

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

STEVEN COZZOLINO, : SUPERIOR COURT OF NEW JERSEY
 : LAW DIVISION - ESSEX COUNTY
Plaintiff, : Docket No.: ESX-L-10417-10
 :
 :
 :
vs. : CIVIL ACTION
 :
 : OPINION
MICHAEL COZZOLINO :
 :
 :
Defendant. :
 :
 :
 : April 04, 2011

Allen L. Harris on behalf of plaintiff Michael Cozzolino
(Budd Larner)

William J. Berman on behalf of defendant Steven Cozzolino
(Berman Rosenbach P.C.)

CAREY, J.S.C.

Before the Court is an Order to Show Cause seeking the entry of an order confirming an arbitration award and entering judgment in favor plaintiff Steven Cozzolino ("Steven") and against defendant Michael Cozzolino ("Michael") on that award. For the following reasons the Court grants and enters the Order.

Background

Steven and Michael each held equal interests in three businesses: [1] Cozzolino Furniture Design ("CFD"), [2] COR Products Inc. ("COR") and [3] 20 Standish LLC ("Standish"). Steven's Verified Complaint, p. 2. CFD leased premises from Standish. The terms of the lease stipulated payment of \$9,083.00 per month rent with maintenance, repairs,

utilities and liability insurance paid by CFD. Lease Agreement, June 17, 2005, ¶¶4, 5, 8 and 11. Standish, as landlord under the lease, paid the base amount of municipal taxes. The base amount was the municipal taxes assessed during the calendar 2004 year. During the term of the lease CFD was to pay the full amount of any increase in municipal taxes above the base amount. Lease Agmt. ¶¶30.

In May 2008, CFD was a debtor-in-possession under Chapter 11 of the United States Bankruptcy Code in a matter entitled In Re Cozzolino Furniture Design, Inc., Case No. 06-20898 (NLW). Steven's Ver. Comp. at 2. During May 15, 2008 proceedings in the United States Bankruptcy Court, District of New Jersey, before the Honorable Novalyn L. Winfield, the parties agreed on the record to submit all issues regarding CFD, COR and Standish to arbitration before the Honorable John M. Boyle (ret.). Transcript of Hearing at 2-6, In Re Cozzolino Furniture, No. 06-20898 (D.N.J. May 15, 2008).

The parties and Judge Boyle confirmed the appointment of the arbitrator in an Agreement for Binding Private Arbitration signed May 22, 2008. Agreement for Binding Private Arbitration ¶¶11 (May 22, 2008). The parties agreed, "to submit to arbitration, administered by under its applicable rules and according to the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-1 et seq., or as mutually agreed to by counsel." Agr. For Binding Pvt. Arb. ¶¶1. The Arbitrator was to, "be bound by any

mutual agreements made between the parties," with copies of the agreements attached to the Agreement for Binding Private Arbitration. Id. ¶¶8.

At a Pre-Arbitration hearing held with counsel on May 22, 2008, the parties also entered into a Pre-Hearing Arbitration Order. Among the issues addressed by the Order was the scope of review by the Arbitrator and the appealability of the Arbitrator's decision. The scope of issues reviewable by the arbitrator was broadly defined to include "All related issues regarding [CFD], [COR] and [Standish]." Pre-Hearing Arbitration Order ¶¶4 (May 22, 2008). The Order included a waiver of any and all rights of appeal or to in any way challenge the Arbitrator's decision. Pre-Hrg. Arb. Order ¶¶14.

Arbitration proceedings were duly conducted pursuant to the Arbitration Agreement and the Pre-Hearing Arbitration Order. Judge Boyle entered the initial arbitration award June 25, 2008. As to CFD, it was ordered Steven purchase his brother Michael's one-half interest for the sum of Fifty Thousand Dollars (\$50,000) plus the return to Michael of an additional Fifty Thousand Dollars (\$50,000) borrowed by Michael in order to make his contribution to the Bankruptcy Plan. Arbitration Award at 1, Cozzolino v. Cozzolino (June 25, 2008) (Boyle, Arb.). COR was split into two entities; Steven retained the wall panel aspect of the business and Michael retained the floor aspect of the business. Arb. Awd. at 3.

The determination regarding CFD's lease obligations to Standish created the underlying conflict. The parties retained equal interest in Standish. Arb. Awd. at 5. CFD and the wall panel business retained by Steven were to be the tenants of the building. Id. Judge Boyle acknowledged the lease agreement between the parties and so ordered, "the existing rent per square foot presently being paid will continue unabated for another five years on a triple net basis." Arb. Awd. at 6.

Additional arbitration proceedings were held relating to discrete issues. The Arbitrator entered awards with respect to those discrete issues and are not a matter of contention in this proceeding. Steven's Ver. Compl., p. 4. Further arbitration hearings were scheduled for August 3, 2010. Steven's Ver. Compl., p. 4. Among the issues requested by Michael's counsel to be presented and resolved at the arbitration hearing was "Resolution of whether payments by Standish Avenue, LLC for real estate taxes was proper and/or whether reimbursement from tenant is necessary." Letter from William J. Berman to Hon. John M. Boyle (ret.), at ¶¶10 (May 24, 2010).

The August 3, 2010 hearing resulted in a Third Supplemental Arbitration Award. Judge Boyle's order modified the lease provision set forth in the June 25, 2008 Arbitration Award, stating.

The term triple net was a misnomer. However, that would mean that the rent as defined in the 2005 Lease would be the same for five years effective June 2008 or until June 2013. The Award states that the parties

had agreed to that understanding. The Arbitrator is not unmindful of the fact that there is an obligation to balance the interest of the parties on a fair and reasonable basis. Beyond this agreement it would only be fair to recognize the fact that the costs of everything, including taxes inevitably increases. The Landlord should not be called upon to further subsidize the Tenant. Consequently, it would seem that we should take the year 2004, which is the base year, under the old Leases under Paragraph 30 and utilize that floor going forward. Thus the Tenant would be responsible henceforth beginning June 2007 to pay the tax increase with the year 2004 as a base. The Landlord will continue to pay the base and the Tenant will pay the increase over the base.

Third Supplemental Arbitration Award at 10, Cozzolino v. Cozzolino (Nov. 16, 2010) (Boyle, Arb.). CFD had been obligated to pay the base taxes as a result the June 25, 2008 Arbitration Award. The resulting order made Standish retroactively liable for around \$30,000 to \$35,000 in taxes, as assessed at the 2004 base level, from 2008 through 2010. Steven's Reply Brief, p. 14.

Present Order to Show Cause

Following the entry of the Third Supplemental Arbitration Award, Steven by way of counsel filed the present Order to Show Cause pursuant to N.J.S.A. 2A:23B-22¹ to confirm the Third Supplemental Arbitration Award and to enter judgment for Michael's share of the taxes paid by CFD plus applicable interest.

¹N.J.S.A. 2A:23B-22 provides, "After a party to an arbitration proceeding receives notice of an award, the party may file a summary action with the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to section 20 or 24 of this act or is vacated pursuant to section 23 of this act."

Michael objected to the confirmation of the award and moved to modify or vacate the November 16, 2010 award pursuant to N.J.S.A. 2A:23A-13². Michael argued the review and modification of the lease stipulation by the Arbitrator exceeded the powers of the arbitrator and [2] the modification of the lease stipulation was not made in accordance with applicable principles of substantive law.

New Jersey case law strictly limits the circumstances where the trial court may modify, correct or vacate an arbitration award. The State Supreme Court set forth the standard of review in Tretina v. Fitzpatrick & Assocs. 135 N.J. 349 (1993). The majority opinion adopted Chief Justice Wilentz's concurring opinion from Perini Corp. v. Greate Bay Hotel and Casino 129 N.J. 479 (1992). "Basically, arbitration awards may be vacated only for fraud, corruption or similar wrongdoing on the part of the arbitrators." Tretina at 358. The Tretina court acknowledged, "in most cases the Chief Justice would not vacate an award even though it might be based on a mistake of law." Chief Justice Wilentz in Perini contended "Whether the arbitrators commit errors of law or errors of fact should be totally irrelevant. The only questions are: were the arbitrators

² N.J.S.A. 2A:23A-13 provides, in pertinent part that, "The award shall be vacated on application of a party...if the court finds that the rights of the party were prejudiced by...[3] in making the award the umpire's exceeding their power or so imperfectly executing that power that a final and definite award was not made...[5] [and] the umpire's committing prejudicial error by erroneously applying law to the issues and facts presented for alternative resolution."

honest and did they stay within the bounds of the arbitration agreement?" Perini at 519.

N.J.S.A. 2A:23B-23 was adopted in 2003. Since then, courts have readily adopted the Chief Justice's standard from Tretina. Courts have recognized, "[the 2003 Act] continues our states's long-standing policy to favor voluntary arbitration as a means of dispute. In other words, the same principles that governed judicial review of arbitration awards prior to the 2003 Act apply to such review of awards under that act." Block v. Plosia, 390 N.J. Super. 543, 551 (App. Div. 2007). The standard adopted in Tretina has been applied to arbitration decisions challenged under N.J.S.A. 2A:23B-23. See Manger v. Manger, 417 N.J. Super. 370, 375-77 (App. Div. 2010).

Michael hinges much of his argument focused on the "triple-net" requirement of the June 25, 2008 Arbitration Award. He contends Judge Boyle made an error of law, as the Third Supplemental Award was inconsistent with the wishes of the Bankruptcy Court. Judge Boyle acknowledged throughout the arbitration that, "any arbitration award must be consistent with the representations made to the Bankruptcy Court..." Arb. Tr., 2 (June 23, 2008).

The Second Amended Plan of Reorganization filed by CFD stipulated rent owed to Standish was to remain "\$9,083.00 per month plus additional amounts as provided under the lease agreement." Second Amd. Plan of Reorg., 16 (Jan. 21,

2008). Judge Winfield accepted the Second Amended Plan by order dated June 26, 2008.

A pure triple-net lease is one where the tenant is "responsible for maintaining the premises and for paying all utilities, taxes and other charges associated with the property." N.J. Industrial Properties Inc. v. Y.C. & Y.L., Inc., 100 N.J. 432, 434 (1985). While CFD paid rent plus all utilities, insurance and maintenance on the property leased from Standish during the term of the lease prior to CFD's bankruptcy, they did not pay the full amount of taxes. Standish paid the municipal taxes on the property up to the amount assessed in 2004; CFD paid the amount in excess of the base. The pre-Bankruptcy lease between Standish and CFD was a pure triple-net lease.

The June 25, 2008 Arbitration Award ordering the rent to continue unabated for another five years on a triple-net basis was inconsistent with the Bankruptcy Court's order. Under the lease agreement, CFD was not liable for the full amount of municipal taxes. Judge Boyle, after 32 months, recognized the error stating in the November 16, 2010 award, "The term triple net was a misnomer." He then adjusted his order in accordance with the original lease, resetting the base amount to the 2004 assessment as provided in the lease agreement. Since Judge Boyle entered an award consistent with the desires of the Bankruptcy Court, he did not commit an error of law sufficient to vacate the arbitration award.

Michael contends Judge Boyle acted in excess of his authority in modifying the lease stipulation. During the May 15, 2008 proceedings in the United States Bankruptcy Court before Judge Winfield, Michael Sirota, Esq. commented on the record without objection, "the parties appear, once and for all to have agreed to arbitrate, giv[ing] Judge Boyle carte Blanche." Tr. of Hrg. at 2, In Re Cozzolino Furniture, No. 06-20898. Judge Boyle was granted wide scope to review all related issues regarding CFD, COR and Standish in the Pre-Hearing Arbitration Order.

In the June 25, 2008 Arbitration Award, Judge Boyle acknowledged, "Although all of the substantive issues have been decided, there may be some details or refinements that are necessary to be resolved particularly as to Standish since the parties intend to prepare a new Lease and Operating Agreement...There may also be issues that we are not aware of at this point and jurisdiction shall be retained for that purpose." Arb. Awd. at 7.

Prior to the August 2010 arbitration, Michael requested review of whether payment by Standish for real estate taxes was proper and whether reimbursement from the tenant was necessary. Though counsel may have sought to further reduce Michael's obligation to pay taxes as co-owner of Standish and instead found it increased; the fact remains that he opened the issue for review.

Due to the parties' agreement giving Judge Boyle wide latitude when determining their issues, Judge Boyle reserved

the right in the June 25, 2008 Arbitration Award to revisit any issues that needed further modification and Michael's request to review the lease stipulation opening the door for review in conjunction with the narrow power of the Court under the Law to modify or vacate arbitration awards; the Court finds that Judge Boyle did not act in excess of his power.

For the reasons stated above the Court finds no reason to vacate the arbitration award of November 16, 2010 and hereby **GRANTS** Steven Cozzolino's Order to Show Cause to confirm the Arbitration Award of November 16, 2010 and to Enter Judgment. Because the Court addressed the case on the merits, the Court declines to comment on the Statute of Limitations issue.

Hon. Dennis F. Carey, III, J.S.C.