

Lamb v Nustvold

2016 NY Slip Op 32496(U)

December 21, 2016

Supreme Court, New York County

Docket Number: 157207/16

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

JOHN LAMB,

Petitioner,

-against-

JOHN NUSTVOLD,

Respondent.

INDEX NO. 157207/16
MOTION DATE 11-16-2016
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 15 were read on this petition to/for Art. 75 relief and cross-petition to vacate arbitration award:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED

1 - 4

5 - 10, 11 - 13, 14

15

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered and adjudged that the petition to confirm the July 11, 2016 arbitrator’s final award and pursuant to Real Property Actions and Proceeding Law (RPAPL) § 231 and §901[1] for partition and to direct the sale of their apartment at public auction, is granted. Respondent’s cross-petition to vacate the arbitrator’s award pursuant to CPLR §7511[b], [1], [i],[ii],[iii], and [iv] alternatively to modify the award pursuant to CPLR §7511[c], is denied.

In December of 1995, John Lamb (hereinafter referred to as “Petitioner”) and John Nustvold (hereinafter referred to as “Respondent”) jointly purchased cooperative apartment #7C at 310 West 94th Street, New York, New York 10025 (hereinafter referred to as the “apartment”) and are joint tenants in common pursuant to the proprietary lease. Petitioner and Respondent deposited their incomes into a joint checking account that was used to pay for living expenses.

On November 12, 2014, Petitioner and Respondent entered into an agreement titled “Postseparation Agreement Regarding Housing” (hereinafter referred to as the “agreement”). The form for the agreement came from a book of text and agreements published by NOLO Press. The agreement states that both parties would live separately effective January 1, 2015, but that Respondent would remain in the apartment, pay all monthly bills related to the apartment and be responsible for all repairs until such time as he decided to relocate, and the apartment would be put up for sale. Pursuant to the agreement in December of 2014, both parties closed on a Home Equity Line of Credit (HELOC) totaling \$100,000.00, which was completely drawn down by the Petitioner. The parties also agreed that any disputes that could not be resolved through good faith solutions would be arbitrated.

On March 30, 2015 Petitioner without Respondent’s consent had the stock certificates for the proprietary lease modified to change the parties’ status as joint tenants in common with no right of survivorship, from joint tenants in common with right of survivorship (Pet. Exh. B).

Petitioner sought arbitration and served a September 25, 2015 demand for arbitration on Respondent. The demand sought to have the agreement set aside as unconscionable and for lack of consideration. The demand also sought the sale of the apartment and personal property of the parties, with equitable distribution of the net proceeds (Cross-Pet. Exh. B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

On May 6, 2016, the parties and their attorneys appeared for a hearing before Gerald Levine, Esq. (hereinafter referred to as the “arbitrator”) of American Arbitration Association (“AAA”). On July 11, 2016, the arbitrator rendered a final award, directing the parties to market the apartment, or in the event of failure to agree, directed Petitioner to commence this proceeding. The final award directed proceeds of the sale to be first used to pay the expenses of the sale and fees of the referee and then divided between the parties equally, with Petitioner’s share of the proceeds to be used to first pay off the HELOC before distribution of proceeds to him. The parties’ personal property was directed to be sold with the parties splitting the proceeds. The award states that the terms of the November 12, 2014 agreement were unconscionable, and that Petitioner had acted to disavow the agreement at the earliest opportunity, and that it should be set aside (Pet. Exh. B).

Petitioner commenced this proceeding by Order to Show Cause seeking to confirm the July 11, 2016 arbitrator’s final award and pursuant to RPAPL § 231 and §901[1] for partition, and to direct the sale of the apartment at public auction, together with the costs and reasonable attorneys fees for bringing this proceeding.

