Matter of CPG Constr. & Dev. Corp. v 415 Greenwich Fee Owner, LLC
2012 NY Slip Op 33404(U)
March 12, 2012
Sup Ct, New York County
Docket Number: 102055/10
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 102055/2010
CPG CONSTRUCTION
VS.
415 GREENWICH FEE OWNER
SEQUENCE NUMBER : 005
RENEWAL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his 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/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/12/12 JUSTICE SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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In the Matter of the Arbitration Between,

CPG CONSTRUCTION & DEVELOPMENT CORP., SAFECO INSURANCE COMPANY OF AMERICA,

Petitioners,

-against-

415 GREENWICH FEE OWNER, LLC,

Respondent,

Index No. 102055/10
Action No. 1

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415 GREENWICH MEZZANINE OWNER, LLC, HERITAGE PARTNERS, LLC, 415 GREENWICH, LLC, ETHAN ELDON and JOEL SILVER,

Plaintiffs,

-against-

KBS 415 GREENWICH, LLC, KBS TRIBECA SUMMIT, LLC, 415 GREENWICH SENIOR MEZZANINE OWNER, LLC, and 415 GREENWICH FEE OWNER, LLC,

Defendants.

Index No. 651176/10
Action No. 2

Decision & Order

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SHIRLEY WERNER KORNREICH, J.:

Motions under the above-referenced related index numbers are consolidated herein for disposition. The motion under Index No. 102055/10 (Action No. 1), motion sequence number 005, seeks renewal of a prior motion to confirm an arbitration award, so confirmed (the Confirmation), in order to lodge opposition to and vacate it, based on newly discovered evidence. The motion under Index No. 651176/10 (Action No. 2), motion sequence number 001, is to dismiss the complaint filed as a result of the allegedly improper Confirmation.

I. Background

The underlying arbitration between the parties involves a real estate development project at 415 Greenwich Street, New York City, known as the Tribeca Summit (the Property). 415 Greenwich, LLC (415 Greenwich) was the parent and 100% owner of 415 Greenwich Mezzanine Owner, LLC (415 Mezzanine). Heritage Partners, LLC (Heritage) is the managing partner of 415 Greenwich. 415 Mezzanine was itself the parent and 100% owner of defendant 415 Greenwich Senior Mezzanine Owner, LLC (415 Senior Mezzanine). Finally, 415 Senior Mezzanine was the parent of 415 Greenwich Fee Owner, LLC (Fee Owner). Fee Owner owned the entire interest in the construction project on the Property, was the party to a construction contract with CPG Construction & Development Corp. (CPG), and was the beneficiary of a surety bond from Safeco Insurance Company of America (Safeco). This litigation generally involves the distribution of various assets among the parties as a result of default under loans and unsuccessful financing arrangements.

More specifically, Fee Owner purchased the Property in January 2004 for $60,000,000 and, subsequently, entered into an agreement with CPG for the construction/conversion of the 205,000 square foot pre-war landmark building thereon into 63 apartments with commercial space and a garage (the Project). At a later juncture, to secure the completion of the Project, a $50,000,000 performance bond was issued by Safeco/Liberty Mutual (hereinafter, included as and collectively, Safeco) insuring timely completion of the Project.

Under the construction agreement, CPG as construction manager and contractor was obligated to complete the conversion of the Property in 14 months, time being of the essence. The construction was not completed until 34 months after the start, allegedly causing damages in

excess of $100 million. Those alleged damages comprise $88 million in cancelled sales contracts, additional bank interest charges, excess real estate taxes, administrative fees, additional operational expenses, and maintenance of the residential units, commercial space, and common areas in the building, all due to the 20-month delay in the completion of construction.

As a result of the losses caused by the contractor's delay, an action was filed in the Supreme Court, County of New York. After commencement of the original litigation, the parties agreed to resolve their dispute by binding arbitration in lieu of the continuing litigation. That arbitration, *CPG Construc. & Development Corp. Safeco Insurance Co. of Amer. v 415 Greenwich Fee Owner, LLC*, JAMS Arbitration Case No. 13400097239 (the Arbitration), was affirmed by this court (*see* Action No. 1, Index No. 102055/10, above, for caption) as of April 1, 2010, and judgment was entered on April 23, 2010 (the Confirmation, as noted above).

