

**Matter of Pinnacle Realty of N.Y. LLC v Greiner Maltz
Co. of N.Y. Inc.**

2014 NY Slip Op 34058(U)

March 11, 2014

Supreme Court, Queens County

Docket Number: Index No. 701655/2013

Judge: Orin R. Kitzes

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

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In the Matter of the Application of Number 701655/ 2013
PINNACLE REALTY OF NEW YORK LLC,

Petitioner, Motion
Date July 17, 2013

-against-

GREINER MALTZ COMPANY OF NEW YORK INC., Motion Seq. No. 1 & 2

Respondent.
-----x

The following papers numbered E1 to E40 read on this application by petitioner Pinnacle Realty of New York LLC (Pinnacle) pursuant to CPLR 7503(b) to stay the arbitration proceedings brought against it by respondent Greiner Maltz Company of New York Inc. (Greiner) before the Real Estate Board of New York (REBNY) and on this separate motion by nonparty REBNY pursuant to CPLR 1012 and/or CPLR 1013 to intervene.

	<u>Papers Numbered</u>
Order to Show Cause-Petition-Affidavits-Exhibits..	E1-E13
Notice of Motion-Affidavits-Exhibits	E16-E27
Answering Affidavits-Exhibits.....	E28-E32
Memorandum of Law.....	E33
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Memorandum of Law.....	E40

Upon the foregoing papers it is ordered and adjudged that the petition and motion are consolidated and determined as follows:

Petitioner Pinnacle commenced this special proceeding under Article 75 of the CPLR against respondent Greiner on May 2, 2013, by filing an order to show cause and verified petition, seeking to

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COUNTY CLERK
QUEENS COUNTY

stay an arbitration proceeding commenced against petitioner Pinnacle by respondent Greiner before nonparty REBNY, a real estate trade organization in the City of New York, regarding a dispute over brokerage commissions. Nonparty REBNY moves to intervene in the instant proceeding.

The case underlying this proceeding concerns a dispute between petitioner Pinnacle and respondent Greiner, which are commercial real estate companies, in connection with the sale of certain real property. On February 28, 2013, respondent Greiner made a demand for arbitration against petitioner Pinnacle and one of its brokers, David Junik, seeking to recover certain commissions paid to petitioner Pinnacle in connection with the sale of a group of heavy industrial use properties known as 150 Scott Avenue, Brooklyn, New York. In that demand letter, respondent Greiner alleges the following: The subject Brooklyn properties were sold to Josh and Jack Guttman d/b/a Zev Electric (Guttman). One of the brokers responsible for the sale, David Junik, began working on the transaction while he was a broker at and a shareholder of respondent Greiner. When David Junik left respondent Greiner for petitioner Pinnacle, he signed an agreement to share any commissions that might be earned on that transaction with respondent Greiner. When the subject property was sold to Guttman in May of 2012, David Junik and Pinnacle failed to honor that agreement to share the commissions.

After respondent Greiner made its demand for arbitration, Gary Blum, a principal of petitioner Pinnacle responded on March 7, 2013, by letter, in which he challenged REBNY's jurisdiction to hear the matter, stating that petitioner Pinnacle was not obligated to arbitrate because Pinnacle's membership in REBNY ended in the year 2012, and it made a decision not to rejoin in 2013, as evidenced by their nonpayment of dues. Although challenging the jurisdiction of REBNY, petitioner Pinnacle did not seek a stay of arbitration pursuant to CPLR 7503(c) at that time.

REBNY treated petitioner Pinnacle's letter of March 11, 2013, as an objection to arbitrate pursuant to Section B(11) of the REBNY Arbitration Procedure, and convened a Subcommittee of its Arbitration Committee to determine whether or not petitioner Pinnacle was required to arbitrate the matter at REBNY. The Subcommittee met on March 28, 2013, and issued its ruling on April 2, 2013, holding that pursuant to Article XIII of the REBNY Constitution, petitioner Pinnacle was required to arbitrate the matter, but that Junik was not required to be a party to the arbitration because he, individually, was not a member of REBNY.

REBNY thereafter circulated an Arbitration Agreement which respondent Greiner executed and returned on April 4, 2013, and which petitioner Pinnacle declined to execute and to return. After sending the Arbitration Agreement to petitioner Pinnacle on April 16, 2013, REBNY sent an email dated May 6, 2013, to Pinnacle notifying it that its time to sign and return the Arbitration Agreement was expiring that date since Section B(5) of the Arbitration Procedures of REBNY required the executed arbitration agreement to be returned within 20 days after the mailing date. Petitioner Pinnacle did not execute and return that Arbitration Agreement; nor did it request an extension of time to do so. Instead, on May 8, 2013, petitioner Pinnacle commenced the instant proceeding to stay arbitration before REBNY, and obtained a temporary stay of arbitration pending the hearing and determination of this petition.

It is well established that arbitration is favored by New York Courts, as a matter of public policy. (See *TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335 [1998].) Generally, under New York statutory and case law, a court may address three threshold questions on a motion to compel or to stay arbitration: (1) whether the parties made a valid agreement to arbitrate; (2) if so, whether the agreement has been complied with; and (3) whether the claim sought to be arbitrated would be barred by limitation of time had it been asserted in State court. (See *Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1 [1980]; see also *Da Silva v Savo*, 35 AD3d 647 [2006]; *Matter of County of Nassau v Civil Service Employees Association, Inc.*, 14 AD3d 509 [2005].) Once it is determined that the parties have agreed to arbitrate the subject matter in dispute, the court's role has ended and it may not address the merits of the particular claims. (See *Matter of Praetorian Realty Corp. [Presidential Towers Residence]*, 40 NY2d 897 [1976].)

