

**Matter of New York Proton Regional Ctr., LLC v  
Lion's Prop. Dev. Group, LLC**

2024 NY Slip Op 31835(U)

May 24, 2024

Supreme Court, New York County

Docket Number: Index No. 654692/2023

Judge: John J. Kelley

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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. JOHN J. KELLEY **PART** **56M**

*Justice*

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In the Matter of

NEW YORK PROTON REGIONAL CENTER, LLC, NCM  
USA BRONX, LLC, BIG APPLE CAPITAL LENDERS LLC,  
YITZCHACK TESSLER, and ARI HERRMANN,

Petitioners,

- v -

LION'S PROPERTY DEVELOPMENT GROUP, LLC,

Respondent.

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**INDEX NO.** 654692/2023

**MOTION DATE** 04/08/2024

**MOTION SEQ. NO.** 001

**DECISION, ORDER, AND  
JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8 were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

New York Proton Regional Center, LLC (NYPRC), NCM USA Bronx, LLC (NCM), Big Apple Capital Lenders, LLC (Big Apple), Yitzchack Tessler, and Ari Herrmann (collectively the petitioners) petition pursuant to CPLR 7510 to confirm decretal paragraphs 1 through 7 of an arbitration award dated September 26, 2022, that had been rendered by an arbitrator acting under the auspices of International Centre for Dispute Resolution (ICDR), which denied claims asserted by the respondent Lion's Property Development Group, LLC, against them in the arbitration proceeding. They also petition pursuant to CPLR 7511 to vacate decretal paragraphs 8 through 12 of that award, which, inter alia, denied the counterclaims that they asserted against the respondent in the arbitration proceeding, and directed the parties to share equally the fees of the arbitrator and the costs of arbitration. The respondent does not oppose the petition. The petition is granted to the extent that decretal paragraphs 1 through 7 in the award are confirmed, the petition is otherwise denied, and decretal paragraphs 8 through 12 in the award are thereupon confirmed.

The crux of the underlying dispute involves the propriety and extend fees payable in connection with loan investments made by foreign investors to NYPRC, NCM, and Big Apple (collectively the corporate petitioners) pursuant to a federal economic development program. Specifically, it involves whether the respondent, which essentially had brokered the investments, was entitled to, or entitled to retain, certain of those fees. In the underlying arbitration proceeding, the respondent asserted claims sounding in breach of contract, quantum meruit, and unjust enrichment, and to recover on an account stated. The petitioners asserted counterclaims sounding in fraud and also sought negate any obligation on an account stated.

In her 30-page award, ICDR arbitrator Michele S. Riley explained that the United States Citizenship and Immigration Services (USCIS) administers the United States Immigrant Investment Pilot Program number 5 (USCIS EB-5 Program), the purpose of which is to provide an avenue for certain employment-based immigration designed to stimulate the United States economy through job creation and capital investment by foreign investors. She further explained that, under the USCIS EB-5 Program, persons who are foreign investors may qualify for EB-5 classification by investing, through an investment vehicle, in a company that has designed a project that would stimulate the United States economy by creating a certain number of jobs in a certain geographic region of the United States in which it has authority to act.

The arbitrator found that, in or about 2012, the corporate petitioners designed and sponsored an investment project under the USCIS EB-5 Program (hereinafter the EB-5 Project) and that, in order to satisfy the capital investment requirements necessary to qualify for EB-5 classification, as established and modified by the USCIS, foreign investors would be required to invest, in the form of a loan, at least \$500,000 each in Big Apple, which served as the investment vehicle. Big Apple would then loan the funds that it raised to NYPRC and NCM, which would appropriate the proceeds of the loan to run the EB-5 Project and provide jobs in the New York region. In return for their investment in the EB-5 Project, the foreign investor would receive a visa to travel to, and potentially a permanent visa to enter, the United States.

Additionally, the investor would receive interest on his or her loan that would “accrue at an estimated rate of 1.5% per annum on a non-compounded basis.” The arbitrator further noted that the respondent is an entity specializing in matching foreign investors with qualified EB-5 projects, as well as in facilitating all pre-investment negotiations and required due diligence.

The arbitrator found that, on August 14, 2012, the corporate petitioners entered into an exclusive agency and marketing agreement with the respondent related to the EB-5 Project, pursuant to which they gave the respondent exclusive rights to identify and procure foreign investors to participate in the EB-5 Project, and pursuant to which the respondent agreed to conduct all negotiations, provide and procure all services incidental to investments in the EB-5 Project, and undertake the due diligence required to ensure that all such investments were compliant with USCIS rules and regulations. She further found that the respondent was to receive a fee of \$45,000 for each qualified foreign investor, which was to be paid in the form of the investors’ payments of a service fee over and above their \$500,000 investments. In addition, the arbitrator found that the project fees largely were used to cover the marketing and costs of related services incurred in procuring the investors. The agreement also provided that it “may be terminated for justifiable cause upon written notice by either party if the other party fails to perform its obligations hereunder.” Pursuant to the terms of the agreement, the corporate petitioners paid the respondent its project fee of \$45,000 per each of 12 investors that the respondent procured, which resulted in a total investment amount of \$6,000,000, payable to the corporate petitioners. Eight of the Investors made their investment loans in 2013, while the remaining four made their investment loans in 2014, 2015 and 2016, and, as such, at the time of the arbitration hearing, all of those loans had matured.

With respect to the respondent’s claim that the parties had entered into a side agreement and had added a handwritten provision to the marketing agreement concerning bonuses to be paid to the respondent, the arbitrator concluded that the sole operative provision set forth in the version of the agreement that had been produced by the corporate petitioners

concerned their right “to cancel the [Marketing] agreement attached hereto and made a part hereof at any time and at will, in which event [the respondent] will not be obligated to refund any expenses advanced to it by [the corporate petitioners] prior to such termination.” The respondent’s principal, however, testified at the arbitration hearing that, when presented with the side agreement, and after considering the ramifications of the corporate petitioners’ right to cancel the marketing agreement at any time and at will, he objected to the change in terms, and requested the petitioner Ari Herrmann to memorialize what the respondent’s principal characterized as a prior agreement providing the respondent with a \$15,000 bonus per year per. The arbitrator concluded that, despite the respondent’s contention that the return on the investments would “accrue at an estimated rate of 1.5% per annum on a non-compounded basis,” the loan agreements themselves actually stipulated that interest on the investments of the made by the investors will “accrue at an estimated rate of 4.5% per annum on a non-compounded Basis,” and thereupon rejected the respondent’s contention that the corporate petitioners were obligated to pay the respondent, as a bonus, the difference between the two rates, that is, interest at the rate of 3% per year per investor. She further rejected the versions of the side agreement and marketing agreement that the respondent submitted to her, which purportedly included the bonus provisions, concluding that they were not authentic documents, and were generated without the corporate petitioners’ consent. The arbitrator thus concluded that the additions of bonus provisions by the respondent were made in contravention of the marketing agreement, which provided that said agreement “cannot be changed or modified except in writing and with both parties’ prior written approval and consent.”

The arbitrator further found, however, that none of the petitioners objected to a January 2020 invoice, pursuant to which they remitted proceeds to the respondent, or to any subsequent invoices for the unpaid balance of any alleged bonus, and that they made no effort to ascertain whether they were, in fact, obligated to pay a purported bonus, but that, in any event, those payments of “remitted proceeds” were not made in satisfaction of any obligation to pay the

purported bonus in the first instance. She further concluded that neither Herrmann nor the petitioner Yitzchack Tessler personally guaranteed any of the corporate petitioners' obligations under the marketing agreement.

The arbitrator thus rejected the respondent's claims to recover for breach of contract against the corporate petitioners, its claims to recover for breach of contract against Herrmann and Tessler, its claims to recover for quantum meruit or unjust enrichment against all of the petitioners, its claim to recover on an account stated against all of the respondents, and its attempt to pierce the corporate veil to recover against Herrmann and Tessler for the corporate petitioners' liability.

The counterclaims asserted by the petitioners in the arbitration proceeding included a counterclaim for the return of proceeds that they remitted to the respondent on the ground that the remittance of those proceeds was procured by fraud, and to recover those proceeds on the ground that they were not obligated to pay under the theory that they were subject to an account stated. The arbitrator concluded that the evidence did not support those counterclaims.

With respect to the counterclaim alleging fraud, the arbitrator found that,

“[w]hile Mr. Tessler testified that he had been defrauded into paying the Remitted Proceeds, an examination of the record indicates otherwise. Mr. Tessler repeatedly denied that the payments of the Remitted Proceeds were made to satisfy any obligation to pay the Bonus or any bonus to Lion's Property. Rather, Mr. Tessler, motivated by a charitable impulse, made payments of the Remitted Proceeds to satisfy some yet-to-be determined payment obligation that he believed the Corporate [petitioners] owed to [the respondent] in connection with the EB-5 Project. Mr. Tessler emphatically testified that such payments were not made to satisfy any obligation of the Corporate [petitioners] to pay the Bonus to [the respondent]. Mr. Tessler further testified that he did not discover that the Remitted Proceeds were tied to or purportedly paid to satisfy the Bonus until he reviewed the Arbitration Demand in March 2021 well after he made the last payment of the Remitted Proceeds in September 2020.

“Consequently, because there is no nexus between [the respondent's] fraudulent acts and [petitioners'] payments of the Remitted Proceeds, [petitioners] are not entitled to the return of the Remitted Proceeds on the basis of fraud. By claiming that fraud is a ground for the return of the Remitted Proceeds, [petitioners] implicitly acknowledge that other grounds for defending against an account stated claim should also apply to any claim for the return of payments made in

satisfaction of an account stated . . . Such other grounds are timely objection to an account statement and due examination of the statement.”

In her award, the arbitrator further concluded that, absent fraud, misrepresentation, or other equitable considerations, the standard for prevailing on a claim for an account stated is whether the party to a contract receiving invoices has objected within a reasonable time, and that where a recipient failed to object to an account statement within a reasonable time, the recipient would be bound by it as an account stated. As she explained it,

“[i]mplicit in the requirement to object is the expectation that the recipient of an account statement will make an effort to determine whether the statement is correct. The decisions of New York courts on claims for account stated make this expectation explicit by uniformly requiring that the recipient of an account statement examine the statement to ascertain whether it is correct or not.”

She determined that, to recover the remitted proceeds, the petitioners were obligated to establish that they were neither given the opportunity nor had the ability to obtain full knowledge of the true facts and circumstances relating thereto, they would have had to show that they had fulfilled their duty to examine the January 2020 invoice and subsequent invoices to ascertain whether they were correct or not, and that they timely objected to the January 2020 invoice or subsequent invoices referable to the putative bonus. As the arbitrator concluded,

[t]his, the [petitioners] cannot do. . . [Petitioners] were willfully blind to [respondent’s] demand for payment of the Bonus or additional funds under the Marketing Agreement and the Side Agreement. [Petitioners] had several opportunities to examine whether they had an obligation to pay the Bonus or any additional funds to [respondent] over and above the Project Fees but declined to do so. Not only did [petitioners] fail to object to any invoices for the Remitted Proceeds but they also made payments of the Remitted Proceeds. The examination undertaken by [petitioners] as to whether the amounts stated in the January 2020 Invoice or subsequent invoices were correct or, more importantly, whether they even bore any obligation to pay those amounts, was woefully inadequate if non-existent. Thus, [petitioners] do not satisfy any of the grounds for defeating an account stated claim under New York law. Accordingly, [petitioners’] counterclaim for the return of the Remitted Proceeds is denied.”

The arbitrator thus denied all of the counterclaims that the petitioners asserted in the arbitration proceeding, including their counterclaim for an award of attorneys’ fees, and directed that the parties equally share the costs of arbitration and the arbitrator’s fees.

The petitioners commenced this proceeding on September 25, 2023 (see CPLR 304[a]).

Pursuant to CPLR 7510, 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.” Where, as here, the parties both participated in the arbitration proceeding, the award may only be vacated if the court finds that the rights of a party were prejudiced by:

“(i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection”

(CPLR 7511[b][1]). More particularly, an arbitration award may be vacated pursuant to CPLR 7511(b)(1)(iii) where an arbitrator exceeded his or her power, including where the award violates strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator’s power (see *Matter of Isernio v Blue Star Jets, LLC*, 140 AD3d 480 [1st Dept 2016]). The grounds specified in CPLR 7511 for vacatur of an arbitration award are exclusive (see *Bernstein Family Ltd. Partnership v Sovereign Partners, L.P.*, 66 AD3d 1, 8 [1st Dept 2009]), and it is a “well-established rule that an arbitrator’s rulings, unlike a trial court’s, are largely unreviewable” (*Matter of Falzone v New York Cent. Mut. Fire Ins. Co.*, 15 NY3d 530, 534 [2013]). Moreover, a petition or motion to vacate an arbitration award must be made within 90 days of the delivery of the award to the party seeking vacatur (see CPLR 7511[a]).

The petitioners timely interposed that branch of the petition seeking to confirm decretal paragraphs 1 through 7 of the award, as they commenced this proceeding within one year of their receipt of the award. Moreover, the court agrees with the petitioners that decretal paragraphs 1 through 7 of the award should be confirmed, as that portion of award was proper in all respects and no grounds exist for modification or vacatur. By failing to answer or appear

in this proceeding, the respondent has waived any contention that this portion of the award was improper. Hence, that branch of the petition must be granted.

Conversely, with respect to that branch of the petition seeking to vacate decretal paragraphs 8 through 12 of the award, the petitioners have failed to establish that any of the grounds for vacatur enumerated in CPLR 7511(b) are applicable here. They did not argue that the award itself was secured by corruption, fraud, or misconduct, that the arbitrator exhibited bias towards the respondent, or that the arbitrator failed to follow applicable procedures. Nor did they establish that the award violated strong public policy, was irrational, or clearly exceeded a specifically enumerated limitation on the arbitrator's power. Rather, the essence of this branch of the petition is that the petitioners disagreed with the arbitrator's fact-finding or interpretation of applicable law. The court concludes that the arbitrator did not misinterpret the law with respect to fraud or proximate cause, or with respect to negating an account stated. The court "reject[s] petitioner[s]' main argument that the arbitrator's fact-finding was irrational and required vacatur, in light of the well-settled principle that courts in considering a petition to vacate a voluntary arbitration may not review the arbitrator's findings of fact" (*Matter of Henville v Metropolitan Transp. Auth.*, 148 AD3d 460, 461 [1st Dept 2017]). Hence, that branch of the petition seeking vacatur of decretal paragraphs 8 through 12 of the award must be denied.

In any event, this proceeding was commenced long after the 90-day period for seeking vacatur of the award had expired (see CPLR 7511[a]). Consequently, that branch of the petition seeking vacatur of decretal paragraphs 8 through 12 of the award must be denied for that reason as well (see *Matter of Pender v New York State Off. of Mental Retardation & Dev. Disabilities*, 27 AD3d 756, 756-757 [2d Dept 2006]).

The court notes that, pursuant to CPLR 7511(e), "upon the denial of a motion to vacate or modify" an award, the court "shall confirm the award."

Accordingly, it is,

ORDERED and ADJUDGED that the branch of the petition seeking to confirm decretal paragraphs 1 through 7 of the award dated September 26, 2022, and rendered in the proceeding entitled *Matter of Lion's Prop. Dev. Group, LLC v New York Proton Regional Ctr., LLC, et al.*, International Centre for Dispute Resolution, Case No. 01-21-0002-1146, be, and hereby, is, granted, and that portion of the award is confirmed; and it is further,

ORDERED and ADJUDGED that the branch of the petition seeking to vacate decretal paragraphs 8 through 12 of the award dated September 26, 2022, and rendered in the proceeding entitled *Matter of Lion's Prop. Dev. Group, LLC v New York Proton Regional Ctr., LLC, et al.*, International Centre for Dispute Resolution, Case No. 01-21-0002-1146, be, and hereby, is, denied, and that portion of the award is thereupon confirmed.

This constituted the Decision, Order, and Judgment of the court.

5/24/2024

DATE

JOHN J. KELLEY, 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