[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Cahn Justice PART 49m

Eoonan Tierney

- v -

Kevin Byrne

INDEX NO. 601096/00

MOTION DATE 5/25/05

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . . .

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Dated: 8/17/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

----------X

FIONAN TIERNEY,

Plaintiff,

-against- Index No. 601096/00

KEVIN BYRNE and INNOVATIVE THOUGHTS, INC.,

Defendants.

----------X

Herman Cahn, J.:

Plaintiff Fionan Tierney moves to confirm an arbitration award, CPLR 7510 and 7514, and to enter judgment in favor of Tierney against defendants Kevin Byrne and Innovative Thoughts, Inc., (IT), in the amount of $251,250, together with interest at 9% per annum from January 21, 2005.

This action arises out of a 1992 oral joint venture agreement between Tierney and Byrne to purchase, restore, and rent two adjacent buildings in Manhattan. To implement the joint venture, Tierney and Byrne used IT, which had previously been formed by Byrne, and created nonparty Byrne-Tierney Holdings, Inc. They placed each building under the sole ownership of one of the corporations. Subsequently, Tierney discovered that Byrne had failed to turn over 50% of Innovative Thought's stock to Tierney when they formed the joint venture.

Tierney then commenced this action on the ground that Byrne's retention of

complete ownership of IT and its building constituted breach of the joint venture agreement. In the amended complaint, Tierney asserts claims for, among other things, breach of contract and unjust enrichment. He seeks specific performance of the agreement, an accounting, a judicial declaration that he is half-owner of IT, and recovery of 50% of the net profits generated by the company's building.

During the pendency of the action, the court, with counsel's consent, appointed Stephen R. Kaye, Esq., to mediate the matter. On December 22, 2004, during the mediation, the parties entered into a stipulation of settlement that provides for payment by defendants to Tierney of $251,250 in two installments. The first payment of $51,250 was due on or before June 30, 2005. The second payment of $200,000 was to be memorialized in a promissory note that provides for payment in full on January 2, 2008, and for interest to accrue at a rate of 5% per annum, to be paid annually, commencing on January 2, 2006.

The stipulation also provides that both payments are to be secured by a mortgage on real property located in Orangeburg, South Carolina, owned by IT. With regard to establishing the value of the collateral, the stipulation provides that "[d]efendants shall provide plaintiff within 30 days with certified copies of the deed recorded on the Property, all encumbrances and mortgages relating to the [P]roperty, and a copy of a current appraisal, by an appraiser to be mutually selected, or of the appraisal, if any, done in connection with IT's purchase of the Property" (Stipulation at ¶ 3). The stipulation

further provides that "[d]efendants represent that the Property has unpledged value of no less than $500,000" (Stipulation at ¶ 4).

While the parties did not specify in the stipulation any remedies upon defendants' default in providing the required valuation documentation, the parties expressly authorized the mediator to resolve disputes regarding whether the unencumbered value of the collateral was adequate to secure the debt (see Stipulation at ¶ 5).

Defendants failed to provide the required documentation within the time specified in the stipulation. Tierney contacted the mediator and requested his assistance in compelling them to fulfill their obligations under the stipulation. In the award, the mediator summarizes his response:

> [t]his was followed by my telephone conference on March 11 with counsel for Tierney and counsel for Byrne and IT. After hearing counsel, I suggested that the parties make a further attempt to resolve the matter satisfactorily without my intervention as arbitrator under the Settlement Agreement, but if no such resolution were reached by March 21, [2005], I would entertain an application in that capacity. I also advised the parties that I would have no involvement as mediator in discussions, if any, so as not to compromise my contractual role as arbitrator

(Award at 5).

The parties did not resolve their dispute by the March 21, 2005, deadline. Several days later, Tierney made a formal written motion before Mr. Kaye for an immediate arbitration award accelerating the entire debt, on the ground that defendants' failure to timely provide the certified deed and other documents relating to the collateral's value

constitutes a material breach of the settlement stipulation terms. Tierney's motion papers begin with the caption of the action at bar, which includes the identification of this court as the venue of the action, but the motion was never submitted here.

Defendants did not serve formal opposition papers to the motion, but, instead, advised by letter dated April 6, 2005, that they would shortly provide the required documents.

By e-mail sent April 11, 2005, Mr. Kaye, acting as arbitrator, advised the parties' counsel of his intent to render a decision by April 22, 2005. By letters dated April 19 and 20, 2005, defendants forwarded a deed to the property that had not been certified, but did not provide any other documents. Defendants also stated that the deed's recital of the $2.25 million purchase price demonstrated that the property's value far exceeded the amount of the debt.

Mr. Kaye, acting as an arbitrator, then issued an award in which he granted the motion on the ground that defendants had breached a material term of the stipulation by failing to provide the documentation listed in the stipulation. Specifically, he found that the stipulation empowers him to act as an arbitrator in resolving the parties' disputes, and he awarded Tierney $251,250, together with interest. Mr. Kaye denied that branch of the motion seeking reimbursement of Tierney's attorneys' fees. He also held that Tierney and defendants were each liable for one-half of his fee for services provided as an arbitrator.

Tierney now moves to confirm the (arbitration) award and to enter judgment

against defendants in the amount of $251,250.

In opposition, defendants contend that the award is a nullity because Mr. Kaye, as arbitrator, failed to follow the guidelines regarding notice and a hearing established by CPLR 7506 and, instead, issued an award based upon motion papers that did not include sworn statements by any of the parties.

"It is well-settled that an agreement to arbitrate requires a clear and unequivocal manifestation of an intention to arbitrate. The reason for this requirement is because by agreeing to arbitrate a dispute, a party waives 'many of his normal rights under the procedural and substantive law' [Marlene Indus. v Carnac Textiles, Inc., 45 NY2d 327, 334 (1978)] and 'surrender[s] the right to resort to the courts' [Waldron v Goddess, 61 NY2d 181, 183 (1984)]" (Railworks Corp. v Villafane Elec. Corp., 6 Misc3d 301, 303 [Sup Ct, NY County 2004], citing Mionis v Bank Julius Baer & Co., 301 AD2d 104 [1st Dept 2002]).

In the award, Mr. Kaye found that the stipulation addendum's dispute resolution provision constitutes an agreement to arbitrate before himself, any dispute arising of the stipulation. The provision provides that "[i]n the event of any disputes between the parties before this action is discontinued, either party may submit such dispute to [the individual who had acted as mediator], or to the Court if [he] is not available" (Stipulation Addendum at second ¶ 3).

Mr. Kaye noted that, pursuant to the stipulation, "the [legal] action is not to be

discontinued until all of the steps in the settlement process, as provided for in that Agreement, have been completed. At issue here . . . is whether Byrne and Innovative [Thoughts] breached their obligations to complete the very first step in that settlement process" (Award at fn. 2). He then reasoned that, "[i]n light of that provision, my availability, the fact that the instant action has not been discontinued and the absence of any right of appeal from any Decision and Award rendered by me, I consider that my capacity in rendering this Decision and Award is that of Arbitrator" (Award at 1 [footnotes omitted]). In so holding, the arbitrator relied on Railworks Corp., (6 Misc3d 301, supra).

In Railworks Corp. (id.), the court found that the parties' dispute resolution stipulation constituted an agreement to arbitrate, rather than merely an agreement to submit their dispute for resolution by U.S. District Judge Denny Chin according to abbreviated submission and hearing procedures. The court noted that the parties agreed in a written stipulation to resolve their dispute in an "arbitration-style proceeding" and to voluntarily dismiss with prejudice all of their claims and defenses raised in the then pending litigation. They also set forth rules and guidelines governing the hearing, including the maximum amounts which could be awarded, the closing of the proceedings to the public, the time limits for each side's presentation, and the documentary evidence and exhibits that could be submitted. In the stipulation, the parties acknowledged their intent to resolve their dispute by "the alternative dispute resolution process" established in

the stipulation and that "Judge Chin's determination in this matter is binding, final and nonappealable."

