

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17  
Justice

	x	Index Number <u>22284</u> 2007
NATHAN BERMAN, etc., et al.		
- against -		Motion Date <u>September 19,</u> 2007
VICTOR WEINGARTEN		Motion Cal. Number <u>12</u>
	x	Motion Seq. No. <u>1</u>

The following papers numbered 1 to 6 read on this motion by plaintiff Nathan Berman and plaintiff Sophia Popovic, the co-executors of the estate of Jacob Popovic, for, inter alia, a preliminary injunction prohibiting defendant Victor Weingarten from enforcing an arbitrator's award.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5
Other (Memorandum of Law).....	6

Upon the foregoing papers it is ordered that the motion is denied. (See the accompanying memorandum.)

Dated: October 24, 2007

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J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 17

_____	X	INDEX NO. 22284/07
NATHAN BERMAN, etc., et al.		MOTION SEQ. NO. 1
- against -		MOTION CAL NO: 12
VICTOR WEINGARTEN		MOTION DATE: 9/19/07
_____	X	BY: KITZES, J.
		DATED: October 24, 2007

Plaintiff Nathan Berman and plaintiff Sophia Popovic, the co-executors of the estate of Jacob Popovic, have moved for, inter alia, a preliminary injunction prohibiting defendant Victor Weingarten from enforcing an arbitrator's award.

Defendant Victor Weingarten, Fred Weingarten (his brother), and the late Jacob Popovic were equal partners in WPW Associates. Victor Weingarten filed a claim with the American Arbitration Association for the purpose of dissolving the partnership. Fred Weingarten and Jacob Popovic responded to the claim which accused them of, inter alia, self-dealing. However, on July 1, 2007, while the arbitration proceeding was pending, Jacob Popovic died. Upon being informed of the death, the arbitrator directed Victor Weingarten and Fred Weingarten to replead. Victor Weingarten filed an amended arbitration claim against Fred

Weingarten and the Estate of Jacob Popovic. After conducting a preliminary hearing, the arbitrator issued an order dated August 15, 2007 which found, inter alia, that section 10(E) of the partnership agreement required both surviving partners to collectively purchase the interest of the Popovic estate in the business, but since Victor Weingarten refused to join with his brother in the purchase, the partnership had to be liquidated. The Surrogate's Court of the County of Nassau issued preliminary letters testamentary to plaintiff Nathan Berman and plaintiff Sophia Popovic on August 21, 2007. Fred Weingarten raised issues before the arbitrator concerning the alleged right of the estate to be heard in the arbitration proceeding. The arbitrator issued a partial award dated August 27, 2007 finding, inter alia, that the partnership agreement gave him jurisdiction over claims and controversies arising from it and that a dispute existed concerning whether and how the partnership should be dissolved which were proper for him to determine. The arbitrator further found: "[T]he estate of Jacob Popovic, by virtue of the clear and unambiguous provisions of the Partnership Agreement and by operation of law, did not become a partner in WPW and is not a party ('necessary' or otherwise) to these proceedings. Indeed, under the circumstances presented here, the sole role of the Estate is to be the recipient of the economic value of the Decedent's interest in the partnership as will be determined in these proceedings \*\*\*." The arbitrator

directed the dissolution and liquidation of the partnership under his supervision, and he scheduled a hearing for September 10, 2007 concerning the manner of the liquidation, permitting a representative of the Estate to attend "in the interest of transparency."

The plaintiff executors began this action by the filing of a summons and a complaint on or about September 6, 2007, and they seek, a judgment declaring, *inter alia*, that the arbitration award rendered without the joinder of the Estate is void. The attorney for Victor Weingarten offered to stipulate to a stay of the arbitration proceeding so that the Estate could move before the arbitrator for a reconsideration of his partial award, but the attorney for the estate declined the offer. The attorney for Victor Weingarten also offered to stipulate that the Estate was a party to the arbitration proceeding, but the attorney for the estate again declined the offer.

That branch of the motion which is for an order vacating the arbitrator's partial award pursuant to CPLR 7511(b)(2) is denied. The court notes initially that while a special proceeding is the usual vehicle first used to obtain judicial intervention in an arbitration matter (see, CPLR 7502[a]), the plaintiffs have elected to bring a motion within the context of an action for a declaratory judgment. In any event, "judicial interference with an arbitration award \*\*\* should be avoided unless that award be

violative of a strong public policy, totally irrational or in excess of a specifically enumerated limitation upon arbitral authority." (Board of Educ. of Dover Union Free School Dist. v Dover-Wingdale Teachers' Ass'n, 61 NY2d 913, 915; see, In re Sobel (Charles Schwab & Co., Inc.), 37 AD3d 877.) In the case at bar, the plaintiffs did not show that there are good grounds for vacating the arbitrator's award. First, the determination of whether the estate was a necessary party to the arbitration proceeding is a matter involving the interpretation of the partnership agreement. The arbitrator found that "the estate of Jacob Popovic, by virtue of the clear and unambiguous provisions of the Partnership Agreement and by operation of law, did not become a partner in WPW and is not a party ('necessary' or otherwise) to these proceedings." "An arbitrator's interpretation of the parties' contract is not subject to judicial challenge even where the apparent or plain meaning of the words of the contract has been disregarded \*\*\*." (In re Etkin & Co., Inc. (Play It Again Apparel, Inc.), 235 AD2d 264, 265; see, Matter of Five Boro Roofing & Sheet Metal Works (Van-Tulco, Inc.), 180 AD2d 558.) Second, unless required by the agreement, an arbitrator need not observe the principles of substantive law or rules of procedure which govern the traditional litigation process. (See, Matter of Sprinzen, 46 NY2d 623; In re Windsor Cent. School Dist. (Windsor Teachers Ass'n), 306 AD2d 669; Dutchess Bldg. Renovations, Inc. v Immerblum

198 AD2d 413.) While generally a court must order the substitution of a representative for a party who dies during litigation (see, CPLR 1015; Kelly v Methodist Hosp., 276 AD2d 672), the arbitrator merely had to proceed in a rational manner after the death of Jacob Popovic, and, under all of the circumstances of this case, the arbitrator did so. Third, an arbitrator's award will not be vacated for nonjoinder and the like where a party has chosen not to participate in the proceeding. (See, Matter of Antique Rug Dealers Ass'n (Hakimian), 210 AD2d 111; Matter of Condell (Shanker), 151 AD2d 798.) In the case at bar, the arbitrator gave a representative of the estate an opportunity to attend a meeting in late August, 2007 and the hearing scheduled for September 10, 2007. Moreover, Victor Weingarten was willing to stipulate to the joinder of the estate to allow it to move for reconsideration of the partial award. The plaintiffs have chosen not to participate in the underlying arbitration proceeding, and, thus, their application lacks merit.

The remaining branches of the motion are denied.

Short form order signed herewith.

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J.S.C.