At the time of the arbitrator selection, Fee Owner was represented by the law firm of Storch, Amini & Munves, P.C., and co-counsel Dollinger Gonski & Grossman. Philip L. Bruner (Bruner, or the Arbitrator) was proposed as a possible arbitrator by Julian F. Hoffar of Watt, Tieder & Hoffar & Fitzgerald LLP (Watt Tieder), the firm which represented CPG. A letter was sent to Bruner by Watt Tieder, which included a list of the parties and their counsel, to ascertain whether Bruner had any potential conflicts of interest. Bruner made certain disclosures, and the parties agreed to have Bruner arbitrate the dispute.

Bruner awarded actual damages to CPG (the Award or the Arbitration Award). In April 2010, upon an Order to Show Cause of February 22, 2010, this court confirmed the Arbitration Award, which confirmation was unopposed by Fee Owner.

II. Renewal of Motion to Confirm in Action No. 1

The Award of the Arbitrator having been confirmed by this court, plaintiffs Eldon and Silver (the Prior Owners) now seek renewal on behalf of Fee Owner, pursuant to CPLR 2221 (e). They wish to introduce evidence of Bruner's non-disclosures, in opposition to the Confirmation and in support of vacating the Award under CPLR Article 75. Specifically, However, they allege that Bruner had deep, undisclosed personal, professional, and business relationships with the opposing parties and counsel in the Arbitration. Bruner was co-editor of a book by the Tort Trial and Insurance Section of the American Bar Association, *Managing and Litigating the Complex Surety Case*, to which Julian F. Hoffar of Watt, Tieder (Chapter 11; attorneys for CPG), Armen Shahinian, Esq. of Wolff & Samson PC (Chapter 3; attorney for Safeco), Joseph Monaghan, Esq. of Wolff & Samson PC (Chapter 3; attorney for Safeco), Ronald Goetsch (Chapter 4; Director of Surety Claims at Safeco/Liberty Mutual), and J. Blake Wilcox (Chapter 7; Assistant Vice President at Safeco/Liberty Mutual) had all contributed. Bruner also apparently co-chaired and moderated a symposium for the purpose of marketing and selling the book, and contributed to another book involving some of the parties, entitled *The Bond Default Manual* (2005). Furthermore, Bruner and Thomas J. Powell of Watt Tieder allegedly were co-counsel for defendant in a case styled *US v Ellerbe Becket*, 976 F Supp 1262 (D Minn 1997). Finally, Bruner apparently was a partner at the firm Faegre & Benson from 1991 through 2007, a firm which had represented Liberty Mutual on at least three occasions. According to Fee Owner's own arguments, they were aware of Bruner's alleged failures to disclose various asserted biases and prejudicial information to the parties, certainly by the time of Confirmation.

Under CPLR 2221 (e), a motion for leave to renew shall be granted where: (I) it is specifically so identified; (ii) it is based "upon new facts not offered on the prior motion that

would change the prior determination or . . . demonstrate that there has been a change in the law that would change the prior determination"; and (iii) there is "reasonable justification for the failure to present such facts on the prior motion." Although, it has been established that "renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion . . . , courts have discretion to relax this requirement and to grant such a motion in the interest of justice." *Mejia v Nanni*, 307 AD2d 870, 871 (1st Dept 2003), citing *Daniels v City of New York*, 291 AD2d 260 (1st Dept 2002), and *Strong v Brookhaven Mem. Hosp. Med. Ctr.*, 240 AD2d 726 (2nd Dept 1997) (internal citations omitted).

Here, the court sees no reason to exercise its discretion to relax the requirement that evidence be newly discovered. First, the facts offered do not change whether the court would have confirmed the Award. The Confirmation of the Award was unopposed, the Fee Owner did not exercise diligence in seeking the facts that were eventually uncovered, and the facts themselves are not of the nature that would warrant renewal.

