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

PRESENT: Hon. Judge Eileen Bransten Justice PART 6

Shkelzen Islamaj

-v-

Quaker Hill Venture

INDEX NO. 113194/02

MOTION DATE 9-24-02

MOTION SEQ. NO. 01

MOTION CAL. NO. 06

The following papers, numbered 1 to 3 were read on this motion to/for Vacate arbitral awards and cross-motion to confirm

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion providing

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

DATED: Dated: 12-10-02

Judge Eileen Bransten J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX
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Application of SHKELZEN ISLAMAJ,

Petitioner,

Index No. 113194/02
Motion Date: 9/24/02
Motion Seq. Nos.: 01
Motion Cal. No.: 06

For an Order Pursuant to Article 75 of the CPLR Vacating and/or Modifying **A** Prior Arbitration Award

-against-

QUAKER HILL VENTURE, LLC and JORDAN LEWIS,

Respondents.
..... X

PRESENT: EILEEN BRANSTEN, J.[1]

Pursuant to CPLR 7511(b) and (c), petitioner Shkelzen Islamaj (the "Petitioner") moves for ajudgment vacating and/or modifying an arbitration award (the "Award"), which ordered a dissolution of Belgian Fries, LLC (the "Company"). Respondents Quaker Hill Venture, LLC and Jordan Lewis (the "Respondents"), cross-move for an order confirming the award.[2]

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[1] The Court thanks Michael Shender, an intern from CUNY School of Law, for his valuable assistance.

[2] Petitioner further seeks court supervision of the sale of assets ordered by the arbitrator. Pursuant to a Consent Order filed in bankruptcy proceedings, Respondents agreed not to object to judicial supervision. This Court will authorize oversight of the sale on the condition that the parties enter into a consent order or stipulation selecting an individual who will act as a receiver to supervise the sale of the Company's assets and collect as well as disperse the funds received pursuant to the terms of the arbitration award. Significantly, the cost of the receiver will be paid bv the parties in accordance with their own agreement, which must be submitted within 14 days of this decision and order. If the parties cannot agree on the terms of appointment of a particular

BACKGROUND

The Company was organized in 1988 pursuant to the Operating Agreement (the "Agreement") between Quaker Hill and Shkelzen Islamaj. Section 8.8 of the Agreement provides that:

> "any and all disputes, controversies and claims arising out of or relating to this Agreement or the performance hereof shall be settled and determined by arbitration in New York City pursuant to the Commercial Rules then obtaining of the American Arbitration Association * * * . The parties agree that the arbitrators shall have the power to award damages, preliminary or permanent injunctive relief * * * . The arbitration award shall be final and binding upon the parties and judgment thereon may be entered in any court having competent jurisdiction thereof."

See, Petition to Vacate, Ex. B.

The Company enjoyed success and was praised in newspaper articles. Soon, however, disputes arose between Petitioner and Respondents over the Company's expansion and operational control.

Unable to resolve these disputes, in September 2000 Respondents demanded arbitration pursuant to the Agreement. Importantly, the relief Respondents sought was dissolution of the Company. *See*, Answer, Ex. C. Indeed, the Demand for Arbitration unambiguously states that the relief sought was "dissolution." *Id.*

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receiver and payment of fees within 14 days, the sale is to proceed without a receiver unless the Court upon demonstration of good cause rules otherwise.

The parties participated in three days of hearings, during which they submitted testimonial and documentary evidence to the arbitrator. In the course of the arbitration, the arbitrator asked for submissionsby the parties regarding the procedures to follow in the event dissolution was ordered. Upon receiving a copy of Respondents' proposal, Petitioner's attorney submitted a letter articulating objections to the proposal without once challenging the arbitrator's authority to order dissolution. ***See,*** Answer, Ex. D.

On January 31, 2002, the arbitrator issued an award directing dissolution of the Company. ***See,*** Answer, Ex. A.

Following issuance of the Award, Petitioner commenced this Article 75 proceeding in which he claims that the Award should be vacated because the arbitrator exceeded his power under the Agreement by ordering dissolution. *See,* Petition to Vacate, at ¶ 22. Alternatively, Petitioner argues that the Award should be modified to allow him the right of first refusal pursuant to the Agreement. ***See,*** Petition to Vacate, at ¶ 22.

Respondents counter that pursuant to the Agreement and New York law, the arbitrator had the power to order dissolution of the Company, and moreover, that Petitioner waived his rights to challenge dissolution or demand the right of first refusal because he failed to raise these issues during the course of the arbitration. This Court agrees with Respondents and will confirm the award.

ANALYSIS[3]

It is well settled that courts will not vacate an arbitration award unless it facially violates a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on the arbitrator's power. *Branciforte v. Levey*, 222 A.D.2d 276 (1st Dep't 1995) (quoting *Matter of Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 308 [1984], *rearg. denied*, 62 N.Y.2d 803 [1984]); *Matter of Kaplan v. Werlin*, 215 A.D.2d 388, 390 (2d Dep't 1995) *lv. dismissed* 86 N.Y.2d 868 (1995), *lv. dismissed and denied* 87 N.Y.2d 915 (1996); *see also*, CPLR 7511(b)(1)(iii); *Matter of Neiman v. Backer*, 211 A.D.2d 721, 722-23 (2d Dep't 1995), *lv. denied* 87 N.Y.2d 801 (1995). This is true even when the arbitrator misapplies substantive rules of law or misconstrues or disregards the plain meaning of the parties' agreement. *See, Branciforte v. Levey, supra*, 222 A.D.2d 276; *Kaplan v. Werlin, supra*, 215 A.D.2d, at 390.

Furthermore, any limitation on the arbitrator's power must be expressly set forth as part of the arbitration clause itself. *Matter of Silverman v. Benmor Coats, Inc., supra*, 61 N.Y.2d, at 307. Where the parties have a broad arbitration agreement, exclusion of a substantive issue from its ambit generally requires specific enumeration of the subject intended to be put beyond the arbitrator's reach. *Id.*, at 308. Thus, if an arbitration agreement

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[3] The parties vigorously contest the timeliness of this proceeding. In the interests of efficiency, this Court will address the merits of the petition as denial of Petitioner's motion to vacate or modify is warranted regardless of timeliness.

is broad and does not expressly restrict dissolution as one of the available remedies, an arbitrator does not exceed his authority by ordering dissolution. *Matter of Ehrlich v. Stein*, 143 A.D.2d 908, 910 (2d Dep't 1988); *see also, Pegalis, Wachsman & Erickson, P.C. v. Wachsman*, 262 A.D.2d 381 (2d Dep't 1999) ("The fact that the dispute might otherwise serve as a predicate for judicial dissolution does not narrow the scope of the arbitration"), *lv. denied* 93 N.Y.2d 817 (1999).

Moreover, the power to seek vacatur of an arbitration award under CPLR 7511 is limited by CPLR 7503, which requires a party to promptly raise arbitrability issues before participating in arbitration. *See, Rochester City School Dist. v. Rochester Teachers Ass'n*, 41 N.Y.2d 578, 583 (1977). A party who has fully participated in arbitration, accordingly, cannot later seek to vacate the resulting award on the ground that the controversy was not arbitrable. *Id.* (citation omitted); *Morfopoulos v. Lundquist*, 191 A.D.2d 197 (1st Dep't 1993) (petitioners waived their right to have issue of arbitrability judicially determined by active participation in arbitration process); *Matter of Thompson v. S.L.T. Ready-Mix*, 216 A.D.2d 656, 657 (3d Dep't 1995) (respondent's failure to seek a stay of arbitration and its active participation in the arbitration hearing, without objection, constituted a waiver). Nor may a participant in an arbitration after-the-fact invoke the argument that the arbitrator "exceeded authority" when the parties' arbitration agreement is broad and certainly could be construed

to include the matter actually arbitrated. *See, Rochester City School Dist. v. Rochester Teachers Assn., supra,* 41 N.Y.2d, at 583.

Under these circumstances, Respondents correctly argue that the arbitrator had authority to order dissolution of the Company. Although the parties' arbitration agreement did not expressly provide for dissolution, it broadly covered "any and all disputes" as well as authorizing the arbitrator to grant damages or compulsory relief--such as dissolution.

Petitioner relies on *Matter of Albany County Sheriff's Loc. 775 of Council 82 v. Albany County*, 101 A.D.2d 620 (3d Dep't 1984), *rev'd* 63 N.Y.2d 654 (1984), in arguing that the arbitrator clearly exceeded his power as the Award essentially created a new contract between the parties. *See*, Petition to Vacate, at ¶ 27. Reliance on that case is completely misplaced as the New York Court of Appeals reversed its holding and confirmed the arbitration award at issue, concluding that an award will not be vacated even though the arbitrator misconstrued or disregarded the parties' agreement. *See, Matter of Albany County Sheriff's Local 775,* 63 N.Y.2d 654, 656 (1984) ("[a]n arbitrator's interpretation may even disregard 'the apparent, or even the plain, meaning of the words' of the contract before him and still be impervious to challenge in the courts" [citation omitted]).