In seeking to stay arbitration before REBNY, here, petitioner Pinnacle contends that respondent Greiner does not have the right to compel arbitration in that there is no binding arbitration agreement between the parties since petitioner Pinnacle and nonparty Junik are not, and never have been, members of REBNY.

In opposition thereto, respondent Greiner asserts that petitioner Pinnacle, like respondent Greiner, was a member of REBNY at the time when the commission dispute at issue arose; that pursuant to the REBNY Constitution, there is a valid agreement to arbitrate between respondent Greiner and petitioner Pinnacle; and that the subject commission dispute comes within the scope of that arbitration agreement. In support thereof, respondent Greiner proffers evidence that in 2012, two of its members and principals,

Ira Press and John Maltz, were "Non-Resident Broker" and "Non-Resident Appraiser" members of REBNY, and that one of petitioner Pinnacle's members and principals, James Tack, was a "Borough Broker"¹ member of REBNY. Members of REBNY, agree to abide by the provisions of the REBNY Constitution, and also agree that in the event of a dispute between members associated with different firms arising out of their professional activities to submit the dispute to arbitration in accordance with the provisions Article XIII of the REBNY Constitution, rather than to litigate the matter.

Article XIII, Section 1 of the REBNY Constitution provides that "[w]henever (i) differences shall arise between Broker A, Broker B, Borough Broker, Appraiser A, Non-Resident Appraiser, Non-Resident Broker, or Management A and Management B Members of the Board, or the firm with which such members are affiliated, such membership status and affiliation being determined as of the time when such differences arose pertaining to their business relations, and (ii) any such member on his own behalf or that of his firm, provided that such member's and his firm's membership shall be current, shall demand the other member or the firm with which he is affiliated to submit the same to arbitration, then it shall be compulsory upon such member and his firm to submit to arbitration as hereinafter provided."

Respondent Greiner contends that the REBNY Constitution constitutes an agreement to arbitrate between REBNY members, which includes respondent Greiner and petitioner Pinnacle, the "firm(s) with which such members are affiliated" since principals of both respondent Greiner and petitioner Pinnacle are "Non-Resident Appraiser," "Non-Resident Broker" and "Borough Broker" members of REBNY, respectively, as defined by the REBNY Constitution. Respondent Greiner also contends that, as such, it can compel arbitration under this agreement.

Respondent Greiner is correct in its contentions. Membership in a group, such as this, whose organizing documents require arbitration of certain disagreements, satisfies and constitutes an

¹ As defined in the REBNY Constitution, a "Borough Broker" member of REBNY is "[a]ny individual who holds a license as a real estate broker pursuant to New York Real Property Law Article 12-A who acts as a Real Estate Broker, Agent, or Auctioneer, either in his own name or as member of a partnership or an Officer of a corporation and whose main office and main business is in any borough of the City of New York, other than the Borough of Manhattan"

agreement under CPLR 7503(a). (See *Matter of Willard Alexander, Inc. [Glasser]*, 31 NY2d 270 [1972]; see also *Imagine Mktg. Group, LLC, v 125North10, LLC*, 2011 NY Slip Op 31948[U] [Sup Ct, NY County 2011].) Thus, there is a valid agreement to arbitrate in this case. In addition, the dispute over commissions concerns members of REBNY and the "firm(s) with which such members are affiliated." Therefore, contrary to petitioner Pinnacle's assertion that Pinnacle was never a member of REBNY, since James Tack was current in his membership in 2012, and held the status of "Borough Broker," and not an individual license, petitioner Pinnacle, the firm with which he was "affiliated" and in which he was a principal, was also a member required to arbitrate before REBNY.

Petitioner Pinnacle alternatively asserts that James Tack and Pinnacle are not required to submit to arbitration before REBNY since they resigned their membership in REBNY in 2012, and did not pay dues in 2013. Pursuant to Article III, Section 4 of the REBNY Constitution a member of REBNY can only resign their membership in writing addressed to REBNY or REBNY's Secretary, and a member may not resign while a demand for arbitration is pending. Here, there was no such written resignation letter or notice from either James Tack or petitioner Pinnacle.

Respondent Greiner also met its burden, as the party seeking to enforce the instant arbitration provision, of proving that the dispute herein is encompassed by said provision. (See *State of New York v Philip Morris Inc.*, 8 NY3d 574 [2007]; see also *Bowmer v Bowmer*, 50 NY2d 288 [1980]; *Matter of Cusimano v Berita Realty, LLC*, 103 AD3d 720 [2013].) A reading of the plain language of Article XIII, Section 1 of the REBNY Constitution makes clear that the issue of the commissions from the sale of the Brooklyn properties in dispute comes within the scope of the arbitration agreement. (See *State of New York v Philip Morris Inc.*, *supra*.) Further, the claims sought to be arbitrated are timely brought.

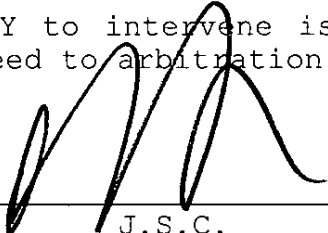
Inasmuch as this Court determines that the subject arbitration agreement is valid, the parties have complied with its terms, the dispute comes within the scope of the arbitration agreement and the claims sought to be arbitrated are not time-barred under State law, the application of petitioner Pinnacle to stay arbitration must be denied.

In light of this determination, nonparty REBNY's motion to intervene is denied as academic.

Accordingly, petitioner Pinnacle's application to stay arbitration is denied and the instant proceeding is dismissed. In

addition, the motion of nonparty REBNY to intervene is denied.
Thus, the parties shall forthwith proceed to arbitration.

Dated: March 11, 2014



J.S.C.