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Matter of Guttman v Diamond
2014 NY Slip Op 50138(U)
Decided on February 5, 2014
Supreme Court, New York County
Kornreich, J.
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Decided on February 5, 2014

Supreme Court, New York County

In the Matter of the Application of Jack Guttman, ALAN MRUVKA and MURRAY MRUVKA FAMILY TRUST, Members of 367 SOUTHERN PARTNERS, LLC, Petitioners,

against

Warren Diamond, JOHN DEL MONACO, GRACE DEL MONACO and DAVID BROWN, , Respondents.

In the Matter of an Article 75 Proceeding ALAN MRUVKA, MURRAY MRUVKA and the MRUVKA FAMILY TRUST, Petitioners,

against

DAVID BROWN, Respondent, -and- WARREN DIAMOND and JOHN DEL MONACO, Additional Respondents.

651079/2013

Friedman Harfenist Kraut & Perlstein, LLP, for Jack Guttman and the Mruvka Parties.

Law Offices of Carole R. Bernstein, for David Brown.

Shirley Werner Kornreich, J.

Motion Sequence Numbers 006 and 007 under Index No. 651079/2013 (the First Action) and Motion Sequence Number 001 under Index No. 653989/2013 (the Second Action) are consolidated for disposition.

In the First Action, respondent David Brown moves by order to show cause to compel arbitration and for an injunction staying the settlement of the First Action pending the conclusion of arbitration. Seq. 006. In the Second Action, petitioners Alan Mruvka, Murray Mruvka, and the Mruvka Family Trust (collectively, the Mruvka Parties) move to stay the arbitration. Seq. 001. Also, in the First Action, petitioner Jack Guttman and the Mruvka Parties move to confirm the Report of Special Referee Ira Gammerman entered on December 6, 2013 (the Report). Seq. 007. For the reasons that follow, the arbitration is stayed and the Report is confirmed.

Factual Background & Procedural History

The instant motions come before the court after the execution of a global settlement of the parties' business disputes concerning storage centers located in New York and New Jersey and property in California. These business disputes engendered litigation and arbitration in a number of jurisdictions. The settlement resulted in three, separate settlement agreements.On June 24, 2013, the court so-ordered a settlement agreement in the First Action, executed by the parties on April 17, 2013 (the Settlement), shortly after the action was commenced and before the parties appeared in court. *See* Dkt. 10.[FN1] In that action, Guttman and the Mruvka Parties sought dissolution of 367 Southern Partners, LLC (Southern), an entity which formerly operated a storage facility in the Bronx. Its storage facility had been sold in 2011. The Settlement, which is highly complex, calls for countless steps to be taken to effectuate its main goal of serving as a business divorce, whereby the parties exchange money and equity in various companies owned by them so that they no longer would do business together. The Settlement provides for a "tenants-in-common", tax free exchange of the parties' interests in the properties such that the Mruvka Parties would get the New Jersey

properties and Diamond would get the New York properties. The Settlement further provides that Brown, a minority equity holder, would relinquish his equity in exchange for $550,000. Though Brown did not sign the Settlement, as explained below, he was very much a part of its negotiation.

Trouble first arose when Diamond, Del Monaco, and their companies failed to comply with their obligations under the Settlement, including their failure to effectuate the transfer of their interests in the New Jersey properties. On August 9, 2013, Guttman and the Mruvka Parties moved to hold them in contempt for violating the Settlement. At Diamond and Del Monaco's behest and the court's urging, the contempt application was converted into a motion to compel. After a hearing on September 18, 2013, the motion was granted with an award of attorneys' fees, which were later computed in the Report. *See* Dkt. 53 (Transcript) & Dkt. 125 (Report). Further issues in effectuating the settlement led to another contempt motion being made against Diamond and Del Monaco on November 5, 2013. These issues were discussed at a hearing on November 8, 2013. *See* Dkt. 109 (Transcript). In the midst of this conflict, Brown, who had nothing to do with the contempt motions, interjected himself. [*2]

On November 1, 2013, Brown served the Mruvka Parties with an arbitration demand (the

Demand).[FN2] The Demand sought to nullify the Settlement on the ground that the operating agreements governing the companies, of which Brown and the Mruvka Parties are members, require: (1) unanimous member consent for the transfer of membership interests;[FN3] and (2) the arbitration of member disputes. Brown's position is that the Settlement, which provides for the transfer of such membership interests, is invalid because Brown's consent was not first obtained.The Settlement, however, was negotiated over three days, between April 15 and April 17, 2013. The negotiations involved the Mruvka Parties, Diamond, Del Monaco, and their related companies (e.g. ASSMA). Brown, however, was not in the room and was not a signatory to the Settlement. Brown's absence was unremarkable since, unlike the other parties, Brown's role was simply limited to the transfer of equity for cash, not the more complex obligations undertaken by the other parties. Nonetheless, Brown was very much a part of the negotiations. Diamond repeatedly communicated by telephone with Brown during the course of negotiating. Indeed, the $550,000 that Brown is contractually entitled to receive was an amount negotiated by Brown through Diamond. Brown gave repeated oral assurances that he was on board. As a result of Brown's (and Diamond's) conduct, there was no doubt in the Mruvka Parties' mind that, when the Settlement was executed on April 17 and approved by the court on June 24, Brown had no objection. Brown, meanwhile, was well aware of the Settlement's terms, including the membership interest transfers he now protests. In fact, he

did not object to it for seven months, until millions of dollars had changed hands in keeping with the related settlement agreements.

To be sure, the failure to obtain Brown's signature was unwise. Indeed, there are myriad ways in which the Settlement might have been drafted more artfully, such as by making sure the global settlements were integrated. *See* Dkt. 109 (11/8/13 Tr.). Yet, despite these flaws, there is more than enough undisputed evidence to bar Brown, as a matter of law, from undermining it at this late stage.

Indeed, this is not the first dispute involving this LLC and Brown. Brown is more than familiar with operating agreement at issue and the requirement of consent. To explain, in the 2010 federal action (discussed in n.3, *supra*), Brown made a similar, belated intervention attempt advancing the same unanimous consent argument. *See SFC*, 2010 WL 3912855, at *1-2. In that case, however, Brown did not take the position that this issue is subject to arbitration under the parties' operating agreements. Rather, Brown litigated the issue on a motion for summary judgment. Judge Rakoff denied the motion, finding a question of fact since the operating agreement addresses transfer of membership interests in two separate paragraphs — one requiring [*3]unanimous consent of members and the other majority consent. *See id.* at *1-2.For the reasons explained below, Brown is precluded from compelling arbitration here and cannot challenge the Settlement.

Arbitration & The Settlement

The Federal Arbitration Act (the FAA) governs the determination of whether the instant dispute is subject to arbitration because the Settlement affects multi-state litigation concerning storage faculties located in multiple states.[FN4] *See Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 (2005) (pursuant to 9 USC § 2, the FAA governs arbitration of disputes affecting interstate commerce). Though federal policy strongly favors arbitration, and "waiver is not to be lightly inferred," a party may waive its right to compel arbitration where "prejudice to the other party is demonstrated." *Rush v Oppenheimer & Co.*, 779 F2d 885, 887 (2d Cir 1985). While courts consider certain factors [FN5] in determining whether the right to arbitration has been waived, "[t]here is no bright-line rule [as] the determination of waiver depends on the particular facts of each case." *PPG Indus., Inc. v Webster Auto Parts, Inc.*, 128 F3d 103, 107-08 (2d Cir 1997). That being said, it is well settled that "[t]he key to a waiver analysis is prejudice. Waiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated.'" *La. Stadium & Exposition Dist. v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F3d 156, 159 (2d Cir 2010), quoting *Thyssen, Inc. v Calypso Shipping Corp.*, 310 F3d

102, 105 (2d Cir 2002) and *Rush*, 779 F2d at 887.

