

<b>Matter of Stern v Polachek</b>
2022 NY Slip Op 32181(U)
June 30, 2022
Supreme Court, Kings County
Docket Number: Index No. 510849/2020
Judge: Francois A. Rivera
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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of June 2022

HONORABLE FRANCOIS A. RIVERA

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In the Matter of the Application of,  
YISROEL DOVID STERN,

Petitioner,

FOR AN ORDER PURSUANT TO CPLR  
ARTICLE 75 TO CONFIRM THE ARBITRATION  
AWARD, DATED AUGUST 8, 2019

**DECISION & ORDER**  
Index No. 510849/2020

- against -

SHMUEL ZANVIL POLACHEK and MEIR POLACHEK,

Respondents.

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By notice of petition and petition filed on June 24, 2020, under motion sequence number one, petitioner Yisorel Dovid Stern (hereinafter Stern) moved pursuant to CPLR 7510 for an order: (1) confirming the August 8, 2019 arbitration award (hereinafter the award) entered by the Rabbinical Court of Kolel Tartikov in favor of Stern and against respondents Shmuel Zanvil Polachek (hereinafter S. Polachek) and Meir Polachek (hereinafter M. Polachek), jointly and severally; and (2) pursuant to CPLR § 7514, directing the Clerk of Kings County (hereinafter (KCCO) to enter

judgment in favor of Stern against the respondents, jointly and severally in the sum of \$590,000.00, with interest from August 8, 2019, the date of the award.

By notice of cross motion filed on October 28, 2020, under motion sequence number two, respondent S. Polachek moved pursuant to CPLR 7511 to vacate the award and opposed Stern's petition to confirm the award.

By notice of motion filed on October 28, 2020, under motion sequence number three, respondent M. Polachek also moved pursuant to CPLR 7511 to vacate the award and opposed Stern's petition to confirm the award.

Stern's petition to confirm the award and supporting documents are NYSCEF Document Nos. 1-9. S. Polachek's cross motion to vacate the award and supporting papers are NYSCEF Document Nos. 14-29. M. Polachek's cross motion to vacate the award and supporting documents are NYSCEF Document Nos. 30-35. Stern's opposition to the cross motion are NYSCEF Document Nos. 38 and 39. Both S. and M. Polacheks' Reply Documents are NYSCEF Document Nos. 41, 42, 43 and 44.

After oral argument conducted on April 29, 2021, and after review of all the motion papers, an evidentiary hearing was ordered to resolve the material issues of fact raised.

The evidentiary hearing was conducted on July 20, 2021, November 23, 2021, and November 30, 2021. Petitioner Stern, respondents S. and M. Polachek, and non-party Rosa Stern testified. Stern admitted seven exhibits into evidence the respondents

admitted one exhibit. Each party submitted a request for findings of fact pursuant to CPLR 4213 (a) and written legal arguments and conclusions of law.

### **FINDINGS OF FACT**

Stern and S. Polachek entered into a contract under which S. Polachek agreed to build and sell, and Stern agreed to purchase apartment No. 6B located at 116 Skillman Street, Brooklyn, New York, Block Number 01899, and Lot Number 1815 (hereinafter the premises). The contract was solely between Stern and S. Polachek, M. Polachek was not a party to the contract. Stern paid S. Polachek \$260,000.00 as a down payment deposit. S. Polachek was obligated to build the condominium unit to certain specifications and transfer title to Stern. S. Polachek refused to transfer the premises to petitioner.

Based on the parties' disagreements, Stern summoned S. Polachek to appear before the Rabbinic Court of Kiryas Joel and secured from that Rabbinic Court a letter of injunction against S. Polachek. The summons and injunction were directed only to S. Polachek. He was unwilling to arbitrate before the Kiryas Joel Rabbinic Court. Alternatively, Stern and S. Polachek verbally agreed to arbitrate their disagreement before the Rabbinic Court of Kolel Tartikov (hereinafter RCKT) within Kings County, State of New York and specifically subjected themselves to the jurisdiction of this court.

On or about October 23, 2013, S. Polachek and Stern appeared to begin their arbitration before RCKT. Stern was accompanied by his wife and S. Polachek was accompanied by his son, M. Polachek.

On January 29, 2014, the Tartikov arbitrators issued an interim decision in which respondents were required to sell the premises to petitioner.

On October 1, 2014, over 9 months after the interim decision, S. Polachek transferred the premises to Tuvia Gross. Tuvia Gross bought the premises from S. Polachek after the arbitration proceeding before the RCKT had begun, after S. Polachek was directed to sell the premises to Stern, but before a final determination was rendered by the arbitrators. Stern wanted to obtain the premises but was not able to persuade Tuvia Gross to submit to the jurisdiction of the RCKT. Tuvia Gross was willing and agreed to arbitrate the dispute between Stern and himself before the Rabbinical Court of Central Rabbinical Congress of the USA and Canada (hereinafter RCC).

The RCKT arbitrators specifically retained jurisdiction to hold further proceedings between Stern and S. Polachek but agreed to wait to do so until after the RCC decided the arbitration proceedings between Stern and Tuvia Gross as those proceedings would determine whether title to the premises could be transferred to Stern.

On January 31, 2018, while there were ongoing proceedings before the RCC and before it reached its final decision, Tuvia Gross transferred the subject premises to Atlantic Holdings Equities LLC for a full refund of the initial purchase price from S. Polachek.

On February 13, 2018, the RCC issued an award finding that it could not undo the transfer by Tuvia Gross. Following the award from the RCC, the RCKT directed the parties to return before them for further proceedings.

During this time period, Stern commenced a special proceeding against Tuvia Gross, S. Polachek and Atlantic Holding Equities, LLC to confirm the award from the RCC. The proceeding was filed in the New York State Supreme Court of Kings County under Index No. 507755/2018 (hereinafter the 2018 action). The 2018 action was commenced by the filing of an order to show cause, petition, and a notice of pendency on the subject premise and was entitled Stern v Gross et al.

Although Stern denominated the 2018 action as one to confirm the award of the RCC, the relief sought in the 2018 action was directly to the contrary to what was determined by the RCC. Stern and Tuvia Gross were the only parties to the arbitration proceeding before the RCC, neither S. Polachek nor Atlantic Holding Equities LLC participated. The RCC had determined that in the dispute between Stern and Tuvia Gross, it could not undue the transfer of the subject premise from S. Polachek to Tuvia Gross.

However, the relief sought in the 2018 action, as stated in the petition, sought the following relief: an order confirming the RCC award, and directing the respondents to convey the subject premises to Stern, or in the alternative, an order directing the execution of a judicial deed or a sheriff's deed of the subject premises to Stern.

Both Tuvia Gross and S. Polachek separately cross moved to dismiss the petition in the 2018 action. Stern opposed the cross motions and cross moved to amend the petition. By decision and order dated March 11, 2019, the Court granted the cross motion of Tuvia Gross and S. Polachek to dismiss the petition and noted that Stern

withdrew his motion to amend the petition. The dismissal of the Stern v Gross et al action under 507755/2018 was without prejudice.

The matter returned to the Rabbinical Court of Kolel Tartikov and the arbitrators reached a final award on August 8, 2019. The final award required both S. and M. Polachek to pay Stern the sum of \$590,000.00 for the damages. Respondents did not pay the sum of \$590,000, or any portion thereof.

The Rabbinical Court served a copy of the Arbitration Award on petitioner and respondents shortly after it was issued. The petition was brought within one year after the delivery of the Arbitration Award.

## LAW AND APPLICATION

CPLR article 75 codifies a limited role for the judiciary in arbitration (*American Intl. Specialty Lines Ins. Co. v Allied Capital Corp.*, 35 NY3d 64, 70 [2020]). CPLR 7510 provides that the court shall confirm an arbitration award upon application of a party made within one year after its delivery to him or her, unless the award is vacated or modified upon a ground specified in section 7511. Judicial review of arbitration awards is typically limited to final determinations upon the matters submitted to the arbitrators (*American Intl. Specialty Lines Ins. Co.*, 35 N.Y.3d at 72, quoting *Mobil Oil Indonesia Inc. v Asamera Oil [Indonesia]*, 43 NY2d 276, 281 [1977]). A final arbitration award is generally one that resolves the entire arbitration (*American Intl. Specialty Lines Ins. Co.*, 35 N.Y.3d at 72).

Under New York secular law, like contract rights generally, a right to arbitration may be modified, waived, or abandoned (*Sherrill v Grayco Bldrs., Inc.*, 64 NY2d 261, 272 [1985]; see *Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007]). Where a party affirmatively seeks the benefits of litigation, in a manner inconsistent with its later claim that the parties were obligated to settle their differences by arbitration, the right to arbitrate has been waived (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 372 [2005]; *Matter of Waldman v Mosdos Bobov, Inc.*, 72 AD3d 983 [2nd Dept 2010]).

