

<b>Goldberger v Fischer</b>
2014 NY Slip Op 33864(U)
August 21, 2014
Supreme Court, Kings County
Docket Number: 5226/11
Judge: David I. Schmidt
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5226/2011 Cross DTD 7/7/14

At an IAS Part 47 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 7<sup>th</sup> day of July, 2014

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

-----X  
ANSHIL GOLDBERGER,

Petitioner,

- against -

ARON FISCHER A/K/A AARON FISCHER A/K/A  
ALEXANDER FISCHER, et ano,

Respondents.

-----X  
The following papers numbered 1 to 15 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1 - 9
Opposing Affidavits (Affirmations) _____	10 - 15
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Index No. 5226/M

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Upon the foregoing papers, motion sequence numbers 3, 4 and 5 are consolidated for disposition. Petitioner Anshil Goldberger moves for an order: (1) pursuant to CPLR 3126, striking the claimed set offs interposed by respondents Aron Fischer a/k/a Aaron Fischer a/k/a Alexander Fischer and Matesyuhi Fischer a/k/a Matthew Fischer a/k/a Mates Fischer (collectively referred to as the Fischers) or, in the alternative, precluding them from offering

any evidence regarding their claimed set offs; and (2) confirming the arbitrators' award dated November 18, 2010 (the Arbitration Award) determining petitioner's ownership interest in F&G Associates (F&G) and directing that judgment be entered thereon. By separate motion, petitioner moves for an order, pursuant to CPLR 7510, confirming the Arbitration Award now that an accounting has been completed from which the value of his interest in F&G is ascertainable or, in the alternative, (2) granting renewal of his prior application to confirm the Arbitration Award, pursuant to CPLR 7510, and upon renewal, issuing an order confirming the Arbitration Award and entering a judgment for the value of petitioner's interest, together with interest pursuant to CPLR 5002. Respondents cross-move for an order compelling arbitration by the Rabbinical Court and staying this proceeding pending entry of a final award from the arbitrators.

#### *Facts and Procedural Background*

Petitioner and respondents created a partnership, F&G, to purchase certain mortgages; the partnership agreement allocated the expenses and profits of F&F between petitioner and respondents. When the parties could not agree to the amount of money due to petitioner, he initiated binding arbitration before a Rabbinical Court, the Central Rabbinical Congress of the U.S.A. and Canada (the Beth Din).

By decision dated May 9, 2000, the Beth Din found that:

"A. The partnership between the parties with respect to the mortgage that they purchased from the 'Chemical' Bank is such that the Plaintiff has 30% in the partnership and the Defendants have 70%.

"B. The Defendants may deduct from the award that they will receive what is owed by the Plaintiff according to the contract (partnership agreement) between them, as well as from the remaining obligations owed to the Defendants by the Plaintiff."

(the May 2000 Arbitration Award).

After reopening the arbitration proceeding at petitioner's request, the Beth Din issued a second decision, the November 18, 2012 Arbitration Award, in which the arbitrators held, in pertinent part, that:

"1. The defendant has 67% of the F&G Associates business and the plaintiff has 33%; the parties shall divide among themselves the money they got from the city as a result of the civil court rulings, in accordance with the above percentages.

"2. Because the money was delivered to the defendant and he has already delivered a significant part of the money to the plaintiff, the defendant is required to provide a correct and detailed accounting of all income he received at the partnership business, in order to determine whether he still owes the plaintiff money, and how much.

"3. All legal fees and other costs to carry out the claims from the government after 2/1/96 rest upon the defendant. If the defendant has an argument to deduct a certain amount from the money he received, he should justly account for it upon delivering it to the plaintiff, and he is required to immediately deliver to the plaintiff that which is owed to him in accordance with the above percentages.

"4. If the parties will not agree among themselves as to the accounting, they shall submit it to an accountant who is acceptable to the two parties; if they will not agree on an accountant, the Rabbinical Court will rule on the proper course of action. . . .

"6. If a dispute will arise between the parties about the interpretation of this Rabbinical Court Ruling, they shall present their issues before the Rabbinical Court signed below, and the Rabbinical Court will rule on the proper course of action."

(the Arbitration Award).

Thereafter, by petition returnable on April 18, 2011, Mr. Goldberger made his first application to confirm the Arbitration Award and to enter judgment thereon. By decision dated May 18, 2011, this court held that:

"Motion is denied except that the parties are ordered to have each of their accountants select a third, neutral accountant within 30 days and must return to arbitration (Rabbinical Court) for determination of the amount owed . . . pursuant to the arbitration argument between the parties. If the accountants do not agree on accountant Judge Schmidt will appoint an accountant and the parties shall return to arbitration. Judge Schmidt will monitor the progress of the Rabbinical Court by monthly calls from the parties."

(the May 2011 Decision). Petitioner further alleges that on that day, this court telephoned the Rabbinical Court and spoke to Rabbi Silber, who stated that the Beth Din considered their work with this matter done and that this court should work with the parties to finalize the matter.

The parties were unable to agree to the selection of the third arbitrator. By motion returnable August 23, 2011, petitioner moved to compel respondents to produce certain documents in aid of arbitration. By decision dated September 7, 2011, petitioner's motion was granted to the extent of appointing Mr. Resplea to act as the neutral accountant and ordering respondents to comply with petitioner's discovery requests within 30 days.

When respondents continued to object to the appointment of the third accountant, petitioner brought the now pending motion to strike respondents' set offs and to confirm the Arbitration Award. By decision dated November 28, 2011, the application was adjourned and the parties were directed to have their respective accountants contact Zell and Ettinger to act as the third impartial accountant to resolve their dispute. Two additional orders were issued by this court in which the motion was further adjourned, the issues to be addressed were clarified and scheduling issues were addressed.

On February 20, 2013, Mark I. Ettinger issued a memorandum setting forth his recommendations. Petitioner alleges that he objected to that memorandum on numerous grounds, including Mr. Ettinger's decision to compound the interest owed to respondents on the expenses that they paid on behalf of F&G, to disallow allow petitioner's request to recover interest on the money owed to him, to deduct income taxes paid by respondents that petitioner claimed were not verified and whether a payment made to Mr. Freilich on behalf of petitioner was a partnership expense. To address the issue of interest, the court suggested that petitioner obtain a Heter Iska from his Rabbi permitting him to receive interest and issued an order dated April 11, 2013 directing Mr. Fischer to provide Mr. Ettinger with signed authorizations allowing the accountant to obtain copies of the income tax return evidencing his claim for a set off for taxes paid. Petitioner obtained a Heter Iska. When Mr. Fischer had not yet provided a signed authorization by the next court appearance, May 21, 2013, this court issued an order appointing Mates Fischer as Aron Fischer's guardian for the

limited purpose of signing an authorization to obtain the subject tax returns.

Mr. Ettinger then issued a two part memorandum dated August 13, 2013. In Part 1, Mr. Ettinger determined that Mr. Fischer was not entitled to a deduction for the taxes that he alleged that he paid; he refused to omit the payment made to Mr. Freilich on behalf of petitioner; and he refused to add interest to the balance owed to petitioner, believing that the determination of whether Mr. Goldberger is entitled to interest is a question for the court or the Beth Din. Mr. Ettinger then prepared Part 2, which he stated that he prepared at the request of Mates Fischer in an attempt to permit the parties to enter into a "global settlement" concerning other deals entered into between them.

#### *Petitioner's Contentions*

In seeking confirmation of the Arbitration Award, petitioner first argues that whether his motion is considered to be one seeking to renew the motion originally returnable on November 28, 2011 or it is considered to be a new motion; all of the issues are properly before the court. More specifically, Mr. Goldberger asserts that although an accounting had not been completed when the earlier motion was made, Mr. Ettinger has since completed his review of the partnership's finances, so that the Arbitration Award should now be confirmed by this court, albeit with some modifications. Petitioner also argues that since respondents made no attempt to modify or vacate the Arbitration Award within 90 days after delivery of the Award to them, which was November 18, 2010, as is required pursuant to CPLR 7511, they should not now be permitted to oppose confirmation.

Turning to the merits, Mr. Goldberger argues that the court must now confirm the Arbitration Award because Mr. Ettinger's findings resolve the dispute of the amount of money owed to him by respondents on behalf of F&G. He goes on the argue, however, that the findings made by Mr. Ettinger's should be modified to exclude the interest awarded to respondents, since they are only entitled to an award interest for the period after the issuance of an award. As an alternative, petitioner argues that if respondents are awarded interest from any period before the Arbitration Award was issued, he should also be awarded interest pursuant to CPLR 5001 from the date that the money to which he is entitled was paid to respondents on behalf of F&G. Petitioner also argues that he should be awarded post-award interest pursuant to CPLR 5002; petitioner contends that an award of this interest is particularly appropriate in this case, since respondents have intentionally delayed final resolution of this matter. Finally, petitioner asserts that Mr. Ettinger's preparation of Part 2 of his memorandum was improper, since he never consented to it, Mr. Ettinger was not authorized by the court to address those issues and the accountant had improper ex parte conversations with Mr. Fischer in order to prepare the memo.

#### *Respondents' Contentions*

In opposition to petitioner's application and in support of their request for an order compelling arbitration, respondents first argue that petitioner's assertions should not be given credence because he misrepresents the facts in an effort to mislead the court. More specifically, respondents assert that paragraphs 4 and 6 of the Arbitration Award clearly

indicate that it was not a final and binding decision, since the parties were directed to provide an accounting and to return to the Rabbinical Court if any dispute arose. Instead, Mr. Goldberger chose to bring two petitions to confirm the award before this court. Respondents also argue that in choosing to resolve their dispute in a Rabbinical Court, they agreed to be bound by the law in the Talmud, and not by the laws of the State of New York. Accordingly, they argue that this court should not be involved in the arbitration, which is still not at an end.

Respondents go on to argue that the issue of whether interest should be awarded is properly determined by the Rabbinical Court because interest is not permitted under Rabbinical Law. Further, respondents assert that petitioner already brought an action against them seeking interest; that matter resulted in a judgment in the amount of \$161,817.64 being entered in favor of Mr. Goldberger (*Anshil Goldberger v Aron Fischer a/k/a Aaron Fischer a/k/a Alexander Fischer*, Kings County Sup Ct, Index No, 39565/06). Respondents also assert that Mr. Goldberger's claim that he did not participate in the request that Mr. Ettinger consider other matters is equally without merit, as is illustrated by reference to the order of this court dated February 9, 2012. In addition, respondents argue that the Beth Din had already ruled on this issue in the May 2000 Arbitration Award. They also contend that the Heter Iska obtained by petitioner is without effect, since he obtained the document on an ex parte basis, the document cannot be retroactive and it cannot create a right *nunc pro tunc*. Respondents thus assert that all of the issues to be resolved between them were referred to Mr. Ettinger and must now be ruled upon by the Rabbinical Court. Respondents conclude

by asserting that after the matter is remanded to the Rabbinical Court and a final award is issued, each of the parties can then move to confirm or vacate the award.

Respondents also rely upon an affirmation submitted by Rabbi Yitzchock Glick, as the Administrator of the Beth Din, in which he respectfully requests that this court should not further inject itself into the rabbinical arbitration because the language included in the Arbitration Award made it clear that if the parties could not agree between themselves, they should return to the Rabbinical Court. Rabbi Glick further avers that the Beth Din never advised this court that the Rabbinical Court was done with the matter, as represented by Mr. Goldberger, but instead advised the court that the parties should return to the Beth Din on any remaining disputes.

***Petitioner's Reply***

In reply, petitioner alleges that respondents have refused to pay him the money that has been owed to him since 1999, despite the fact that he commenced two arbitration proceedings against them and was forced to incur significant legal fees to reduce the first award to judgment. Petitioner further avers that respondents continue their attempts to delay his right to payment, although it is clear from the Arbitration Award that they were directed to take all steps necessary to permit a prompt accounting to be completed and to immediately deliver the balance of his 33% interest in F&G to him.

Petitioner thus asserts that since the Arbitration Award resolves all disputes submitted to arbitration, it is in writing, it is signed and affirmed by the arbitrators and it was delivered

to respondents, it must be confirmed. The absence of a monetary value for Mr. Golberger's partnership interest does not render it "non-final," as argued by respondents, since it sets forth the mathematical procedures to be utilized to determine the dollar amount of the award. Petitioner further argues that it is improper for the arbitrators to submit affirmations in an attempt to explain or clarify their rulings; accordingly, the affirmations from Rabbi Glick should not be considered. In the alternative, petitioner argues that respondents' participation in this court proceeding by going forward with the accounting constitutes a waiver of their right to compel arbitration. Finally, petitioner asserts that since the Arbitration Award is a final award, the issue of whether he is entitled to post-award interest is controlled by CPLR 5002.