It is well established that " [p]rior litigation of the same legal and factual issues as those the party now wants to arbitrate results in the waiver of the right to arbitrate.'" *REDF Organic Recovery, LLC v Kafin*, 2012 WL 5844191, at *4 (SDNY 2012), quoting *Doctor's Assocs., Inc. v Distajo*, 107 F3d 126, 133 (2d Cir 1997). Though there is no wavier "where a party has previously litigated an unrelated yet arbitrable dispute," wavier occurs "when a party has *previously litigated the same claims it now seeks to arbitrate*." *Doctor's Assocs.*, 107 F3d at 133 [*4](emphasis added).[FN6]

The Mruvka Parties' articulate two bases for wavier: (1) Brown's decision to litigate the unanimous consent clause issue in *SFC*; and (2) unreasonably waiting to the eleventh hour to compel arbitration in this action, knowing full well of the prejudice the Mruvka Parties would suffer by holding off its arbitration demand until this point. With respect to *SFC*, not only did Brown choose to intervene in that action, Brown explicitly chose to litigate the issue on a summary judgment motion instead of seeking to compel arbitration. During the negotiation of the Settlement, Diamond and Brown were aware of Judge Rakoff's ruling about the conflicting consent provisions. Despite this cloud of legal uncertainty hanging over the Settlement, Diamond and Brown kept silent. Indeed, Brown participated in the negotiation but avoided signing the documents, a requirement for unanimous consent. The court not only finds there to be prejudice here, but finds such prejudice was anticipated and intended. The time to make a consent objection was in April 2013, not seven months later when Brown knew that the Mruvka Parties would be seriously prejudiced by Brown's silence. Such a willfully devious omission cannot be countenanced by this court.

Moreover, in light of Brown's waiver of arbitration, the court holds that the doctrine of laches precludes Brown from challenging the Settlement. "Laches is an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party. The mere lapse of time, without a showing of prejudice, is insufficient to sustain a claim of laches. Prejudice may be demonstrated by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay." *Linker v Martin*, 23 AD3d 186, 189 (1st Dept 2005) (quotation marks and citations omitted); *see Dante v 310 Assocs.*, 121 AD2d 332, 334 (1st Dept 1986), *app denied* 68 NY2d 607 (1986) (essential elements of laches are unreasonable and inexcusable delay in undertaking enforcement of rights resulting in prejudice). Here, Brown seeks both arbitration and rescission (an equitable remedy) of the Settlement on the ground that it does not comply with the subject consent provisions. The unreasonableness of the delay and the

prejudice discussed above are evident and bar Brown's claims.

To be sure, since the Settlement was so-ordered by this court, an arbitrator lacks the authority to nullify it. Moreover, at most, all that could be arbitrated is whether unanimous consent is required — not the terms of the Settlement itself, which concern matters subject to litigation, not arbitration. If Brown wanted to require unanimous consent before the Settlement was agreed to, he would have been well within his rights to arbitrate at that time. He, however, cannot participate in negotiations and then stand idly by for more than half a year, hoping to gain the very leverage he seeks to exercise now.

*[*5]Confirmation of the Report*

The Report is confirmed because, in reviewing the record before Referee Gammerman, the court finds that the Report is supported by the evidence.[FN7] *See Atlantic Aviation Investment LLC v Varig Logistica, S.A.*, 73 AD3d 467 (1st Dept 2010) ("a court will not disturb the findings of a special referee where those findings are supported by the record"); *see also Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705 (1st Dept 1985) ("New York courts will look with favor upon a Referee's report, inasmuch as the Referee, as trier of fact, is considered to be in the best position to determine the issues presented"), quoting *Holy Spirit Assn. v Tax Comm'n of the City of New York*, 81AD2d 64, 70-71 (1st Dept 1981). Accordingly, it is