Petitioner's reliance on *Pavilion Cent. School Dist. v. Pavilion Faculty Ass'n*, 51 A.D.2d 119 (4th Dep't 1976), *lv. dismissed* 40 N.Y.2d 803 (1976), 40 N.Y.2d 845 (1976),

42 N.Y.2d 961 (1977), 42 N.Y.2d 804 (1977), 42 N.Y.2d 974 (1977), is also misplaced. In *Pavilion Cent. School Dist.*, the school district violated the 60-day notice requirement when it notified a teacher that she would not be offered tenure. *Id.*, at 120. The purpose underlying the notice provision was to give teachers lead time to secure other employment. Since the teacher in question was taking one year off on maternity leave and unquestionably would not be seeking other employment anyway, an award reinstating her for another year was totally irrational as she suffered no harm from violation of the notice provision. *Id.*, at 124. Here, by contrast, Petitioner has not established that dissolution was completely irrational, particularly since the Company has lost money every year. *See*, Answer, at ¶ 9, 11.

Nor does *Matter of Riverbay Corp. v. Local 32-E*, 91 A.D.2d 509 (1st Dep't 1982), support Petitioner's position. In *Riverbay*, the court held that the arbitrator exceeded his power and rendered a "totally irrational" construction to the contractual provisions in dispute because he required the employer to give a clear warning before discharging its employee. *Id.* The court concluded that the arbitrator, in effect, made an entirely new contract as the parties' agreement did not require that any warning be given. *Id.*, at 510. Unlike in *Riverbuy*, which was decided decades ago, the arbitrator here did not render a "totally irrational" award. Nor did he create a new contract term. The arbitrator simply concluded that dissolution--a remedy which fell within the purview of the parties' broad arbitration clause--was appropriate.

Where, as here, the parties had a broad arbitration agreement, which did not expressly exclude dissolution as one of the available remedies, the power of the arbitrator will not be limited. *See, Silverman v. Benmor Coats, Inc., supra,* 61 N.Y.2d, at 307.

This is particularly true here as Petitioner never once argued to the arbitrator that he was not empowered to grant dissolution--the only relief explicitly sought in Respondents' Demand for Arbitration--and never sought a stay of arbitration. Petitioner's failure to seek a stay of arbitration pursuant to CPLR 7503, and his active participation in the arbitration hearing without objection, under the circumstances, bars his present attempt to contest arbitrator's power to award dissolution. *Matter of Thompson v. S.L.T. Ready-Mix, supra,* 216 A.D.2d, at 657. Petitioner cannot submit to arbitration and then, unhappy with the result, seek judicial relitigation.

In the same vein, Petitioner is precluded from arguing that the arbitrator did not honor his contractual right of first refusal. *See,* Petition to Vacate, **Ex.** B. Petitioner fully participated in the arbitration without once raising his purported right of first refusal. ***See,*** CPLR 7511(b)(1)(iv) ("The award shall be vacated * * * if the court finds that the rights of that party were prejudiced by * * * failure to follow the procedure of this article, *unless* the party applying to vacate the award continued with the arbitration with notice of the defect and without objection") (emphasis added); *see also, Stephens v. Prudential Ins. Co. of Am.*,

278 A.D.2d 16 (1st Dep't 2000). This Court cannot and will not vacate or modify an arbitration award to grant the right of first refusal where the issue was one for the arbitrator to decide and Petitioner had a full and fair opportunity to present it for resolution but inexplicably failed to do so. Accordingly, it is

ORDERED that the Petition of Shkelzen Islamaj for an order vacating or modifying the arbitration award is denied; it is further

ORDERED that Respondents' cross-petition to confirm the arbitration award is granted; and it is further

ORDERED that within 14 days of this Decision and Order, the parties may enter into a consent order for appointment of a receiver to supervise the sale of assets ordered in the arbitration award. The parties are to agree on an individual to supervise the sale and a cost/fee arrangement. Failure to agree and submit an Order to this Court within 14 days will result in denial of the request unless for good cause this Court orders otherwise (which it is unlikely to do).

This constitutes the decision and order of the Court.

Settle Judgment.

Dated: New York, New York
December 10 2002

ENTER

Hon. Eileen Bransten