

<b>Matter of Stark v Rubel</b>
2015 NY Slip Op 31385(U)
July 27, 2015
Supreme Court, Kings County
Docket Number: 503016/2013
Judge: Mark I. Partnow
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At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2<sup>nd</sup> day of July, 2015.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

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In the Matter of the Arbitration of  
Certain Controversies Between

MOSHE STARK,

Petitioner,

- against -

SARA RUBEL (A/K/A SARAH RUBEL) and  
JUMBO ENTERPRISE CORP.,

Respondents.

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DECISION/ORDER

Index No. 503016/2013

Motion Sequence Nos. 1-5

The following papers numbered 1 to 29 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-3, 8-9, 13-16, 17-19, 20-22</u>
Opposing Affidavits (Affirmations) _____	<u>23-25, 26, 27, 28, 29</u>
Reply Affidavits (Affirmations) _____	_____
<u>Supporting</u> Affidavits (Affirmations) _____	<u>4, 5, 6, 7, 10-11</u>
Other Papers <u>Verified Answer</u> _____	<u>12</u>

Upon the foregoing papers in this special proceeding, petitioner Moshe Stark moves by notice of petition for an order, pursuant to CPLR 7510, confirming an arbitration award and, consequently, entering judgment against respondents Sara Rubel (a/k/a Sarah Rubel) and Jumbo Enterprise Corp. (Jumbo) in the amount awarded by the arbitrators. Respondents

cross-move for an order, pursuant to CPLR 7511, vacating the subject arbitration award. Non-party Miron Produce, Inc. (Miron) moves, by order to show cause, for an order, pursuant to CPLR 1012 and 1013, granting it leave to intervene in this special proceeding. Respondents move for an order, pursuant to CPLR 3025, granting them leave to amend their pleadings. Lastly, petitioner cross-moves for an order, pursuant to CPLR 3002, declaring section 5 of the Judiciary Law unconstitutional.

### ***Background and Arguments***

This special proceeding and the related motions stem from a commercial dispute about a commission allegedly due to petitioner in exchange for a shipment of eggs to respondents. According to the petition, on March 3, 2013,<sup>1</sup> petitioner and Rubel executed an agreement whereby they agreed to submit the dispute to a rabbinical court or council. Petitioner alleges that on April 4, 2013, the rabbinical court issued a decision and award, which directed respondents<sup>2</sup> to pay petitioner the principal sum of thirty thousand dollars. Petitioner states that he has since demanded that payment from respondents but has not received the same; therefore, claims petitioner, after complying with the procedures contained in Article 75 of

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<sup>1</sup> As identified in an affirmation submitted by the members of the subject rabbinical court. Rubel apparently had some doubt about the date of the hearing. The correct date of the hearing—more specifically, the day of the week—is relevant as discussed below.

<sup>2</sup> Petitioner claims that the arbitration agreement provides that the rabbinical court will treat the obligations of a natural person (i.e. Rubel) as binding on a corporation controlled by the natural person (i.e. Jumbo).

the Civil Practice Law and Rules, he has properly commenced the instant special proceeding to confirm the arbitration award and enter judgment against respondents.<sup>3</sup>

Respondents replied with a purported cross petition opposing confirmation of the arbitration award and a motion to vacate the award. In support, Rubel claims that she was denied due process by the rabbinical court—as an example, she states that she “repeatedly requested to present her defense and documentary evidence to the rabbinical court but they simply ignored her.” Rubel argues that the rabbinical court provided her with no opportunity to be heard, and also that it did not inform her that she had a right to retain counsel. She alleges both that petitioner was permitted to make his case to the rabbinical court *ex parte*, and that she was not permitted to either present evidence or cross-examine witnesses. She also avers that the alleged arbitration agreement did not contain a recitation of her rights and the potential consequences of losing her case. She contends that, therefore, the subject arbitration procedure fell well short of the due process requirements contained in Article 75 of the Civil Practice Law and Rules. Indeed, she characterizes the acts of the rabbinical court as “prejudicial misconduct.”

Also, Rubel asserts that the award of the rabbinical court is irrational. Rubel asserts that the arbitration stemmed from a dispute between Miron and petitioner (an alleged salesman employed by Miron) concerning petitioner’s obligations and commission amounts

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<sup>3</sup> Petitioner also alleges that the subject arbitration agreement provides for attorney’s fees payable to the enforcing party if judicial enforcement of an award is sought. Counsel for petitioner submits affirmations detailing their billing rate and itemized lists of billable activity. These affirmations in support of attorney’s fees are (unsurprisingly) opposed by respondents.

due. Rubel admits that Jumbo “is currently indebted to Miron on Miron’s unpaid invoices,” but not to petitioner. Respondents assert that there is no contract or other agreement between petitioner and either respondent; there is only the obligation of Jumbo to pay sums due to Miron. Respondents maintain that the rabbinical court, in essence, created a contractual relationship between petitioner and respondents where none existed. Respondents further argue that judicial enforcement of the arbitration award would thus lead to an irrational result: requiring respondents to pay the same debt twice, to different creditors. Respondents conclude that for these reasons, enforcement of the arbitration award would violate the public policy of the State of New York.

In opposition to respondents’ arguments, and in further support of his original arguments, petitioner first asserts that respondents make unsubstantiated allegations. As an example, notes petitioner, there is no evidence in the record that respondents attempted to retain counsel but were denied that right by the rabbinical court; instead, respondents only claim “in a most conclusory fashion” that they were not apprised of their right to representation. Petitioner claims that this self-serving statement is insufficient to demonstrate that the award should be vacated.

Next, petitioner claims that any failure of Rubel to understand the nature of the arbitration agreement that she executed is attributable only to her, and is not (as she suggests) indicative of procedural improprieties. Petitioner characterizes as “frivolous” any argument that Rubel should be excused from her obligations under the subject arbitration award

because she did not understand the written text of the arbitration agreement; also, he maintains, since the rabbinical court did not preclude her from presenting evidence or witnesses, any mistakes or failure in doing so is attributable only to her.<sup>4</sup> In sum, petitioner argues that Rubel agreed to, in writing, and later participated in the dispute resolution procedure she now attacks.

Also, continues petitioner, notwithstanding Rubel's present arguments, the award was justified because the rabbinical court correctly applied Jewish law (and Rubel agreed to this procedure) to resolve the dispute. The award, petitioner reasons, is thus not irrational or unsupported by proof. Petitioner also asserts that since the award is consistent with the common law relating to agents and their principals,<sup>5</sup> the award does not violate the public policy of this State. For these reasons, petitioner concludes that respondents did not meet their "heavy burden" necessary to demonstrate that the award should be vacated.<sup>6</sup>

Miron then filed and served its order to show cause, seeking leave to intervene in this special proceeding. In support, Miron states, by way of background, that it is in the business of selling produce and eggs to distributors and retail establishments; Miron asserts that it entered into an enterprise with petitioner based on petitioner's representation that he could

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<sup>4</sup> Petitioner submits an affirmation of the arbitrators whereby they "explain our award, with specific findings of fact and conclusions of Jewish law."

<sup>5</sup> Petitioner disputes that he was a Miron salesman; instead, he characterizes his business relationship with Miron as akin to either a joint venture or partnership.

<sup>6</sup> Petitioner also characterizes the purported cross petition as "jurisdictionally defective" and that it should simply be considered an answer to the original petition.

easily both purchase large quantities of eggs and sell them to a large base of potential customers. According to Miron, this representation turned out to be untrue, as petitioner consistently failed to both deliver and sell profitable timely shipments of eggs, and Miron thus ceased its business relationship with petitioner.

Given that Jumbo's indebtedness to Miron is undisputed, Miron claims that it is therefore "totally amazing" for petitioner, after commencing an arbitral proceeding against respondents, to convince (with only his allegations) the rabbinical court that the debt owed by Jumbo to Miron is somehow payable to petitioner. The award in petitioner's favor, reasons Miron, is therefore arbitrary and capricious. Moreover, continues Miron, the rabbinical court effectively adjudged Miron's rights in absentia; the award affects Miron's property rights, but Miron had no opportunity to defend its interests before the rabbinical court.