Similarly, in Chris O'Connell, Inc. v Beacon Looms, Inc., (235 AD2d 248 [1st Dept 1997]), the Appellate Division, First Department found that the following language in a stipulation sufficiently indicates an intention to arbitrate rather than mediate:

> [a]lthough the parties' agreement employs the word 'mediate' rather than 'arbitrate', it does provide that '[t]he proceedings shall be conducted as the mediator directs, with written findings', that 'such findings are agreed to be enforceable in any court with jurisdiction over the [losing] party', and that '[c]osts of mediation shall be borne by the [losing] party'

(Chris O'Connell, Inc. v Beacon Looms, Inc., 235 AD2d at 249; Lovisa Constr. Co. v County of Suffolk, 108 AD2d 791, 792 [2d Dept 1985] [finding that "[a]lthough no particular wording is required to constitute a valid, binding arbitration agreement, nor even the inclusion of the words 'arbitrate' or 'arbitrator', the language used must be clear and unambiguous"]).

Here, the dispute resolution provision set forth in the stipulation is not as clear. In it, the parties agree that each "may" submit a dispute under the stipulation to the individual who had acted as mediator, but that, if he were not available, then the party may submit the dispute to the court for resolution. The use of the word, "may," indicates that a choice of forum was contemplated. However, the rest of the sentence indicates that only the individual who had acted as mediator could resolve the parties' disputes, assuming he were available. Significantly, neither during argument on the motion before

Mr. Kaye, nor during the instant motion to confirm, have the parties themselves, or any person with knowledge, submitted an affidavit regarding their intention as to "arbitrate" or "mediate," if there were a dispute.

In addition, as noted in the award, the proceeding began as a mediation and both sides agreed that the legal action would remain active until completion of the settlement process. In fact, the litigation has remained active, perhaps indicating the parties' intention to enforce their rights and defenses under the settlement stipulation before the court, if necessary.

Given the ambiguity of the dispute resolution provision, the proceedings' commencement as a mediation, and the lack of a hearing, defendants' silence with regard to the mediator's verbal statement that he would decide the motion as an arbitrator cannot be construed as acquiescence to arbitration. Consent to arbitration cannot be given inadvertently (Marek v Alexander Laufer & Son, Inc., 257 AD2d 363 [1st Dept 1999]).

Inasmuch as the wording of the provision and the surrounding circumstances do not clearly indicate whether the parties *intended that the mediator remain* a mediator in resolving disputes arising under the settlement stipulation or whether they intended to vest him with the broader powers of an arbitrator in resolving those disputes, a hearing on this issue is necessary.

The issue of the parties' intention on this point when they entered into the stipulation, is respectfully referred to a Special Referee to hear and report. Pending the

receipt of the report, the motion is held in abeyance.

The court notes that, if the parties did intend to arbitrate disputes arising under the settlement provision, then the arbitrator should have held a hearing. "Unless the parties have waived their rights, arbitrators are required to take an oath, hold hearings on notice to the parties, [and] decide the matter only on the evidence submitted at the hearing" (Matter of Penn Cent. Corp., 56 NY2d 120, 126 [1982], citing CPLR 7506). While the right to a hearing may be waived in writing or by the party's participation in the arbitration without objection (see CPLR 7506 [f]), here, no written waiver exists and defendants' attempts by letter to fulfill their contractual obligations under the settlement stipulation cannot be held to constitute knowing participation in an arbitration proceeding.

Accordingly, it is

ORDERED that the issue of whether in agreeing to the settlement stipulation addendum dispute resolution provision, the parties intended to have such disputes resolved by arbitration before Mr. Kaye, is referred to a Special Referee to hear and report with recommendations, except that, upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the motion is held in abeyance pending receipt of a report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

[* 11]

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

Dated: August 17, 2005

ENTER:

J.S.C.