Partition is the preferred method, but pursuant to RPAPL §901[1] sale of the property will be directed “if it appears that partition cannot be made without prejudice to the owners.”(Loughran v. Cruickshank, 8 A.D. 3d 799, 778 N.Y.S. 2d 224 [3rd Dept., 2004]). The demonstration of ownership and right to possession of the property and that physical partition alone cannot be made without great prejudice is sufficient to state a prima facie basis for partition and sale of the property. A claim of adverse circumstances is not enough to avoid partition sale relief (Manganiello v. Lipman, 74 A.D. 3d 667, 905 N.Y.S. 2d 153 [1st Dept., 2013]). Pursuant to RPAPL 231[1] the partition sale must be at a public auction to the highest bidder (Lauriello v. Gallota, 70 A.D. 3d 1009, 895 N.Y.S. 2d 495 [2nd Dept., 2010]).

The arbitrator determined that the parties would not be able to resolve their dispute by mere partition and that because of the greater prejudice to the parties, a partition sale was required. Petitioner is out of possession but remains a tenant in common and co-owner of the property and continues to be prejudiced by the delay in obtaining the sale. Petitioner has stated a prima facie basis to obtain a partition sale at auction and the appointment of a referee.

Respondent filed a cross-petition pursuant to §7511[b][1] [i], [ii], [iii], [iv], seeking to vacate the award. Alternatively, pursuant to §7511[c], Respondent seeks to modify the award as miscalculating the description of the property and the arbitrator exceeded his authority by ordering the sale of personal property.

Pursuant to CPLR §7511, there are limited grounds to vacate an arbitrator’s award which are narrowly applied. An arbitrator’s award will not be set aside even though the arbitrator misconstrues or disregards the agreement, or misapplies substantive rules of law, unless it violates strong public policy or is totally irrational (Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 N.Y. 3d 471, 846 N.E. 2d 1201, 813 N.Y.S. 2d 691 [2006] and In re Stephanie Cherry v. New York State Insurance Fund, 83 A.D. 3d 446, 920 N.Y.S. 2d 342 [1st Dept., 2011]). Vacatur of an arbitrator’s award is generally limited to fraud, corruption, bias, when the determination is beyond the arbitrator’s power, or is so imperfect a definite award cannot be made (In r e Stonington Management Corporation v. Furtsch, 298 A.D. 2d 247, 748 N.Y.S. 2d 258 [1st Dept., 2002] and Matter of Sims v. Siegelson, 246 A.D. 2d 374, 668 N.Y.S. 2d 20 [1st Dept., 1998]).

Respondent seeks relief pursuant to §7511[b][1] [i] and [ii] alleging clear and discriminatory misinterpretation of the law and bias by the arbitrator

Pursuant to CPLR §7511[b][1][i] allegations of corruption, fraud or misconduct require clear and convincing evidence of bias or discriminatory misinterpretation of the

law (see *In re Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp.*, 103 A.D. 3d 456, 960 N.Y.S. 2d 16 [1st Dept., 2013]). Manifest disregard of the Law requires "both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case" (*Transparty Value, L.L.C. v. Johnson*, 93 A.D. 3d 599, 941 N.Y.S. 2d 96 [1st Dept., 2012]). CPLR §7511[b][1][ii] applies to partiality or bias of the arbitrator, mere inference of partiality is not enough to warrant vacatur of the award and errors of fact or law do not demonstrate partiality (*Lee v. Omni Berkshire Place Hotel*, 302 A.D. 2d 286, 753 N.Y.S. 2d 838 [1st Dept., 2003] and *Rose v. J.J. Lowrey & Co.*, 181 A.D. 2d 418, 580 N.Y.S. 2d 745 [1st Dept., 1992]).

Respondent's allegations of bias and discriminatory misinterpretation of the law by the arbitrator do not sufficiently prove partiality or bias. Respondent does not provide clear and convincing evidence and instead relies on inference. Respondent has not provided clear and convincing proof that the arbitrator was aware of a well defined, explicit law and chose to ignore it. Respondent's inference of bias or prejudice because of his same sex relationship with the Petitioner and the arbitrator's failure to address pre-nuptial and post-nuptial cases provided by Respondent's lawyer, is not substantiated. The arbitrator's credibility determinations of Petitioner's testimony and that of the three witnesses produced at the hearing, together with his interpretation of the law as it applies to the agreement, do not warrant judicial interference. Respondent has not stated a basis to obtain relief pursuant to §7511[b][1] [i][or §7511[b][1][ii].

Respondent seeks relief pursuant to §7511[b][1] [iii] and [iv] arguing that the demand to arbitrate was defective, the arbitrator exhibited a manifest disregard of the law, and exceeded his powers once he determined there was no agreement to arbitrate amongst the parties.

CPLR §7511[b][1][iii], applies when the arbitrator exceeded his authority. An award, "is not subject to vacatur due to mistake of fact or law, or disregard of the plain words of the parties agreement. Rather the court must find that the award is 'totally irrational or violative of strong public policy and thus in excess of the arbitrator's powers.'" (*American Country Ins. Co. v. Mariany*, 118 A.D. 3d 509, 987 N.Y.S. 2d 143 [1st Dept., 2014] citing to *Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y. 2d 146, 654 N.E. 2d 95, 630 N.Y.S. 2d 274 [1995]). CPLR §7511[b][1][iii] is applied "...only where the limitation exceeded is found in the arbitration clause itself, not in some other part of the agreement." (*Pharma Consult, Inc. v. Nutrition Technologies LLC*, 25 A.D. 3d 421, 809 N.Y.S. 2d 9 [1st Dept., 2006]).

Respondent failed to state a basis to vacate the award pursuant to CPLR §7511[b][1][iii]. The award provides a reasoned explanation for the finding of unconscionability and that Petitioner had acted to disavow the agreement at the earliest opportunity. The award is not totally irrational or a violation of public policy. The arbitrator relied on the evidence presented by both parties. The alleged mistake of law by the arbitrator (rendering of an award after finding the contract was invalid), is not a basis for vacating the arbitrator's award.

Participation in the arbitration without objection, or seeking a stay results in waiver of claims of non-compliance with the proper procedures of Article 75, or that there is no agreement to arbitrate pursuant to CPLR §7511[b][1][iv] (*Sims v. Siegelson*, 246 A.D. 2d 374, 668 N.Y.S. 2d 20 [1st Dept. 1998]).

Respondent accepted the service of the notice of intent to arbitrate and fully participated in the arbitration without objection. The arbitrator did not find the parties November 12, 2014 agreement invalid until the completion of the hearing when, after hearing all the evidence, he rendered the final award. The finding of unconscionability and that Petitioner had acted to disavow the agreement at the earliest opportunity, is not

a basis for judicial interference warranting vacatur of the award. Respondent failed to state a basis to vacate the award pursuant to CPLR §7511[b][1][iv].

The cross-petition seeks to modify the award as miscalculating the description of the property and the arbitrator exceeded his authority by ordering the sale of personal property.

CPLR §7511[c] only authorizes modification of computational errors, amounting to miscalculation and mistakes in description, not substantive rulings (*Madison Realty Capital, L.P. v. Scarborough-St. James Corp.*, 135 A.D. 3d 652, 25 N.Y.S. 3d 83 [1st Dept., 2016] citing to *Daly v. Lehman Brothers, Inc.*, 252 A.D. 2d 357, 675 N.Y.S. 2d 535 [1st Dept., 1998]).

Respondent fails to state the manner in which the arbitrator miscalculated the description of the property or a basis for modification. The relief sought by Respondent for the personal property is not computational in nature and is not a basis for the relief sought pursuant to CPLR §7511[c]. The agreement has a broad arbitration clause applying to any dispute arising between the parties and stating that the decision of the arbitrator will be binding (Pet. Exh. A). Petitioner sought to have the dispute concerning personal property resolved at the arbitration and stated that relief in the demand for arbitration served on the Respondent (Cross-Pet. Exh. B). Respondent provides no proof that he objected to the arbitrator resolving the dispute over personal property either before or during the arbitration.

Respondent has not established that he will suffer greater prejudice in the direction of the partition and sale than the petitioner, or that the equities are in his favor. The cross-petition fails to establish entitlement to vacatur or modification of the arbitrator's award or denial of the relief sought in the petition. Petitioner failed to provide arguments establishing entitlement to the reasonable attorneys fees and costs sought for bringing this proceeding and that relief will be denied.

Accordingly, it is ORDERED and ADJUDGED, that the petition to confirm the July 11, 2016 arbitrator's final award and pursuant to RPAPL § 231 and §901[1] for partition directing the sale of their apartment at public auction, is granted, and it is further

ORDERED and ADJUDGED, that John Lamb and John Nustvold are equal tenants in common of apartment #7C at 310 West 94th Street, New York, New York 10025 and the personal property locate therein, and it is further

ORDERED and ADJUDGED, that all the property located at apartment #7C at 310 West 94th Street, New York, New York 10025 be sold in one parcel at public auction to the highest bidder at Supreme Court State of New York, 60 Centre Street, New York, New York 10007, and it is further

ORDERED, that Thomas L. Tedeschi, Esq., 8744 251st Street, Bellerose, New York 11426, (718) 347-7093 is hereby appointed Referee to conduct the partition sale at auction, and that said referee give notice of the time and place of sale, according to the laws and rules of this Court, by publication in the *New York Law Journal*, and by notifying the parties to this proceeding by notifying their attorneys at the addresses on file with the Court, and it is further

ORDERED, that any of the parties to this action may become a purchaser of the property at the sale, and that the referee shall execute to the purchaser or purchasers on such sale the proprietary shares and requisite documentation of the premises sold, the purchaser shall be responsible for all transfer and filing related fees, and it is further

ORDERED, that the Referee is to receive and forthwith deposit the proceeds of the sale into an account in the name of the referee, as referee with Citibank, 272-06 Union Turnpike, New Hyde Park, New York, 11040, and it is further

ORDERED, that the Referee shall immediately upon the completion of the sale, file with the Clerk of this Court his report, under oath, containing a description of the premises sold, the name of the purchaser and the price at which the premises was sold, and it is further

ORDERED and ADJUDGED, that the Referee shall thereafter make the following payments therefrom and the Referee's checks drawn for such purpose shall be paid by such depository, to wit: (1) The Referee shall be paid a sum not to exceed \$250.00 for the preparation and filing of the report, and (2) the referee shall pay a sum not to exceed \$500.00, the amount allowed by CPLR § 8003 to the Referee, as the Referee Fee for conducting the sale herein, and the Referee shall be paid any additional fees required in finalizing the sale of this property, and it is further

ORDERED, that the Referee shall pay advertising expense and the expenses of said sale as shown on the bills presented and certified by the said Referee to be correct, and it is further

ORDERED, the Referee shall pay the amount of any lien or liens upon the premises, located at apartment #7C at 310 West 94th Street, New York, New York 10025, and it is further

ORDERED, that John Lamb and John Nustvold shall each be entitled to an equal share of the proceeds of the sale of personal property, and it is further


ORDERED, that the Referee shall divide the proceeds of the sale equally between John Lamb and John Nustvold, and distribute the proceeds after paying the Home Equity Line of Credit of \$100,000.00 from John Lamb's share of the proceeds, and it is further

ORDERED, that the remainder of the relief sought in the petition for the costs and reasonable attorneys fees for bringing this proceeding, is denied, and it is further

ORDERED and ADJUDGED that the cross-petition to vacate the arbitrator's award pursuant to CPLR §7511[b],[1], [i],[ii],[iii], and [iv], alternatively to modify the award pursuant to CPLR §7511[c], is denied, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

ENTER:



MANUEL J. MENDEZ, J.S.C. MANUEL J. MENDEZ J.S.C.

Dated: December 21, 2016

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**

Check if appropriate: **DO NOT POST** **REFERENCE**