Fee Owner offers no facts that would have changed the court's decision to confirm the Arbitration Award. The facts offered on renewal have to establish that there is no "barely colorable justification" for the Award (*Matter of Roffler v Spear, Leeds & Kellogg*, 13 AD3d 308, 309 [1st Dept 2004]), which they utterly fail to do. Fee Owner merely offers a series of tenuous connections between Bruner and the opposition in the Arbitration, without explaining or suggesting how such a relationship might have influenced Bruner's decision-making. In fact, even after the court directed Fee Owner to submit opposition papers by March 15, 2010, Fee Owner offered no opposition whatsoever to the motion to confirm the Arbitration Award. Thus, there is a strong inference, that the Award was at least "colorable," even in the estimation of Fee

Owner and the Prior Owners. *See also Graniteville Co. v First Natl. Trading Co.*, 179 AD2d 467, 469 (1st Dept 1992) ("[a]n arbitration award will be confirmed if any plausible basis exists for the award and mere errors of law or fact will not suffice as a basis for vacatur").

Furthermore, Fee Owner has offered no facts that would justify vacating or modifying the Award, which threshold must be met to have avoided confirmation in the first place. There is no evidence offered that entails corruption, fraud, or misconduct, in procuring the Award (*see* CPLR 7511 [b] [I]), no indication, save innuendo, that Bruner was biased, or that Bruner exceeded his power in determining the Award (CPLR 7511 [b] [ii] & [iii]). *See Matter of Vermilya (Distin)*, 157 AD2d 1030, 1031 (3rd Dept 1990). What is offered is the fact that Bruner was the co-editor of a book published by the American Bar Association and attorneys for parties to the arbitration contributed chapters to that book. Also, Bruner contributed to another book in which some of these same lawyers contributed, a partner of Watt Tieder were co-counsel in a case thirteen years prior, and in the past, a firm with which Bruner had been affiliated represented one of the insurers on three occasions. This is not sufficient.

Moreover, it appears that Fee Owner could have found the facts complained of with minimal due diligence. For instance, it is not difficult to discover co-authorship of a text published by the American Bar Association. Notably, Fee Owner argues that "[i]t was only after *independent research* conducted in April and early May that these conflicts were discovered." Memorandum in Support, at 20. Meanwhile, the Order to Show Cause to confirm the Arbitration Award was dated February 22, 2010. The time to conduct independent research was before the Arbitration, upon grant of the Award, or, at the very least, upon the instruction of the court in response to the motion to confirm the Award.

Although there is an unquestioned obligation of a potential arbitrator to disclose potential sources of bias, "[t]his does not mean that a party to an arbitration may sit idly back and rely exclusively upon the arbitrator's disclosure." *Matter of J. P. Stevens & Co. (Rytex Corp.)*, 34 NY2d 123, 129 (1974). "A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." *Matter of Allstate Ins. Co. v Liberty Mut. Ins.*, 58 AD3d 727, 728 (2nd Dept 2009) (citations omitted). "To the extent that the new materials [are] matters of public record available before the court issued its decision . . . they [cannot] serve as a proper basis for a motion to renew." *Welch Foods v Wilson*, 247 AD2d 830, 831 (4th Dept 1998); *City of White Plains v Deruvo*, 159 AD2d 534 (2nd Dept 1990).

Arbitrator's Obligations of Disclosure

Despite their own arguable lack of diligence, Prior Owners quite rightly point out that an arbitrator has a heavy responsibility to disclose, as earnestly as possible, all information that may give rise to the appearance of a predisposition or bias. This responsibility is particularly crucial because "[a]n arbitrator's functions are quasi-judicial[, b]ut unlike a judge, he is not subject to disqualification for all of the grounds set forth in section 14 of the Judiciary Law." *Matter of Milliken Woolens (Weber Knit Sportswear)*, 11 AD2d 166, 168 (1st Dept 1960), citing *Matter of Amtorg Trading Corp. (Camden Fibre Mills)*, 277 App Div 531, 532-533 (1st Dept 1950), *affd* 304 NY 519 (1952). In addition, "[a]n arbitration award is not reviewable by a court for errors of law or fact." *Matter of Colony Liq. Distribs. (Local 669, Intl. Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.)*, 34 AD2d 1060, 1061 (3rd Dept 1970), *affd* 28 NY2d 596 (1971), citing *Matter of Colletti (Mesh)*, 23 AD2d 245, 248 (1st Dept), *affd* 17 NY2d 460 (1965),

and *Matter of Friedman*, 215 App Div 130, 136 (1st Dept 1926); *see generally Matter of Labor Relations Section of N. N.Y. Builders Exch. v Gordon*, 41 AD2d 25, 27 (4th Dept 1973). Arbitrators, then, should place the utmost importance on complete and comprehensive disclosure.

Here, the court is not convinced that Bruner made the best possible disclosure he could have made. It may be possible to contribute a monograph to a publication of the American Bar Association, and not be aware of other authors, but, as co-editor of *Managing and Litigating the Complex Surety Case*, Bruner should have been aware of the potential for the appearance of a relationship giving rise to an inference of bias or a suspicion of partiality. *Id.* That said, the relationships Bruner may have had, upon the evidence submitted, do not suggest an action as drastic as vacating the Arbitration Award. Indeed, the relationships between the parties seem isolated, and are not of such a nature that Bruner might have been caused to act other than with the requisite impartiality. *See e.g. Matter of Cross Props. (Gimbel Bros.)*, 15 AD2d 913, 914 (1st Dept), *affd* 12 NY2d 806 (1962).

The cases that Prior Owners rely upon are markedly more egregious than the mere omission of the information here. *See Matter of J. P. Stevens & Co.*, 34 NY2d at 123 (arbitrators' employers had direct, ongoing, dealings with party); *Matter of Morgan Guar. Trust Co. of N.Y. v Solow Bldg. Co.*, 279 AD2d 431 (1st Dept 2001) (arbitrator worked with petitioner's counsel on prior arbitrations *and* he was scheduled to testify against respondent in an unrelated matter); *Matter of Milliken Woolens (Weber Knit Sportswear)*, 11 AD2d at 168 (regular business dealings in "millions of dollars," arbitrator served as arbitrator in three prior cases in which respondents' counsel represented a party and in which the arbitrator had joined in a favorable award, and action respondents' counsel was prosecuting against the arbitrator's company at the

time of the arbitration was settled immediately after the award).

Cases resulting in vacation of an award invariably involve direct financial or professional ongoing relationships (*see Matter of Cross Props [Gimbel Bros.]*, 15 AD2d at 914) that feature aspects such as employment or contractual entanglement. "It is well settled that mere occasional associations between an arbitrator and a party or witness will not warrant disqualification of the arbitrator on the ground of the appearance of bias or partiality." *Matter of Henry Quentzel Plumbing Supply Co. v Quentzel*, 193 AD2d 678, 678-679(2nd Dept 1993), citing, among other cases, *Matter of Siegel (Lewis)*, 40 NY2d 687, 690 (1976). It appears that Bruner's contacts with the parties were largely professional; to disqualify him on that basis would undermine the very purposes of the arbitration system to utilize experienced professionals to resolve disputes within their areas of expertise. *Id.* Under these circumstances, the court is loath to sustain patently belated motion practice aimed at vacating and reversing, or delaying, the confirmed Arbitration Award.

This is particularly the case here where there is no strong indication that Bruner was prejudiced in actuality. Indeed, it seems that the investigation of his prior relationships was such an afterthought, that even after direction from this court to submit opposition to Confirmation of the Award, Fee Owners did not take action. Although, as noted above, it is a fair suggestion that Bruner should have made better disclosure and there is a fair inference that counsel for CPG and Safeco might have known of disclosable, public, prior relationships, the mere suggestion of partiality is not sufficient to warrant interference with the Arbitrator's Award. *Matter of Brill [Muller Bros.]*, 22 AD2d 678, 678 (1st Dept 1964). Moreover, the adequacy of that Award is not arbitrarily reviewable. *See e.g. Matter of Torano [Motor Veh. Acc, Indem. Corp.]*, 19 AD2d 356,

359 [1st Dept 1963], *affd* 15 NY2d 882 [1965]); *see generally Matter of Provenzano (Motor Veh. Acc. Indem. Corp.)*, 28 AD2d 528, 528 (1st Dept 1967).

Standing of Prior Owners

Petitioners in Action No. 1 object, *a priori*, to the motion of Prior Owners to renew, as they are not current owners of 415 Greenwich due to an assignment of the assets of 415 Greenwich in February of 2010 to KBS 415 Greenwich, LLC, an affiliate and the designee of KBS Tribeca Summit, LLC (both KBS entities will hereinafter collectively be referred to as KBS) (the Assignment). Meanwhile, Prior Owner, Joel Silver submits an extensive affidavit outlining the intentions behind the Assignment, and how they were thwarted by a settlement and release agreement (the Settlement) eventually agreed by KBS.

As of June 2010, CPG, Safeco, 415 Greenwich, and KBS did enter into the Settlement. The Settlement clearly acknowledged the Arbitration Award, and admits that Prior Owners, herein, have no authority to seek to vacate the Arbitration Award, and release all claims that KBS had against CPG and/or Safeco. There has been no reasonable argument offered that the Settlement was entered into fraudulently or without authority. *See Hallock v State of New York*, 64 NY2d 224, 230 (1984); *Matter of Frutiger*, 29 NY2d 143, 149-150 (1971).

In all events, as the motion to renew is denied on its own merit, there is little import in a determination of whether Prior Owners have standing, as Fee Owner, to bring the ineffective motion. It is a moot question, since the motion to renew is denied.

III. Motion to Dismiss Action No. 2

Before the above-referenced Settlement, Prior Owners, CPG, Safeco, and two other creditors had entered into a January 5, 2009 agreement, meant to cover management of all main

aspects of the Project going forward, including the distribution of funds (the Omnibus). Under the Omnibus, the creditors received certain liens and security interests in the unsold units of the Project and ownership interests in 415 Mezzanine. *See* Omnibus, Art. 3. Prior Owners aver that the "clear intent" of the Omnibus was to preclude any of the parties from foreclosing on collateral held under the initial loan documents.

In this regard, Prior Owners note that the Omnibus states that the loan documents are not modified except as expressly set forth in the Omnibus. Therefore, they argue, any action that would be inconsistent with the Omnibus is not allowable, and the Omnibus would apply. One such action, ostensibly, would be the entry of a judgment pursuant to the Confirmation.

As of May 2009, 415 Mezzanine and KBS extended the terms of loan amounts due under the prior agreements and the Omnibus in a Seventh Modification of Second Mezzanine Loan Documents (Seventh Modification). The Seventh Modification provided that in the event of a default (*i.e.* a failure to repay loan amounts by February 1, 2010), Prior Owners would transfer all right, title, and interest in 415 Mezzanine to KBS, without formal conveyance of fee ownership as a separate transaction. Prior Owners therefore executed, in advance and in accordance with Section 5 of the Seventh Modification, the Assignment, referenced above, of membership interest that could be simply countersigned by KBS should the event of default occur (the Transfer Provision). Finally, the Seventh Modification contained a provision releasing KBS from all claims and liabilities. *See* Seventh Modification, § 19.

After the Seventh Modification, the Arbitration took place. During the Arbitration, 415 Mezzanine apparently needed a further loan from KBS, a 'protective advance,' in order to complete the Arbitration. In connection with this extension of credit, the parties signed an

"Eighth Modification of Second Mezzanine Loan Documents" as of October 16, 2009 (the Eighth Modification). The release contained in the Seventh Modification was confirmed and reiterated by the Eighth Modification. *See* Seventh Modification, § 14.

The amounts due under the loans as of February 1, 2010, were not paid. KBS then elected its designee to take the ownership rights acquirable under the Transfer Provision. Shortly thereafter, the Arbitration was completed and an Award determined. Action No. 1 ensued, and the Award was confirmed. After all motions in Action No. 1 had been submitted, Prior Owners brought Action No. 2 seeking recovery for breach of the Omnibus (first cause of action), a declaration that the Assignment is void and setting aside the conveyance made thereby (second), conversion of the property transferred under the Assignment (third), lender liability due to the over-extension of the rights of KBS (fourth), breach of KBS's fiduciary duty to Prior Owners (fifth), impairment of collateral and failure to marshal assets due to KBS's refusal to appeal the Arbitration Award Confirmation (sixth).

CPG and Safeco move to dismiss Action No. 2 based upon the releases contained in the Seventh and Eighth Modifications. Prior Owners maintain that the releases are not effective in that they are simply boilerplate, not intended to supercede the extant Omnibus, and that the complete understanding of the parties is embodied in a series of documents.

This argument is specious. First, there is no reason that the understanding of the parties would not include, in the "series of documents," the twice executed comprehensive releases signed by the parties. Moreover, to the extent that Prior Owners characterize the releases as "boilerplate," there is no law that boilerplate, by definition, is not enforceable.

Prior Owners rely on *Mangini v McClurg* (24 NY2d 556 [1969]) to assert that they are

entitled to prove that there was no intention to release the particular claims they are making. Such reliance is misplaced. First, that case addressed mutual mistake. Although a release may be set aside for mutual mistake (*Dickson v City of New York*, 43 AD3d 809, 809 ([1st Dept 2007]), neither CPG nor Safeco have indicated that they made any mistake in executing the releases. Therefore, if there was a mistake, it was not mutual. *John Monks & Sons v West Street Improvement Co.*, 149 App Div 504 (1st Dept 1912) (mutual mistake in executing a contract must involve both parties). To the extent that Prior Owners' claim a unilateral mistake, that claim also is unavailing. Rescission or invalidation of the otherwise enforceable release would require not only the unilateral mistake, but also actual or constructive fraud or inequitable conduct on the part of CPG and/or Safeco. *Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 369-370 (1st Dept 2007). No such allegation has been made.

Prior Owners also rely on *Cahill v Regan* (5 NY2d 292, 299 [1959]) to indicate that "a release may not be read to cover matters which the parties did not desire or intend to dispose of." However, here, the release, for example, in the Seventh Modification states, in all capital letters, that "the release shall include all aspects of this modification agreement and the loan documents . . . and that it may be pleaded as an absolute bar to any of all current claims pending . . ." Seventh Modification ¶ 19. More pointedly, the Seventh Modification releases claims for "breach of contract, breach of commitment, breach of partnership or other fiduciary duty, breach of confidence, undue influence, . . . bad faith, . . . or failure to act in good faith." *Id.* The instant case is unlike *Cahill*, where a party sought to apply a general release given in an unrelated replevin action to an invention and patent that came into existence a year later and the parties did not even know of the existence of a patent application.

Prior Owner's assertion that this matter is factually similar to *Augello v Koenig-Rivkin* (56 AD3d 503 [2nd Dept 2008]) is beyond comprehension. That matter involved subrogation and substitution of a non-party insurer as a subrogee of a plaintiff based upon a release. The court found, quite understandably, that a release given to protect a claim while also protecting the plaintiff's right to retain any recovery in excess of the insurer's subrogation claim, cannot, at the same time, be used to require a substitution that would eradicate the purpose of the release. *Id.* at 504. Here, there is no indication that CPG or Safeco are using the releases in any other way than indicated in the plain language of the releases.

A release is "a jural act of high significance without which the settlement of disputes would be rendered all but impossible." *Mangini*, 24 NY2d at 563. Prior Owners' attempt to continue litigation after the releases contained in the Seventh and Eighth Modifications can only be condoned where there are colorable allegations of grave injustice, such as duress, illegality, fraud, or mutual mistake. *See generally Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.,* 17 NY3d 269, 276 (2011); *Toledo v West Farms Neighborhood Hous. Dev. Fund Co.,* 34 AD3d 228, 229 (1st Dept 2006). Each of the causes of action are directly addressed by the releases, and they, therefore, are dismissed.

Breach of the Omnibus

As the validity of the releases have been upheld, Prior Owners' claim of breach of the Omnibus is without gravitas. However, for the avoidance of doubt, Prior Owners statement that there was an obligation in the Omnibus for the distributions to be made as described therein, is countered directly by the document itself. The Omnibus states that "solely as a courtesy to Borrower and without any obligation to do so, the Lenders have agreed to allow Net Sale

Proceeds . . . to be applied as set forth herein." Omnibus, ¶ H. The Omnibus provides that "nothing herein shall be deemed or construed as altering . . . the relative rights and remedies of (a) the Lenders upon a default by Borrower under any of the Loan Documents or (b) subject to Section 7 hereof, CPG and Safeco upon a default by Borrower under any of the CPG Documents or the Safeco Documents." Omnibus, ¶ 5.

Prior Owners equitable argument that KBS is somehow getting a windfall by asserting its full ownership of pledged collateral is unconvincing. The Omnibus states that "following the occurrence of a default or event of default under the Safeco Documents or the CPG Documents, Safeco and/or CPG, as applicable, shall have the right to exercise all of their respective rights and remedies available to Safeco and CPG under the Safeco Documents, the CPG Documents or applicable law." Omnibus, ¶ 12 (b). The very existence and execution of a Second Mezzanine Pledge and Security Agreement, executed as of February 28, 2006 (Pledge Agreement), disposes of any arguments that KBS is somehow getting a windfall from the collateral of the "membership interests of Pledger" previously subject to strict foreclosure upon an event of default. In any event, "a court of equity may not relieve a defaulting debtor from the consequences of his act merely because the results are harsh. Sympathy cannot be permitted to undermine the stability of contractual obligations." *Key Intl. Mfg. v Stillman*, 103 AD2d 475, 478 (2nd Dept 1984) (citations omitted).

Finally, Prior Owners' reference to New York Uniform Commercial Code 9-615 (d) (2) is ill-conceived. That section refers to security interests. Prior Owners' membership interests in Fee Owner were pledged as collateral. As such, UCC 9-617 applies, and the whole of the collateral becomes the property of the transferee. Prior Owners have *disclaimed* all interest in the

collateral.

Prior Owners may not be excused from the consequences of the agreements and releases they executed by their alleged failure to appreciate the plain meaning and language of the documents, which were negotiated upon the advice of counsel. The record indicates that Prior Owners are sophisticated businessmen capable of clearly expressing their intent. *See e.g. Reiss v Financial Performance Corp.*, 97 NY2d 195, 199-200 (2001). This court presumes that deliberately prepared and executed written instruments manifest the true intention of the parties. *See George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 (1978); *Quantum Chem. Corp. v Reliance Group*, 180 AD2d 548, 548-549 (1st Dept 1992). The motion to dismiss the complaint, therefore, is granted. Accordingly, it is hereby

ORDERED that the motion of Respondent for leave to renew the motion to confirm the arbitration award under Index No. 102055/10, is denied; and it is further

ORDERED that the motion of defendants to dismiss the complaint under Index No. 651176/10 is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 12, 2012

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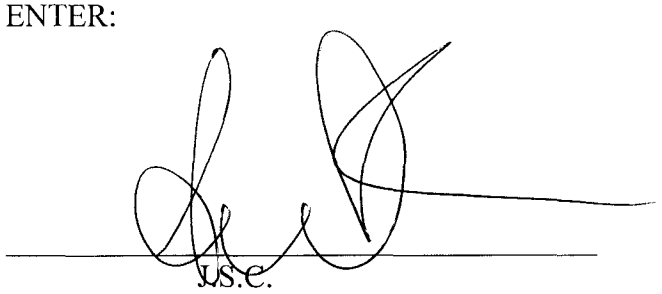

J.S.C.