On January 31, 2018, while there were ongoing proceedings before the RCC and before it reached its final decision, Tuvia Gross transferred the subject premises to Atlantic Holdings Equities LLC for a full refund of the initial purchase price from S. Polachek. On February 13, 2018, the RCC issued an award finding that it could not undo the transfer by Tuvia Gross. Following the award from the RCC, the Rabbinical Court of Kolel Tartikov directed the parties to return to them for further proceedings.

During this time period, Stern commenced a special proceeding against Tuvia Gross, S. Polachek and Atlantic Holding Equities, LLC to confirm the award from the RCC. The proceeding was filed in Kings County under Index No. 507755/2018 in an action entitled Stern v Gross et al. (hereinafter the 2018 action). The 2018 action was commenced by order to show cause and petition and included a notice of pendency on the subject premise. Stern and Tuvia Gross were the only parties to the arbitration proceeding before the RCC and not S. Polachek nor Atlantic Holding Equities LLC.

Although Stern denominated the 2018 action as one to confirm the award of the RCC, the relief sought in the 2018 action was directly to the contrary to what was determined by the RCC. In particular, the RCC determined that in the dispute between Stern and Tuvia Gross, it could not undue the transfer of the subject premise form S. Polachek to Tuvia Gross. However, the relief sought in the petition in the 2018 action sought the following relief: confirmation of the RCC award, an order directing the respondents to convey the subject premises to Stern, or in the alternative, an order directing the execution of a judicial deed or a sheriff's deed of the subject premises to Stern.

Both Tuvia Gross and S. Polachek separately cross moved to dismiss the petition in the 2018 action. Stern opposed the cross motions and cross moved to amend the petition. By decision and order dated March 11, 2019, the Court granted the cross motion of Tuvia Gross and S. Polachek to dismiss the petition and noted Stern's withdrawal of his motion to amend the petition. The dismissal of the Stern v Gross et al action under 507755/2018 was dismissed without prejudice.

Stern's conduct in commencing and maintaining the 2018 action against Tuvia Gross, S. Polachek and Atlantic Holding Equities, LLC, and resisting the motions by Tuvia Gross and S. Polachek to dismiss the action amounted to a waiver of his right to arbitrate his claims with S. Polachek. Stern's conduct was an affirmative act seeking the benefit of litigation in a manner that was inconsistent with Stern's claim that the parties were to settle their difference by arbitration (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 372 [2005]).

As a result, S. Polachek was no longer bound to arbitrate his dispute with Stern over the subject premises. Consequently, by the time the Rabbinical Court of Kolel Tartikov and the arbitrators reached a final award on August 8, 2019, Stern had already lost the right to arbitrate his claims by waiver. Consequently, the award by the Rabbinical Court of Kolel which required both S. and M. Polachek to pay Stern the sum of \$590,000.00 in damages could not be confirmed by Stern.

The Court also notes the following. M. Polacek was not a party to the contract between Stern and S. Polachek regarding the subject premise. M. Polacheck did not agree to arbitrate any dispute between himself and Stern. After Stern and S. Polachek agreed to arbitrate their dispute at the Rabbinical Court of Kolel Tartikov, they arrived at the Rabbinical court with family. Stern came with his wife and S. Polacheck came with his son M. Polachek. The arbitrators were presented with objections regarding the presence of the nonparties, namely, Stern's wife and S. Polachek's son at the arbitration. The arbitrators resolved the objection by letting the family members stay if they signed a document binding them to the arbitrators' authority over them. M. Polachek signed the agreement. The signing of the agreement was not actually an agreement to arbitrate but merely, an acquiescence to a condition required by the arbitrators to remain at the arbitration. Consequently, M. Polachek's signing of the agreement does not properly serve as a basis in fact or law to render him liable in damages to Stern for breach of the agreement between Stern and S. Polachek.

**CONCLUSION**

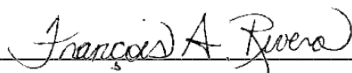
The petition by Yisorel Dovid Stern for an order pursuant to CPLR 7510 for an order confirming the August 8, 2019, arbitration award entered by the Rabbinical Court of Kolel Tartikov in favor of Stern and against respondents Shmuel Zanvil Polachek and Meir Polachek is denied, and the petition is dismissed.

The cross motion by Shmuel Zanvil Polachek for an order pursuant to CPLR 7511 vacating the award is granted.

The cross motion by Meir Polachek for an order pursuant to CPLR 7511 vacating the award is granted.

The foregoing constitutes the decision and order of this Court.

ENTER:

  
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J.S.C.