

AKF Inc v ESHG Kent Is. LLC
2026 NY Slip Op 30428(U)
February 5, 2026
Supreme Court, New York County
Docket Number: Index No. 652142/2025
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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AKF INC,

Petitioner,

- v -

ESHG KENT ISLAND LLC,RICHARD LAURENCE COOPER

Respondent.

-----X

INDEX NO. 652142/2025

MOTION DATE 08/19/2025

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

Upon the foregoing documents, the motion is granted in part and denied in part.

Background

Petitioner is a company in the business of providing revenue purchase agreements. Respondents entered into such an agreement (the "RPA") with Petitioner in October of 2024, as merchant and guarantor. Petitioner alleges that the merchant respondent diverted funds from the bank account in violation of the RPA. The parties submitted their dispute to arbitration pursuant to the terms of the RPA.

Petitioner commenced this special proceeding in the midst of arbitration, seeking to restrain Respondents' bank accounts pending the determination of the arbitration. Petitioner moved by order to show cause for the relief sought in the petition. The petition was denied and the matter marked disposed by order of this court on April 29, 2025, on the grounds that Petitioner failed to provide any proof that Respondents would dissipate funds.

The pending Rapid Ruling arbitration has since concluded, with an award issued in Petitioner's favor. Petitioner nevertheless now moves under this same index number to confirm

the arbitration award. Respondents oppose. Oral argument has been scheduled twice on this matter, and twice counsel for Respondents has failed to appear.

Discussion

As an initial matter, Petitioner cites to CPLR § 7502(a)(iii), but this provision does not give Petitioner the ability to bring such a motion. This special proceeding was concluded when the Court denied the petition and marked the matter disposed. The relief that Petitioner seeks here is not sought in the petition and should be sought by a separate special proceeding. The Court feels that in the interest of justice, it will reach the merits of this motion, given the prolonged delay of the two missed oral arguments. Furthermore, because counsel for Respondents failed to appear to two scheduled oral arguments, the Court sanctions Respondents in the amount of fees and costs incurred by Petitioner in attending the two oral arguments.

Petitioner seeks to confirm the arbitral award, and Respondents oppose on two grounds: 1) that the agreement in question is a usurious loan and therefore unenforceable, and 2) that the liquidated damages 25% fee is an unenforceable penalty. In the arbitral award, the arbitrator discussed why they did not find the agreement in question to be a usurious loan under existing case law, but did not address whether the 25% fee was an unenforceable penalty or valid liquidated damages. In opposition to the motion, Respondents urge the Court to vacate the arbitration award as against public policy. They did not formally cross-move to vacate, but it is sufficient for a party to oppose a motion to confirm and formally cross-moving to vacate is not required. *International Components Corp. v. Klaiber*, 59 A.D.2d 853, 854 [1st Dept. 1977]. For the reasons that follow, the award is confirmed except for the portion that awarded a 25% fee, which is vacated as against public policy and law.

The Standard to Vacate an Arbitration Award

Under Article 75 of the CPLR, a court “shall confirm an award” unless said award is “vacated or modified upon a ground specified in section seventy-five hundred eleven of this article.” CPLR § 7510. The grounds given in the CPLR for vacating or modifying an award include when an arbitrator exceeds their power. CPLR § 7511(b)(1)(iii). An arbitrator “has no power to award punitive damages, even if agreed upon by the parties.” *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 356 [1976]. Therefore, “an arbitrator’s award which imposes punitive damages should be vacated.” *Id.* Furthermore, “an award may not be confirmed if it directs an act that would violate the law and confirmation will be denied pursuant to the court’s general equity powers where an award is contrary to the public policy of the State.” *Meyers v. Kinney Motors, Inc.*, 32 A.D.2d 266, 268 [1st Dept. 1969]. If an arbitrator does award unenforceable punitive damages, that portion of the award should be vacated. *Garrity*, at 360.

The Breach Administration Fee is Clearly an Unenforceable Penalty

In *Truck Rent-A-Center*, the Court of Appeals noted that “a liquidated damage provision is an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of the breach of the agreement.” *Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 424 [1977]. Such provisions were meant for “situations where it would be difficult, if not actually impossible, to calculate the amount of actual damages.” *Id.* The Court of Appeals held that such provisions would not, however, be enforced if it is against public policy that that “a provision which requires, in the event of contractual breach, the payment of a sum of money grossly disproportionate to the amount of actual damages provides for penalty and is unenforceable [because such provisions have] its basis in the principle of just compensation for loss.” *Id.* Or “[i]n other words, a penalty is distinct

from a compensatory remedy and a penalty is not measured by the losses caused by the wrongdoing.” *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 37 N.Y.3d 552, 563 [2021].

Here, Petitioner argues that this 25% fee is not an unenforceable penalty because in the past, they have had trouble in collecting on judgments issued against merchants. This reasoning bears no relation to the calculation of damages cause by a breach of the contract. Difficulties in collecting against parties who may not have funds or who may attempt to hide funds are inherent in all contracts. The amount of damages caused by the breach here are easily calculable down to the now-defunct penny, and therefore any liquidated damages provision becomes a penalty rather than a genuine attempt to reflect actual damages caused by a breach. *See, e.g., JMD Holding Corp. v. Cong. Fin. Corp.*, 309 A.D.2d 645, 645 – 46 [1st Dept. 2003]. That other merchants in the past have eluded Petitioner’s attempts to enforce judgments simply does not relate to the matter of calculating the damages caused by a breach of a straightforward purchase agreement. The breach administration fee awarded by the arbitrator is a clear example of an unenforceable penalty that is grossly disproportionate to the breach, and confirmation of that portion of the award would violate strong public policy. But while Respondent urges the Court to vacate the entire award based on the penalty provision, they have cited to no case standing for that proposition. Therefore, the Court will follow the example set forth in *Garrity* and will vacate only that portion of the award that granted an unenforceable penalty. Accordingly, it is hereby

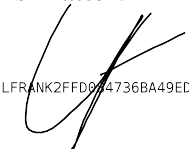
ADJUDGED that the motion is granted in part; and it is further

ORDERED that the arbitral award in this matter dated August 9, 2025, is confirmed in part; and it is further

ORDERED that petitioner AKF inc., d/b/a Fundkite is entitled to judgment against respondents ESHG Kent Island LLC d/b/a Coopers Tavern/The Coopers Tavern/ Cooper’s

Tavern and Richard Laurence Cooper in the amount of \$70,750, plus interest from the date of August 9, 2025, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that petitioner may make an application to the Court for costs and fees associated with appearance at the two scheduled oral arguments on this matter.

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LYLE E. FRANK, J.S.C.

2/5/2026

DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: