

Peter Pennoyer Architects, P.C. v Goel
2017 NY Slip Op 32588(U)
December 11, 2017
Supreme Court, New York County
Docket Number: 655454/2017
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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PETER PENNOYER ARCHITECTS, P.C.,

Petitioner,

- v -

DAVID and STACY GOEL,

Respondents.

INDEX NO. 655454/2017

MOTION DATE _____

MOTION SEQ. NO. 001 & 002

**DECISION, ORDER
AND JUDGMENT**

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The following e-filed documents, listed by NYSCEF document number 2, 12, 13, 16, 35
were read on this application to/for Confirm/Vacate Award

OSTRAGER, J:

Pursuant to CPLR 7510, Peter Pennoyer Architects, P.C. ("Petitioner" or "PPA") seeks to confirm the August 7, 2017 Final Arbitration Award issued by Arbitrator Amy K. Eckman in the arbitration proceeding entitled *Peter Pennoyer Architects, P.C. v. David and Stacey Goel*, American Arbitration Association Case No. 02-15-0005-3953 (the "Arbitration") (NYSCEF Doc. No. 8) and to have a judgment entered in favor of Petitioner based on the Award. David and Stacey Goel ("Respondents") move to vacate the Award in part pursuant to CPLR 7511(b)(iii) on the ground that the Arbitrator "exceeded [her] power or so imperfectly executed [the Award] that a final and definite award upon the subject matter submitted was not made."

The Arbitration arose from a dispute over interior design services provided by PPA pursuant to a contract it had with the Goels. In brief, PPA asserted that the Goels had breached the contract by failing to fully pay PPA for certain goods and services and for failing to

reimburse PPA for certain expenses it allegedly incurred. The Goels alleged, *inter alia*, that PPA had failed to properly administer the project, causing unanticipated costs, and had improperly sought reimbursement of certain expenses that were not justified.

Under the terms of the parties' contract, all disputes arising thereunder were to be decided by the American Arbitration Association ("AAA"). On October 20, 2015, PPA submitted a request for arbitration with the AAA. Hearings in the Arbitration commenced on January 12, 2017 at AAA offices and did not conclude until June 2017.

According to the procedural history recited by the Arbitrator in the Award, on May 25, 2017, after several days of hearings and well after the deadline for disclosure of experts, Respondents requested permission to present accounting experts. The Arbitrator allowed Respondents to submit affidavits from these experts in lieu of live testimony, and allowed PPA to respond by affidavit.

On August 7, 2017, the Arbitrator issued the Final Award, awarding to PPA the sum of \$625,000 for outstanding invoices for work performed plus \$16,470 in storage costs paid by PPA for a total of \$641,470.00, and an additional \$6,500 in costs related to the Arbitration. The Arbitrator directed Respondents to make payment no later than ten business days after the August 7 Award, or by August 21, 2017, after which time statutory interest would accrue on any amounts unpaid. Respondents have yet to make payment.

New York courts, as a matter of public policy, consistently support contractually mandated arbitration. *Goldfinger v. Lisker*, 68 N.Y.2d 225, 230 (1986). The party seeking vacatur of a final arbitration award bears a heavy burden. *Caso v. Coffey*, 41 N.Y.2d 153, 159 (1976). Generally, "[a]n arbitration award may not be vacated unless it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's

power.” *Matter of Board of Education of the Arlington Central School District v. Arlington Teachers Association*, 78 N.Y.2d 33, 37 (1991). Pertinently, CPLR 7511(b)(iii), the provision relied upon by the Goels, provides that an award shall be vacated if a court finds that “an arbitrator ... exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made.” An award is deficient and subject to vacatur “only 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.” *Matter of Meisels v. Uhr*, 79 N.Y.2d 526, 536 (1992).

The specific controversy here relates to the assertion by the Goels during the Arbitration that PPA had wrongly charged them \$46,531 in Massachusetts sales taxes (the “Sales Tax Overcharge”). The Goels sought a return of the Sales Tax Overcharge, or that any monetary award to PPA be offset by an equal amount. PPA asserted that it had charged sales taxes to the Goels and had paid all amounts to the Massachusetts tax authority based on advice from their accountants.

In support of their claims of Sales Tax Overcharge, the Goels submitted to the Arbitrator an affidavit from Paul Graney, a partner at Marcum LLP, a public accounting and advisory service firm. As explained in the Award (at p 9), Graney claimed that PPA “did not properly segregate the costs for tangible property, which would have been subject to sales tax, and service categories, e.g., installation, messenger services, cleaning, storage, handling and design fee, as well as meals and travel” which are not subject to sales tax. PPA responded that Mr. Graney’s calculations did “not appear to be based on a review of specific invoices and activities, [making it] impossible to ascertain the bases on which [Graney had arrived] at his calculations.” According to the Arbitrator (at p 9), PPA had further argued that it had “relied on its own

accounting firm to provide guidance as to Massachusetts sales tax requirements and that to do a proper analysis it would be necessary to go through each individual invoice, which it did not have time to do during the pendency of the arbitration.” However, in an affidavit from its in-house accounting manager, Brian Coltrinari, PPA offered to have the firm of DiCicco, Gulman & Company, LLP (“DGC”), a Massachusetts firm that provides tax and accounting services to the design profession, review all the invoices and the Sales Tax Overcharge claim and, if appropriate, file amended returns and seek a refund from the Massachusetts tax authority and refund any amounts received to the Goels.

Respondents primarily argue in this proceeding that the Award did not determine with sufficient finality whether they were entitled to a refund based on the claimed Sales Tax Overcharge. The Award stated, *inter alia* (on p 12), that:

Regarding the Massachusetts sales tax issue, because Claimant [PPA] has already engaged DGC to look into this and, if appropriate, to file amended returns. I direct in this award that it continue this process and see it through to a conclusion, refunding to Respondents amounts received, if any, at such time this may occur.

In addition, the Award reads (at p 12-13):

This Award is in full settlement of all claims, counterclaims and offsets submitted to this Arbitration, which includes any and all potential claims, offsets or counterclaims relating to the ID Contract dated as of May 15, 2012 and any claims, offsets or counterclaims for account stated, breach of contract, fiduciary duty, overpayment, recoupment of sales taxes and inventory (except as allowed herein) and any other matter relating to the relationship between the parties insofar as it relates to interior design services at the project.

The only aspect of the Award Respondents dispute is that part of the determination related to their claim of a Sales Tax Overcharge. Respondents argue that the Award necessarily, and improperly, delegates decision-making responsibility, entrusted to the Arbitrator, to DGC to determine whether, and in what amount, to seek a refund of the Sales Tax Overcharge when the Arbitrator was tasked with deciding that issue.

Petitioner responds that the Award issued finally determined the parties' rights and obligations, and stated with particularity the amounts to be paid. They assert that PPA's offer to pursue a refund with the Massachusetts tax authorities, and to refund any amounts received to Respondents, was accepted by the Arbitrator and that there was no requirement that any particular amount be obtained from the authorities, only that PPA would make a good faith effort to file an amended return if necessary and refund to Respondents any amounts received. The Court finds that is precisely what the Arbitrator determined, and it is precisely what has occurred since the filing of this petition.

After oral argument, counsel for PPA indicated to the Court that it had, in fact, applied for a sales tax refund in accordance with the Arbitration Award and that it had obtained a sales tax refund check from the Commonwealth of Massachusetts. With a cover letter dated December 8, 2017, counsel for PPA delivered to counsel for the Goels a check for \$37,621.30, representing the full amount of the tax refund PPA had received; an additional \$751.03 that had been requested was still under review by the tax authorities, but counsel committed to delivering a check for that amount to the Goels should the additional refund be received (NYSCEF Doc. No. 45).¹

The Court hereby grants the petition to confirm the Arbitration Award in substantial part and also grants the cross-motion but only to the extent of providing an interest adjustment as discussed more fully below. The Arbitrator's determination of the sales tax issue was well within her power, was reasonable under the circumstances, and was sufficiently final and definite to warrant confirmation. The evidence related to the tax issue was presented in affidavit form when

¹ The Goels had claimed a Sales Tax Overcharge of \$46,531.00, but DGC concluded on behalf of PPA that the law only supported a requested refund of \$38,372.33.

the hearings were near completion. Unable to determine the highly technical issue herself based on the limited information provided by the parties, and implicitly recognizing that the determination of sales tax overcharge was dependent upon the findings of the Massachusetts tax authorities, the Arbitrator directed that PPA review its invoices again in light of Respondent's claim and make a good faith application to the tax authorities for a refund, if the evidence and tax law could support it.

Although the amount of the refund was not known at the time of the Award, the process directed by the Arbitrator was sufficiently final and definite to withstand scrutiny under the CPLR, particularly in light of the small amount at issue (a claim for \$46,131.00) as compared to the balance of the Award (\$641,470.00), which remains undisputed. As only PPA could apply under the law for the sales tax refund, and since PPA had agreed at the Arbitration to promptly make such an application, the Arbitrator reasonably directed PPA to continue the process. Further, by stating that the Award resolved all claims, including "the recoupment of sales taxes ... (except as allowed herein) and any other matter relating to the relationship between the parties insofar as it relates to interior design services at the project," the Arbitrator guaranteed that her direction that PPA "follow through" was a final and definite mandate and not merely an indefinite suggestion. Thus, PPA is entitled to confirmation of the Award.

Nevertheless, the Goels are entitled to an adjustment of interest chargeable on the amount due. The Arbitrator had directed interest on amounts unpaid as of August 31, 2017. The only amount properly due was \$603,848.70, which is the \$641,470.00 principal amount as reduced by the \$37,621.30 tax refund. The tax refund should be treated as an offset for purposes of the interest calculation. The cross-motion is thus granted to the extent of providing for interest only on the \$603,848.70.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is granted in substantial part and the August 7, 2017 Final Arbitration Award issued by Arbitrator Amy K. Eckman in the arbitration proceeding entitled *Peter Pennoyer Architects, P.C. v. David and Stacey Goel*, American Arbitration Association Case No. 02-15-0005-3953 is confirmed to the extent provided herein, and Respondent's cross-motion to vacate or modify the Award is granted to the extent provided herein; and it is further

ADJUDGED that petitioner Peter Pennoyer Architects, P.C., do recover from respondent David Goel and Stacey Goel the amount of \$641,470.00 plus interest at the rate of 9% per annum on the sum of \$603,848.70 from August 21, 2017, as computed by the Clerk in the amount of \$ _____, together with costs and disbursements in the amount of \$ _____ as taxed by the Clerk, for the total amount of \$ _____, and that the petitioner have execution therefor unless the amount is paid in full within five business days of the service of this Decision, Order and Judgment with notice of entry; and it is further.

ADJUDGED regarding items in storage, once payment is made pursuant to the Award, title and access to possession of any items contained in storage shall be transferred to Respondents, who thereafter shall be responsible to either use or dispose of the items or to continue paying storage fees, as they wish; and it is further

ADJUDGED regarding the Massachusetts sales tax issue, because Petitioner has already engaged DGC to look into this issue and, if appropriate, to file amended returns, Petitioner shall continue this process and see it through to a conclusion, refunding to Respondents all amounts received, if any, at such time this may occur; and it is further

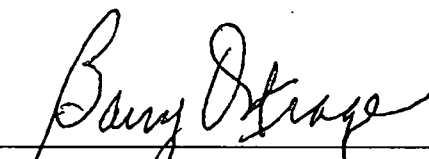
ADJUDGED that the administrative fees of the American Arbitration Association totaling

\$18,500.00 and the compensation of the Arbitrator totaling \$45,552.50 shall be borne equally by the parties. Therefore, Respondents shall reimburse Petitioner the sum of \$6,500.00, representing that portion of said fees in excess of the apportioned costs previously incurred by Petitioner; and it is further

ADJUDGED that the Award is in full settlement of all claims, counterclaims and offsets submitted in the Arbitration, which includes any and all potential claims, offsets or counterclaims relating to the ID Contract dated as of May 15, 2012 and any claims, offsets or counterclaims for account stated, breach of contract, fiduciary duty, overpayment, recoupment of sales taxes and inventory (except as allowed in the Award or herein) and any other matter relating to the relationship between the parties insofar as it relates to interior design services at the Project.

12/11/2017

DATE


BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER
JSC

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

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NON-FINAL DISPOSITION

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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FIDUCIARY APPOINTMENT

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REFERENCE