on the Note, but then defaulted on the payment of the balance due. In June 2010, 100 LT made a payment of $100,000 to petitioner. In December 2011, petitioner called Mr. Gross to appear in the Rabbinical Court to arbitrate the dispute. On January 1, 2012, Mr. Goldstein and Mr. Gross executed an arbitration agreement pursuant to which they agreed "to submit all the controversies (claims and counter claims) between" them.

Petitioner recently learned from a member of 100 LT that respondents have entered into a contract to sell the Property and intend to close in the near future. The sales price is $15,000,000, of which the first $12,000,000 will go to pay 100 LT's other debts and the remaining $3,000,000 will be distributed to the members.

Respondents' Contentions

In opposition to petitioner's application and in support of their application to vacate the Arbitration Award, respondents argue that the Note and mortgage upon which petitioner relies were assigned to Doral Bank on June 30, 2010 (the Assignment) and that the Assignment was duly recorded in the Office of the City Register. To further support this contention, respondents allege that petitioner received a check in the amount of $100,000 from Doral Bank on that day. In addition, Doral Bank incorporated the Note in its

"Mortgage Modification and Extension Agreement". Respondents thus conclude that petitioner had no interest in the Note on January 1, 2012, when he entered in to the Arbitration Agreement, and on May 29, 2013, when the arbitration hearing took place, so that he has no standing to proceed to enforce any obligation relating to 100 LT.

Respondents go on to argue that the Arbitration Award must be vacated because they were not provided with notice of the arbitration proceeding as is required pursuant to CPLR 7506. In this regard, respondents contend that the waiver of notice relied upon by petitioner was signed by Mr. Gross and cannot, therefore, serve to waive notice on behalf of 100 LT. Moreover, although Mr. Gross waived formal notice, the arbitrators cannot schedule a hearing when one of the parties is totally unaware that the proceeding had been scheduled. More specifically, respondents assert that the arbitrators actually issued two rulings. Respondents assert that the first, issued on May 29, 2013, when respondents were not aware of the proceeding, advised petitioner to seek court intervention to compel arbitration. Respondents go on to assert that they did not consent to the hearing being adjourned to May 30, 2103, when the second Arbitration Award, the Award upon petitioner relies, was issued.

Next, respondents assert that this court has no jurisdiction to confirm the Arbitration Award, since once the arbitrators became aware that respondents contended that they were not required to arbitrate the subject dispute, the issue of whether there was a valid agreement to arbitrate should have been referred to the court. To further support this position, respondents attach an affirmation from Solomon Antar, Esq., in which Mr. Antar alleges that

Mr. Gross contacted him on May 29, 2013 with regard to the scheduled arbitration hearing. Mr. Antar telephoned one of the arbitrators, Rabbi Markowitz, who told him that the Panel would not consider any request for an adjournment unless Mr. Gross made an appearance, in person or in writing, accepting the jurisdiction of the arbitrators. He so advised Mr. Gross, who then made his decision with regard to whether he would appear. Mr. Gross alleges that in accordance with the Mr. Antar's advise, he did not appear, since he did not believe that he was obligated to arbitrate.

With regard to the merits of petitioner's argument, respondents argue that the arbitration agreement upon which petitioner relies was executed in connection with the $200,000 that he was owed by Meserole and that this dispute was settled by the payment of $215,000 by check dated January 12, 2012. Respondents allege that this position is further supported by the fact that petitioner failed to seek any payment from 100 LT between June 30, 2010 and May 2013.

Petitioner's Opposition

In opposition to respondent's cross motion and in further support of his petition, Mr. Goldstein submits an affirmation from Yaakov Markowitz, the secretary of the Rabbinical Court. Therein, Mr. Markowitz alleges that petitioner and Mr. Gross appeared before the arbitrators on January 1, 2012 and entered into an agreement to submit all of their disputes to the Rabbinical Court. Mr. Goldstein claimed that he was owed money by two limited liability companies that were owned or managed by Mr. Gross, 100 LT and Meserole. After

presenting their case to the arbitrators for approximately 30 to 45 minutes, petitioner and Mr. Gross stepped outside for about 15 minutes and when they returned, they told the arbitrators that they would try to resolve their disputes between themselves and if they could not do so, they would return to the Rabbinical Court after construction of a building owned by one of the companies was completed. Mr. Markowitz further alleges that on May 13, 2013, he drafted and issued a summons to Mr. Gross on behalf of Mr. Goldstein summoning the former to appear before the Rabbinical Court on May 29, 2013; he personally mailed it to Mr. Gross at his address on 45th Street in Brooklyn. Mr. Markowitz also spoke to Mr. Gross on May 22, 2013, when Mr. Gross telephoned him to advise him that another matter before the Rabbinical Court had settled; when Mr. Markowitz told Mr. Gross that he would see him on May 29, 2013 for the arbitration with Mr. Goldstein, Mr. Gross said "OK", apparently acknowledging that he was aware of the upcoming scheduled appearance.

Mr. Markowitz goes on to allege that nonetheless, Mr. Gross did not appear on May 29, 2013. Accordingly, the arbitrators heard evidence from Mr. Goldstein and issued a "siruv," or a contempt order, due to Mr. Gross' failure to appear. On the morning of May 30, 2013, Mr. Gross again telephoned Mr. Markowitz to tell him that his lawyer wished to proceed in a different forum. Mr. Markowitz advised Mr. Gross that the Rabbinical Court had issued a siruv against him and Mr. Gross told him that he would appear at 5:00 PM that evening; Mr. Markowitz so advised Mr. Goldstein. That afternoon, Mr. Markowitz received a telephone call from Mr. Antar, who asked if the Rabbinical Court would adjourn the

hearing; Mr. Markowitz told him that an adjournment would be granted if Mr. Gross personally signed a document agreeing to appear at the adjourned date. Later that afternoon, an attorney who works with Mr. Antar telephoned Mr. Markowitz and told him that Mr. Gross was not interested in signing the adjournment request. The Rabbinical Court proceeded at 5:00. When Mr. Gross failed to appear, the Arbitration Award was issued and Mr. Markowitz mailed a copy of it to Mr. Gross.

Mr. Goldstein also submits an affirmation in which he alleges that Mr. Gross and his attorney, Mr. Deckelbaum, who Mr. Goldstein believed also represented him, as he had done in the past, pressured him into signing the Assignment so that Doral Bank would provide additional financing for the Property. Mr. Goldstein alleges that he initially refused to execute the Assignment because he would not accept $200,000, i.e., Doral would pay him $100,000 immediately and he would receive an additional $100,000 from 100 LT when the sale closed, in satisfaction of the $400,000 that he had loaned respondents. Mr. Deckelbaum ultimately persuaded Mr. Goldstein to agree, but he told the attorney that he intended to seek to recover the shortfall before a Rabbinical Court. Mr. Goldstein also alleges that 100 LT recognized that he was owed an additional debt of $100,000 in the "Second Amended and Restated Operating Agreement" (Amended Operating Agreement), dated June 30, 2013. As is relevant herein, that agreement provided, in paragraph 11, that any funds available to 100 LT would be disbursed to repay the loan of $100,000 owed to him; to date, Mr. Goldstein has not been paid this $100,000.

Finally, Mr. Goldstein contends that Mr. Gross acknowledged that he personally received $600,000 from him in the Isska Agreement; that Agreement is not referred to in the Assignment. He explains that although the Isska Agreement states that the $600,000 is a personal debt of Mr. Gross, the Note executed to evidence the loan was structured as a loan to 100 LT because Jewish law does not recognize the existence of corporations.

