

**Panzer v Epstein**

2024 NY Slip Op 32635(U)

July 9, 2024

Supreme Court, New York County

Docket Number: Index No. 654909/2021

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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MOSHE CHAIM PANZER		INDEX NO. <u>654909/2021</u>
Petitioner,		MOTION DATE <u>10/30/2023</u>
- v -		MOTION SEQ. NO. <u>009</u>
JOEL EPSTEIN,		
Respondent.		<b>DECISION + ORDER ON MOTION</b>

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 272, 273, 274, 275, 276, 277, 278 were read on this motion to ENFORCE JUDGMENT, CONTEMPT, SANCTIONS and RENEWAL.

Respondent Joel Epstein’s (“Epstein” or “Respondent”) motion to compel Petitioner Moshe Chaim Panzer (“Panzer” or “Petitioner”) to comply with the Court’s Judgment, for contempt, for sanctions, and for leave to renew his motion to transfer the Kings County Action to this Court is **granted** to the extent that Panzer is directed to accept the Escrow Amount from the Escrow Agent, which will complete the transfer of his interests in the Fabuwood Entities to Epstein, and is otherwise denied.

Panzer’s argument that the Closing directed in *Joel Epstein v. Moshe Chaim Panzer*, AAA Case No 01- 21-0004-9666 (the “Arbitration”) and confirmed by the Court’s Judgment is “optional” is unavailing (Tr. 79-80 [NYSCEF 278]). The record shows that the AAA panel directed the Closing. Having entered Judgment confirming the Final Award, this Court may enforce the AAA panel’s determination.

## A. Background

During the Arbitration, the parties entered into a Confidential Settlement Agreement dated May 31, 2022 (“Settlement” [NYSCEF 63]). The Settlement provides that “[Epstein] shall exercise his Buyout Right to purchase all the outstanding shares of the Fabuwood Entities held by [Panzer]” and that Panzer “shall sell. . .all equity interests. . .in all of the Fabuwood entities” (Settlement ¶¶1, 2). The Settlement provides for the AAA panel to select a “Buyout Price” and provides detailed instructions for a “Closing” to take place within sixty days of the panel’s determination (Settlement ¶¶4-27).

The Settlement further provides that, upon its execution, Epstein would establish an “Escrow Account” and that counsel for Epstein would be the “Escrow Agent.” Annexed to the Settlement are executed “Escrow Documents,” including Panzer’s resignation letter from the Fabuwood Entities and “Irrevocable Stock Power” assignments.

The Settlement provides that, following the panel’s selection of the Buyout Price, all amounts payable to Panzer shall be deposited in the Escrow Account two business days before Closing. Following the deposit, the Escrow Agent is required to send a “Closing Notice” scheduling a “Closing Date” to release both the escrowed funds and documents (Settlement ¶¶16-17). Panzer’s only role at Closing was to accept payment at which point he “shall be deemed to have resigned” from the Fabuwood Entities and “the Arbitration will conclude” (Settlement ¶¶18, 22).

The Settlement also includes the following “Default” provision:

30. Default: If Claimant and/or Respondent fails to perform his obligations as specified in the Agreement upon the signing of the Agreement and/or upon the date of the Closing, then: a. the provisions of this Agreement and the Exhibits annexed hereto are thereby voided in their entirety; b. The Recitals shall not be interpreted as an admission of

liability and shall have no evidentiary value; and c. Claimant and Respondent's rights, titles, and interests in the Fabuwood Entities, as existed prior to the execution of this Agreement shall be reinstated, except that in the event Claimant defaults, all claims made by Claimant in the Arbitration, are hereby waived.

Following the Settlement, the Arbitration panel issued an Order ["Interim Decision"] dated November 30, 2022, providing that "[t]he Buyout Date (Closing) shall be on or by April 18, 2023" (NYSCEF 67).

An evidentiary hearing was held on January 24-25, 2023. The March 20, 2023, Final Award (NYSCEF 60) after a baseball-style arbitration accepted Epstein's "Appraised Value" in "accordance with Paragraph 10 of the Confidential Settlement Agreement" and stated that "[t]his Arbitration is concluded."

On March 31, 2023, counsel for Epstein served a Closing Notice setting April 4, 2023, as the Closing Date and confirmed that the Buyout Price had been placed in the Escrow Account (NYSCEF 79). Counsel for Panzer objected to the Closing Notice on the grounds that "Mr. Epstein has materially breached the Settlement Agreement. . ." (NYSCEF 80).

On the Closing Date, the Escrow Agent advised counsel for Panzer that the Escrow Documents had been released but that its attempts to deliver the escrowed funds to Panzer were rejected (NYSCEF 82). On April 5, 2023, counsel for Panzer dismissed the Closing as a "sham," stating again that Epstein had breached the Settlement Agreement (NYSCEF 83).

On April 14, 2023, Epstein moved in this Court to confirm the Final Award and compel Panzer to accept the amounts in the Escrow Account to complete the Closing. Epstein's motion included copies of the AAA panel's pre-hearing orders, including the Interim Decision (NYSCEF 67-71). Panzer cross-moved to vacate the Final Award. In his papers, Panzer noted cryptically in a footnote that the Settlement Agreement was an "option" that provided Epstein

with an “opportunity – but not the obligation” to purchase Panzer’s shares (NYSCEF 109 at n. 3). Panzer did not, however, suggest that *he* had an option to decline to complete the Closing if Epstein tendered payment consistent with an arbitration award.

The Court confirmed the Final Award on June 23, 2023 (*Panzer v Epstein*, 2023 N.Y. Slip Op. 32099[U], 1 [N.Y. Sup Ct, New York County 2023] [“Order”]). The Court did not at that time compel Panzer to accept the funds in the Escrow Account, finding that Epstein’s request for such relief was premature. Instead, the Court stated that “[s]hould [Panzer] fail to abide by the Final Award, which will be enforceable as a judgment, Epstein may move to compel compliance” (Order at 5 [citations omitted]). A judgment confirming the Final Award was entered on July 24, 2023 (NYSCEF 221 [“Judgment”]). No notice of appeal was filed.

Rather than accept the funds in the Escrow Account, Panzer initiated an action in Kings County Supreme Court seeking to void the Settlement and for reinstatement of his interests in the Fabuwood Entities based on alleged breaches by Epstein (“Kings County Action” [Index No. 520417/2023]). While the Kings County Action was pending, Epstein filed the instant motion to compel compliance with the Court’s Order and Judgment, and for contempt.

While Epstein’s motion was pending, on November 2, 2023, the Hon. Reginald A. Boddie dismissed the Kings County Action based on, among other things, the res judicata effect of this Court’s Judgment (NYSCEF 275). Justice Boddie observed that Panzer’s allegations “are identical to those he asserted in” this proceeding.

On December 8, 2023, Panzer submitted opposition to the instant motion, arguing for the first time that the Final Award was limited to selecting an “Appraised Value” for a “potential buyout” (NYSCEF 272 at 10-11). Panzer argued that the Settlement’s Default provision, quoted

above, authorized either party to elect not to proceed with the Closing. Essentially, Panzer argues that the entire arbitration after the Settlement Agreement was an advisory process, which either side was free to ignore and return to arbitration as if the Settlement had not occurred.

The Court heard oral argument on March 28, 2024 (NYSCEF 278 [Transcript]). The Court rejected Panzer's position that Closing was optional, but requested supplemental briefing on the question whether the Court had the authority to compel Panzer to accept the escrowed funds, which is not explicitly addressed in the Final Award (Tr. at 79-84). Specifically, the Court requested that the parties address the Court of Appeals' decision in *TCR Sports Broadcasting Holding, LLP v WN Partner, LLC*, 40 NY3d 71, 87 [2023] ("*TCR*"), which held that this Court exceeded its authority by issuing a money judgment and imposing prejudgment interest based on an arbitral award that determined the "fair market value" of certain telecast rights fees but did not (because it could not under the parties' agreement) issue a monetary award or adjudicate any disputes as to nonpayment of fees.

Following the submission of supplemental briefing (NYSCEF 276-277), the Court concludes that, unlike in *TCR Sports*, the arbitrators had and exercised the authority to direct the parties to complete the Closing. The Interim Decision setting the Closing Date is subsumed in the Final Award and any challenge to the Interim Decision should have been raised by Panzer in connection with his cross-motion to vacate the Final Award. Accordingly, the Court directs Panzer to accept the funds from the Escrow Agent to complete the transfer of his interests in the Fabuwood Entities to Epstein.

## B. Discussion

The Court's role in reviewing an arbitration in the first instance is limited, and the Court is required to confirm a final award even where there is only a "barely colorable justification for the outcome reached" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006] quoting *Matter of Andros Cia. Maritima, S.A. [Marc Rich & Co., A.G.]*, 579 F.2d 691, 704 [2d Cir.1978] [other citations omitted]). However, once a judgment is entered pursuant to CPLR 7514, the Court is tasked with interpreting and enforcing the Final Award. As explained by the First Department:

Where a dispute exists as to the meaning of an arbitration award that has been confirmed in a judgment, it becomes "the Court's function to determine and declare the meaning and intent of the arbitrator". To that end, a court may review the text of the arbitrator's award in conjunction with whatever findings, if any, the arbitrator has made. In so doing, a court should adopt the most reasonable meaning of the text by avoiding any potential interpretations of the award that would render any part of its language superfluous or lead to an absurd result.

(*Pine St. Assoc., L.P. v Southridge Partners, L.P.*, 107 AD3d 95, 100 [1<sup>st</sup> Dept 2013] [citations omitted]).

The Court finds that the Arbitration panel had the authority to direct the Closing under the terms of the Settlement Agreement and did in fact direct the parties to complete the Closing in the Interim Decision underlying the Final Award. The Court also finds that Epstein's motion is properly addressed to this Court pursuant to CPLR 7502(a)(iii) ("Notwithstanding the entry of judgment, all subsequent applications shall be made by motion in the special proceeding. . .in which the first application was made").

The Final Award provides, in relevant part:

In accordance with Paragraph 10 of the Confidential Settlement Agreement between the parties dated May 31, 2022, the Panel selects the Appraised Value of the Claimant's appraisal firm.

Paragraph 10 of the Settlement provides, in relevant part:

Once the Panel decides which appraisal and subsequent appraised value shall serve as the purchase price of the Buyout Shares ("Buyout Price"), Claimant shall purchase Respondent's Buyout Shares at a closing to take place no later than sixty days (60) of the determination of the Buyout Price (the "Closing"), pursuant to that amount and no other amount shall be used to determine the Buyout Price.

The Panel had the authority to direct the Closing in the Settlement and did so in its Interim Decision, which is subsumed within the Final Award (*Capital Enterprises Co. v Dorman*, 178 AD3d 507, 508 [1<sup>st</sup> Dept 2019] citing *Avon Products, Inc. v Solow*, 150 AD2d 236, 239 [1<sup>st</sup> Dept 1989] [challenges to interlocutory orders in arbitration must be raised in a motion to vacate a final award]). "Shall" is a mandatory, and not permissive, command and there is nothing in the record to support Panzer's contention that Closing was optional (*Liu v Ruiz*, 200 AD3d 68, 74 [1<sup>st</sup> Dept 2021]). Thus, unlike in *TCR*, in which the parties' agreement limited the arbitrators' authority to determining the value of certain rights fees but not to issue a monetary award (43 NY3d at 87), the AAA panel in this case had the authority to direct a Closing to finalize resolution of the dispute.<sup>1</sup>

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<sup>1</sup> Panzer's suggestion that the Settlement's Default provision renders the entire arbitration effort an advisory process – to be negated at either party's option if unsatisfied with the terms of Closing – is unpersuasive. The far more rational reading of that provision is that it provides an option to a *non*-breaching party, in this case Epstein, in the event of a breach. The record simply does not support an interpretation would render the Settlement and all subsequent proceedings, including the Final Award and the Judgment, illusory. Indeed, Panzer's own actions are inconsistent with such an argument. Specifically, if the Arbitration was only to determine a "potential buyout," Panzer would not have needed to vigorously challenge the Final Award or file the Kings County Action to "reinstate" any rights in the Fabuwood Entities. As determined in the Kings County Action, Panzer's efforts to "claw back" any interest in the Fabuwood

Here, all of the necessary Escrow Documents were signed and all of the necessary procedures to complete the Closing are set forth in the Settlement. The Closing was properly noticed by the Escrow Agent, and it is only Panzer's rejection of the funds from the Escrow Agent that has caused this proceeding to remain active.

While the Court rejects Panzer's arguments, it will not impose sanctions at this time because the Judgment did not set a date certain for Panzer to accept the escrowed funds. However, the directives in *this* order are a "clear mandate" to complete the Closing by a specific date and sanctions may be awarded should Panzer not consummate the Closing as directed (*Pac. All. Asia Opportunity Fund L.P. v Wan*, 199 AD3d 423 [1st Dept 2021] *citing* Judiciary Law § 753 [case citations omitted]).

Finally, the branch of Epstein's motion seeking renewal of the motion to transfer the Kings County Action and consolidate it with the instant proceeding is denied as moot given the dismissal of the Kings County Action (NYSCEF 275).

Accordingly, it is

**ORDERED** that the branch of Epstein's motion seeking to compel compliance with the Final Award, as confirmed in the Order and resulting Judgment, is **GRANTED**. Panzer shall provide wiring instructions to counsel for Epstein (the Escrow Agent) within five (5) days after the service of a copy of this order with notice of its entry and the Escrow Agent may release the escrowed funds as directed within five (5) days of receiving wiring instructions; it is further

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Entities were "identical" to those asserted in this proceeding and Panzer may not "relitigate matters previously addressed in the arbitral forum" (*Grayco Alternative Partnership II, LP v 5 Stone Green Capital LLC*, 79 Misc 3d 1213(A) [Sup Ct New York County 2023] *citing* *Muriel Siebert & C. v Ponmany*, 190 AD2d 544, 544 [1st Dept 1993]).

**ORDERED** that those branches of Epstein’s motion seeking a finding of contempt and for sanctions are **DENIED**; and it is further

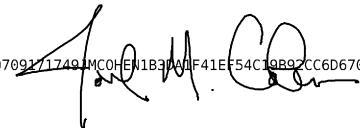
**ORDERED** that the branch of Epstein’s motion seeking leave to renew is denied as moot in light of the dismissal of the Kings County Action.

This constitutes the decision and order of the Court.

7/9/2024

DATE

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JOEL M. COHEN, 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