#### *Discussion*

##### *Leave to Reargue/New Motion*

"A motion for leave to renew is intended to bring to the court's attention new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the court's attention" (*Tishman Constr. v City of New York*, 280 AD2d 374, 376 [2001], citing *Pahl Equip. v Kassts*, 182 AD2d 22 [1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992]; *Foley v Roche*, 68 AD2d 558 [1979]). The court thus concludes that since the accounting upon which petitioner now relies in moving to confirm the Arbitration Award had not yet been completed when he made his earlier motion, the motion now before the court cannot properly

be characterized as a motion to renew.

It is well settled, however, that “[w]here ‘a different state of facts has arisen since the first motion, a new motion based on these facts, but seeking the same relief as that sought in the first motion, may be made as a matter of right’” (*First Nationwide Bank v Brookhaven Realty Assocs.*, 223 AD2d 618, 621 [1996], *lv dismissed* 88 NY2d 963 [1996], citing 2 Carmody-Wait 2d, NY Prac § 8:73, at 392-393; *De Lacy v Kelly*, 147 App Div 37 [1911]). Accordingly, petitioner’s application is properly before the court.

***Timeliness of Respondents’ Application***

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 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 attempt to oppose confirmation of the Arbitration Award is untimely because it is made in a cross motion in opposition to petitioner’s application to confirm the Award is without merit.

### *Waiver of Right to Compel Arbitration*

As argued by petitioner, it is well settled that even where parties possess a right to compel arbitration, their participation in litigation may constitute an affirmative acceptance of the judicial forum, with a concomitant waiver of any right to arbitration (*see generally Accessory v Capco Wai Shing, LLC*, 39 AD3d 344, 345 [2007], citing *Sherrill v Grayco Bldrs.*, 64 NY2d 261, 272 [1985]; *De Sapio v Kohlmeyer*, 35 NY2d 402, 405 [1974]). It has been recognized, however, that:

“While a party who commences an action waives arbitration, the same cannot be said for a defendant (*see De Sapio v Kohlmeyer*, 35 NY2d 402, 405 [1974]). A defendant who submits an answer, or submits a pre-answer motion to dismiss the action, does not waive arbitration, especially if the arbitrability of the controversy is asserted as a ground to dismiss the action (*see Flynn v Labor Ready*, 6 AD3d 492 [2004]; *Spatz v Ridge Lea Assocs., LLC.*, 309 AD2d 1248 [2003]; *Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614 [1999]).”

(*Willer v Kleinman*, 114 AD3d 850 [2014]). Thus, for example, a purely defensive action is not inconsistent with a later attempt to force arbitration (*Matter of Haupt v Rose*, 265 NY 108 [1934]). Accordingly, “[t]he crucial question . . . is what degree of participation by the defendant in the action will create a waiver of a right to stay the action. In the absence of unreasonable delay, so long as the defendant’s actions are consistent with an assertion of the right to arbitrate, there is no waiver” (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66-67 [2007] [internal citations omitted]).

In this case, the dispute between the parties had been arbitrated before the Beth Din

for approximately ten years when petitioner made his earlier application to the court to confirm the Arbitration Award, and he then sought judicial intervention to compel discovery. Thus, it was petitioner who sought to move the dispute into the secular court, so that respondents had no choice but to respond to the motions made by petitioner, or they may well have had a judgment on default entered against them (*see generally De Sapio v Kohlmeyer*, 35 NY2d at 405, *Willer*, 114 AD3d 850). Moreover, it must be noted that respondents consistently maintained their position that the Beth Din had directed the parties to the arbitration to conduct an accounting so that the amount of money owed to petitioner could be determined and if any dispute arose, to return to the Beth Din.

