NRT N.Y. LLC v The Ann Holdings, LLC
2019 NY Slip Op 33607(U)
December 3, 2019
Supreme Court, New York County
Docket Number: 655447/2019
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
---x
NRT NEW YORK LLC, d/b/a, THE CORCORAN GROUP.,

Petitioner,

-against-

THE ANN HOLDINGS, LLC,

Respondent.
---x

DECISION AND ORDER
Index No.: 655447/2019
Motion Sequence 001

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this Article 75 Action, NRT New York, LLC d/b/a The Corcoran Group (Petitioner) moves to confirm an arbitration decision issued in its favor pursuant to CPLR § 7510. The Ann Holdings, LLC (Respondent) opposes the motion. For the reasons set forth below, the Court grants the petition in its entirety.

BACKGROUND FACTS

This action arises out of an underlying arbitration proceeding commenced by Petitioner, a real estate broker, against Respondent, the owner of a condominium unit in Manhattan, to collect a commission owed for the sale of the unit. By written agreement, the parties had agreed that Petitioner was entitled to a 5% commission on any sale or exercise by the condominium's board of managers of its right of first refusal during the term of the agreement, which expired in September 2011 (NYSCEF doc No. 1, ¶ 4). Respondent entered into a contract of sale with a purchaser procured by Petitioner for a purchase price of $7,400,000 during the term of the

agreement. The board of managers, however, exercised its right of first refusal and assigned its right to a third party entitled MS6TC LLC. Respondent refused to close on the grounds that the third-party entity was controlled by a neighbor of an adjacent unit in the building whose spouse was a member of the board (NYSCEF doc No. 9 at 2). The issue was eventually litigated and resolved in favor of the board by the Supreme Court of New York County, and then affirmed by the First Department (*S. Tower Residential Bd. of Managers of Time Warner Ctr. Condo. v Ann Holdings, LLC*, 127 AD3d 485, 485, [N.Y. App. Div. 2015]). Following the First Department's ruling, the apartment was purchased by MS6TC LLC for $7,400,000 in November 2015 (NYSCEF doc No. 1, ¶ 5).

Following the sale, Respondent refused to pay Petitioner the commission. In February 2016, Petitioner commenced the underlying arbitration proceeding with the American Arbitration Proceeding to recover its brokerage commission, along with interest. Respondent answered asserting counterclaims for breach of contract and breach of fiduciary duty. Following the sale, Respondent contended that Petitioner was not entitled to the commission as the sale took place after the agreement term, and the agreement made no provision for the sale of the unit to a third-party designee of the board of managers. Respondent also claimed breach of fiduciary duty because Petitioner failed to inform Respondent that the neighbor was interested in the unit in the first place, even though the neighbor likely would have paid a higher price than the original purchaser. Petitioner also allegedly failed to inform Respondent that her neighbor was represented by another broker of the same agency (NYSCEF doc No. 9 at 2).

The arbitration hearing took place over multiple days throughout October and December 2018, and February 2019, where the panel heard testimony from all parties involved. In

September 2019, the panel issued an award in favor of Petitioner, on the grounds that "[t]he chief and only material condition to [Petitioner]'s right to its commission was the procurement of a willing and able buyer" (NYSCEF doc No. 2 at 8). The panel disregarded Respondent's dual agent argument, noting Respondent was aware of all circumstances and was not damaged. The Panel awarded Petitioner its commission plus interest calculated at the statutory rate of 9% (*id.* at 11).

Respondent has not voluntarily satisfied the arbitration award, leading Petitioner to bring the motion currently before this Court. Respondent in opposition argues that the conduct of the arbitration panel satisfies the high standard required for vacatur of arbitration awards under Article 75. Respondent contends that the panel applied its own standard when it should have relied on the plain language of the listing agreement detailing when a commission would be due, that it improperly awarded interest dating back to 2011 although the sale did not occur until 2015, and that the panel engaged in various procedural misconduct that denied Respondent a fair hearing, including forcing Respondent's personal attorney to testify to privileged communications.

DISCUSSION

An arbitration award may be vacated pursuant to CPLR 7511(b)(1)(iii) where an arbitrator exceeded his or her power, including where the award violates strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power (*See Matter of Isernio v Blue Star Jets, LLC*, 140 AD3d 480, 480 [1st Dept 2016]). Where arbitration is compulsory, "judicial review under CPLR Article 75 is broad, requiring that the award be in accord with due process and supported by adequate evidence in the record .... The award must

also be rational and satisfy the arbitrary and capricious standard of CPLR article 78" (*Motor Veh. Mfrs. Ass'n of U.S. v State of New York*, 75 NY2d 175 [1990]). While compulsory arbitration decisions require a stricter scrutiny than consensual ones, courts are still bound by the arbitrator's factual findings, interpretation of relevant documents, and judgment concerning remedies. A court cannot substitute its judgment for that of the arbitrator simply because it believes its interpretation is superior to that of an arbitrator who has made errors of judgment or fact (*Matter of New York State Correctional Officers and Police Benevolent Assn. v. State of New York*, 94 NY2d 321 [1999]).

Awards also are not be vacated even where the error claimed is the incorrect application of a rule of substantive law, unless it is so 'irrational as to require vacatur'" (*Matter of Smith [Firemen's Ins. Co]*, 55 NY2d 224, 232 [1982]). To be upheld, an award in an arbitration proceeding need only have evidentiary support and cannot be arbitrary and capricious (*See Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]). Even though the decision must have evidentiary support, "[a]ssessment of the evidence presented at an arbitration proceeding is the arbitrator's function rather than that of the court" (*Fitzgerald v Fahnestock & Co., Inc.*, 48 AD3d 246, 247 [1st Dept 2008], *quoting Peckerman v D & D Assocs.*, 165 AD2d 289, 296 [1st Dep't 1991]). Under Article 75, arbitrators are not bound by substantive rules of law, including those of evidence. (*Silverman v Benmore*, 61 N.Y.2d 299, 308 [1984]). "An arbitral award cannot be attacked on the ground that an arbitrator refused to consider, or failed to appreciate, particular evidence or arguments" (*Genger v. Genger*, 87 AD3d 871, 874 n. 2 [1st Dept 2011]). Under CPLR 7511(b)(1)(iii), as long as an arbitrator addresses the issues submitted for resolution, vacatur will not be granted, unless the award is completely

irrational - that is, the resulting award goes beyond the issues before the arbitrator (*Rochester City School Dist. v Rochester Teachers Assn.*, 41 NY2d 578, 582 [1977]).

Here, Respondent first argues that the arbitrators' decision making meets the high standard necessary for vacatur under Article 75 because the panel completely ignored the plain language of the listing agreement. The panel noted that Petitioner produced a willing and able buyer, and the board of managers exercised its right of first refusal, both of which happened during the term of the agreement. The panel thus felt Petitioner was entitled to the commission, consisting with commonly accepted principles of real estate law which dictate that a commission is earned when a broker produces a willing and able purchaser (*see Colvin v Post Mtge. Land Co.*, 225 NY 510 (NY 1910); *Levy v Lacey,* 22 NY2d 271,273 (NY 1968); *Stern v Gepo Realty Corp.*, 289 NY 274,276 (NY 1942]).

While the agreement states the commission is not paid until closing, the closing was only delayed because Respondent refused to sell to the third-party entity designated by the board until ordered to do so by the First Department. The panel noted this delayed closing was due to no fault of Petitioner, who otherwise fulfilled its duty under the listing agreement. The panel's reasoning thus was in line with generally accepted principles of fair and reasonable contract interpretation, which hold that "due consideration [should be given] to the circumstances surrounding its execution, to the purpose of the parties in making the contract." (*Aron v Gillman*, 309 NY 157 [1985]).

The Court notes that pursuant to Article 75, the panel's decision is not subject to vacatur even if the panel made an error in substantive law. However, it does not even appear that the panel disregarded substantive law as the decision is largely in keeping with general principles of

applicable law regarding brokerage commissions. As noted above, a commission is typically due when a broker produces a willing and able buyer. Regarding Respondent's argument that the broker violated the Dual Agent rule, the panel evaluated the facts and testimony before it and concluded that Petitioner breached no fiduciary duty to Respondent. While Petitioner did not inform Respondent that the owner of the neighboring unit was interested in the apartment, the failure to provide such a disclosure is not necessarily a violation of fiduciary duty. In *Douglas Elliman v Tretter* (84 AD3d 446 [1st Dept 2011]), a seller's broker was accused of being a dual agent because she had shown the purchaser other properties for sale besides that of the seller. The First Department upheld summary judgment to the broker for its commission (*id.* at 448).

Here, a legal representative for Petitioner did briefly speak with Respondent's neighbor and advised him regarding what price to bid for the unit, but the representative did not act as his broker and was not any paid fee by the neighbor (NYSCEF doc No. 32 at 13). The panel also noted that Respondent was aware of this development and suffered no harm.

Just as arbitrators are not bound by rules of substantive law, they also are not bound by rules of evidence (*see Silverman v Benmore*, 61 NY2d 299, 308 [1984]). Thus, Respondent's contentions that the arbitrators overruled Respondent's attorney's objections to questions on the grounds of attorney client privilege is without merit. Respondent's attorney was often the sole representative of Respondent in contact with Petitioner, and a key argument during the arbitration hearing was whether Petitioner breached its duty by not effectively communicating with the attorney. Furthermore, nothing confidential was divulged as the issue the arbitration panel focused on was mainly the communications between Respondent's attorney and the

attorney representing the purchasing neighbor (NYSCEF doc No. 32 at 16). This is thus a misplaced argument that does not have a bearing on vacatur of the arbitration decision.

Respondent separately argues that even if the decision is not subject to vacatur, the panel erred in calculating the amount of interest owed. Respondent claims the interest should be calculated from the date of the closing, November 12, 2015. However, CPLR 5001(b) states that "interest shall be computed from the earliest ascertainable date the cause of action existed." The panel determined this date to be in September 2011, when the board first exercised its right of first refusal (NYSCEF doc No. 32 at 13). The closing was only delayed beyond that due to the litigation proceedings initiated by Respondent, beyond the control of Petitioner. The panel thus felt interest should be calculated once Petitioner first earned its commission, and as it had a rational basis for making that decision, the Court finds no reason to substitute new interest calculations.

As Respondent has failed to meet its heavy burden of establishing grounds for vacatur of the award pursuant to Article 75, the award is confirmed in its entirety.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED and that the petition of NRT New York, LLC d/b/a The Corcoran Group is granted in its entirety; and it is further

ORDERED AND ADJUGED that the Final Arbitration Award in the matter *NRT New York LLC., d/b/a The Corcoran Group v. The Ann Holdings LLC., (American Arbitration Association Case No. 01-16-0000-5218)*, is hereby confirmed; and it is further

ORDERED AND ADJUDGED that Petitioner does recover of Respondent Ann Holdings, LLC, the sum of $715,059.29 with costs and disbursements; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that Petitioner shall serve a copy of this order, along with notice of entry, on all parties within 15 days of entry.

Dated: December 3, 2019

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.