

1414 Holdings, LLC v BMS-PSO, LLC

2017 NY Slip Op 32551(U)

December 1, 2017

Supreme Court, New York County

Docket Number: 654931/2016

Judge: Eileen Bransten

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

-----X
1414 HOLDINGS, LLC

Plaintiff,

Index No. 654931/2016
Mot. Seq. 001

-against-

BMS-PSO, LLC

DECISION AND ORDER

Defendants.
-----X

HON. EILEEN BRANSTEN:

Petitioner, 1414 Holdings, LLC, makes this motion to vacate an arbitration award (mot seq. 001).

I. BACKGROUND:

A. General Background

Petitioner, 1414 Holdings LLC, is the landlord of premises located at 1414 Avenue of the Americas in New York (hereinafter "Premises"). Respondent is the tenant of 1414 Avenue of the Americas, Floor 19.

In 1996, the parties entered into a leasing agreement for the 19th floor for a Term of fifteen (15) years and six (6) days. *Pet.* ¶¶8-9. Pursuant to the terms of the lease agreement, the Tenant had the option to extend the lease for two additional five (5) year periods. *Id at* ¶10. The Tenant exercised the first option to extend in 2010 and the second option to extend in 2015. *Id at* ¶¶ 11, 15.

1414 Holdings LLC v. BMS-PSO, LLC
(654931/2016)

Page 2 of 9

Also pursuant to the terms of the lease agreement, when the Tenant exercises the option to extend the lease, the Landlord shall have twenty (20) days to give a notice of the determination as to the fair market value of the rental for the premises. *See id at ¶16.* Upon receipt of the Landlord's notice the Tenant then has twenty (20) Days to give its determination as to the fair market value of the rental for the premises. *Id.* Where the parties are unable to agree on the fair rental value of the premises, the lease provides the parties will arbitrate the dispute. *Id.* Each party may select an arbitrator and then jointly select a third, neutral, arbitrator to decide which fair market proposal to utilize. *Id at ¶¶ 16-17.*

The instant dispute arose when the Tenant elected to extend the lease for a second time, triggering the twenty-day notice requirement. The parties provided each other with notices as to the fair market value. *Id.* Unable to agree on the fair market value each party selected an arbitrator then jointly selected a third, neutral, arbitrator. *See id at ¶¶ 19-22; see also Claman Affirm. Ex 5.*

B. The Arbitration Clause of the Lease Agreement

Section 75 of the Lease Agreement provides the terms under which the tenant may exercise the option to extend the lease for a period of five years. *See Pet. Ex. 1 §75.* Part B of section 75 includes an agreement to arbitrate disputes in the valuation of the

1414 Holdings LLC v. BMS-PSO, LLC
(654931/2016)

Page 3 of 9

Property when exercising the option to extend the lease. *See id at §75.B.* It states, in relevant part:

Within twenty (20) days after the Landlord's receipt of Tenant's notice exercising said option, Landlord shall give Tenant notice ("Landlord's Notice") of Landlord's determination of fair market value of fixed annual rent and escalation package (collectively "Landlord's Fair Market Terms") for the rental of the Demised Premises to Tenant for the Option Period in question. Landlord's Notice shall also contain specification of an individual with not less than 10 years' experience in leasing commercial office space in New York City ("Landlord's Arbitrator"). Tenant Shall give notice ("Tenant's Notice") to Landlord within twenty (20) days of the giving of Landlord's Notice of terms ("Tenant's Fair Market Terms") which tenant believes are such fair market value. If Tenant gives Tenant's Notice, it must contain specification of an individual with such leasing experience as an arbitrator. Otherwise Tenant's Notice shall be void. If tenant does not give Tenant's Notice within such twenty (20) day period, Landlord's Fair Market Terms shall be deemed to be "True Fair Market" . . . If Tenant gives Tenant's Notice, then the two individuals so selected shall[,] within three (3) days after the giving of Tenant's Notice[,] select[,] in writing[,] a third individual (the "Arbitrator") with the same level of qualifications. If the Arbitrator is not selected within said three (3) days, then the third arbitrator having such qualifications shall be appointed by the American Arbitration Association ("AAA"). Within ten (10) days of the appointment the Arbitrator shall select either Landlord's Fair Market Terms or Tenant's Fair Market terms. Such selection shall be deemed to [be] "True Fair Market". *Id.*

