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| Matter of Dukhon v Kim |
| 2013 NY Slip Op 31721(U) |
| July 25, 2013 |
| Sup Ct, New York County |
| Docket Number: 651776/2013 |
| Judge: Cynthia S. Kern |
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART _____

Index Number : 651776/2013
DUKHON, VITALY
vs.
KIM, DOW
SEQUENCE NUMBER : 001
CONFIRM AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

is decided in accordance with the annexed decision.

U N F I L E D J U D G M E N T
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):
13 651776

Dated: 7/25/13

CK, J.S.C.

1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

CYNTHIA S. KERN
NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X

In the Matter of the Application of

VITALY DUKHON,

Petitioner,

Index No. 651776/2013

-against-

DECISION/ORDER

DOW KIM a/k/a DO WOO KIM,

Respondent.

-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

| Papers | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed..... | <u>1</u> |
| Affirmation in Opposition | <u>2</u> |
| Replying Affidavits..... | <u>3</u> |
| Exhibits..... | <u>4</u> |

Petitioner commenced the instant proceeding seeking an order pursuant to CPLR § 7510 confirming the arbitration award rendered on May 6, 2013 (the “Award”) and directing that judgment be entered thereon. Respondent cross-moves for an order pursuant to CPLR § 7511 (c) modifying the Award to eliminate the portion that awards petitioner \$1.7 million based on a theory of promissory estoppel. For the reasons set forth below, petitioner’s motion is granted and respondent’s cross-motion is denied.

The relevant facts and procedural history are as follows. Petitioner Vitaly Dukhon (“Dukhon”) and respondent Dow Kim (“Kim”) were limited partners in Diamond Lake Investment Group, L.P. and members of Diamond Lake GP, LLC (collectively “Diamond Lake”).

Section 9.06 of “The Limited Liability Company Agreement of Diamond Lake GP LLC (the “LLC Agreement”),” provided that for:

any controversy or dispute arising out of . . . the actions or omissions of any Member in connection with the business of the Company, each of the parties consents to submit any such controversy or dispute to be finally resolved by arbitration in accordance with the CPR Institute for Dispute Resolution Rules.

Similarly, Section 9.06 of the “First Amended and Restated Limited Partnership Agreement of Diamond Lake Investment Group LP (the “LP Agreement”)” provided that for:

any controversy or dispute arising out of . . . the actions or omissions of any Partner in connection with the business of the Partnership, each of the parties consents to submit any such controversy or dispute to be finally resolved by arbitration in accordance with the CPR Institute for Dispute Resolution Rules.

On or about February 9, 2010, Dukhon commenced arbitration before the International Institute for Conflict Prevention and Resolution (“CPR”) asserting claims against Kim in his individual capacity. Dukhon’s Notice of Arbitration stated that “Mr. Dukhon brings this arbitration to recover a certain fixed, minimum compensation amount that was promised to him by Mr. Kim and the other Respondents—along with other related damages.” Additionally, Dukhon’s Notice of Arbitration delineated nine claims against Kim: (1) Breach of Written Contract; (2) Breach of Oral Contract; (3) Breach of Contract via a third party beneficiary; (4) Alter Ego; (5) Quantum Merit; (6) Unjust Enrichment; (7) Violation of New York Labor Law; (8) Fraudulent Misrepresentation; and (9) Gross Negligence.

On or about March 1, 2010, Kim commenced an Article 75 proceeding in the New York Supreme Court, New York County, seeking to permanently stay the arbitration on the ground that there was no valid arbitration agreement between the parties requiring him to arbitrate any dispute in his individual capacity. On September 28, 2010, The Honorable Justice Barbara

Kapnick granted Kim's petition and stayed the arbitration. Thereafter, Dukhon moved for reargument, which Kapnick granted and, upon reargument, vacated her prior decision and ordered Kim to arbitrate. That decision was affirmed by the Appellate Division, First Department on November 3, 2011.

On February 23, 2012, the CPR convened a pre-hearing conference with the parties. During the pre-hearing conference, Kim withdrew his challenge to the jurisdiction of the CPR and "[t]he parties consent[ed] to the jurisdiction of the Tribunal and to their full power, authority and jurisdiction to decide all matters within the scope of Section 9.06 of [the LP Agreement] and Section 9.06 of [the LLC Agreement]." Thereafter, the parties engaged in discovery. Tens of thousands of pages of discovery were exchanged and depositions of Kim and Dukhon were conducted. A hearing was held from October 1, 2012, through October 5, 2012, and continued on November 19, 2012, and December 4, 2012. In the end, over two-hundred exhibits were submitted as part of the hearing and sixteen witnesses testified.

On May 6, 2013, the arbitration panel issued its Decision and Award. In a detailed fifty-one page document, the panel concluded that the evidence presented was insufficient to prove any of the nine stated claims in Dukhon's Notice of Arbitration but that Dukhon had proven that he was entitled to recover from Kim under the theory of promissory estoppel and that Kim, under the circumstances, was estopped from denying liability to Dukhon. While plaintiff did not specifically plead a claim for promissory estoppel, the panel pointed out that he "requested such and other further relief as the Tribunal deems just and appropriate." Additionally, pursuant to CPR Rule 10.3, the arbitration panel has the power to "grant any remedy or relief, including but not limited to specific performance of a contract, which is within the scope of the agreement of

the parties and permissible under the law(s) or rules of law applicable to the dispute.” Thus, the panel issued an award in favor of Dukhon and against Kim in the amount of \$1.7 million.

Kim has failed to pay any of the Award to Dukhon and Dukhon has brought the instant petition to confirm the Award and for an entry of judgment in favor of him and against Kim in the amount of \$1.7 million. Kim’s cross-petition seeks an order pursuant to CPLR § 7511 (c)(2) modifying the Award to eliminate that portion that awards Dukhon \$1.7 million based on a theory of promissory estoppel on the ground that said claim was never raised by Dukhon and, as a result, Kim was unable to contest or defend against the claim. Specifically, Kim argues that the panel “violated [his] fundamental due process rights guaranteed by CPLR 7506 by failing to identify a cause of action they were considering and then by failing to allow Kim to present evidence in support of his defense to the unknown ‘promissory estoppel’ claim.”

It is well settled that the determinations of an arbitration panel are not to be lightly set aside and “judicial review of an arbitration proceeding is extremely limited.” *Frankel v. Sardis*, 76 A.D.3d 136, 139 (1st Dept 2010). Indeed, “[e]ven in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice.” *Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 N.Y.2d 321, 326 (1999). Thus, pursuant to CPLR § 7510, “[t]he 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.” Pursuant to CPLR § 7511(c)(2), “[t]he court shall modify the award if . . . the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted.” When determining whether the matter was submitted to

arbitration, “the language of arbitration demands is not subject to the strict standards of construction applicable to formal court pleadings” and the correct inquiry is whether “the issue was undisputedly within the parameters of the arbitration agreement, and was in fact addressed during the course of the arbitration proceeding.” *Frankel*, 76 A.D.3d at 142; *see also Roffler v. Spear, Leeds & Kellogg*, 13 A.D.3d 308 (1st Dept 2004) (confirming arbitration award that awarded damages to individual petitioners even though the statement of claim asserted only derivative claims on behalf of petitioners’ corporation).

In the present case, Kim’s cross-motion to modify the award is denied as he has failed to demonstrate a proper ground for modification. As an initial matter, it is clear that the issue of whether Dukhon could recover from Kim under the theory of promissory estoppel or whether Kim could be estopped from denying liability based on Kim’s representations when hiring Dukhon to work at and join Diamond Lake undisputedly falls within the parties’ arbitration agreements. During the preliminary conference, both parties agreed to the “jurisdiction of the Tribunal and to their full power, authority and jurisdiction to decide all matters within the scope of Section 9.06 of [the LP Agreement] and Section 9.06 of [the LLC Agreement].” These Sections are broad arbitration clauses under which the parties agreed to arbitrate any controversy involving “the actions or omissions” of any Member or Partner “in connection with the business” of the Diamond Lakes entities. The panel determined that Dukhon was entitled to \$1.7 million under the theory of promissory estoppel based on Kim’s representations to Dukhon when hiring him to work at Diamond Lake. Those representations are clearly actions of a member or partner that pertain to Diamond Lake and fit squarely within the arbitration agreements. Additionally, it is clear that the promissory estoppel issues were addressed during the arbitration proceedings.

Indeed, the arbitration panel was presented with and the hearing revolved around one central issue: whether Dukhon suffered damages as a result of Kim's representations and actions in hiring Dukhon to work for and join Diamond Lake. Moreover, the arbitration panel notes in the Award that "[t]hroughout the Hearing, [Dukhon] asserted that Respondent Kim should be equitably estopped from denying liability." Under these circumstances, it is inconceivable that the claim of promissory estoppel was not addressed during the arbitration proceeding and it is immaterial that a claim for promissory estoppel was not specifically stated in Dukhon's Notice of Claim.

Additionally, Kim's contention that he did not have an "opportunity to be heard" in violation of his due process rights under CPLR § 7506 is without merit and belied by the undisputed record before the court. Pursuant to CPLR § 7506 (c), "[t]he parties are entitled to be heard, to present evidence and to cross-examine witnesses." In the present case, Kim was given ample opportunity to present his case to the arbitration panel during the seven days of the hearing, which centered around whether Dukhon was damaged as a result of Kim's representations, and in hundreds of pages of pre and post-hearing briefs. Indeed, Kim fails to identify even one piece of evidence or testimony he would have presented if promissory estoppel was originally listed on Dukhon's Notice of Claim. Kim's argument is even further undermined by the panel's fifty-one page Award, which includes four pages specifically outlining the facts upon which it based its decision to grant an award to Dukhon based on promissory estoppel.

Based on the foregoing, Kim's cross-motion is denied and Dukhon's motion to confirm the Award is granted. Accordingly, it is hereby

ORDERED and ADJUDGED that Dukhon's petition is granted and the arbitration award

