

Goldman v Weiss

2023 NY Slip Op 30599(U)

February 24, 2023

Supreme Court, New York County

Docket Number: Index No. 653186/2022

Judge: Barry Ostrager

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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. BARRY R. OSTRAGER	PART	IAS MOTION 61EFM
<i>Justice</i>		
-----X	INDEX NO.	653186/2022
YOEL GOLDMAN,	MOTION DATE	
Plaintiff,		
- v -	MOTION SEQ. NOS.	002 & 003
ZELIG WEISS,	DECISION + ORDER ON MOTIONS	
Defendant.		
-----X		

HON. BARRY R. OSTRAGER

Petitioner Yoel Goldman commenced this special proceeding by filing a petition on September 1, 2022, pursuant to CPLR Article 75, seeking injunctive relief and discovery in aid of arbitration. To date, no demand for arbitration has been filed. Goldman and respondent Zelig Weiss have been involved for many years in various business ventures primarily related to the William Vale Hotel in Brooklyn, New York. In this proceeding, Goldman seeks, among other things, to enjoin Wiess from making certain “Major Decisions” without Goldman’s consent, from transferring assets from any account of the parties’ joint ventures, and from destroying any books and records. Additionally, Goldman seeks an order compelling Weiss to comply with certain obligations related to the parties’ joint ventures and the related litigation in the Kings County Supreme Court in the case captioned *Wythe Berry Fee Owner LLC v. Wythe Berry LLC, et al.*, Index 514152/2021. It appears to be undisputed that the disputes underlying this proceeding are subject to mandatory arbitration.

On February 24, 2023, the Court heard oral argument on two motions in this proceeding: the motion by Weiss to change the venue of this proceeding to Kings County on the ground that venue in New York County is improper under the CPLR (seq. 002); and the motion by Weiss to

dismiss this proceeding for lack of jurisdiction, pursuant to CPLR 3211(a)(8), based on allegedly improper service (seq. 003). In accordance with the February 24, 2023, transcript of proceedings and as stated herein, both motions are denied.

The Court denies respondent's motion to change venue from New York County to Kings County (seq. 002). The basis for the motion is respondent's claim that venue in New York County is improper under the controlling statutes. That claim lacks merit. The basis for venue stated in the Petition is the arbitration clause is the Parties' Agreement. Specifically, the Fifth Amendment to the parties' Operating Agreement states that:

Except as otherwise provided herein, any dispute arising under this agreement (but not disputes arising under other agreements executed pursuant hereto or collateral hereto such as the Note, Guaranty and Security Agreement) shall be determined by the American Arbitration Association, New York, New York, in accordance with its rules then governing.

CPLR 7502(a)(i) says that " A special proceeding ... before a court [regarding] the first application arising out of an arbitrable controversy ... shall be brought in the court and county specified in the agreement ... " And CPLR 506(a) provides that "a special proceeding may be commenced in any county within the judicial district where the proceeding is triable." New York County is located in the First Judicial District. Kings County is the Second Judicial District. Thus, both statutes provide for venue in New York County based on the parties' Agreement.

Contrary to respondent's argument, the arbitration provision is not merely a description of the AAA entity. Rather, the provision implies a locale for the arbitration in New York County. The use of the phrase "New York, New York" is in contrast with other provisions in the parties' Agreement, such as a description of the parties' residence, that specifically states "Brooklyn, NY". The fact that the parties reside in Kings County and that the Hotel at issue is located there is not relevant under these circumstances because the basis for respondent's motion is that the

choice of venue in New York County is “improper” under the controlling statutes, and the cited statutes confirm that venue in New York County is, in fact, proper. There is no claim, nor could there be under the prevailing case law, that New York County is not a convenient location for residents of Kings County.

Finally, the Court rejects respondent’s claims about the lack of a party affidavit in response to respondent’s demand to change venue. Since the basis for venue is a document (the Operating Agreement), the attorney affirmation coupled with the party verification of the Petition is sufficient. Accordingly, respondent’s motion to change venue to Kings County is denied, and the action shall continue here in New York County.

Regarding respondent’s motion to dismiss based on improper service (seq. 003), the Court denies the motion in its entirety. The extremely detailed affidavits of service from petitioner’s process server, which show delivery of the papers to respondent’s son at respondent’s residence, establish valid service by delivery to “a person of suitable age and discretion at the actual ... dwelling place,” followed by a mailing to the residence, create a rebuttable presumption of valid service. Respondent has failed to rebut that presumption, or even create an issue of fact requiring a hearing.

First, respondent Weiss in his affidavit never directly denies receipt of the papers and merely indicates that he never discussed the issue with his son. (See NYSCEF Doc. Nos. 16 and 35). The fact that respondent’s son may be 16, as opposed to 18 as estimated by the process server, does not mean that the son does not qualify as a person of suitable age and discretion. The process server detailed in his Supplemental Affidavit his conversation with respondent’s son and confirmed that the son understood when the process server explained that he was delivering papers for the father. (NYSCEF Doc. No. 44). The process server and the son also discussed the

process server’s prior delivery of a copy of the same papers for Mr. Weiss at the Hotel, and the son confirmed that his father had received them.

Also without merit is respondent’s attempt to attack the mailing on the ground that the address on the envelope did not contain a condominium unit number. As the process server explained in detail in his affidavit, the nine-unit building did not contain a unit number for the residence, which had a separate first floor residence at the side of the building. Also, petitioner’s counsel pointed to various documents wherein respondent listed his address without specifying any floor or unit number. (See NYSCEF Doc. Nos. 38-43). The postal address on the envelope is a valid mailing address, and respondent never denied receipt of the mailing. Therefore, respondent’s efforts to dismiss the case based on a claim of improper service are rejected.

Respondent shall Answer the Petition within ten days of the date of this Decision. A conference is scheduled for March 30, 2023, at 10:00 a.m. via Microsoft Teams to discuss the status of the anticipated arbitration and other pending proceedings, unless counsel agree before that time to resolve this action in favor of the mandatory arbitration. If the Petition remains unresolved, the Court on March 30 will set a date to hear oral argument and decide the Petition on the merits.

Dated: February 24, 2023


 BARRY R. OSTRAGER, J.S.C.

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