CITATION: Popack v. Lipszyc, 2017 ONSC 4581
COURT FILE NO.: CV-16-555488
DATE: 20170828

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
JOSEPH POPACK, UNITED NORTHEASTERN RETAIL PORTFOLIO INC., UNITED BURLINGTON RETAIL PORTFOLIO INC., CAPTURE REAL ESTATE LLC, MIRIAM POPACK, EPHRIAM PIEKARSKI, MENDEL HENDEL, SCHNEUR ZALMEN HENDEL, SHOLOM BER HENDEL, RIVKA FELDMAN and DEBORAH ZISSY RASKIN	)	*Daniel Sheppard*, for the Applicants
Applicants	)	
	)	
– and –	)	
	)	*Colin P. Stevenson and Neil G. Wilson,* for
MOSHE LIPSZYC and SARA LIPSZYC	)	the Respondents
Respondents	)	
	)	
	)	**HEARD: July 26, 2017**
	)	

G. DOW, J.

REASONS FOR DECISION

[1] The Applicant, Joseph Popack (and the remaining applicants being corporations that he controlled or individuals who were aligned with the same interest) seek an order recognizing and enforcing the award of the Bais Din or Beth Din of Mechon L'Hoyroa ("Beth Din") dated August 15, 2013 awarding the Applicants $400,000.00. The Respondents, Moshe Lipszyc and Sara Lipszyc (subsequently referred to only as Moshe Lipszyc) disputes that the Applicant is entitled to such an order and brought a concurrent motion to stay recognition and enforcement of the arbitral award.

Background Facts

[2] Joseph Popack and Moshe Lipszyc were engaged in a business venture involving commercial real estate which broke down and resulted in disputes culminating in a decision by

Justice A. Pollak dated September 2, 2008 refusing Joseph Popack's request for a Mareva injunction and granting Moshe Lipszyc's request for an order staying the litigation given arbitration clauses in agreements executed by the parties. Costs were awarded in favour of Moshe Lipszyc in the agreed upon amount of $45,000.00. The Court of Appeal varied the order of Justice Pollak on May 4, 2009 to refer the dispute to Crown Heights Beth Din and Rabbi Schwei with a fixed timetable. Costs were awarded in favour of Moshe Lipszyc in the amount of $27,500.00. Leave to the Supreme Court of Canada was sought by Joseph Popack but not granted with costs in favour of Moshe Lipszyc.

[3] The arbitration before Rabbi Schwei did not proceed and the parties agreed to proceed before the Beth Din of Mechon L'Hoyroa by a signed agreement dated November 10, 2010 with an Addendum Agreement executed on January 11, 2011. The Beth Din of Mechon L'Hoyroa heard the dispute and issued a ruling on August 15, 2013 that provided for the return of funds placed in escrow by Joseph Popack and that Moshe Lipszyc pay Joseph Popack an additional $400,000.00.

[4] On November 7, 2013 Joseph Popack issued an Application in the Superior Court of Justice seeking to set aside the award which was heard and decided by Justice W. Matheson with Reasons released on June 1, 2015. These Reasons concluded that it was within her discretion to set aside the award and grounds to set aside the award existed. The grounds involved the Beth Din having conferred with Rabbi Schwei in a manner that raised the possibility of prejudice to both sides. Justice Matheson determined it was not appropriate to set aside the award and dismissed the Application with costs to be agreed upon between the parties or determined by her.

[5] Joseph Popack appealed this decision with Reasons of the Court of Appeal released on February 18, 2016. The appeal was dismissed and Moshe Lipszyc was awarded costs in the amount of $25,000.00. In acknowledging receipt of the costs award, counsel for Moshe Lipszyc confirmed in a letter dated April 22, 2016 that Moshe Lipszyc had contacted the Beth Din seeking to reduce the award with regard to costs incurred in the "failed court proceedings, including all related, uncompensated costs and damages."

[6] In the original Application before me issued June 24, 2016 (which was replaced by an Amended Application Record on agreement of the parties), Joseph Popack sought the same relief on reduced material. Joseph Popack sought recognition and enforcement of the arbitration award of $400,000.00 in United States currency. The determination of the currency of the award was not sought before me.

[7] The Beth Din forwarded a letter to the parties dated September 18, 2016 addressing the issue of United States dollars as opposed to Canadian dollars and invited the parties to contact them to "schedule a hearing" if there were "claims and/or proofs that relate to the currency issue and for that matter any other claims that the parties wished to be resolved".

[8] It should be noted Joseph Popack's evidence included, in his cross-examination on December 21, 2016 that he refuses to re-attend before the Beth Din and that this may have resulted in threats of contempt or ex-communication (known to the parties as a type of "siruv"). This may be relevant to the most recent communication from the Beth Din, June 7, 2017 that the

award of August 15, 2013 "is stayed until Popack comes back to the Bais Din for a hearing to determine Lipszyc's claim".

[9] While the above summary does not describe or detail notices of when or how the arbitration process was to occur, the Arbitration Agreement executed by the parties on November 10, 2010 and subsequent Addendum Agreement dated January 11, 2011 included (to quote from Justice Matheson at paragraph 13 of her decision) the following:

(i) that the arbitrators "may make their award based on Din Torah, compromise, settlement, or any other way they wish to reach a decision";

(ii) that "no transcript of the proceeding need be made" unless the arbitrators decided to arrange for one (which did not occur);

(iii) that the arbitrators could "follow any procedure as they decide";

(iv) that the parties waived "formal notice of the time and place of the arbitration proceeding";

(v) that the arbitrators had "the right to hear testimony and evidence without the presence of a party if the party doesn't attend a scheduled hearing";

(vi) that the arbitrators did not need to explain to anyone the reasons for their decision;

(vii) that the decision of the arbitral tribunal was not open for appeal either in any religious court or any secular court; and

(viii) that in certain circumstances the arbitrators had jurisdiction regarding disputes after the award including motions due to "judicial error, new evidence, etc., ... to the extent permitted by law."

Analysis

[10] Joseph Popack takes the position the onus is on Moshe Lipszyc to satisfy me the award made is not yet binding. I agree. Further, he submits the issues raised by Moshe Lipszyc about currency, costs and damages are collateral attacks and what is a final award. Joseph Popack points to the wording of the award, particularly statements in it which references "the matter of controversies" between the parties "regarding the partnership between them", the "hearing the arguments of the parties and their evidence, an analysis of their statements, and deliberations amongst us" that upon Moshe Lipszyc paying Joseph Popack $400,000.00 "the parties are released from each other". Joseph Popack submits this is binding and enforceable. I disagree for the reasons set out below.

[11] Joseph Popack correctly points to international arbitral disputes being enforceable by Ontario's adoption of the UNCITRAL *Model Law on International Commercial Arbitration* ("*Model Law*") through the *International Commercial Act*, S.O. 2017, Chapter 2 and the

legislation it replaced. It requires Moshe Lipszyc to show that under Article V, section 1(e) of the Ontario statute, which duplicates Article 36, section (1)(a)(v) of the *Model Law* that the award is not yet binding on the parties. I was directed to the decision of *Dalimpex Ltd. v. Janicki et al*, [2013] O.J. No. 2094 (at paragraph 47) for the legal principle that "it falls upon the court to make a final determination of any issue that may be raised under article 36." I agree.

[12] Joseph Popack also relies on the absence of any pending proceeding to appeal the award. I disagree. Moshe Lipszyc made it clear within the three months permitted following the release of the Court of Appeal reasons dealing with Joseph Popack's efforts to set aside the award of its intention to pursue further issues related to the subject matter arbitrated that were not identified as dealt with in the Beth Din's communication of August 15, 2013 which could affect the obligation and amount one of the parties is to pay the other.

[13] My conclusion that the communication by the arbitral tribunal or here, the Beth Din that the sum of $400,000.00 was to be paid by Moshe Lipszyc to Joseph Popack is not yet binding relies on the fact the Beth Din has released statements on two subsequent occasions, September 18, 2016 and June 7, 2017. On September 18, 2016 the Beth Din stated its willingness to consider additional issues. On June 7, 2017 the Beth Din stayed the award until Joseph Popack appears before it. Both statements are an indication that the arbitration process the parties committed to is not yet complete. As a result enforcement proceedings are premature. The Beth Din is not yet at the stage of being *functus officio*.

[14] In reaching this conclusion, I rely on the comments of the Court of Appeal in *Dancap Productions Inc. v. Key Brand Entertainment Inc.*, 2009 ONCA 135 (at paragraphs 32-34) where the court referenced its approval for comments in the *Dalimpex Ltd. v. Janicki*, *supra*, that the arbitral tribunal should determine, in the first instance, whether the dispute placed before it is within its mandated jurisdiction. This is sometimes referred to as the competence – competence principle and that courts should show deference to arbitrators in resolving challenges to their jurisdiction.

[15] In reaching this conclusion, I am mindful that the current state of the arbitration may be at a standoff. That is, so long as Joseph Popack refuses to appear before the Beth Din, he shall not be entitled to seek recovery of the (additional) $400,000.00 indicated he is to receive. Further, the request of Moshe Lipszyc to address the costs and other damages may be frustrated. However, that issue was not before me. I am also mindful of the evidence and submissions that the agreement to proceed before the Beth Din was motivated, to some extent, by the religion of the parties. This was recognized in the Addendum Agreement dated January 11, 2011 at paragraph 2 when it states that the Beth Din "may make their award, decision, and/or decree based upon Jewish Law, Halacha, and any other method outlined in the November 10, 2010, Arbitration Agreement". As the parties agreed to this process, it should be respected given the current factual matrix.

Conclusion

[16] The Application is dismissed. For completeness, I would also dismiss the Respondent's motion to stay the application. The parties agreed on the quantum of costs to be awarded, $15,000.00, to the successful party and the same are payable, in this instance, to the Respondents, Moshe Lipszyc and Sara Lipszyc, by the Applicants.

Mr. Justice G. Dow

Released: August 28, 2017

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– and –

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