Accordingly, the court concludes that respondents' conduct in this proceeding was not inconsistent with their claim that the parties were obligated to settle their differences by arbitration (*see Byrnes v Castaldi*, 72 AD3d 718, 720 [2010] [a defendant may forfeit the right to arbitrate by acting inconsistently with the intention to arbitrate, such as by participating in the discovery process without asserting the right to arbitrate]; *cf. Friedman v CYL Cemetery*, 99 AD3d 857, 858 [2012] [respondents failed to raise their purported right to arbitration as a defense in their answers, and thereafter moved for a change of venue, sought discovery, participated in preliminary conferences, moved to dismiss the cross claims, and waited more than one year after the interposition of the cross claims and more than eight months after the service of their answers to move to compel arbitration, so that their conduct was found to be clearly inconsistent with their later claim that the parties were obligated to

settle their differences by arbitration)).

#### ***Confirmation of the Arbitration Award***

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]). In this regard:

“[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 Tr. Auth. v Transp. Workers Union, Local 100*, 6 NY3d 332, 336 [2005]).

“[A]n 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]): Further, “[j]udicial review of an arbitrator’s award is extremely limited, and a reviewing court may not second-guess the fact-findings of the arbitrator” (*Matter of Liberty Mut. Ins. Co. v Sedgewick*, 43 AD3d 1062, 1063 [2007], quoting *Pearlman v Pearlman*, 169 AD2d 825, 826 [1991]). “Arbitrators have great discretion in fashioning remedies for aggrieved parties and are not bound by substantive rules of law in fixing awards. The arbitrator is empowered to do justice as he sees it, applying his own sense of law and equity to the facts as he finds them

and he can make his award reflecting the letter and spirit of the agreement” (*Dicker v Jodi-Lynn Washomatic*, 149 AD2d 649, 650 [1989] [internal citations omitted]).

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], *lv denied* 99 NY2d 651 [2003]).

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*

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<sup>1</sup> CPLR 7511(b)(1) provides that:

“The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

(continued...)

*Family Ltd. Partnership v Sovereign Partners, L.P.*, 66 AD3d 1, 3 [2009] [emphasis in original). Thus, “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]).

As is also relevant to the issues now before this court:

“[B]efore the court may intervene or even entertain a suit seeking court intervention, there must be an ‘award’ within the meaning of the statute. The ‘awards’ of arbitrators which are subject to judicial examination under the statute -- and then only to a very limited extent -- are the final determinations made at the conclusion of the arbitration proceedings. Generally, the award is the arbitrators’ decision and final determination upon the matters submitted (23 Carmody-Wait, NY Prac, § 141:120) and must be coextensive with the submission (*see Jones v Welwood*, 71 NY 208, 212 [1977]).”

(*Mobil Oil Indon. v Asamera Oil*, 43 NY2d 276, 281 [1977]). An award is indefinite or

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<sup>1</sup>(...continued)

“(i) corruption, fraud or misconduct in procuring the award; or

“(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

“(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

“(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.”

nonfinal for purposes of CPLR 7511 “if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy” (*Meisels v Uhr*, 79 NY2d 526, 536 [1992], citing *Hiscock v Harris*, 74 NY 108, 113 [1878]; *Matter of Guetta [Raxon Fabrics Corp.]*, 123 AD2d 40, 44 [1987]). In contrast, “[w]here ‘[t]he formulae for the computations are so clear and specific that the determination of the amounts owing . . . is merely an accounting calculation’, the award is final and definite and is required to be confirmed” (*Morgan Guar. Trust Co. v Solow*, 114 AD2d 818, 818 [1985], *affd* 68 NY2d 779 [1986], quoting *Matter of Hunter [Proser]*, 274 App Div 311, 312 [1948], *affd* 298 NY 828 [1949]; *accord Matter of Board of Educ. of Amityville Union Free School Dist.*, 62 AD3d 992, 993-994 [2009]).

As is also relevant to the instant dispute, “[i]n a contract dispute brought before an arbitrator the question of whether interest from the date of the breach of the contract should be allowed in an arbitration award is a mixed question of law and fact for the arbitrator to determine” (*Gruberg v Cortell Group*, 143 AD2d 39, 39 [1988], citing *Matter of Penco Fabrics [Louis Bogopulsky, Inc.]*, 1 AD2d 659 [1955]; *accord Rothermel v Fidelity & Guarantee Ins. Underwriters*, 280 AD2d 862 [2001]). It is equally well settled that petitioner is entitled to prejudgment interest from the date of the arbitration award pursuant to CPLR 5002<sup>2</sup> (see *Matter of Shimon v Silberman*, 92 AD3d 789, 790-791 [2012], *lv denied* 19 NY3d

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<sup>2</sup> CPLR 5002 provides that interest “shall be recovered upon the total sum awarded . . . from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment.”

802 [2012]; *Matter of Goldberger v Fischer*, 54 AD3d 955, 956 [2008]; *NYCTL 1998-2 Trust v Wagner*, 61 AD3d 728, 729 [2009]).

In this case, the court finds that there is not yet a final arbitration award before the court that may be confirmed or vacated. Significant in this regard is the fact that Mr. Ettinger is not an arbitrator, nor can the memorandum that he issued be considered an arbitration award. In so holding, the court also declines to find that the Arbitration Award set forth a definitive mathematical formula pursuant to which the chosen accountant could determine the amount of money to which petitioner is entitled. In fact, petitioner's arguments with regard to what expenses should be included in the award to him makes this clear.

Moreover, the Arbitration Award relied upon by petitioner unequivocally provides that:

"If a dispute will arise between the parties about the interpretation of this Rabbinical Court Ruling, they shall present their issues before the Rabbinical Court signed below, and the Rabbinical Court will rule on the proper course of action."

Thus, the Beth Din was fully aware that the Arbitration Award did not provide for a final resolution of the dispute between the parties because the above quoted paragraph directs the parties to return to the Rabbinical Court if they cannot resolve the matter between them.

Finally, in seeking confirmation of the award, petitioner argues that this court should modify the amount of interest recommended by Mr. Ettinger. As noted above, the determination of whether or not interest should be awarded from a date of the breach to the date of the arbitrator award is a decision that should be made by the arbitrators (*see Gruberg*,

143 AD2d at 39; *Rothermel v Fidelity & Guarantee Ins. Underwriters*, 280 AD2d 862; *Matter of Penco Fabrics [Louis Bogopulsky, Inc.]*, 1 AD2d 659). Moreover, an application to modify an arbitration award is controlled by CPLR 7511, which provides that an award may be modified if:

“1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

“2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

“3. the award is imperfect in a matter of form, not affecting the merits of the controversy.”

Thus, this court is without authority to modify the amount of interest recommended by Mr. Ettinger because such relief is not provided by the above statute (*see generally Bay Ridge Medical Group v Health Ins. Plan*, 22 AD2d 807, 807-808 [1964], citing *Matter of Torano [MVAIC]*, 19 AD 2d 356 [1963]; *Matter of Weiner Co. [Freund Co.]*, 2 AD 2d 341 [1956], *aff'd* 3 NY 2d 806 [1957] )

In the alternative, in the May 2011 Decision, rendered to dispose of petitioner's first application to confirm the Arbitration Award, this court held that the parties “must return to arbitration (Rabbinical Court) for determination of the amount owed . . . pursuant to the arbitration argument between the parties.” This decision constitutes law of the case, which doctrine provides that where an issue has been judicially determined, reconsideration thereof

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in the course of the same litigation is precluded (*see Anderson v Anderson*, 5 AD3d 1105, 1106 [2004] [internal citations omitted]; *see generally Martin v Cohoes*, 37 NY2d 162, 371 NYS2d 687 [1975] [law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as judges and courts of co-ordinate jurisdiction are concerned]).

Accordingly, it is


**ORDERED**, that respondent's cross-motion (Mot. Seq. No. 5) is granted and the instant matter is stayed pending the arbitration, however the stay is conditioned upon respondent posting an undertaking in the amount of \$ 710, 070.82 with the court, or alternatively, an agreement by the parties to deposit the same sum in escrow. The undertaking or escrow agreement must be finalized within 45 days of the date of this order, it is further

**ORDERED**, that petitioner's motion to confirm/reargue (Mot. Seq. No. 4) and the motion to strike (Mot. Seq. No. 3) are denied with leave to renew upon the conclusion of the arbitration or respondent's failure to post the above security interest.

ENTER,  


J. S. C.

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