ORDERED that, with respect to the motions to compel or to stay arbitration, the court finds that David Brown waived his right to arbitration, and thus the arbitration Brown sought to commence in his November 1, 2013 notice is permanently stayed, the Article 75 proceeding is dismissed, and the Clerk is directed to enter judgment accordingly under Index No. 653989/2013; and it is further

ORDERED that the motion by petitioners Jack Guttman, Alan Mruvka, Murray Mruvka, and the Mruvka Family Trust to confirm the Report of Special Referee Ira Gammerman entered on December 6, 2013 is granted, said report is confirmed, and the Clerk is directed to enter judgment under Index No. 651079/2013 in favor of said petitioners and against respondents Warren Diamond and John Del Monaco in the amount of $23,641, and said judgment is severed from the main judgment under Index No. 651079/2013.

Dated: February 5, 2014ENTER:

J.S.C.

Footnotes

Footnote 1: Unless otherwise indicated, the court cites to the docket in the First Action.

Footnote 2: The Mruvka Parties commenced the Second Action to stay the arbitration on November 18, 2013. On November 21, 2013, Brown filed a motion in the First Action to compel arbitration.

Footnote 3: The member consent requirement is governed by two sections (7(C) & 10(B)), which, as Judge Rakoff observed in related litigation (discussed further below), "are patently inconsistent with one another. While a plain reading of the former provision would indicate that the consent of a majority of holders of percentage interests would suffice to authorize a transfer, the latter paragraph on its face requires unanimous consent." *SFC Enterprises v Diamond*, 2010 WL 3912855, at *2 (SDNY 2010). The determination of which section governs need not be made since, for the reasons decided herein, Brown cannot object to the transfers set forth in the Settlement.

Footnote 4: Most of the other issues raised by the parties are inapposite since the relevant inquiry is whether Brown waived his right to arbitration. If not, federal law mandates that this court compel arbitration. However, as explained herein, Brown's egregious course of conduct, in collaboration with Diamond, constitutes the very sort of prejudice that warrants a finding of waiver. In reviewing the applicable case law, the court struggled to find a comparably egregious scenario. This, however, bolsters the notion that, if prejudice is a real ground to find wavier, this case must surely not be sent to arbitration.

Footnote 5: "(1) the time elapsed from commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice." *Technology in Partnership, Inc. v Rudin*, 2013 WL 5183741, at *1 (2d Cir 2013). It should be noted that, as the Second Circuit observed, recent United States Supreme Court precedent [e.g., *AT & T Mobility LLC v Concepcion*, 131 SCt 1740 (2011)] does not alter "the uncontroversial premise that affirmative defenses like arbitrability are subject to forfeiture if not raised in a timely fashion.'" *Technology in Partnership*, 2013 WL 5183741, at *2, quoting *Schipani v McLeod*, 541 F3d 158, 164 (2d Cir 2008).

Footnote 6: It should be noted that, even if New York law (instead of the FAA) applied, the inquiry would be similar. *See Tengtu Int'l Corp. v Cheung*, 24 AD3d 170, 172 (1st Dept 2005) ("the affirmative use of the judicial process to prosecute claims also encompassed by an arbitration agreement [] results in a waiver of the right to arbitration"); *Waldman v Mosdos Bobov, Inc.*, 72

AD3d 983, 984 (2d Dept 2010) ("By commencing an action at law involving arbitrable issues, [the petitioners] waived whatever right [they] had to arbitration once waived, the right to arbitrate cannot be regained, even by the respondent's failure to seek a stay of arbitration").

Footnote 7: Notwithstanding the countless bad acts of Diamond and Del Monaco, which led to the award of attorneys' fees (and, in retrospect, a contempt order might have been appropriate), in this instance, the court will not address why their arguments seeking to modify the Report (e.g. fee reduction for time working on contempt instead of motion to compel) further test the patience of this court.

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