SHORT FORM ORDER

INDEX No. 04-14855

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 5/12/11
ADJ. DATE 7/7/11
Mot. Seq. #007 - MotD
Mot. Seq. #008 - XMD

NORTH FORK BANK, Plaintiff, - against - COMPUTERIZED QUALITY SEPARATION CORP., ANDREW TEPFER, ERIC TEPFER, NORMAN J. TEPFER, JERRY TEPFER, and BARRY GREEN, Defendants.	BONCHONSKY & ZAINO, LLP Attorney for Defendant Computerized Quality Separation Corp. 226 Seventh Street, Suite 1200 Garden City, New York 11530 BRUCE MINSKY, LLP Attorney for Andrew Tepfer 112 Brick Church Road New Hempstead, New York 10977 AGINS, SIEGEL, REINER & BOUKLAS, LLP Attorney for Defendants Eric Tepfer, Norman J. Tepfer & Jerry Tepfer 386 Park Avenue South, Suite 1200 New York, New York 10016 M. JOHN PITTONI, LLC Attorney for Defendant Barry Green 226 Seventh Street, Suite 200 Garden City, New York 11530

Upon the following papers numbered 1 to 34 read on this motion to confirm arbitration award; cross motion to impose retaining lien; Notice of Motion/ Order to Show Cause and supporting papers 1-7; Notice of Cross Motion and supporting papers 8-14; Answering Affidavits and supporting papers 15-21; 22-27; Replying Affidavits and supporting papers 28-34; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Barry Green for an order directing the entry of judgment on an arbitration award dated February 3, 2011 and dismissing the action, is granted to the extent of confirming the arbitration award and directing the entry of judgment thereon, and is otherwise denied; and it is further

ORDERED that the cross motion by Agins, Siegel, Reiner & Bouklas, LLP for an order confirming the attorney's retaining lien on an escrow fund, directing payment from that fund to Agins, Siegel, Reiner & Bouklas, LLP in the amount of $21,977.65, and distributing the balance of the fund, is denied.

At all relevant times prior to February 19, 2004, defendants Andrew Tepfer, Eric Tepfer, Norman J. Tepfer, and Jerry Tepfer were the sole shareholders, officers, and directors of defendant Computerized Quality Separation Corp. ("CQS"). In or about October 2003, CQS retained Richard C. Agins, Esq. of Agins, Siegel & Reiner, LLP (the predecessor to Agins, Siegel, Reiner & Bouklas, LLP) to assist in a restructuring of the company. It appears that CQS was experiencing financial difficulty and had found a potential buyer, defendant Barry Green.

On or about February 19, 2004, a stock purchase agreement was executed by and among the defendants, whereby Andrew Tepfer, Norman J. Tepfer, Jerry Tepfer, as sellers, sold their 75% share of CQS's stock and assets to Barry Green, as buyer, for a purchase price of $195,000.00, with Eric Tepfer retaining his 25% share of the company. Pursuant to paragraphs 2(b) and 9(b) of the stock purchase agreement, the buyer was to cause the sellers, within 60 days after the closing, to be released from certain liabilities, including a promissory note dated August 1, 2002 executed by CQS in favor of the U.S. Small Business Administration in the amount of $297,900.00 ("the SBA note"), and a promissory note dated November 1, 2002 executed by CQS in favor of North Fork Bank in the amount of $692,463.23 ("the North Fork note"). Paragraph 2(c) provides that the sellers shall continue to be covered for all benefits they received as employees of the company for a period of six months following the closing. Paragraph 9(c) requires the buyer to retain the consulting services of Jerry Tepfer on terms to be negotiated. Paragraph 11(b) provides that the buyer shall indemnify the sellers from and against any claims resulting from the buyer's failure to perform his obligations under the stock purchase agreement. Paragraph 14(d) provides that all disputes between the parties arising out of the stock purchase agreement shall be decided by arbitration. According to Agins, he represented CQS and all four Tepfers in connection with the transaction.

It appears that, contemporaneously with the execution of the stock purchase agreement, an escrow agreement was entered into by and among the defendants, whereby $45,000.00 of the purchase price was to remain in escrow with Agins, Siegel & Reiner, LLP for a stated period of days following the closing, and to be distributed to Barry Green upon certain stated conditions. It is noted that the copy of the escrow agreement provided to the Court is largely unintelligible, not only in terms of its content, but also because it contains numerous cross-outs and write-overs, and because the bottom line or lines on three of the four pages have been cut off.

In or about July 2004, the plaintiff commenced this action to recover the amounts due on the North Fork note. It is undisputed that the plaintiff has since settled its claims with all of the defendants and that the only claim remaining in the action is a cross claim asserted by Norman J. Tepfer and Jerry Tepfer against CQS and Barry Green for contractual indemnification. The Court has not been provided with a copy of the answer containing that cross claim.

By letter dated April 15, 2010, Norman J. Tepfer and Jerry Tepfer ("the claimants") notified Barry Green ("the respondent") of their intention to arbitrate a number of claims under the stock purchase agreement, namely, the respondent's failure to timely release the claimants from certain liabilities as required by paragraphs 2(b) and 9(b), the respondent's failure to provide the claimants with certain benefits as required by paragraph 2(c), the respondent's failure to retain the consulting services of Jerry Tepfer as required by paragraph 9(c), the respondent's failure to indemnify the claimants as required by paragraph 11(b), and the respondent's failure to release the balance of the purchase price being held in escrow. It appears that a hearing took place before an arbitrator on December 22, 2010.

On February 3, 2011, the arbitrator issued an award denying each of the claims asserted by the claimants and directing that the escrow funds be distributed 50% to the claimants and 50% to the respondent. The arbitrator found no credible evidence that the respondent breached paragraphs 2(c) or 9(c) of the stock purchase agreement, nor that the claimants were monetarily damaged by the alleged breach of paragraphs 2(b), 9(b) or 11 of the stock purchase agreement. As for the escrow, the arbitrator found no competent evidence bearing on the resolution of the issue.[1] Absent such evidence, and "if for no other reason than to end the seven (7) years of expensive bickering between the parties," the arbitrator determined "to end the conflict once and for all by splitting the escrow between the parties."

Barry Green now moves, in effect, to confirm the arbitration award and to dismiss the remaining cross claim against him on the ground that it raises issues identical to those which were the subject of the arbitration proceeding and is, therefore, barred by res judicata; Agins, Siegel, Reiner & Bouklas, LLP cross-moves to "confirm" its retaining lien on the escrow fund and to direct the payment of its legal fees from that fund.

Pursuant to CPLR 7510, a court "shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." CPLR 7511 (b) (1) sets forth the exclusive grounds for vacating an award where, as here, the aggrieved party participated in the arbitration:

> (i) corruption, fraud or misconduct in procuring the award; or
>
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
>
> (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
>
> (iv) 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.

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[1] Like the Court, the arbitrator noted that the escrow agreement was "virtually incomprehensible."

Even if the arbitrator misconstrues or disregards the relevant facts or law, the award will not be vacated "unless it is violative of a strong public policy, is totally irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (***Matter of Town of Callicoon [Civil Serv. Empls. Assn., Town of Callicoon Unit]***, 70 NY2d 907, 909, 524 NYS2d 389 [1987]). As such, judicial review of arbitration awards is extremely limited, and courts are obligated to give deference to an arbitrator's decision. "An arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice" (***Matter of MBNA Am. Bank v Karathanos***, 65 AD3d 688, 883 NYS2d 917, 918 [2009]). By the same reasoning, a party seeking to vacate an award carries a heavy burden (*e.g.* ***Scollar v Cece***, 28 AD3d 317, 812 NYS2d 521 [2006]), "for once the issue is properly before the arbitrator, questions of law and fact are merged in the award and are not within the power of the judiciary to resolve" (***Binghamton Civ. Serv. Forum v City of Binghamton***, 44 NY2d 23, 28, 403 NYS2d 482, 484 [1978]).

Upon review, the Court finds no basis for disturbing the award. Although the claimants assert[2] that the award should be vacated to the extent that the arbitrator failed to address or consider their liability in connection with the SBA note (*cf.* ***Hamilton Partners v Singer***, 290 AD2d 316, 736 NYS2d 219 [2002]), they have failed to provide any record of the proceedings before the arbitrator. Consequently, it cannot be said on this record that the arbitrator neglected to rule on the issue, or even that the issue was raised by the parties. Since the claimants have not sustained their burden, the Court is mandated to confirm the award and to direct the entry of judgment on the award (*see* CPLR 7510, 7514), and the motion is granted to that extent.

The remaining branch of the motion, which is addressed to the cross claim, is denied. While a party will be precluded under the doctrine of collateral estoppel from relitigating an issue raised and decided against it in a prior action or proceeding, including an arbitration proceeding (***QDR Consultants & Dev. Corp. v Colonia Ins. Co.***, 251 AD2d 641, 675 NYS2d 117, *lv denied* 92 NY2d 814, 681 NYS2d 475 [1998]), the party seeking to invoke collateral estoppel must show, *inter alia*, that the identical issue was decided in the prior proceeding and is decisive in the present action (***Nachum v Ezagui***, 83 AD3d 1017, 922 NYS2d 459 [2011]). Likewise, a party seeking to invoke res judicata must demonstrate that the critical issue in the present action was decided in the prior proceeding (***Luscher v Arrua***, 21 AD3d 1005, 801 NYS2d 379 [2005]). Here, as Barry Green has not furnished a copy of the pleading containing the cross claim, and absent sufficient information to determine exactly what issues were raised and decided in the arbitration proceeding, it cannot be determined on this record whether the requirements of collateral estoppel or res judicata have been met.

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[2] A party may oppose an arbitration award either by motion pursuant to CPLR 7511 (a) to vacate or modify the award within 90 days after delivery of the award or, as here, by objecting to the award on the grounds set forth in CPLR 7511 (b) upon an application to confirm the award notwithstanding the expiration of the 90-day period (*see* ***Matter of Brentnall v Nationwide Mut. Ins. Co.***, 194 AD2d 537, 598 NYS2d 315 [1993]; ***Karlan Constr. Co. v Burdick Assoc. Owners Corp.***, 166 AD2d 416, 560 NYS2d 480 [1990]; ***State Farm Mut. Auto. Ins. Co. v Fireman's Fund Ins. Co.***, 121 AD2d 529, 504 NYS2d 24 [1986]).

As for the cross motion, it suffices to note that unless the terms of an escrow agreement provide for payment of an attorney's fee from the escrow funds–and it does not appear that the defendants' agreement so provides–such funds are not subject to a retaining lien, since the attorney holds the funds solely in a fiduciary or custodial capacity on behalf of its client (***Goldberg & Connolly v Graystone Constr. Corp.***, 65 AD3d 1082, 886 NYS2d 703 [2009], *lv denied* 14 NY3d 705, 899 NYS2d 129 [2010]; ***Schelter v Schelter***, 206 AD2d 865, 614 NYS2d 853 [1994]; ***Marsano v State Bank of Albany***, 27 AD2d 411, 279 NYS2d 817 [1967], *appeal dismissed* 23 NY2d 1018, 299 NYS2d 458 [1969]; ***Entertainment & Amusements of Ohio v Barnes***, 49 Misc 2d 316, 267 NYS2d 359 [1966]; *see also* ***Miller v J.A. Keeffe, P.C.***, 276 AD2d 757, 715 NYS2d 423 [2000], *lv denied* 97 NY2d 608, 739 NYS2d 97 [2002]). Accordingly, the cross motion is denied in its entirety.

Dated: 1/17/12

A.J.S.C.

___ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION