Matter of Wieser v Kohn
2013 NY Slip Op 33700(U)
December 30, 2013
Sup Ct, Kings County
Docket Number: 501548/2013
Judge: David I. Schmidt
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At an IAS Term, Part Comm-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of December, 2013

P R E S E N T:

HON. DAVID I. SCHMIDT,
Justice.

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In the Matter of the Arbitration of Certain Controversies Between,

ABRAHAM WIESER, et ano.,

Petitioners,

- against -

Index No. 501548/2013

MIKE KOHN, et ano.,

Respondents.

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The following papers numbered 1 to 11 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 2 3 - 5
Opposing Affidavits (Affirmations)	6
Reply Affidavits (Affirmations)	7 - 10
Affidavit (Affirmation) of Yaakov Markowitz	11
Other Papers	

Upon the foregoing papers, petitioners Abraham Wieser and Baruch Wieser move by way or order to show cause for an order 1) pursuant to CPLR 7510, confirming an arbitration award rendered by a rabbinical court declaring that petitioners are joint 50% owners of 740 Myrtle Avenue, LLC (740 LLC) and directing respondents Mike Kohn and Mendel Gluck to assign 50% of their ownership interests of 740 LLC to petitioners, 2) pursuant to CPLR 7510, directing respondent Kohn to have his nominee, Allan Lebovits,

Esq., cancel and discharge a certain encumbrance and declaration, dated September 15, 2011, pursuant to CPLR 7510, directing respondents to account for the profits of the 740 LLC and thereafter split same with petitioners and 4) granting attorneys fees, costs and disbursements. Respondent Gluck cross-moves for an order vacating the subject arbitration award.

This proceeding stems from a dispute over ownership interests of certain real property located at 740 Myrtle Avenue, 740A Myrtle Avenue and 145 Sanford Street in Brooklyn. In September of 2007, petitioners sought to purchase the property with the financial assistance of Gluck. 740 LLC was thereafter formed. Kohn was named the sole member of 740 LLC while Gluck and Baruch Wieser were named managers. In addition to financing the purchase through loans, petitioners invested $300,000 toward the purchase price while Gluck contributed $600,000. Upon receipt of $100,000 of loan proceeds at closing, petitioners investment was deemed reduced to $200,000, with Gluck's investment at $600,000. According to petitioners, they had eighteen months to "equalize" their investment with Gluck (i.e., paying an additional $200,000 to bring petitioners' and Gluck's investments to $400,000 each). After eighteen months had past, Gluck demanded that the parties arbitrate before Rabbi Mendel Zilber.

In August 2010, Rabbi Zilber issued an award providing that petitioners had the right to "buy out" Gluck by tendering $1,750,000 to pay off the two loans used to finance the purchase, with Gluck receiving the remaining approximate sum of $600,000. Alternatively, if petitioners did not exercise their option to buy out Gluck, then Gluck was granted the right to buy out petitioners by tendering $2,000,000, from which the loans would be paid off and the remaining balance of approximately $840,000 would be split

between petitioners (collectively) and Gluck. Neither petitioners nor Gluck exercised their buyout option immediately following the issuance of the award.

On October 22, 2010, a second award was issued which indicated that Gluck was prepared to purchase petitioners' interests and that Gluck remitted to Rabbi Zilber a check in the amount of $100,000, which Gluck maintained was the amount necessary for such purchase. Rabbi Zilber directed the parties to appear before a three member rabbinical panel to determine whether $100,000 was the correct price. On January 12, 2011, a rabbinical panel (Central Rabbinical Congress of U.S.A. and Canada)("CRC") issued an award stating that a "Rabbinical Court Ruling was issued that [the subject real property] belongs to [Gluck and his son], and the Rabbinical Court will schedule a time to hear the claims and demands to set an amount which [Gluck is] required to pay the selling party." On March 31, 2011, the CRC issued a subsequent award providing that Gluck may buy out petitioners by tendering the sum of $130,320. Given that Gluck had previously escrowed with Rabbi Zilber the amount of $100,000, the award obligated Gluck to pay an additional $30,320 to petitioners. It is disputed by the parties whether Gluck failed to tender the $30,320 or whether Gluck did in fact tender the $30,320 and petitioners refused to accept the payment.

Petitioners thereafter unsuccessfully attempted to summon Gluck to certain rabbinical courts (Mechon L'Hoyroa Beth Din and Tartikov Beth Din). On or about February 17, 2013, petitioners summoned Gluck to appear before the Rabinnical Court of Givas Hamoroh (Givas) on March 6, 2013. On March 5, 2013, one day before the scheduled appearance date, Gluck called Givas requesting an adjournment. According to petitioners and the secretray of Givas, Yaakov Markowitz, Gluck was granted an adjournment on the condition that Gluck agreed in writing to arbitrate before Givas.

Gluck thereafter submitted to the Beth Din a signed handwritten document stating in Yiddish:

> "I am ready to go to Beth Din to Din Torah with Weider Avraham-Baruch- next week Wednesday, god willing, Mar. 13, 5pm."[1]

A second document submitted to Givas by Gluck states, allegedly, in Hebrew:

> "I agree to litigate with Weiser Barcuch-Avraham at a rabbinical court, at the rabbinical court of Givas Hamorah, G-d willing in the coming week, on Wednesday Mar 13 at 5:00."[2]

Upon the request of Gluck, Givas adjourned the matter a second time to March 20, 2013. When Gluck did not appear at Givas on the adjourned date, the panel considered Gluck in default and proceeded as against Kohn, who had previously signed a formal agreement on January 3, 2013 to litigate the matter before Givas . On March 20, 2013, the Givas panel issued an award finding that petitioner owned 50% of 740 LLC, that Gluck must show petitioners all expenses and profits of the subject properties and split the profits with petitioners, Kohn must free the debt of "Mr. Liebowitz" form the properties within thirty days as Kohn admitted that the debt was "merely a "ruse" and that Gluck and Kohn may not sell or encumber the properties without the consent of petitioners.

Following the issuance of the award, petitioners commenced the instant proceeding to confirm the award. Gluck cross-moves to vacate the award on the grounds that the Givas panel is barred by res judicata from issuing a new award different from the previous determination of the CRC, that Gluck never agreed to submit the controversy to arbitration

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[1]Translated from Yiddish by Yaakov Markowitz.

[2]Translated from Hebrew by Shnayon Burton. According to Yaakov Markowitz, Gluck was informed that the first Yiddish document was insufficient for an adjournment as it did not expressly identify Givas as the rabbinical court Din.

before Givas and that the arbitration proceedings and issuance of the award were in contravention of certain procedural provisions of CPLR article 75.

Pursuant to CPLR 7511(b)(1) an arbitration award may be vacated on application of a party who participated in the arbitration only if the rights of that party were prejudiced by (1) corruption, fraud, or misconduct in procuring the award; (2) partiality of a supposedly neutral arbitrator; (3) the arbitrator exceeding his powers so that no final and definite award was made; or (4) failure to follow procedures provided by CPLR article 75 (*Wieder v Schwartz*, 35 AD3d 752, 753 [2006]). "The doctrine of res judicata operates to preclude the reconsideration of claims actually litigated and resolved in a prior proceeding, as well as claims for different relief against the same party which arise out of the same factual grouping or transaction, and which should have or could have been resolved in the prior proceeding" (*Mahler v Campagna*, 60 AD3d 1009, 1011 [2009]). The doctrine of res judicata applies to arbitration awards with the same force and effect as it applies to judgments of a court (*id.*; *see QDR Consultants & Dev. Corp. v Colonia Ins. Co.*, 251 AD2d 641, 642 [1998]; *Dimacopoulos v Consort Dev. Corp.*, 158 AD2d 658, 659 [1990]; *Luppo v Waldbaum, Inc.*, 131 AD2d 443, 445 [1987]). The claims between petitioners and Gluck with respect to the parties' ownership interests in 740 LLC were litigated and resolved in the CRC awards dated January 12, 2011 and March 31, 2011, wherein the rabbinical court awarded ownership to Gluck (along with his son) and established the amount of the purchase price Gluck was to remit to petitioners.

In *Matter of Pinnacle Envt. Sys. [Cannon Bldg. of Troy Assoc.]*, 305 AD2d 897, 898 [2003] the Appellate Division, Third Department held that the arbitrator in a second arbitration proceeding "exceeded her power" by conducting a hearing and making an award on the same claim as the first arbitrator's award, which was binding. In *MVAIC v*

Travelers Ins. Co., 246 AD2d 420 [1998], the Appellate Division, First Department stated that "[b]ased on the principle of res judicata, an arbitrator exceeds his power by conducting a hearing and making an award premised on the same claim as a prior award, which, unless vacated, is "complete, final and binding" (*id.* at 422 [citation omitted]).

However, in *Matter of Kowaleski (New York State Dept. of Correctional Servs.)* (16 NY3d 85, 90 [2010]), the Court of Appeals deemed it "well-settled" that an arbitrator exceeds his or her power only if the "award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*id.* [internal quotation marks and citation omitted]; *see* also CPLR 7511 [b] [1] [iii]). The court further noted that "[o]utside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where an arbitrator has made an error of fact or law" (*Kowaleski*, 16 NY3d at 91 [internal quotation marks omitted]; *see also Matter of Falzone*, 15 NY3d 530, 534 [2010]). In *Falzone*, the Court of Appeals held that an arbitrator's failure to apply collateral estoppel to preclude determination of an issue resolved in a prior arbitration proceeding is not subject to review by the court (*Falzone*, 15 NY at 535).

In *Matter of Globus Coffee, LLC v SJN, Inc.* (47 AD3d 713 [2008]), the Appellate Division, Second Department stated that " res judicata is not a basis on which a court may, under CPLR 7511, vacate an arbitration award" (*id.* at 714 citing *Matter of City School Dist. of City of Tonawanda v Tonawanda Educ. Assn.*, 63 NY2d 846, 848 [1984]["The existence of a prior award inconsistent with one sought to be vacated is not included among the grounds set out in CPLR 7511 (subd [b]) on which a court may upset an arbitration award."]). Thus, even if the Givas award was issued in contravention of the

principle of res judicata and/or collateral estoppel, such cannot constitute a ground upon which the subsequent award may be vacated by this court.

Nonetheless, pursuant to CPLR 7511 (b)(2)(ii), an arbitration award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate[3] if the court finds that a valid agreement to arbitrate was not made. Unlike Kohn, Gluck did not sign the "agreement to submit to arbitration" form from Givas, which document clearly sets forth the names of the three rabbinical arbitrators who would preside over the matter, specifically provides that the undersigned parties agreed to "submit to binding arbitration. . .all the controversies. . .between the undersigned parties," that the parties waive all rights under CPLR article 75 and that the arbitration would proceed without the presence of a party if the party does not attend a scheduled hearing. Petitioners argue that the handwritten notes sent by Gluck to Givas indicating that he was "ready to go to Beth Din to Din Torah" with petitioners and that he "agree[d] to litigate" with petitioners constitute a valid agreement by Gluck to submit the dispute involving 740 LLC to arbitration before the Givas panel.

With respect to the second handwritten note, translated from Hebrew, Gluck maintains that the translation is inaccurate in that he did not use Hebrew terminology meaning that he agreed to "litigate," but rather used the Hebrew word "leylach," meaning to "walk," as a way to express his intention to merely appear before Givas to explain that he would not relitigate the case.

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[3]The summons from Givas cannot be deemed a notice of intent to arbitrate as it does not "specify[] the agreement pursuant to which arbitration is sought" and does not state that "unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time." (CPLR 7503 [c]).

"A party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties' 'clear, explicit and unequivocal' agreement to arbitrate" (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006], quoting *Matter of Waldron [Goddess]*, 61 NY2d 181, 183 [1984]; "An agreement to arbitrate "must not depend upon implication or subtlety" (*Messiah's Covenant Community Church v Weinbaum*, 74 AD3d 916, 918 [2010]). "No party is bound to arbitrate unless by clear language he has so agreed, nor should parties be inveigled into arbitration" (*Kahn v Biernbaum*, 55Ad2d 589, 589 [1976][citations and internal quotation marks omitted]).

Even assuming that the translation of the Hebrew note is accurate, it is not clear from Gluck's statement that he agreed "to litigate" with petitioners before Givas that Gluck agreed and intended to once again arbitrate the dispute regarding ownership of the 740. Neither the Yiddish note nor the Hebrew note, as translated, identifies the nature of the dispute or scope of the issues to be subject to arbitration. The notes do not disprove Gluck's allegation that he agreed only to appear before Givas for the sole purpose of explaining that the parties had already arbitrated their dispute to conclusion and that he would not engage in any further proceedings. Indeed, given the fact that the dispute between the parties was resolved favorably toward Gluck in the prior arbitration before the CRC, the argument that Gluck's notes constituted a "clear, explicit and unequivocal" agreement to arbitrate the dispute anew is especially specious.

Because there is no evidence that Gluck clearly and explicitly agreed to arbitrate before Givas, the award must be vacated pursuant to CPLR 7511 (b)(2)(ii). As a result, petitioner's motion to confirm the Givas award is denied and Gluck's cross motion to vacate the award as to him is granted. While Kohn clearly agreed to submit to arbitration

before Givas and did not submit any opposing papers in this proceeding, because there are questions of what interest, if any, Kohn has in 740 LLC and whether enforcement of the award as against Kohn would affect the rights and interest of Gluck, this court declines to confirm the Givas award with respect to Kohn. That part of petitioners' motion for costs, attorneys fees and disbursements is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT