

Finkelstein v Finkelstein

2023 NY Slip Op 30675(U)

March 7, 2023

Supreme Court, New York County

Docket Number: Index No. 650559/2021

Judge: Paul A. Goetz

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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. PAUL A. GOETZ PART 47

Justice

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<p>NACHUM DOV FINKELSTEIN, ZLATA FRIEDMAN,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">- v -</p> <p>REUVEN FINKELSTEIN, 1212 GRANT REALTY LLC, CRESTEF REALTY LLC, 829 REALTY LLC, CEDARROW REALTY LLC, 1180 REALTY LLC, 911 LLC, 409 REALTY CORP, AKIVA FINKELSTEIN, YITZCHAK ZEVI FINKELSTEIN, AVRAHAM FINKELSTEIN, LIBA MAGID, DOES 1-10,</p> <p style="text-align: center;">Respondents.</p> <p>-----X</p>	<p>INDEX NO. <u>650559/2021</u></p> <p>MOTION DATE <u>03/23/2022, 08/22/2022, 10/03/2022</u></p> <p>MOTION SEQ. NO. <u>013 015 017</u></p>
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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 013) 306, 307, 308, 311, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331

were read on this motion to/for REMOVE RECEIVER/COMPEL ACCTING.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 373, 374, 375, 376, 377, 379, 380, 381, 382

were read on this motion to/for APPOINT - REFEREE.

The following e-filed documents, listed by NYSCEF document number (Motion 017) 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432

were read on this motion to/for JUDGMENT - MONEY.

In this family dispute over the ownership of a portfolio of properties arbitrated before a Beth Din panel, respondents except for Shmuel Akiva Finkelstein and Liba Magid (moving respondents) move for an order directing petitioners and “nominal respondents” Shmuel Akiva Finkelstein and Yitzchak Finkelstein¹ to provide a full accounting of all assets directly or

¹ On January 27, 2021 Heller Horowitz & Feit PC appeared for all of the respondents (NYSCEF Doc No 10). On November 1, 2021 a notice of change of attorneys was filed substituting Jeffrey M. Rosenberg, PC for respondent Liba Magid (NYSCEF Doc No 183) and on November 19, 2021 Leader Berkon Colao & Silverstein, LLP filed a notice of appearance on behalf of respondent Shmuel Akiva Finkelstein. No other substitutions or notices of appearances were filed on behalf of any of the parties. Consequently, Heller Horowitz & Feit PC is still the attorney of record for Yitzchak Zev Finkelstein, one of the respondents against whom it is seeking relief.

indirectly received from Jacob Finkelstein or the family trusts established by Jacob Finkelstein (MS # 13). These same respondents move separately for an order pursuant to CPLR § 4311 appointing a referee to supervise the accounting and “true-up” process mandated by the Beth Din panel’s January 6, 2021 Clarified Arbitration Award and this court’s June 3, 2021 Judgment and thereafter to hear and report on any contested items relating thereto (MS # 15). Petitioners move for a money judgment in favor of petitioners in their capacities as trustees of the trusts established by Jacob Finkelstein against respondent Reuven Finkelstein in the amount of \$43,901,545 and against Avraham Finkelstein in the amount of \$8,345,497, plus interest accruing through the date of judgment; and an order directing the Sherriff to execute such documents as are necessary to effectuate the transfer of certain properties to the designees of the trusts, which designees will be identified on a form of proposed judgment to be submitted upon the Court’s request (MS # 17). The motions are consolidated for disposition.

BACKGROUND

Procedural History

On January 25, 2021 petitioners commenced this special proceeding pursuant to CPLR § 7510 to confirm the Beth Din’s Clarified award/judgement.

By decision and order dated May 24, 2021 the Beth Din’s May 6, 2020 arbitration award as clarified by the January 6, 2021 clarification was confirmed (NYSCEF Doc No 53). The factual background surrounding the parties’ dispute and the resolution of the dispute are set out in the May 24, 2021 decision and order and familiarity with that decision and order is assumed. The January 6, 2021 clarified award (denominated a judgment by the Beth Din) requires the parties to provide an accounting “of every asset that he or she has received - directly or indirectly

and beneficially or actually - from Jacob or the Trusts since 2010” (Clarified award/judgment, NYSCEF Doc No 3 ¶ 16). It further requires:

Any amounts that the party has received in excess of his or her pro rata share of the Trust assets in any capacity shall be returned to the applicable Trust for the pro rata benefit of the children and Trust beneficiaries or directly to the children for any non-Trust assets and an award entered in this amount. If the party can meet his or her own burden and establish that the amounts received were necessary and appropriate expenses related to the management and preservation of the assets, then those amounts need not be returned.

(*id.*).

On June 17, 2021 a judgment was entered confirming the arbitration award, directing respondents to turn over the seven disputed real properties (the properties)² to the trusts or their designees, enjoining respondents from transferring or encumbering interest in the properties, ordering the parties to provide accountings of all assets directly or indirectly received from the trusts or Jacob Finkelstein and delivering to the trusts amounts received since 2010 in excess of each party’s respective *pro rata* share under the applicable trust documents along with pre-judgment and post-judgment interest (NYSCEF Doc No 64). By decision and order dated March 1, 2022 the Appellate Division, First Department affirmed the judgment (NYSCEF Doc No 297).

DISCUSSION

In MS # 15 moving respondents cite CPLR § 4311, Order of Reference and CPLR § 4001, Powers of Referees in support of their request that the court appoint a referee to supervise the accounting process. However, both provisions apply to trials in plenary actions as Article 40 pertains to trials generally and Article 43 applies to trials by a referee. This matter is not a plenary action but rather a special proceeding pursuant to CPLR § 7510 to confirm an arbitration

² 1212 Grant Ave., Bronx, New York; 225 Cross Bronx Expressway, State Road North, Bronx, New York; 829 Greenwood Ave., Brooklyn, New York; 65 W. 192nd St., Bronx, New York; 1180-1182 Lebanon St., Bronx, New York; 911-923 Walton Ave., Bronx, New York; 409 W. 129th St., New York, New York.

award. There is no provision in Article 75 authorizing the court to appoint a referee to supervise the accounting process.

Accordingly, moving respondents' motion to appoint a referee (MS # 15) must be denied.

In MS # 17 petitioners argue that the Trustees' determination that the proposed allocations in the Beneficiary Letter prepared by their counsel (NYSCEF Doc No 393) are reasonable and supported is entitled to deference in light of the broad authority accorded the trustees under the trusts documents. And absent an abuse of discretion, their determination should be affirmed and the money judgment requested by them entered.

In MS # 13 moving respondents allege three deficiencies with petitioners' accounting: 1) it fails to address the period from 2010 to 2014; 2) it omits certain assets; and 3) that from 2014 onward it is based upon bank statements that are within the parties actual custody and control.

By these motions the parties attempt to expand the very limited scope of a CPLR § 7510 special proceeding. CPLR § 7510 provides that:

A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

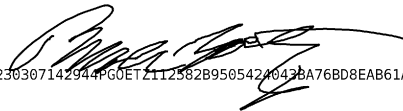
In a special proceeding pursuant to CPLR § 7510 “the court is *not* exercising the quintessentially judicial power to resolve disputes. Rather, it is exercising a ministerial function at the behest of the Legislature” (*Matter of Bernstein Family Ltd. P'ship v. Sovereign Partners, L.P.*, 66 A.D.3d 1, 8 [1st Dept 2009] [emphasis in original]). If there is a dispute about a parties' compliance with an arbitration award, the aggrieved party is required to commence a subsequent enforcement proceeding, it is not resolvable in a CPLR § 7510 proceeding (*id.*). Here the parties disputes concerning the accountings and “true ups” required by the Beth Din's Clarified

award/judgment is a new and separate controversy that must be resolved in a new separate proceeding (*id.*; see also *Granet & Assoc., Inc. v Thom Filicia, Inc.*, 159 AD3d 573 [1st Dept 2018] [in a CPLR § 7510 proceeding “whether [a party] may deduct ‘related expenses’ is the subject of a new controversy . . .”]).³

Accordingly, petitioners’ motion for a money judgment and for an order directing the Sherriff to execute certain real property transfer documents (MS # 17) and moving respondents’ motion for an order directing certain parties to provide a full accounting (MS # 13) must be denied.

Based on the foregoing, it is

ORDERED that MS #s 13, 15 and 17 are denied.


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3/7/2023
DATE

PAUL A. GOETZ, 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

³ Indeed, once the petition was granted the various subsequent motions involving compliance with the Beth Din’s Clarified award/judgment should likely have been denied on this basis as well.