Timeliness of Respondents' Cross Motion to Vacate the Arbitration Award

Petitioner's Contentions

Petitioner argues that respondents' cross motion to vacate the Arbitration Award must be denied on the ground that the application was not filed within 90 days of receipt of the Award, as is required pursuant to CPLR 7511(a). In support of this assertion, petitioner argues that as is set forth in the affirmation submitted by Mr. Markowitz, a copy of the Arbitration Award was mailed to respondents on May 30, 2013, the day that it was issued. Adding five days to that date, as required pursuant to CPLR 2103(b)(2) because it was mailed, the 90 day statue of limitations expired on September 4, 2013. Inasmuch as respondents did not file their cross motion until October 10, 2013, the application must be denied as untimely.

Respondents' Contentions

In opposition, respondents contend that the 90 day statue of limitations is inapplicable in this case, since they are entitled to raise the same arguments in opposition to an application to confirm an arbitration award as they could raise on an application to vacate the award.

Discussion

It is well settled that a proceeding to vacate an arbitration award must be commenced within 90 days of receipt of the arbitrators' determination (*see e.g. Matter of Pender v New York State Off. of Mental Retardation & Dev. Disabilities*, 27 AD3d 756 [2006], *lv denied* 9 NY3d 805 [2007], *rearg denied* 9 NY3d 977 [2007], citing CPLR 7511[a]). It is equally well settled, however, that "a party may oppose an arbitral award either by motion pursuant to CPLR 7511(a) to vacate or modify the award within 90 days after delivery of the award or by objecting to the award in opposition to an application to confirm the award notwithstanding the expiration of the 90-day period" (*Matter of Pine St. Assoc., L.P. v Southridge Partners, L.P.*, 107 AD3d 95, 100 [2013], citing *Matter of Brentnall v Nationwide Mut. Ins. Co.*, 194 AD2d 537, 538 [1993]).

Accordingly, petitioner's claim that respondents' application to vacate the Arbitration Award, made in a cross motion in opposition to petitioner's application to confirm the Award, is untimely is without merit.

Service upon Respondents

Respondents' Contentions

Respondents also argue that the notice of arbitration was not properly served upon them, since CPLR 7506(b) requires that service must be made personally or by registered or certified mail. In this case, Mr. Markowitz alleges only that he mailed the notice. Moreover, 100 LT did not receive any notice, since the correspondence was addressed only to Mr.

Gross.

Petitioner's Contentions

In opposition, petitioner argues that when Mr. Gross signed the Arbitration Agreement, he agreed to waive formal notice of the arbitration proceeding. He further avers that the Rabbinical Court had authority over 100 LT as well, because the corporation was the alter ego of Mr. Gross.

Discussion

As alleged by petitioner, the Arbitration Agreement provides that "[t]he parties hereby waive formal notice of the time and place [of] the arbitration proceeding and consent that the arbitration be held and commence with the jurisdiction of the testimony and evidence without the presence of a party if the party doesn't attend a scheduled hearing." Accordingly, Mr. Gross waived his right to be served pursuant CPLR 7506(b). In so holding, it is also noted that Mr. Gross does not address the issue of his consent to proceed to arbitration pursuant to the argument that he signed, nor does he offer any authority to support the apparent assertion that the notice required by CPLR 7506(b) must also be given when a matter that was already being arbitrated is adjourned.

In the alternative, having already participated in the arbitration when he appeared on January 1, 2010 and signed the Arbitration Agreement, Mr. Gross must be presumed to have waived his right to contest the issue of whether he was bound to arbitrate the instant dispute.

> "CPLR 7501 mandates that 'the court shall not consider whether the claim with respect to which arbitration is sought is

> tenable, or otherwise pass upon the merits of the dispute'; a party served with notice of intention to arbitrate who does not within 20 days thereafter raise the objections that a valid agreement to arbitrate was not made or complied with or assert the bar of a time limitation is thereafter precluded from raising such objections (CPLR 7503, subd [c]) and even if not so served is barred from raising those objections by participation in the arbitration (CPLR 7511, subd [b], par 2); and every procedural right provided for in the article other than the right to be represented by counsel is waived either by written consent or simply by continuing with the arbitration without objection (CPLR 7506, subds [d], [f]; 7511, subd [b], par 1, claimant [iv])."

(*Silverman v Benmor Coats*, 61 NY2d 299, 307 [1984]). Accordingly, having already participated in the arbitration, respondents cannot now argue that the dispute is not subject to arbitration or that they did not receive proper notice.

Finally, the court also notes that the affirmations of Mr. Antar and Mr. Markowitz clearly establish that Mr. Gross had notice that the arbitration would continue on May 29 and 30, 2013, but chose not to appear.

Confirmation/Vacatur of the Arbitration Award

Respondents' Contentions

Respondents contend that the Arbitration Award must be vacated because petitioner lacks standing to assert a claim against them, since pursuant to the Assignment, he no longer is owed any money from 100 LT. They further assert that the arbitrators never acquired jurisdiction over 100 LT.

Petitioner's Contentions

Petitioner contends that the only grounds upon which an arbitration award may be vacated are those set out in CPLR 7511. Petitioner thus concludes that respondents cannot succeed in having the Arbitration Award vacated on the ground that it was not issued in compliance with their interpretation of the law.

Discussion

There is a strong public policy favoring arbitration, and courts interfere as little as possible with the freedom of parties to submit their disputes to arbitration (*see e.g. Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 49 [1997]; *Shah v Monpat Constr.*, 65 AD3d 541, 543 [2009]). Further, "CPLR 7510 states that the court '*shall* confirm an award . . . unless the award is vacated or modified upon a ground specified in section 7511" (*Matter of Bernstein Family Ltd. Partnership v Sovereign Partners, L.P.*, 66 AD3d 1, 3 [2009] [emphasis in original). Thus, it has been held that:

> "The only basis upon which an award can be vacated at the behest of a party who participated in the arbitration or was served with notice of intention to arbitrate is that the rights of that party were prejudiced by corruption, fraud or misconduct in procuring the award, partiality of an arbitrator, that the arbitrator exceeded his power or failed to make a final and definite award, or a procedural failure that was not waived (CPLR 7511, subd [b], par 1)."

(*Silverman*, 61 NY2d at 307). More succinctly stated, "an arbitration award will not be overturned unless it is violative of a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on the arbitral panel's power" (*Wiederhorn v Ezra Merkin*,

98 AD3d 859, 861-862 [2012], *lv denied* 20 NY3d 855 92 [2012] [citation omitted]).

In addition:

> "[C]ourts are obligated to give deference to the decision of the arbitrator (*see Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 629 [1979] ['An arbitrator's paramount responsibility is to reach an equitable result, and the courts will not assume the role of overseers to mold the award to conform to their sense of justice']). This is true even if the arbitrator misapplied the substantive law in the area of the contract (*see Matter of Associated Teachers of Huntington v Board of Educ., Union Free School Dist. No. 3, Town of Huntington*, 33 NY2d 229, 235 [1973]."

(*New York City Transit Auth. v Transp. Workers Union, Local 100*, 6 NY3d 332, 336 [2005]). Thus, "an arbitrator's rulings, unlike a trial court's, are largely unreviewable" (*Matter of Falzone [New York Cent. Mut. Fire Intersection. Co.]*, 15 NY3d 530, 534 [2010]).

It is also well established that where "parties chose to resolve their differences in an ecclesiastical tribunal, temporal courts should not interfere with the binding results therein (*see e.g. Berman v Shatnes Laboratory*, 43 AD2d 736, 737 [1973]). Moreover, it has been held that:

> "Consistent with First Amendment principles, 'civil courts are forbidden from interfering in or determining religious disputes. Such rulings violate the First Amendment because they simultaneously establish one religious belief as correct ... while interfering with the free exercise of the opposing faction's beliefs' (*First Presbyt. Church of Schenectady v United Presbyt. Church in United States of Am.*, 62 NY2d 110, 116 [1984], *cert denied* 469 US 1037 [1984]; *see also Lightman v Flaum*, 97 NY2d 128, 137 [2001], *cert denied* 535 US 1096 [2002]; *Commack Self-Serv. Kosher Meats, Inc. v Weiss*, 294 F3d 415 [2002])."

(*Sieger v Sieger*, 297 AD2d 33, 36-37 [2002]).

Applying the above general principles of law to the facts of this case, having already determined that Mr. Gross agreed to submit all claims between him and Mr. Goldstein to arbitration before the Rabbinical Court, this court cannot review the determination made by the Rabbinical Court. Thus, this court may not review the Rabbinical Court's determination that it had already acquired jurisdiction over Mr. Gross, that the Assignment did not preclude an award in favor of Mr. Goldstein and that 100 LT can be held liable to Mr. Goldstein for money that he lent to corporate entities controlled by Mr. Gross. In so holding, it must be emphasized that, as discussed above, that this court could not vacate the Arbitration Award even if the findings of the arbitrators are erroneous as a matter of law in finding that 100 LT was liable to the same extent as was Mr. Gross with regard to the money borrowed from Mr. Goldstein (*see Matter of City of Oswego v Oswego City Firefighters Assn., Local 2707*, 21 NY3d 880, 882 [2013] [outside of the narrowly circumscribed exceptions that allow vacatur of an arbitration award, courts lack authority to review arbitral decisions, even where an arbitrator has made an error of fact or law]; *Matter of Weinrott [Carp]*, 32 NY2d 190, 194 [1973] [the courts have long been called upon to refrain from interference with arbitration, even where the arbitrator has committed an error of law or of fact]). This conclusion finds further support since, as discussed above, this court is precluded by the First Amendment from interfering in the proceedings held before the Rabbinical Court (*see e.g. Sieger*, 297 AD2d 36-37)

Accordingly, petitioner's application to confirm the Arbitration Award is granted and respondents' application to vacate the Arbitration Award is denied. From this it follows that those portions of petitioner's application seeking to stay the sale of the Property until the judgment awarded by the Rabbinical Court is satisfied is granted, since that relief was also granted by the Rabbinical Court (*see generally In re Claim of Ranni*, 58 NY2d 715, 717 [1982] [the doctrine of res judicata is applicable to arbitration awards and may serve to bar the subsequent relitigation of a single issue or an entire claim]; *Kern v Excelsior 57th Corp., LLC*, 77 AD3d 500, 501 [2010], *lv denied* 16 NY3d 706 [2011] [the doctrines of collateral estoppel and res judicata between the same parties apply as well to arbitration awards as to judicial adjudications]).

Amend Arbitration Award

The Parties' Contentions

In support of this branch of his application, petitioner argues that the court should modify the Arbitration Award to correct an apparent typographical error, i.e., "100 Laquer St." should be modified to read "100 Luquer Street." Respondents do not address this issue.

Discussion

Pursuant to CPLR 7511 (c)(3), the court may modify an arbitration award where it "is imperfect in a matter of form, not affecting the merits of the controversy." Inasmuch as it is clear that the Arbitration Award simply made a typographical error in spelling, this branch of petitioner's application is also granted.

Conclusion

For the above discussed reasons, petitioner's application to confirm the Arbitration Award dated May 30, 2013 is granted. Further, the Arbitration Award shall be deemed amended to refer to 100 Luquer Street, instead of 100 Laquer Street. A money judgment in the amount of $325,000 is entered against respondents Moses Gross and 100 Luquer Towers, LLC, jointly and each one separately. 100 Luquer Towers, LLC, is prohibited from selling or altering ownership to obtain a mortgage on the properties located at 100 Luquer Street in Brooklyn, NY, until the $325,000 judgment is fully satisfied.

The foregoing constitutes that order, decision and judgment of this court.

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