

Warburg Realty Partnership Ltd. v Douglas Elliman, LLC
2020 NY Slip Op 31303(U)
April 27, 2020
Supreme Court, New York County
Docket Number: 652259/2019
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 652259/2019

WARBURG REALTY PARTNERSHIP LTD.

MOTION DATE 11/08/2019

Petitioner,

MOTION SEQ. NO. 001

- v -

DOUGLAS ELLIMAN, LLC D/B/A DOUGLAS ELLIMAN REAL ESTATE,

DECISION + ORDER ON MOTION

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29

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

ORDER

Upon the foregoing documents, it is

ORDERD that the petition is granted and the award rendered in favor of petitioner and against respondent is confirmed; and it is further

ORDERED and ADJUDGED that petitioner Warburg Realty Partnership Ltd., having an address at _____, do recover from respondent Douglas Elliman, having an address at _____, the amount of \$ 244,380.00, plus interest at the statutory rate per annum from the date of January 16, 2019, 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.

DECISION

Petitioner Warburg Realty Partnership, Ltd. ("Warburg") petitions this court for an order confirming the arbitration award, dated January 17, 2019, issued by the Real Estate Board of New York ("REBNY") Arbitration Committee in the Matter of the Hearing between Warburg Realty Partnership v Douglas Elliman Realty, LLC (the "Award").

Respondent Douglas Elliman, LLC d/b/a Douglas Elliman Real Estate ("Douglas Elliman") cross-petitions this court to vacate the Award and the order issued by the REBNY Arbitration Committee Review Panel (the "REBNY Appeal Panel"), dated March 28, 2019, confirming the Award (the "REBNY Appeal Order").

Background

This proceeding arises out of a dispute between Warburg and Douglas Elliman over the split of the commission earned from the sale of certain real estate. Warburg commenced an arbitration to resolve the dispute before REBNY. After REBNY issued the Award in favor of Warburg, Douglas Elliman appealed the Award to the REBNY Appeal Panel on the basis that one of the three arbitrators conducting the arbitration, Robert Knakal (Knakal), was biased. The REBNY Appeal Panel ultimately confirmed the Award, prompting Warburg to commence this special proceeding to

confirm the Award. Douglas Elliman subsequently cross-petitioned for vacatur of the Award and the REBNY Appeal Order.

It is undisputed that: (1) the parties agreed to arbitrate before REBNY, and (2) pursuant to REBNY arbitration procedures, both parties were provided an opportunity to strike or peremptorily challenge the appointment of the any arbitrator within REBNY's arbitration roster, which included Knakal (Complaint ¶ 19; exhibit G). It is also undisputed that Douglas Elliman did not strike, challenge, or otherwise raise any objection to the appointment of Knakal to the three member REBNY arbitration panel prior to the arbitration.

However, two of Douglas Elliman's key arbitration witnesses, John Gomes ("Gomes") and Frederick Eklund ("Eklund", together with Gomes, the "Agents") had a prior disagreement with Knakal over a referral fee arising from an unrelated transaction in October 2016 (the "2016 Matter"). It is undisputed that neither the Agents nor Knakal disclosed the 2016 Matter prior to the commencement of the arbitration.

On January 16, 2010, the arbitration commenced before REBNY, ultimately resulting in the Award. After the Award was issued, Douglas Elliman sought review of the Award on the basis that Knakal was biased and failed in his obligation to disclose the 2016 Matter. Douglas Elliman argues that it was not

informed by its Agents of the 2016 Matter until the Award was issued.

During the hearing before the REBNY Appeal Panel, Gomes testified that although he was aware of the 2016 Matter at the outset of the arbitration, he did not inform Elliman's counsel or raise an objection until after the hearing because he did not believe that it would impact the outcome of the arbitration (Complaint, exhibit B, p. 3). Furthermore, Eklund testified that he was also aware of the 2016 Matter at the outset of the arbitration, and failed to raise it at the commencement of the arbitration because Knakal did not raise it first (id. at p. 3-4).

Knakal stated at the hearing that he: (1) "did not view the 2016 Matter as a dispute", (2) "did not hold any grudge regarding the Agent's decision to not pay him a referral fee", and (3) "did not believe that any of the prior events impacted his ability to fairly and impartially decide the matter" (id. at p. 4).

The REBNY Appeal Panel confirmed the Award finding that Douglas Elliman waived its right to object to Knakal's participation in the arbitration by remaining silent even though it had ample opportunity to challenge his appointment, beginning in 2017 when it received the arbitration roster, to his appointment in 2018 until the arbitration was commenced, and

finally even after Knakal's allegedly aggressive questioning (Bresky, exhibit B, p. 5). Instead Douglas Elliman fully participated in the arbitration and raised its objections only after the issuance of the adverse Award (id.).

DISCUSSION

"It is a bedrock principle of arbitration law that the scope of judicial review of an arbitration proceeding is extremely limited" (Frankel v Sardis, 76 AD3d 136, 139 [1st Dept 2010] [internal citations omitted]). "The arbitrators' interpretation of the issues and the scope of their authority is accorded substantial deference, and courts will not overturn that decision unless there is absolutely no justification for it" (id. at 140 [internal citations omitted]). "As long as the arbitrators remain within their jurisdiction and do not reach an irrational result, they may fashion the law to fit the facts before them and their award will not be set aside because they erred in determination or application of the law" (Channel Textile Co. v Adams, 161 AD2d 409, 409 [1st Dept 1990] [internal quotation marks omitted]).

"Courts may vacate an arbitration award only if it was procured by corruption, fraud or misconduct, if the arbitrator was biased or if the award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (Matter of Diaz v

Kleinknecht Elec., 123 AD3d 1304, 1305 [3d Dept 2014] [internal citations, quotation marks, and brackets omitted]). "Pursuant to CPLR 7511(b)(1)(ii), an arbitration award may be vacated on the ground of the 'partiality of an arbitrator appointed as a neutral'" (Matter of SOMA Partners, LLC v Northwest Biotherapeutics, Inc., 41 AD3d 257, 258 [1st Dept 2007]).

"While such responsibility to ascertain potentially disqualifying facts does rest upon the parties, the major burden of disclosure properly falls upon the arbitrator" (Matter of J. P. Stevens & Co. (Rytex Corp.), 34 NY2d 123, 129 [1974]).

"After all, the arbitrator is in a far better position than the parties to determine and reveal those facts that might give rise to an inference of bias" (id.).

The existence of "undisclosed dealings between a party and an arbitrator which impart a lack of impartiality and fairness, the award made is subject to vacatur" (Matter of Cross Properties, Inc. (Gimbel Bros.), 15 AD2d 913, 914 [1962] affd 12 NY2d 806). "However, this is not to say that any undisclosed relationship, no matter how peripheral, superficial or insignificant, compels the same result" (id.).

Moreover, "a party to an arbitration may [not] sit idly back and rely exclusively upon the arbitrator's disclosure" (J. P. Stevens & Co. (Rytex Corp.), 34 NY2d at 129). "If a party goes forward with arbitration, having actual knowledge of the

arbitrator's bias, or of facts that reasonably should have prompted further, limited inquiry, it may not later claim bias based upon the failure to disclose such facts (*id.*).

Despite the failure of the Agents to inform Douglas Elliman of the 2016 Matter at the outset of the arbitration, the Agents had another opportunity when they perceived the alleged bias during Knakal's questioning. Gomes "realized that [Knakal] held a grudge toward [Eklund] and myself" based on certain questions asked by Knakal during the hearing (*id.* at p. 3). Eklund stated that "[Knakal] continued to express this animosity during [his] testimony and questioned [his] ethics as he did [Gomes] earlier in the proceeding" (*id.* at p. 4). For reasons unknown to the court, the Agents remained silent until the Award was issued.

Consequently, this court finds that Douglas Elliman's failure to raise Knakal's potential for bias prior to the issuance of the Award, despite having actual knowledge, resulted in a waiver of any objections based on the Knakal's potential for bias or his failure to disclose the 2016 Matter (Diaz v Kleinknecht Elec., 123 AD3d at 1306 ["Not having objected to such alleged communications or raised the specter of bias at the hearing, claimant waived such allegations and cannot rely on them now"]).

The fact that Douglas Elliman's Agents did not inform it of the 2016 Matter until after the Award was issued does not create

a basis to vacate the Award. It is well established under New York law that the knowledge of the agent is imputed to the principal and that a principal may be liable for its agent's action or inaction (Kirschner v KPMG LLP, 15 NY3d 446, 465 [1st Dept 2010] ["Agency law presumes imputation even where the agent acts less than admirably, exhibits poor business judgment, or commits fraud"]).

Furthermore, Douglas Elliman's reliance on Manhattan Residential v Elliman is misplaced because the record therein did not indicate that the plaintiff had actual knowledge of the arbitrator's potential for bias prior to the hearing (Manhattan Residential, Inc. v Elliman, 2010 NY Slip Op 32125[U], *9 [Sup Ct, NY County 2010, Edmead, J.]). In contrast, the record in the instant proceeding is replete with evidence that the Agents were aware of Knakal's potential for bias at the outset of the arbitration, which they allege was confirmed during the arbitration by Knakal's conduct, but nevertheless remained silent only to raise its objections after an adverse Award was issued.

Lastly, Douglas Elliman's cross-petition is denied to the extent it seeks vacatur or modification on the basis that the Award was excessive. This court "cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would

be the better one...even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice" (New York State Corr. Officers & Police Benev. Assoc., Inc. v State of New York, 94 NY2d 321, 326 [1999]).

04/27/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE