

Matter of Gottlieb v Izsak
2018 NY Slip Op 32843(U)
November 8, 2018
Supreme Court, Kings County
Docket Number: 512339/2017
Judge: Paul Wooten
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**SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY**

PRESENT: HON. PAUL WOOTEN
Justice

PART 97

In the Matter of the Arbitration of
**SHNEUR GOTTLIEB, AARON GOTTLIEB,
YISROEL GOTTLIEB and YITZCHOK LIEBEL,**

Petitioners,

INDEX NO. **512339/2017**

SEQ NO. **1, 2**

For an Order Pursuant to CPLR Article 75
to Confirm an Arbitration Award

- against -

**YEHOSHUA IZSAK, BORUCH AVIGDOR
YOSEF IZSAK and SARAH LEAH IZSAK,**

Respondents.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

1, 2, 3, 4

5, 6

Motions sequence numbers 1 and 2 are consolidated for disposition.

Shneur Gottlieb (Shneur), Aaron Gottlieb (Aaron), Yisroel Gottlieb (Yisroel) and Yitzchok Liebel (Yitzchok) (collectively, petitioners) commenced this action on June 22, 2017 by a Notice of Petition for an Order, pursuant to CPLR §§ 7510 and 7514, confirming an Arbitration Award dated March 16, 2017 (March 16, 2017 Arbitration Award). The Petition also seeks an Order directing Yehoshua Izsak (Yehoshua), Boruch Avigdor Yosef Izsak (Boruch) and Sarah Leah Izsak (Sarah), husband and wife (collectively, respondents), to comply with the findings of the Rabbinical Court (Rabbinical Court or Beth Din). Specifically, petitioners seek an Order and Judgment (1) directing respondent Yehoshua to pay to Aaron the sum of \$200,000 as set forth in the March 16, 2017 Arbitration Award, and which the parties acknowledged represented the

total value of Aaron's monetary interest in Deja Brew Café, (2) finding Yehoshua and Boruch jointly and severally liable for \$125,000 of the \$200,000 that Yehoshua agreed to pay Aaron, (3) directing that Aaron relinquish his entire share of Deja Brew Café, as well as the lease and anything connected to the business, and provide a release from his brother, brother-in-law and his father in favor of Yehoshua, and (4) all rights and all debts related to Deja Brew Café are the responsibility of Yehoshua (motion sequence 1). Respondents oppose the Petition and cross-move for an Order, pursuant to CPLR 7503(a), compelling petitioners to return to the Beth Din for further arbitration on Yehoshua's request for a modification of the March 16, 2017 Award (motion sequence 2).

BACKGROUND

According to the Petition, a dispute arose between the parties out of disagreements concerning their respective roles and interests in a New Jersey-based business, Deja Brew Café/Kava (Deja Brew). On February 16, 2017, the parties entered into an agreement to arbitrate any issues or disagreements between them before a panel of three independently selected rabbis at a Beth Din. Specifically, the parties agreed as follows:

"We, the undersigned hereby agree to submit to binding arbitration all controversies [claims and counter claims] between the undersigned parties including but not limited to the following controversies related to Deja Brew Caf[é] Inc., Kava . . . and all other related issues relevant to the business [and] affairs of the parties" (Notice of Petition, exhibit A).

The parties and the arbitrators engaged in arbitration. After hearing the claims and disputes of the parties, the Rabbinical Court issued the March 16, 2017 Arbitration Award, wherein the parties agreed, *inter alia*, (1) that Aaron would sell his entire ownership interest, as well as the lease and anything connected to Deja Brew (Aaron's Buyout) for \$200,000 [the Buyout Price]; (2) Yehoshua would pay Aaron the \$200,000 Buyout Price as follows: (a) \$25,000 by the Wednesday, immediately following the date of the arbitration award; (b) \$50,000

forty-five days from March 16, 2017; (c) the remaining \$125,000 within one-hundred and twenty (120) days from March 16, 2017; and, (d) Yehoshua would have his father sign as guarantor of the remaining \$125,000 (*see id.*, exhibit B).

After the parties executed and acknowledged the March 16, 2017 Arbitration Award, Yehoshua emailed the Beit Din regarding scheduling a modification hearing before the Beth Din to address a prior unresolved debt dispute between Aaron and him for \$200,000 (the Prior Debt). On April 7, 2017, the parties returned to the Beth Din at which time the Rabbinical Court issued a ruling on the request to modify (April 7, 2017 Modification Hearing Ruling). Beth Din noted that it had "already handed down judgment in this matter with the agreement of both parties", but was asked to determine if it had the authority to judge on old claims unrelated to the abovementioned store (*see* Notice of Petition, exhibit C). In its Ruling, the Beth Din stated in relevant part as follows:

"We have come to the decision that although according to the arbitration agreement in English we should be able to hand down judgment on those matters [other old claims unrelated to "Kava"], but since in the Hebrew [version] of the arbitration agreement it stated that they came with all their claims and complaints, and it did not mention any limit, therefore this Rabbinical court has the authority to hear the other claims and complaints of the parties. However, since there was a difference of opinion [regarding this] since the judgment was completed and signed with signatures of the parties, and [therefore] it may not be in the right of the Rabbinical court to adjudicate other claims" (*id.*).

The Beth Din went on to further state that it would not judge the old claims regarding the Prior Debt between the parties, but that it would give each party the right to choose whether they want another Rabbinical Court to arbitrate their dispute. The Rabbinical Court then prohibited the parties from filing a petition to confirm the March 16, 2017 until such time as the parties agreed on one of the three judges for the new Rabbinical Court. Failure of the parties to come to a decision regarding one of the Rabbinical Court judges would result in the parties returning to the Beth Din to sign a new arbitration agreement (*see id.*).

LEGAL STANDARD

"Judicial review of arbitration awards is extremely limited" (*Gassman Baiamonte Gruner P.C. v Katz*, 164 AD3d 790, 790 [2d Dept 2018] [internal quotation marks omitted]; see *Matter of County of Nassau v Patalano*, 128 AD3d 694 [2d Dept 2015]; *Matter of Vintage Flooring & Tile, Inc. v DCM of NY, LLC*, 123 AD3d 731, 732 [2d Dept 2014]). "An arbitration award must be upheld when the arbitrator offers even a barely colorable justification for the outcome reached" (*Gassman Baiamonte Gruner P.C.*, 164 AD3d at 790, citing *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006]).

"Consistent with the public policy in favor of arbitration, the grounds specified in CPLR 7511 for vacating an arbitration award are few in number and narrowly applied" (*Matter of Local 295-295C, IUOE v Phoenix Envtl. Servs. Corp.*, 21 AD3d 901, 901 [2d Dept 2005]). "An arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice" (*Matter of Susan D. Settenbrino, P.C. v Barroga-Hayes*, 89 AD3d 1094, 1095 [2d Dept 2011], quoting *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d at 479-80). "An arbitrator is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be" (*Matter of Erin Constr. & Dev. Co., Inc. v Meltzer*, 58 AD3d 729, 730 [2d Dept 2009]).

"An award can be vacated when the arbitrator executes his or her power in such an imperfect manner that the award is not 'final and definite'" (*Matter of Civil Serv. Empls. Assn. v County of Nassau*, 305 AD2d 496, 496 [2d Dept 2003], quoting *Matter of Snyder-Plax v American Arbitration Assn.*, 196 AD2d 872, 874 [2d Dept 1993]; see CPLR 7511[b][1][iii]). An arbitration award is indefinite or non final 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 (see *Goldberger v Fischer*, 148 AD3d 887 [2d Dept 2017]; *Matter of Olidort v*

Pewzner, 125 AD3d 778 [2d Dept 2015]). "An award is final and definite if the computation of the award is 'so clear and specific that the determination of the amounts owing is merely an accounting calculation'" (*Matter of Civil Serv. Empls. Assn.*, 305 AD2d at 496, quoting *Morgan Guar. Trust Co. of N.Y. v Solow*, 114 AD2d 818, 822 [1st Dept 1985] *affd* 68 NY2d 779 [1986]).

Once an arbitrator has rendered an award pursuant to an applicable arbitration agreement, the arbitrator is generally deemed *functus officio*. "The doctrine of *functus officio* provides that absent an agreement to the contrary, after an arbitrator renders a final award, the arbitrator may not entertain an application to change the award, 'except . . . to correct a deficiency of form or a miscalculation of figures or to eliminate matter not submitted'" (*American Intl. Specialty Lines Ins. Co. v Allied Capital Corp.*, ---N.Y.S.3d ---, 2018 NY Slip Op 07194 [1st Dept 2018], quoting *Matter of Wolff & Munier [Diesel Constr. Co.]*, 41 AD2d 618, 618 [1st Dept 1973]; see *Matter of Pinkesz v Wertzberger*, 139 AD3d 1071, 1072 [2d Dept 2016] ["After an arbitrator renders an award, he or she is generally without power to render a new award or to modify the original award"]; *Matter of Hanover Ins. Co. v American Intl. Underwriters Ins. Co.*, 266 AD2d 545, 545 [2d Dept 1999]).

An arbitrator thus improperly exceeds his or her authority by "modifying the original arbitration award by rendering wholly new determinations on matters not addressed in the original award" (*Matter of Outback Steakhouse, Inc. v Contracting Mgt., Inc.*, 58 AD3d 855, 855 [2d Dept 2009]), and "any award rendered after the original award is null and void absent an agreement by the parties" (*Silber v Silber*, 204 AD2d 527, 529 [2d Dept 1994], *lv dismissed in part, denied in part* 85 NY2d 856 [1995]). Nevertheless, an arbitrator may modify an award only upon a written request by one of the parties within 20 days, but may only correct a miscalculation or mistaken description, an award granted on an issue not submitted for arbitration or a defect of form (see *Silber*, 204 AD2d at 529; CPLR §§ 7509, 7511[c]).

DISCUSSION

In support of the Petition, petitioners submit the arbitration agreement, dated February 16, 2017; the March 16, 2017 Arbitration Award, together with the certification of translation; and a copy of the April 7, 2017 Modification Hearing Ruling, together with a certificate of translation. In opposition to the Petition and in support of their cross-motion, respondents attach, *inter alia*, an affidavit from Rabbi Gershon Spiegel (Spiegel), and various email exchanges between the Beth Din and the parties.

Petitioners argue that the Court should confirm the March 16, 2017 Arbitration Award inasmuch as the parties agreed to submit their disputes to binding arbitration before the Beth Din, and the Beth Din, after giving consideration to the parties' arguments, rendered a ruling on the issues before it. Petitioners aver that the Beth Din's April 7, 2017 Modification Hearing Ruling, which, *inter alia*, (1) gave each party the right to choose whether they wanted another Rabbinical Court to adjudge the Prior Debt Dispute, and (2) stayed enforcement of the March 16, 2017 Arbitration Award until the Prior Debt dispute is resolved, should not be binding upon the parties since the arbitrators were *functus officio* at the time of said Ruling.

In opposition to the Petition and in support of their cross-motion, respondents contend that petitioners' motion to confirm the March 16, 2017 Arbitration Award should be denied as premature because the award is not final and definite. Specifically, respondents rely on Rabbi Spiegel's affidavit wherein he stated that on April 7, 2017, the parties appeared at the Beth Din for a modification proceeding (see Rabbi Spiegel's Aff in Opp to Motion to Confirm Arbitration Award, ¶ 9). Rabbi Spiegel averred that at the end of the proceeding, Rabbi Yizchok Isaac Menachem Eichenstein asked petitioner Aaron whether he owed \$200,000 in the Prior Debt to Yehoshua (*id.*). Rabbi Spiegel alleges that Aaron answered in the affirmative, but, Aaron maintained that his obligation to pay the Prior Debt in the amount of \$200,000 was independent

of the Buyout Price awarded to him from the Beth Din regarding his ownership interest in Deja Brew (*id.*).

In light of Aaron's alleged admission, Rabbi Spiegel stated that "the Beth Din determined that it had before it a dispute concerning the terms of payment of the Buyout Price contained in the March 16, 2017 Arbitration Award, and that the "Beth Din has the jurisdiction to resolve the old claims regarding the Prior Debt and contentions based upon new evidence requiring a clarification by the Beth Din" (*id.*). Respondents also submit Yehoshua's sworn affidavit wherein he states that after signing the March 16, 2017 Arbitration Award, he allegedly had a conversation with Aaron about the Prior Debt (*see* Yehoshua's Aff in Opp to Motion to Confirm Arbitration Award and in Supp of Cross-Motion to Compel Arbitration, ¶ 8). Yehoshua averred that Aaron acknowledged the Prior Debt, however, he and Aaron disagreed as to whether the alleged Prior Debt should be offset in the amount of \$200,000 by the Buyout Price set forth in March 16, 2017 Arbitration Award, also in the amount of \$200,000.

In reply, petitioners attached Aaron's affidavit, together with a California Certificate of Acknowledgment, wherein Aaron denies admitting that he owed the Prior Debt to Yehoshua (*see* Aff of Aaron Gottlieb in Supp of Motion to Confirm and in Opp to Cross-Motion, ¶ 5). Aaron argues that Yehoshua raised this issue of the Prior Debt after Yehoshua signed and agreed to the terms of the March 16, 2017 Arbitration Award (*id.*). Aaron also argues that the Court should disregard Rabbi Spiegel's affidavit since Rabbi Spiegel was selected to the three rabbi panel by Yehoshua himself and thus, is not impartial (*id.*). Finally, petitioners argue that respondents' opposition and cross-motion fail to address petitioners' argument that upon

issuing the March 16, 2017 Arbitration Award, the Rabbis were *functus officio*, and thus, were without authority to stay the enforcement of the March 16, 2017 Arbitration Award¹.

After giving consideration to the papers submitted, the Court finds that the March 16, 2017 Arbitration Award is final with respect to the rights and obligations of the parties regarding their dispute concerning Deja Brew and Aaron's Buyout (see *Universitas Educ., LLC v Nova Group, Inc.*, 2012 WL 2045942 [SDNY 2012] [finding that An award is deemed final, and may be confirmed, when it "finally and conclusively disposes of a separate and independent claim, although it does not dispose of all of the claims that were submitted to arbitration").

Specifically, the Court finds that the March 16, 2017 Arbitration Award outlines (1) the parties' agreement for Aaron's Buyout, (2) the Buyout Price, and (3) the payment schedule for the Buyout Price. Moreover, the Beth Din's April 7, 2017 Modification Ruling expressly states that it handed down a final judgment with regards to Aaron's Buyout in Kava (see Notice of Motion, exhibit C). Respondents do not seek to vacate or modify the March 16, 2017 Arbitration Award on a ground specified in CPLR 7511, and therefore, the Court is obliged to confirm the March 16, 2017 Arbitration Award that awarded payment of Aaron's Buyout Price under CPLR 7510 (the court "shall confirm an award . . . unless the award is vacated or modified upon a ground specified in section 7511")(emphasis added); see *Granet & Associates, Inc., v Thom Filicia, Inc.*, 159 AD3d 573, 573 [1st Dept 2018]).

Moreover, to the extent that the portion of the April 2017 Modification Ruling which stayed enforcement of the March 16, 2017 Arbitration Award served to modify the March 16,

¹ On August 10, 2017, respondents uploaded to the New York State Courts Electronic Filing system an Attorney's Affirmation in Further Support of Cross-Motion. On August 14, 2017, the Court received a correspondence from petitioners' counsel objecting to respondents' August 10, 2017 filing as an improper sur-reply since a cross-movant, absent leave of the Court, has no right to submit a reply in support of its cross-motion (see Petitioner's August 10, 2017 letter). The Court finds that the Attorney's Affirmation in Further Support of Cross-Motion filed by respondents on August 10, 2017 is an improper sur-reply, and thus, the Court declines to accept the Attorney's Affirmation in Further Support (see e.g. *Flores v Stankiewicz*, 35 AD3d 804, 805 [2d Dept 2006]).

2017 Award, the Court further finds that the rabbis, as *functus officio*, lacked authority to modify the March 16, 2017 Arbitration Award. Pursuant to CPLR 7511 (c)(1) and (2), an arbitration award may be modified if, *inter alia*, "there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or 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." The Court finds unpersuasive Rabbi Spiegel's argument that the Beth Din determined that it had before it a dispute concerning the terms of payment contained in the March 16, 2017 Arbitration Award, i.e., an offset between the amount of the Prior Debt dispute and the Buyout Price.

The Court finds further that CPLR 7511(c) is inapplicable because Rabbi Spiegel's affidavit demonstrates that the arbitrators did not simply correct a miscalculation on the face of the March 16, 2017 Arbitration Award. Instead, it is evident that the arbitrators performed a subsequent and separate factual analysis and determined two new issues that were not addressed in the March 16, 2017 Arbitration Award— i.e., (1) whether Aaron owed Yehoshua the Prior Debt, and (2) whether Yehoshua is entitled to an offset of the Prior Debt with the Buyout Price in the March 16, 2017 Order (see e.g. *Avamer Associates, L.P. v 57 St. Associates, L.P.*, 67 AD3d 486 [1st Dept 2009]). Thus, the Court finds the portion of the Rabbinical Court's April 2017 Modification Hearing Ruling, which enjoins petitioners from enforcing the March 16, 2017 Arbitration Award is null and void (see *Silber v Silber*, 204 AD2d 527, 529 [2d Dept 1994]). Therefore, the Court finds that the March 16, 2017 Arbitration Award is confirmed.

Moreover, "[a] party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration" (*Degraw Const. Group, Inc. v McGowan Builders, Inc.*, 152 AD3d 567, 568 [2d Dept 2017]; see CPLR 7503[a]). "Where there is no substantial question whether a valid agreement was made or complied with the court shall direct the parties to arbitrate" (*id.*,

citing *Sutphin Retail One, LLC v Sutphin Airtrain Realty, LLC*, 143 AD3d 972, 973 [2d Dept 2016]). "Accordingly, on a motion to compel or stay arbitration, a court must determine, in the first instance . . . whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement" (*id.*, citing, *Sisters of St. John the Baptist, Providence Rest Convent v Geraghty Constructor*, 67 NY2d 997, 998 [1986]).

Here, the Court finds that respondents have not demonstrated that petitioners clearly, explicitly, and unequivocally agreed to arbitrate their disputes regarding the Prior Debt. Therefore, the Court finds that respondents' cross-motion seeking an Order to compel the parties to appear before the Beth Din for further arbitration is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that petitioners' motion pursuant to CPLR §§ 7510 and 7514 confirming the March 16, 2017 Arbitration Award in favor of petitioners is granted in its entirety (motion sequence 1); and, it is further,

ORDERED that respondents' cross-motion for an Order compelling the parties to return to the Beth Din for further arbitration is denied in its entirety (motion sequence 2); and, it is further,

ORDERED that respondents are directed to comply with the directives set forth in the March 16, 2017 Arbitration Award within 45 days of the date of entry of this Order; and, it is further,

ORDERED that counsel for petitioners Shneur Gottlieb, Aaron Gottlieb, Yisroel Gottlieb and Yitzchok Liebel is directed to serve a copy of this Order with Notice of Entry upon the respondents and upon the Clerk of the Court who shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 11/8/18


PAUL WOOTEN J.S.C.