

Bergonzi v MIAC Servs., Inc.

2013 NY Slip Op 32415(U)

September 27, 2013

Supreme Court, New York County

Docket Number: 150444/12

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MADDEN
HON. JOAN A. MADDEN Justice
J.S.C.

PART 11

ADAM BENSONY

- v -

MIAC SERVICES INC

INDEX NO. 150444/12
MOTION DATE _____
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

Dated: September 27, 2013

[Signature]
HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
ADAM BERGONZI, MICHAEL LINKO, WILLIAM
RIZZO, DANIEL MINERVA, and RANDY VIVONA,

Petitioners

INDEX NO. 150444/12

-against-

MIAC SERVICES, INC. and MUNICIPAL
INFRASTRUCTURE ASSURANCE
CORPORATION,

Respondents.

-----X
JOAN A. MADDEN, J.:

Petitioners move, by order to show cause, to hold respondent Municipal Infrastructure Assurance Corporation (“MIAC”) in contempt pursuant to Judiciary Law § 756 and the inherent power of the court for allegedly violating this court’s decision and order dated May 24, 2012 (hereinafter “the prior order”). Respondents MIAC and MIAC Services, Inc. oppose the motion, which is denied for the reasons below.

Petitioners were employed by MIAC Services, Inc. for the purpose, *inter alia*, of launching MIAC which was to provide financial guaranty insurance to the public finance market. In connection with their employment, petitioners entered into substantially similar contracts containing arbitration agreements. When a dispute arose between petitioners and respondents, petitioners moved to compel arbitration. In response, Andrew Hahn Sr. Esq., as attorney for MIAC Services Inc.,¹ submitted an affirmation in opposition, asserting *inter alia*, that the

¹While the affirmation in opposition to the motion to compel states that it was submitted on behalf of MIAC Services, Inc., in its opposition to this motion respondents maintain that the

petitioners' claims were inflated and that the petitioners had failed, as required under the governing arbitration agreements, "to make a good faith effort to resolve any dispute internally on an informal basis through MIAC Services management channels appropriate to the circumstances of the dispute."

In its prior order, the court granted petitioners' motion to compel arbitration, writing that:

The arbitration agreement clearly provides for arbitration with respect to the issues involved and for [respondent] MIAC Services, Inc. to pay the AAA administrative fees. Moreover, the affidavit of Matthew McDonald, an attorney for [petitioners] establishes that [petitioners] made a good faith effort to resolve the dispute at issue on an informal basis prior to commencing an arbitration proceeding. I conclude that [petitioners] have satisfied the provision in the arbitration agreement requiring such effort before a claim is submitted to arbitration. The court then ordered that the motion to compel is granted [and that] ...MIAC Services, Inc. shall pay AAA administrative fees within two weeks of today's date.

Notably, while the petition sought relief with respect to both respondents the court's order expressly referred only to MIAC Services, Inc.

After the prior order was issued, MIAC Services, Inc. and MIAC appeared for arbitration and paid the arbitration fees. Petitioners subsequently filed a Second Demand for Arbitration which named an affiliate of respondents, Macquarie Holdings, U.S.A., Inc. ("Macquarie") as an additional respondent.

On July 15, 2013, after the parties selected the arbitrators, MIAC and Macquarie filed a motion to dismiss, asserting that the arbitrator lacked jurisdiction over them as they were not

opposition papers in the motion to compel were submitted on behalf of both MIAC and MIAC Services, Inc.

signatories to the relevant arbitration agreements.

Petitioners now move for contempt, asserting that MIAC's motion to dismiss before the arbitrator on the ground that it is not a proper party to the arbitration violates an unequivocal mandate in the prior order requiring MIAC to arbitrate, that MIAC knew about the prior order, and that petitioners were prejudiced by its violation as they are being forced to incur additional attorneys' fees.

In opposition, respondents deny that MIAC's motion violated the prior order and point out that the issue regarding the arbitrator's jurisdiction over MIAC as a non-signatory of the arbitration agreements was not raised in papers opposing the petitioners' motion to compel arbitration.

In their reply letter, petitioners maintain that the issue as to the arbitrator's jurisdiction was raised in connection with the motion to compel,² and that the motion to dismiss constitutes a collateral attack on the prior order.

“Contempt is a drastic remedy, which should not issue absent a clear right to such relief.” Coronet Capital Co. v. Spodek, 202 AD2d 20, 29 (1st Dept 1994), quoting, Usina Costa Pinto, S.A. v. Sanco Sav. Co. Ltd., 174 AD2d 487 (1st Dept 1991). To establish civil contempt based on an alleged violation of a court order, the movant must establish, by clear and convincing evidence, that a lawful order of the court expressing an unequivocal mandate was in effect, and that the order was disobeyed to a reasonable certainty. See Matter of Department of Envtl. Protection of City of N.Y. v. Department of Envtl. Conservation of State of N.Y., 70 NY2d 233 (1987); McCormick v. Axelrod, 59 NY2d 574, amended 60 NY2d 652 (1983); Vujovic v.

²There is no transcript of the oral argument on the motion to compel.

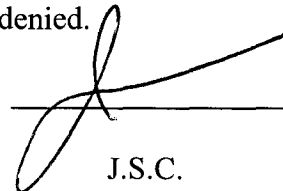
Vujovic, 16 AD3d 490 (2d Dept 2005). The party to be held in contempt must be shown to have had knowledge of the order, and the disobedience must have prejudiced the right of another party. See McCain v. Dinkins, 84 NY2d 216 (1994) McCormick v. Axelrod, *supra*; Garcia v. Great Atl. & Pac. Tea Co., 231 AD2d 401 (1st Dept 1996).

Under this standard, the court finds that there is no basis for holding MIAC in contempt. As a preliminary matter, while the petitioners sought relief against both respondents, MIAC was not specifically mentioned in the court's prior order. In any event, the record shows that MIAC and MIAC Services, Inc. proceeded to arbitration, and that the arbitration fees were paid as directed by the prior order. Furthermore, as the prior order did not expressly address the issue of whether MIAC was required to arbitrate as a non-signatory, it cannot be said that MIAC's motion to dismiss on such grounds violated an unequivocal mandate in the prior order. Accordingly, the court need not reach whether petitioners have been prejudiced by the motion to dismiss.

In view of the above, it is

ORDERED that the motion for contempt is denied.

Dated: September 27, 2013



J.S.C.