Pursuant to the terms of this agreement, the Landlord selected Brian S. Waterman as its Arbitrator, who valued the Property at \$111.73/sq. ft. *See Pet. Ex. 3.* The Tenant selected Joseph J. Messina as its Arbitrator, who valued the Property at \$76.40/sq. ft. *See Pet. Ex. 4.* Together, the two arbitrators recommended Theresa Nygard, a professional real estate appraiser, serve as the neutral, arbitrator in this action. Arbitrator Nygard was retained by the parties and, pursuant to the lease terms, selected the Tenant's Fair Market Terms. *See Claman Affirm. Ex. 12.*

1414 Holdings LLC v. BMS-PSO, LLC
(654931/2016)

Page 4 of 9

*C. The Arbitration Retainer*¹

Prior to commencing work as the third arbitrator, Arbitrator Nygard provided the parties with a Retainer Agreement. *Claman Affirm Ex. 5*. The parties agreed to waive the requirement that the third arbitrator have “not less than 10 years’ experience in leasing commercial office space in New York City” given Arbitrator Nygard’s professional experience as a real estate appraiser. *See id.* Arbitrator Nygard agreed not to render an appraisal but to arbitrate this dispute by selecting one of the two proposed valuations pursuant to the lease terms. *See id.*

The terms of the Retainer agreement further provide that “the scope of the assignment will include meeting with [the parties’] arbitrators, reviewing all submitted documents and evidence, inspecting the subject premises, confirming the appropriateness of the data assumption and analyses presented by the arbitrators, and reaching a decision as to the value of the 19th Floor space.” *See id.*

¹ The copy of the Arbitration Retainer provided to the court only contains the signature of counsel for the Landlord Petitioner and not the Tenant Respondent. Subsequent correspondence between the Petitioner and the Respondent, however, along with Respondent’s agreement to proceed with the arbitration without objection, and indeed the Respondent’s desire to dismiss the Petition, indicate the Respondent’s desire to be bound by the terms of the Retainer. *See Kowalchuk v. Stroup*, 61 A.D.3d 118, 125 (1st Dep’t 2009) (noting that even where the agreement lacked the signature of one party, the subsequent course of performance established a viable contract).

1414 Holdings LLC v. BMS-PSO, LLC
(654931/2016)

Page 5 of 9

Arbitrator Nygard specifically addressed the issue as to whether a formal hearing should be conducted on this matter stating, “It is my understanding that there is disagreement over whether the arbitrators should conduct formal hearings on this matter. Upon being formally retained as the third arbitrator, I will review the documents already submitted to me and meet with the party-appointed arbitrators to resolve this issue preparatory to addressing the rent valuation.” *Id.*

D. The Dispute over a Formal Hearing

As indicated by Arbitrator Nygard, the parties disagreed over the need for a formal hearing in this dispute. *See Claman Affirm. Ex. 6 - 9.* Specifically, the Landlord desired a formal hearing whereby it could exercise its claimed “due process” right to present evidence and cross examine witnesses. *Pet. ¶¶27-30, 41.* The Tenant was satisfied resting upon the papers and relying upon the decision of the arbitrator. *See Claman Affirm. Ex. 9.*

On March 23, 2016, the Petitioner filed an Order to Show Cause seeking to compel Respondent to participate in an arbitration hearing. *Id. at ¶¶ 35-36.* At that hearing, this court expressly stated that the arbitrator is the person to determine whether a CPLR §7506 hearing is necessary. *See Claman Affirm. Ex. 9 (Tr. 9:3-13).*

1414 Holdings LLC v. BMS-PSO, LLC
(654931/2016)

Page 6 of 9

Upon entering into the Retainer Agreement with Arbitrator Nygard, the parties agreed that the need for a formal hearing was to be addressed by the arbitrator. *Claman Affirm. Ex. 5*. Ultimately, the arbitrator determined that there was no need for a formal hearing in this dispute. *See Claman Affirm. Ex. 10*. Specifically, upon review, the arbitrator determined that the Lease did not call for a formal CPLR 7506 hearing and that a determination could be made pending an inspection of the premises and upon a submitted rebuttal of the broker reports. *Id.* It is this court's understanding that no further objection was made subsequent to the arbitrator's decision not to conduct a formal hearing. *See generally, Claman Affirm; see also Claman Affirm Ex. 10; Claman Affirm. Ex. 12.*

II. ANALYSIS:

It is well settled law that a participant in an arbitration proceeding who subsequently seeks to vacate an arbitration award may do so "only on the grounds that the rights of that party were prejudiced by corruption, fraud or misconduct in procuring the award, that the arbitrator lacked impartiality, that the arbitrator exceeded his power or failed to make a final or definite award, or that there was a procedural failure that was not waived." *See Fishman v. Roxanne Mgmt.*, 24 A.D.3d 365, 366 (2005). Here, the Landlord claims that its right to due process was violated by Arbitrator Nygard's refusal to subject the parties to a formal CPLR § 7506 hearing. *See Pet.* ¶5.

1414 Holdings LLC v. BMS-PSO, LLC
(654931/2016)

Page 7 of 9

CPLR § 7506(b) provides that an arbitrator designates a time and place for a hearing and notify the parties in writing personally or by certified mail not less than eight days before the hearing. At such a hearing, the parties are entitled to be heard, present evidence, and cross-examine witnesses. *See CPLR § 7506(c)*. These requirements may be waived by the parties' written consent, or by continuing with the arbitration process without objection. *See CPLR § 7506(f)*.

Here, the Landlord signed a Retainer Agreement with Arbitrator Nygard which left the issue of a formal hearing to the arbitrator's discretion. *See Claman Affirm. Ex. 5*. Arbitrator Nygard then determined that a formal hearing would not be necessary under the terms of the lease agreement. *See Claman Affirm. Ex. 10*. In so doing, the parties waived their right to be heard in a formal proceeding in the event the arbitrator determined a formal hearing was not necessary. *See Simson v. Cushman & Wakefield, Inc.*, 128 A.D.3d 549, 549 (1st Dep't 2015) (holding that the Plaintiff surrendered any right to call or cross-examine witnesses in the arbitration by entering into an arbitration agreement waiving such rights, and further, by participating in the arbitration proceeding without objection). Petitioner has failed to provide any evidence of objection to the arbitrator's decision not to hold a formal hearing pending Arbitrator Nygard's May 13, 2016 email. *See Claman Affirm. Ex. 10*. Thus, if the Petitioner did not agree to leave the issue of a hearing to the arbitrator's discretion, the Petitioner should not have agreed, vis-à-vis counsel's signature, to the conditions contained in Arbitrator Nygard's Retainer

1414 Holdings LLC v. BMS-PSO, LLC
(654931/2016)

Page 8 of 9

Agreement. The Petitioner should have, instead, looked for an alternative Arbitrator within the time provided by the Lease, or, sought to utilize the contingency provided in the Lease Agreement, an Arbitrator from the American Arbitration Association. *See Pet. Ex. A. §75B.*

It is well settled “when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms.” *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004). In reviewing the lease terms, the Arbitrators determined that there was no express requirement for a formal hearing stated in the lease. *See Claman Affirm Ex. 10; see also Pet. Ex. 1 §75B.* The possibility that the arbitrator could have made a different conclusion fails to indicate that Arbitrator Nygard “so misread the lease provisions as to empower a court to set aside the award.” *See Eighty Eight Bleecker Co., LLC v. 88 Bleecker St. Owners, Inc.*, 51 A.D.3d 507, 508 (1st Dep’t 2008) *citing Nat’l Cash Register Co. v. Wilson*, 8 N.Y.2d 377, 383 (1960).

Absent an indication that the Petitioner’s rights were “prejudiced by corruption, fraud or misconduct in procuring the award, that the arbitrator lacked impartiality, that the arbitrator exceeded his power or failed to make a final or definite award, or that there was a procedural failure *that was not waived*” this court sees no reason why it should vacate the award. *See Fishman v. Roxanne Mgmt.*, 24 A.D.3d 365, 366 (2005) (*emphasis added*).

1414 Holdings LLC v. BMS-PSO, LLC
(654931/2016)

Page 9 of 9


DECISION AND ORDER:

Upon the foregoing Decision, it is hereby

ORDERED the petition to vacate the arbitration award is hereby dismissed; and it is further

ORDERED the arbitration award is hereby summarily confirmed.

Dated: Dec 1 2017


HON. EILEEN BRANSTEN
J.S.C.