

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**DB TOY PRODUCTS, INC. and MARILYN
BRECHNER TTEE GERTRUDE SUSSELL
IRREVOCABLE TRUST,**

Petitioners,

- against -

SKY CAPITAL, LLC and PATRICK RATHJE,

Respondents.

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 021779-09
Motion Seq. No: 1
Submission Date: 12/21/09**

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The following papers have been read on this petition:

- Notice of Petition, Petition and Exhibits.....X**
- Affirmation and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Opposition of P. Rathje.....X**
- Affidavit in Reply and Exhibit.....X**

This matter is before the Court for decision on the Petition filed by Petitioners DB Toy Products, Inc. and Marilyn Brechner TTEE Gertrude Sussell Irrevocable Trust ("Petitioners") on November 25, 2009 and submitted on December 21, 2009. For the reasons set forth below, the Court denies Petitioners' application for an Order vacating and setting aside the arbitration award, and confirms the arbitration award.

BACKGROUND

A. Relief Sought

Petitioners DB Toy Products, Inc. (“DB Toy”) and Marilyn Brechner TTEE Gertrude Sussell Irrevocable Trust (“Trust”) move for an Order, pursuant to CPLR § 7511, vacating and setting aside the arbitration award issued in connection with the dispute among the parties.

B. The Parties’ History

The Petition dated October 23, 2009 alleges as follows:

Petitioner DB Toy Products, Inc. (“DB TOY”) is a New York corporation. Petitioner Marilyn Brechner TTEE Gertrude Sussell Irrevocable Trust (“Trust”) is a Trust formed under the laws of the State of New York. Respondent Sky Capital, LLC (“Sky Capital”) is a limited liability company formed under the laws of the State of New York.¹

At all relevant times, Respondent Patrick Rathje (“Rathje”) was employed by Sky Capital. In 2003, Petitioners opened security brokerage accounts with Sky Capital and authorized Respondents Rathje and Sky Capital (collectively “Respondents”) to purchase and sell securities for Petitioners’ benefit. Prior to opening these brokerage accounts (“Accounts”), Petitioners signed an agreement pursuant to which they agreed to arbitrate any disputes with Respondents before the Financial Industry Regulatory Authority (“FINRA”), which was formerly the National Association of Securities Dealers (“NASD”) and the New York Stock Exchange. Between March 2003 and January 2004, Respondents made numerous trades from the Accounts.

In or about May 2003, Respondents recommended that Petitioners invest in Sky Capital Holdings, Ltd. (“Sky Ltd.”). This was a private placement investment meaning that the stock was not registered with the Securities and Exchange Commission (“SEC”), was not traded on any stock exchange and could not be sold. On or about December 5, 2003, DB Toy, by its managing director Milton Brechner, signed a Subscription Agreement with respect to Sky Ltd. Based on Respondents’ recommendation, the Trust invested \$320,000 in Sky Ltd. and DB Toy invested \$160,000 in Sky Ltd.

Petitioners allege that Sky Ltd. was controlled by the same principals who controlled Sky

¹ The Petition alleges that Sky Capital changed its name to Granta Capital Group, LLC in 2008.

Capital, including Ross H. Mandell who was the Chief Executive of both Sky Capital and Sky Ltd. Petitioners allege that their investment in Sky Ltd. was inappropriately risky and speculative and became worthless.

Petitioners instituted an arbitration proceeding ("Arbitration") against Respondents. The Arbitration hearing ("Hearing") took place on July 14, 2008 before three (3) panelists. Marilyn Brechner, Milton Brechner (collectively "Brechners") and Lawrence Kimmel ("Kimmel"), a securities expert, testified for Petitioners at the hearing. Petitioners affirm that Sky Capital did not appear at the Hearing and Rathje appeared at the Hearing without counsel. Rathje did not testify but did question Petitioners and their expert witness. Petitioners allege that the Brechners testified, *inter alia*, that 1) Petitioners chose to invest with Rathje because of his close personal relationship with the Brechners' daughter; and 2) the Brechners were not knowledgeable about the stock market and relied on Rathje's recommendations to their detriment. Kimmel testified, *inter alia*, that the purchase of Sky Ltd. was an inappropriate investment for the Trust because of its risky nature.

The Arbitration decision ("Award") contains a list of the "Case Information" submitted in connection with the Arbitration. That Case Information included the Statement of Claim dated November 12, 2007 that Petitioners submitted. The Statement of Claim contains similar allegations to those made in the Petition, specifically that 1) the investment in Sky Inc. was too risky; and 2) Petitioners relied, to their detriment, on the representations of Rathje. The first cause of action in the Statement of Claim is asserted on behalf of DB Toy and seeks an award of \$161,000 plus interest. The second cause of action in the Statement of Claim is asserted on behalf of the Trust and seeks an award of \$320,000 plus interest. The Statement of Claim also seeks \$1 million in punitive damages as well as counsel fees.

The Award (Ex. 1 to Petition) includes the language that "The Panel acknowledges that they read the pleadings and other materials submitted by the parties." The Award, which refers to Petitioners as "Claimants," provides as follows:

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants' claims are denied in their entirety.
2. Any and all relief not specifically addressed herein, including punitive damages, is denied.

In his Affirmation in Support, counsel for Petitioners affirms that, in September of 2009, he requested a copy of the tapes of the Hearing, so that he could transcribe them for the Court, but has not yet received those. Counsel also provides a list of the Exhibits that Petitioners introduced at the Hearing. Finally, Petitioners' counsel affirms that he advised the Arbitration Panel of information that he learned from a newspaper article regarding the indictment of Sky Capital's officers in connection with their activities, including selling shares of Sky Ltd.

Rathje submitted an opposition dated November 30, 2009. In that opposition, he submits, *inter alia*, that 1) Petitioners have chosen an inappropriate venue to contest the Award because the appropriate venue is the county in which the Arbitration was rendered, in this case New York County; and 2) the Court should deny Petitioners' application because the Arbitration Panel, after considering significant evidence, properly concluded that Petitioners' case lacked merit.

In his Reply Affidavit, Milton Brechner 1) disputes Rathje's assertion that venue is inappropriate in Nassau County; 2) submits that Petitioners' application to vacate the Award is timely; and 3) reaffirms Petitioners' contention that the Award was irrational in light of, *inter alia*, a) Sky Capital's non-appearance at the Hearing, and b) the fact that only Petitioners presented witnesses at the Hearing.

C. The Parties' Positions

Petitioners submit that they established at the Arbitration that the choice of investment in Sky Ltd. was clearly unsuitable and, therefore, that the Court should vacate the Award because it is irrational.

Respondent Rathje submits that the Award is appropriate, and the Court should deny Petitioners' application to vacate that Award.

RULING OF THE COURT

Article 75 of the CPLR is titled "Arbitration." CPLR §§ 7510 and 7511 provide as follows:

§ 7510. Confirmation of award

The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.

§ 7511. Vacating or modifying award

(a) When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:

(i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or

(ii) a valid agreement to arbitrate was not made; or

(iii) the agreement to arbitrate had not been complied with; or

(iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.

(c) Grounds for modifying. The court shall modify the award if:

1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

(d) Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article. Time in any provision limiting the time for a hearing or award shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court.

(e) Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.

An arbitration award may be vacated only upon proof that the underlying dispute was not arbitrable, that a party's rights were prejudiced by fraud or partiality of the arbitrator, that the arbitrator exceeded a specifically enumerated limitation on his or her power, that the award is violative of a strong public policy, or that the award is totally irrational. *Matter of Granite Associates v. Rolon*, 2010 N.Y. App. Div. LEXIS 498, pp. 1-2 (2d Dept. 2010). An award is irrational if there is no proof whatever to justify the award. *Matter of Jadhav v. Ackerman*, 62 A.D.3d 797, 798 (2d Dept. 2009), citing *Matter of NFB Inv. Servs. Corp. v. Fitzgerald*, 49 A.D.3d, 747, 748 (2d Dept. 2008), quoting *Matter of Peckerman v. D & D Assocs.*, 165 A.D.2d 289, 296 (1st Dept. 1991).

The Court cannot conclude that the Award was irrational simply because the Panel only heard from Petitioners' witnesses, and Respondents did not call witnesses to testify on their behalf at the Hearing. The members of the Panel, who heard that testimony, were in the best position to assess the credibility and strength of the witnesses who testified. Moreover, the Panel considered the relevant submissions of the parties, including the Statement of Claim which contained a detailed account of Petitioners' version of the relevant events. In deference to the Panel's assessment of the witnesses' credibility, and upon consideration of the inherently unpredictable nature of investments, the Court cannot conclude that the award was irrational. Finally, Petitioners have not demonstrated any other ground for vacatur of the Award.

In light of the foregoing, the Court denies Petitioners' application in its entirety and hereby confirms the Award.

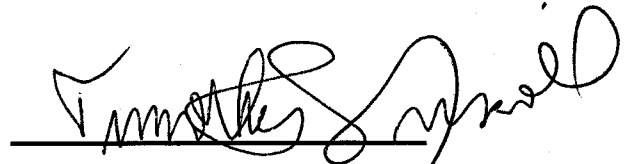
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

February 17, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.

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ENTERED
FEB 23 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE