

Fried v Polacco

2019 NY Slip Op 32141(U)

July 18, 2019

Supreme Court, New York County

Docket Number: 655888/2018

Judge: Andrew Borrok

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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: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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PAUL FRIED

Petitioner,

- v -

MICHAEL POLACCO,

Respondent.

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INDEX NO. 655888/2018
MOTION DATE 11/29/2018
MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT

Upon the foregoing documents and for the reasons set forth on the record (7/18/2019), Paul Fried’s motion to confirm an arbitration award is granted and Michael Polacco’s cross-motion is denied.

This action concerns an arbitration arising from the parties’ former partnership in a business to purchase, manage and sell various properties. On December 17, 2015, Mr. Polacco commenced an action against Mr. Fried: Michael Polacco v. Paul Fried, Index No. 654241/2015. In January 2017, the parties entered into an “intent to settle” where the parties agreed, in part, to arbitrate the matter if they were unable to resolve their dispute (NYSCEF Doc. No. 9, Exhibit 3 at 167-169). The matter eventually proceeded to a three-day arbitration where the parties filed pre-arbitration memorandum and post-arbitration memorandum with reply briefs (NYSCEF Doc. No. 9, Exhibits 21, 28-31). On September 21, 2018, the Honorable Frank Maas (the Arbitrator) issued a 10 page “Final Arbitration Award” (the Award) (NYSCEF Doc. No. 17).

Mr. Fried argues that the Award should be upheld and that judgment should be entered. Mr. Polacco argues that the Award be vacated on the grounds that it was totally irrational, biased, and violated public policy. With regard to arbitration, courts have adopted a “policy of noninterference, with few exceptions” (*Peckerman v D & D Assoc.*, 165 AD2d 289, 295 [1st Dept 1991]). An arbitrator’s award “will not be vacated even though the court concludes that [the arbitrator’s] interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on his power” (*Silverman v Benmor Coats, Inc.*, 61 NY2d 299, 308 [1984]).

An award violates public policy where (1) a court concludes, without engaging in extended factfinding or legal analysis, that a law prohibits absolutely the particular matter to be decided by arbitration, and (2) the award itself violates the constitutional, statutory, or common law (*United Fedn. of Teachers, Local 2 v Bd. of Educ.*, 1 NY3d 72, 80 [2003]). An award is irrational only where there is “no proof whatever to justify the award” (*Peckerman v D & D Assoc.*, 165 AD2d 289, 296 [1st Dept 1991]).

Under CPLR § 7511(b)(1), the court may vacate an arbitration award if there was (i) corruption, fraud, or misconduct, (ii) an impartial arbitrator, or (iii) the arbitrator making the award exceeded their power or so imperfectly executed it that an award upon the subject matter was not made.

The Award does not violate public policy because nothing prohibits the parties' dispute from being resolved by arbitration. In fact, the parties had originally agreed to arbitration to avoid further litigation in court. Although the Mr. Polacco disputes the determinations made by the Arbitrator, the Arbitrator's findings do not violate any constitutional, statutory, or common law. Significantly, the parties had also agreed during arbitration that "the Arbitrator would provide a 'reason' for the award, but not extensive findings of fact and conclusions of law" (NYSCEF Doc. No. 17, at 3). The Arbitrator nevertheless explained the factual disputes underlying each issue that he dealt with. In other words, the Arbitrator provided proof to justify the Award. Accordingly, the Award should be confirmed because it does not violate public policy, it is not irrational, and it does not exceed a limitation on the Arbitrator's power.

Accordingly, it is

ORDERED that petitioner's motion to confirm the arbitration award is granted; and it is further

ORDERED that respondent's cross-motion is denied; and it is further

ADJUDGED that the petition is granted and the award, dated September 21, 2018, rendered by the Honorable Frank Maas in JAMS Arbitration No. 1425023051 is confirmed; and it is further

ADJUDGED that

- (1) Michael Polacco shall recover from Paul Fried the sum of \$40,000, representing the unpaid balance of his loan to Mr. Fried, together with interest thereon from May 15, 2018, at the rate of 8% per annum;

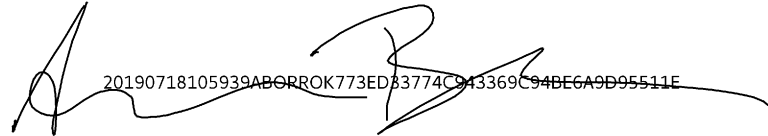
- (2) If he has not already done so, Mr. Polacco may declare the \$40,000 loan immediately due and payable;
- (3) Neither Mr. Polacco nor Mr. Fried shall recover any additional sums by virtue of the Jordan Drive sale and insurance recovery;
- (4) Mr. Polacco is not entitled to recover from Mr. Fried 50% of any amount that **Godfrey** may be awarded in his suit against Mr. Polacco arising out of the Jordan Drive insurance claim;
- (5) Mr. Polacco shall recover \$432,274.28 of the escrowed funds based upon Mr. Fried's improper stripping of that sum from the Lincoln Street joint venture for personal use through the Titan Loan;
- (6) The parties shall cooperate in efforts to negotiate with the Internal Revenue Service and New York State Department of Taxation and Finance to reduce the tax deficiencies arising out of the Lincoln Street mortgage discharge;
- (7) The funds remaining in the escrow account after paying Mr. Polacco \$432,273.28 shall next be applied to payment of the Lincoln Street tax deficiencies;
- (8) If the escrowed funds are insufficient to repay the tax authorities, Mr. Fried and Mr. Polacco shall each contribute 50% of the additional funds needed to satisfy the tax obligations arising out of the Lincoln Street venture. Similarly, if there are surplus funds in the escrow account after those payments they shall be divided evenly between Mr. Polacco and Mr. Fried;
- (9) Mr. Polacco waived his right to receive half of the Lincoln Street rental proceeds at or about the time Mr. Polacco and Mr. Fried agreed not to make further payments to the

bank. Accordingly, Mr. Fried is not required to make any payments to Mr. Polacco by reason of his Lincoln Street rentals;

(10) When the Williamstown and North Magee properties are sold, Mr. Fried shall be entitled to half of any proceeds remaining after accounting for Mr. Polacco's investment and expenses and interest thereon at the rate of 5% per annum. In addition, Mr. Fried shall be entitled to half of any net rental income remaining after Mr. Polacco is compensated for his investment and expenses and interest thereon at the rate of 5% per annum;

(11) Any remaining claims or counterclaims of the parties not specifically discussed in this Final Arbitration Award are denied;

and that the petitioner have execution therefor.


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7/18/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE