

<b>SRW Equities LLC v Nussen</b>
2020 NY Slip Op 30523(U)
February 20, 2020
Supreme Court, Kings County
Docket Number: 509904/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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Application of SRW EQUITIES LLC, 63<sup>RD</sup> STREET  
REALTY II LLC & SAMUEL WEISNER,  
Petitioners,

For an Order Pursuant to Article 75  
of the CPLR Confirming an Arbitration Award

Decision and order

-against-

MICHAEL NUSSEN & JADE USA INC.,  
Respondents,

Index No. 509904/19

February 20, 2020

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PRESENT: HON. LEON RUCHELSMAN

ms # 3

The respondents have moved pursuant to CPLR §2221 seeking to reargue a decision and order dated August 30, 2019 which granted petitioner's motion seeking to confirm an arbitration award. Specifically, the respondents seek to reargue the portion of the decision which denied the respondents leave to file an answer. The petitioners oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

In the prior order the court granted the petitioner's motion seeking to confirm an arbitration award pursuant to CPLR §5710. Further, the court denied the respondent's cross-motion which sought to dismiss the petition. The respondent's cross-motion sought three reliefs, namely to dismiss the petition on the grounds it failed to state any cause of action, to compel the

parties to return to arbitration on the grounds the arbitration had not been completed and lastly, permitting the respondent to answer pursuant to CPLR §404(a). The court granted the petitioner's motion to confirm the award and denied the cross-motion. The respondents now move seeking to reargue the apparent denial of the respondents request to serve an answer.

It is well settled that when the court denies a motion to dismiss a special proceeding there is no "right" to file an answer (Matter of Dodge, 25 NY2d 273, 303 NYS2d 847 [1969]). Thus, the court maintains broad discretion whether to permit the filing of an answer pursuant to CPLR §404(a) (Matter of Foley, 140 AD2d 892, 528 NYS2d 709 [3<sup>rd</sup> Dept., 1988]). A request to file an answer should be denied where it will serve no useful purpose (Matter of Cunningham, 75 AD2d 521, 426 NYS2d 765 [1<sup>st</sup> Dept., 1980]). Although the court has already confirmed the arbitration award the respondents argue an answer would prove useful since it raises issues regarding the propriety of the arbitration hearing itself concerning the presence of counsel and due process violations which were not included within the motion to dismiss. The respondents argue that first they "did not wish to incur the extra expense of a detailed answer. Second, the answer raises objections to the arbitrators' conduct, and Respondents moved pre-answer to compel further proceedings. Respondents did not

wish to list a bunch of grievances against the arbitrators, which could come back to bite him" (Affirmation in Reply, ¶ 14). Thus, the respondents argue the answer is useful. However, that excuse insufficiently explains the failure to raise those issues in the motion to dismiss. In essence, the respondents are arguing they did not wish to impugn the character of the arbitrators and raise these issues at the outset, in the hope they could appear before them again and receive a favorable outcome. Further, if such outcome would not result then they would serve an answer to challenge the lack of due process and other improprieties allegedly committed by the arbitrators. That is a strategic ploy that is not based upon the facts of the case wherein an answer could genuinely prove useful (see, e.g., In re Cline, 77 AD3d 471, 901 NYS2d 2 [1<sup>st</sup> Dept., 2010]). Rather, that is a litigation decision that does not affect any facts regarding the confirmation of the arbitrator's award. If the arbitration hearing was rife with misconduct as alleged wherein the arbitrators violated the respondents' rights to have counsel present, engaged in ex parte communications with the petitioners and only received payment from one party in violation of their own arbitration rules then surely these grievous issues should have naturally been raised in a motion to dismiss the arbitration award or in opposition to the motion seeking confirmation. The

respondents purposeful concealment of these issues to surprise the court later by filing an answer raising these matters means that as a matter of law they do not serve any useful purpose.

Therefore, based on the foregoing, the motion seeking to reargue the earlier decision to permit the filing of an answer is denied.

So ordered.

ENTER:



DATED: February 20, 2020  
Brooklyn N.Y.

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Hon. Leon Ruchelsman  
JSC

**KINGS COUNTY CLERK  
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