For these reasons, Miron concludes that it should be permitted to intervene in the instant special proceeding. Miron argues that, based on the facts and procedural posture in this case, it is entitled to intervene as of right; alternatively, Miron continues, this court should exercise its discretion and allow Miron to intervene. Miron concludes that since granting its motion for leave to intervene does not prejudice the parties, this court should therefore do so.

Petitioner opposes Miron's motion. More specifically, petitioner maintains that while he does not oppose Miron's intervention as such, he represents that any delay in this court's

decision to confirm the subject award prejudices him; petitioner claims that he may be precluded from further judicial action by either an expired limitations period or the doctrine of res judicata. Also, petitioner argues that this court should not (assuming that the award is confirmed) prevent satisfaction of the award on the ground that Miron has an interest in those sums; similarly, petitioner notes that Miron has not sought a preliminary injunction. Lastly, petitioner argues that it is simply meritless for Miron to contend that the arbitration award should be disturbed because Miron was a necessary party to the arbitration proceeding; petitioner claims instead that the arbitration agreement, as executed by petitioner and Rubel, should be enforced as written.

Next, respondents move for leave to amend the responsive pleading to add the affirmative defense that since the subject arbitration hearing was held on a Sunday, the arbitration hearing constituted “judicial proceedings” held on a Sunday, in violation of section 5 of the Judiciary Law. Respondents argue that, accordingly, the award is void. Respondents claim that the section 5 defense is a meritorious one; also, respondents argue that petitioner has no serious claim of “any undue prejudice or surprise or that he is prejudiced by any delay in raising this defense as he has been aware throughout the entirety of these proceedings that the arbitration was held on a Sunday.” Respondents conclude that, therefore, this court should grant their motion for leave to amend their pleadings to include an affirmative defense pursuant to section 5 of the Judiciary Law.

In response, petitioner moves for an order declaring section 5 of the Judiciary Law unconstitutional. In support of this motion, and in opposition to respondents' motion for leave to amend their pleadings, petitioner first argues that respondents have not provided a reasonable excuse for waiting six months until after the arbitral decision was issued before raising an affirmative defense pursuant to section 5 of the Judiciary Law. Specifically, petitioner points out that the subject decision (including the date of the hearing) became part of the record at the end of January, 2014, but respondents did not move for leave to amend until late July of 2014. Petitioner concludes that since respondents offer no reasonable excuse for waiting six months after having definitive proof that the arbitration hearing occurred on a Sunday before moving for leave to amend, respondents' motion should thus "summarily be denied."

Alternatively, petitioner claims that the proposed amended response to the instant petition is an attempt to improve its response and add new arguments, which should not be permitted in this special proceeding. Petitioner argues that a response to a petition filed in a special proceeding is akin to papers filed in opposition to a motion; thus, petitioner contends that respondents, "sensing that its [*sic*] papers are weak" should not now be allowed the "gamesmanship" of asserting better arguments later in the process than what is anticipated.

Petitioner then turns to the merits of his motion. Petitioner claims that section 5 of the Judiciary Law is, at least as applied to private arbitrations conducted by tribunals

consisting of observant Jews, unconstitutional. In support of this claim, petitioner first alleges that section 5 violates the Establishment Clause of the First Amendment of the United States Constitution. Petitioner argues that a statute that precludes observant Jews from conducting a religious arbitrations on Sundays has an overtly religious purpose: “forcing private parties to rest on Sunday.” Petitioner continues by pointing out that section 5 has the impermissible non-secular effect of inhibiting certain religious practices—namely, private adjudication of Jewish law by rabbinical tribunals. Furthermore, petitioner asserts that section 5 lacks any rational connection to any permissible purpose. Petitioner characterizes section 5 as analogous to so-called Sunday blue laws, and maintains that courts of this State have repeatedly held such laws unconstitutional; petitioner also contends that courts have interpreted section 5 in view of “current societal values and behavior.”

Petitioner adds that section 5 is unconstitutional because it violates the Free Exercise Clause of the First Amendment. Petitioner contends that Jews are entitled to engage in rabbinical arbitration on Sundays and have those proceedings result in enforceable awards; petitioner further claims that “observant Jews are prohibited under Jewish law from bringing claims in secular court.” Thus, reasons petitioner, section 5 “impedes [and] burdens” Jewish observances, and therefore violates the Free Exercise Clause.

Similarly, petitioner claims that section 5 violates the Equal Protection Clause of the Fourteenth Amendment. Petitioner characterizes section 5 as “unreasonable, arbitrary or capricious[.]” and contends that it “restrains an individual’s right to pursue a business for a

reason that has no relationship to the public's need." Petitioner argues that courts have held that it is arbitrary for the legislature of this State to choose Sunday (as opposed to any other day of the week) as a day of rest. Petitioner continues, stating that there is "no reasonable public policy . . . why observant Jews - who voluntarily submitted to arbitration" should be able to participate in hearings on Sundays (with resulting arbitral awards that are enforceable in the courts of this State). Petitioner also suggests that section 5 effectively discriminates against non-Christian citizens. For these reasons, petitioner concludes that section 5 violates the constitutional guarantee of equal protection.

In the alternative, petitioner argues that arbitration is not a judicial proceeding for section 5 purposes, at least not since the Civil Practice Law and Rules were enacted in 1962. Since then, petitioner contends, arbitration has not been considered a judicial or special proceeding. Indeed, states petitioner, since 1976, the courts of this State have considered private arbitration a "creature of contract" between private parties. Accordingly, petitioner concludes that section 5 does not apply to the underlying arbitration hearing and award.

Again in the alternative, petitioner contends that if this court finds that the underlying arbitration hearing and award did in fact violate section 5, the proper remedy is to remand the dispute to the rabbinical council for continued or new hearings (not to be held on a Sunday). Petitioner also asserts that, in that instance, it would be unwarranted for this court to disqualify the arbitrators.

Lastly, petitioner argues that, according to the properly-executed arbitration agreement in this matter, respondents expressly agreed to an attorney's fees provision. Specifically, petitioner notes that the applicable terms of the agreement provide that if a party does not abide by the decision of the rabbinical council and challenges it in secular court, that party shall pay reasonable attorney's fees incurred by the challenge. Petitioner alleges that, therefore, it is entitled to an order directing respondents to reimburse his counsel for the litigation costs of this proceeding (including the costs incurred by opposing respondents' motion for leave to amend their pleadings).

In opposition to petitioner's arguments concerning the constitutionality of section 5 of the Judiciary Law, respondents contend that the appellate courts of this state have upheld similar day-of-rest statutes against constitutional challenges if such statutes "neither forces [a party] to observe Sunday Sabbath nor hinders [a party] from observing his own Sabbath." Respondents ask this court to follow the same reasoning in this case: section 5 of the Judiciary Law does not force any party to keep Sunday as a day of rest, and it does not prohibit any party from having a day of rest on a day other than Sunday. Therefore, reason respondents, section 5 is constitutionally sustainable. Additionally, respondents point out that at least one court expressly disclaimed any "constitutional infirmity" with respect to section 5. For these reasons, respondents conclude that this court should deny petitioner's motion for an order declaring section 5 of the Judiciary Law unconstitutional.

## *Discussion*

First, this court grants the petition to confirm the underlying award and denies respondents' motion to vacate the 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]). 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]). More specifically:

"[t]he 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).

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]). Additionally:

"courts 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, this court notes that:

“[c]onsistent 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]).

Respondents’ claims in opposition lack merit. First, Rubel cannot avoid the consequences of executing the arbitration agreement (and thus agreeing to submit the dispute to the rabbinical council, which would use Jewish law to resolve the dispute) merely by stating that she thought the hearing would be informal; so long as she had the capacity to enter a contract, she had the capacity to submit to binding arbitration (*Dormitory Authority*

of *State of N. Y. v Span Elec. Corp.*, 18 NY2d 114 [1966]).<sup>7</sup> Respondents have not demonstrated that Rubel (who has the apparent ability to be an executive officer of Jumbo) lacked any such capacity. Similarly, Rubel, as an officer of Jumbo, had the power to bind Jumbo to any relevant arbitration provision (*Hirschfeld Productions, Inc. v Mirvish*, 218 AD2d 567 [1st Dept 1995], *affd* 88 NY2d 1054 [1996]).

Respondents may be correct that the rabbinical council made mistakes of law; however, this court cannot disturb the arbitral decision even if the rabbinical council made errors of law or fact (*Matter of Weinrott [Carp]*, 32 NY2d 190, 194 [1973] [the courts have long been called upon to refrain from interference with arbitration]). Also, as noted above, this court is further precluded by the First Amendment of the United States Constitution from interfering in the proceedings held before the rabbinical council (*Sieger*, 297 AD2d 36-37). For these reasons, this court confirms the underlying arbitral award and denies respondents' motion to vacate the award.<sup>8</sup>

This court denies Miron's motion for leave to intervene. What Miron seeks is, in essence, consolidation of this special proceeding with the plenary action between Miron and Jumbo; this court should "appropriately decline[]" to do so (*Matter of Anastasi & Assoc. v*

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<sup>7</sup> Similarly, so long as she did not lack capacity to enter into a contract, her age and familiarity with language are immaterial.

<sup>8</sup> This court denies petitioner's request for an award of attorney's fees in this special proceeding. The issue of attorney's fees is itself a subject for arbitration (*see e.g. Matter of RAS Sec. Corp. (Williams)*, 251 AD2d 98 [1st Dept 1998]), and, as such, this court will allow the rabbinical council to determine the amount of such an award.

*Masaryk Towers Corp.*, 52 AD3d 241, 241 [1st Dept 2008]). In any event, Miron's arguments lack merit. Miron is not a party to the arbitration agreement; therefore, the arbitration does not affect Miron's rights. Moreover, if Miron is correct that petitioner has used the arbitration to prejudice Miron (i.e. petitioner will now have an enforceable judgment against Jumbo for the principal sum of \$30,000, which Jumbo could have paid to Miron to settle Miron's claims), nothing in the arbitration award (or this decision and order) prevents Miron from commencing an appropriate proceeding against petitioner to resolve the dispute between Miron and petitioner.

Also, and noting again that this court may not properly interfere with the decision of a religious tribunal (*Sieger*, 297 AD2d 36-37), respondents' motion to amend their pleadings to include the affirmative defense concerning Judiciary Law § 5 is thus moot. Likewise, petitioner's motion for an order declaring Judiciary Law § 5 unconstitutional is academic.<sup>9</sup> These two motions are thus denied.

### ***Conclusion***

For the foregoing reasons, the petition of Moshe Stark is granted, and this court confirms the underlying arbitral award. The clerk of this court is directed to enter judgment

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<sup>9</sup> This court notes that the dispute over Judiciary Law § 5 appears to be in vain. Assuming arguendo that arbitrators perform a "judicial function" (*see e.g. Brody v Owen*, 259 App Div 720 [2d Dept 1940]), "[a]n award made on Sunday by arbitrators of the Jewish faith, in settlement of a religious dispute, has been held valid" (McKinney's Cons Laws of NY, Book 29, Judiciary Law § 5, Notes of Decisions at 16, citing *Isaacs v Beth Hamedash Society*, 1 Hilt 469 [Common Pleas 1857] *aff'd* 19 NY 584 [1859]). There is no indication that *Isaacs* is no longer good law; as such, the underlying award is valid notwithstanding the fact that it was issued on a Sunday.

in the principal sum of \$30,000 against respondents Sara Rubel and Jumbo Enterprise Corp., jointly and severally. The motion of respondents for an order vacating the underlying arbitral award is denied. The motion of non-party Miron Produce, Inc. for an order granting it leave to intervene in this special proceeding is denied. The motion of respondents for an order granting them leave to amend their pleadings is denied. Lastly, the motion of petitioner for an order declaring section 5 of the Judiciary Law unconstitutional is denied.

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

E N T E R,



J. S. C.

**HON. MARK I PARTNOW  
SUPREME COURT JUSTICE**



**NANCY T. SUNSHINE  
Clerk**

**KINGS COUNTY CLERK  
FILED  
2015 JUL 27 AM 10:00**