

**Reed v Yankowitz**

2014 NY Slip Op 32843(U)

October 29, 2014

Sup Ct, Kings County

Docket Number: 506958/2013

Judge: David I. Schmidt

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At an IAS Term, Part 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 29<sup>th</sup> day of October, 2014.

PRESENT:

HON. DAVID SCHMIDT

Justice.

-----X

BERNIE REED, YISROEL LAPPE, 1338 STERLING REALTY, LLC.,

Plaintiffs,

- against -

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CHAIM YANKOWITZ, ISER EHRENFELD AND JOE STERLING, INC.,

Defendants.

-----X

The following papers numbered 1 to read on this motion:

Notice of Motion/Order to Show Cause/  
 Petition/Cross Motion and  
 Affidavits (Affirmations) Annexed \_\_\_\_\_

Opposing Affidavits (Affirmations) \_\_\_\_\_

Reply Affidavits (Affirmations) \_\_\_\_\_

\_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_

Other Papers \_\_\_\_\_

Papers Numbered

1 - 2

3

\_\_\_\_\_

\_\_\_\_\_

In this action alleging fraud and breach of contract, defendants move to dismiss the complaint and compel arbitration.

The parties Bernie Reed, Yisroel Lappe and Chaim Yankowitz entered into a written agreement dated December 12, 2007 to form a joint venture to purchase and develop the property 1338 Sterling Place in Brooklyn, New York. In relevant part, the contract provides:

7. Acting on Behalf of Venture

- no one can act individually on behalf of the venture

#### 8. *Decisions/ Voting/ Control/ Management*

- *Consent of both required - if there is a dispute, then the parties hereto agree that either Rabbi Yaakov Zeideh or Rabbi Ephraim Shimon Leichtag shall be the deciding vote.*

- *CY (Yankowitz) shall be responsible for the day-to-day management, construction, developing, obtaining permits, and Permanent Certificate of Occupancy for a 10 family home, and all other aspects premises management.*

#### *Additional Members*

- *requires approval of all members*

#### 16. *Dispute Resolution*

- *American Arbitration Association if the parties cannot agree upon the names listed in paragraph 8 above.*

Plaintiffs allege that without their permission or authority, in September, 2010, defendant Yankowitz unilaterally transferred the subject property for \$850,000.00 to Joe Sterling, Inc., whose principal is defendant Iser Ehrenfeld; and that the following year, defendants took out a mortgage on the property for \$280,000.00, all in detriment to plaintiffs' interests in the property. In addition, plaintiffs allege that the defendants have received rents and profits from the building that should have gone to plaintiffs.

Defendants contend that these allegations do not give rise to a cause of action for fraud, but rather for a breach of contract. Indeed, the acts allegedly taken by the defendants without the plaintiff's knowledge or consent are covered under the terms of the contract and would, if proved,

constitute a breach of paragraph 7 among other provisions. A cause of action to recover damages for fraud that is premised on an alleged breach of contract cannot lie where the alleged fraud is not collateral to the terms of the agreement. Commander Terminals, LLC v Commander Oil Corp., 71 AD3d 623 (2d Dept., 2010). See also, Yenrab, Inc. v Linden Realty, LLC, 68 AD3d 755; (2d Dept. 2009); Krantz v Chateau Stores of Canada, Ltd., 256 AD2d 186 (1<sup>st</sup>. Dept., 1998). Here no evidence was presented that would demonstrate that the fraud alleged was outside the parameters of the contract.

Before commencing this action the parties appeared before Rabbi Leichtag, one of the arbitrators mentioned in paragraph 8 of the agreement. It appears that Rabbi Leichtag directed that an accountant review the books and records of the venture, and that he failed to appear at the further arbitration sessions scheduled. Thereafter, defendant contends that plaintiff refused to schedule any further sessions until defendant paid plaintiff \$50,00.00.

Plaintiff's argue that they are entitled to a judicial determination rather than an arbitration of this dispute, positing that the arbitration clause of paragraph 8 by its clear terms only requires arbitration of decisions, voting, control and management of the joint venture. As the clause states, one of the two enumerated rabbis would have the deciding vote on such issues as may arise between the partners involving control and management of the company. This arguably would not cover the present issue, which goes beyond the day to day operation of the business, inasmuch as one party is alleged to have unilaterally and fraudulently sold the property that was the subject of the joint venture. Plaintiff contends that the general arbitration clause of paragraph 16 only refers back to paragraph 8, and means that the American Arbitration Association (AAA) shall be

the default arbitrator of decisions, management and control of the venture if the parties do not wish to utilize one of the rabbis selected in paragraph 8 to be a tie breaking vote.

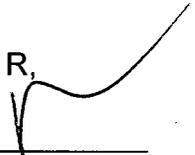
This contention is not supported by the clear language of the agreement. If paragraph 16 was only meant to provide an alternative to the two rabbis selected, that could have been accomplished clearly and simply in paragraph 8 by inserting the AAA as an alternative in that section. Rather, it appears that the separate arbitration provision in paragraph 16 titled "Dispute resolution" is a general arbitration clause that would cover any and all disputes not specified in the earlier paragraph. The parties could chose one of the rabbis mentioned in the other arbitration clause for these matters as well, or if they did not agree on one of the rabbis, use the AAA. The "dispute resolution" clause would have no meaning or purpose if all that was intended was a reiteration of terms of paragraph 8.

In any event, the plaintiffs' appearances before an arbitrator without having sought a stay of arbitration pursuant to CPLR §7503(b) or otherwise preserving their right to have the issue of arbitrability judicially determined waives that right (Matter of Smullyan (SIBJET S.A.), 201 AD2d 335,336 [1<sup>st</sup> Dept, 1994]). Where the contract contains a valid arbitration agreement, a party's participation in the arbitration hearings constitutes a waiver of the claim that the arbitrators do not have jurisdiction over the matter (Matter of Naroor v Gondal, 17 AD3d 142, 143 [2005], lv. den., 5 NY3d 757; reconsideration den., 5 NY3d 798). Moreover, even questions of fraud fall under general arbitration clauses unless specifically excluded (Matter of Silverman (Benmor Coats), 61 NY2d 299 [1984]). As such, although plaintiffs may not have pleaded fraud sufficiently to withstand a motion to dismiss, that claim can still be considered in an arbitration.

Accordingly, defendant's motion to dismiss is granted to the extent that the complaint is dismissed and the parties are directed to proceed to arbitration with Rabbi Yaakov Zeideh or Rabbi Ephriam Shimon Leichtag, and if they cannot agree on one of these rabbis, then they must proceed to arbitration with the American Arbitration Association pursuant to paragraph 16 of their agreement.

All requests for relief not specifically granted are denied.

The foregoing constitutes the decision and order of the court.

ENTER,  
  
\_\_\_\_\_  
J. S. C.

**NON. DAVID L. SCHMIDT**