

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 54

-----X
IN THE MATTER OF

CAPITAL ENTERPRISES CO.,

Petitioner,

-against-

Index No.
653961/2016

ALVIN DWORMAN,

Respondent.

-----X
Transcript of Motion Proceedings

New York Supreme Court
60 Centre Street
New York, New York 10007
January 8, 2019

B E F O R E:

HON. JENNIFER G. SCHECTER, Justice of the Supreme Court

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(Continued on the next page.)

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2 A P P E A R A N C E S: (continued)

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2 THE COURT: Good morning, everyone. Please be
3 seated.

4 It's very warm in here or is it just me?

5 MR. SCHARF: No, it's all of us.

6 THE COURT: I'm sorry.

7 MR. SCHARF: Would Your Honor like us to open
8 some back windows so we get some fresh air in?

9 THE COURT: Is that possible? Can we do that?

10 THE CLERK: We can try, but I tried the other day
11 and I couldn't. I don't know if Brad is stronger.

12 THE COURT: All right. Thank you.

13 Good morning, everyone.

14 I've had a chance to read these papers, so I'm
15 very familiar with what's gone on here. I'm not going to
16 ask for argument on issues that I don't need argument on
17 and I want to do the motions in an order that I think makes
18 the most sense for me.

19 So I want to start with Motion Sequence No. 6,
20 which is the motion by the non-party Sachs Investing Co.
21 and Sachs Properties Co. to vacate the award.

22 So if that requires you to switch places
23 momentarily, go ahead.

24 MR. SCHARF: I'm happy to move.

25 MR. MCGOWAN: All right. That's fine.

26 THE COURT: All right. So knowing that I've read

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2 the papers, explain to me how -- I'm going to call the
3 Sachs companies together the Sachs non-parties -- how do
4 they have standing to raise any arguments related to this
5 arbitration award?

6 MR. MCGOWAN: Well, they have standing under two
7 grounds. One is, first and foremost, I think the statute
8 gives us the grounds to do that. We were not served with
9 the notice of arbitration --

10 THE COURT: So let's talk about that under the
11 CPLR. Is it your position that -- the CPLR talks about
12 parties to the proceeding, whether they were given notice
13 or not given notice. The Sachs entities are non-parties.
14 It can't be that any non-party can invoke the sections of
15 the CPLR that your clients invoke to attack an arbitration
16 award, meaning their interest is derivative. They were
17 part of Capital Enterprises. Capital Enterprises was the
18 party that arbitrated. It had notice, it arbitrated it.

19 What gives the Sachs entities the right to attack
20 the award?

21 MR. MCGOWAN: Well, Your Honor, first and
22 foremost, as a condition precedent, Mr. Palin, representing
23 essentially the Sachs half of Capital Enterprises and
24 seeking dissolution of Capital Properties, which
25 automatically dissolves Capital Enterprises under its
26 terms, he needed our consent in advance to do that. He was

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2 not given that.

3 THE COURT: So did you seek to enjoin the
4 arbitration.

5 MR. MCGOWAN: At the time, Your Honor --

6 THE COURT: If there was no consent and there was
7 outrage as to what was going on in violation of the
8 Partnership Agreement, why not enjoin the proceedings
9 instead of with knowledge of them? Having counsel -- I
10 think it was Pryor Cashman -- sending letters about
11 discovery in the course of the proceedings and then after
12 the fact believing that you could vacate the award on
13 substantive grounds, I'm not following.

14 MR. MCGOWAN: Again, Your Honor, the cases that
15 are cited by respondent's counsel all deal with situations
16 where the entity representing, for example, a union
17 representing an employee, they were authorized in advance
18 to represent those individuals in an arbitration. In this
19 case, Mickey Palin, who's running the show for Enterprises,
20 didn't have that authority. He needed the express consent
21 in advance, which everybody agrees he didn't have. There's
22 no dispute about that.

23 THE COURT: So why didn't you enjoin -- why
24 didn't your clients seek to enjoin the proceedings
25 immediately?

26 MR. MCGOWAN: Your Honor, I think what Your Honor

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2 is essentially contending is some sort of waiver, and there
3 is no waiver by sitting back on all of this. They were
4 hoping that the parties could work out a deal. It wasn't,
5 you know --

6 THE COURT: I don't even think there's standing.
7 If I got to standing, maybe then I would get to waiver,
8 you're right.

9 MR. MCGOWAN: Well, first, they needed our
10 consent. That's clearly -- it's undisputed, they didn't
11 have our consent to seek dissolution, No. 1.

12 THE COURT: But to seek dissolution of the
13 entity, which was -- the dissolution of Capital Enterprises
14 was just a consequence of what was decided in the
15 arbitration.

16 MR. MCGOWAN: No, seeking dissolution in and of
17 itself causes the other entity to dissolve.

18 THE COURT: That's right. It's a consequence of
19 what was decided.

20 MR. MCGOWAN: Right, and it couldn't be sought
21 without our consent, which was not given. So not only did
22 you have that, and literally all of the cases cited by
23 respondent deal with situations where the person involved
24 in the arbitration is probably authorized. That is not the
25 case here. There's no dispute it's not the case here.
26 Instead, they're saying, well, here's the cases saying that

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you weren't involved, you're not a party to the contract.

And the other cases they cite are where the damages were too speculative, and that's where the Court is looking at whether or not you have common-law standing. Here it's undisputed my clients face tens of millions of dollars in tax losses if this liquidation goes through as ordered by the arbitration.

There's no dispute my clients are going to get hammered here with damages. This is not a speculative claim, this is not a disputed claim. There's no dispute there's tens of millions of dollars of losses to my client.

THE COURT: Right. There's no judgment against your client.

MR. MCGOWAN: And the other problem --

THE COURT: Meaning the arbitration award is not per sé against your client, it's a derivative impact.

MR. MCGOWAN: I disagree, Your Honor.

THE COURT: Okay.

MR. MCGOWAN: And here's the reason why. It's because the arbitrator conflated Enterprises with what Carard Management Co., because all of the award -- if you look at every item in the award, it relates to what Carard was doing; improper loans allegedly, leasing out space for below market rent, taking in a management fee of four percent that allegedly was improper.

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2 You look at each and every one of those items and
3 he's ruling on that when Your Honor previously ruled that
4 it was not part of this arbitration. And my client, as a
5 50 percent owner of Enterprises, is getting the damages as
6 a result of that because we own half and Mr. Palin was not
7 authorized to seek dissolution, so he couldn't represent
8 us. Those cases that are cited by respondent are easily
9 distinguishable on those grounds.

10 We're not under that rubric of that caseload.
11 We're under the rubric of 7511 where we're going to get
12 damaged here. We're going to be damaged in a serious
13 manner on an award that on its face the arbitrator exceeded
14 his authority and he's causing damage to us. It's not
15 enough to simply say, oh, well, it happened to Enterprises.
16 We own half of Enterprises.

17 THE COURT: I understand. I read your papers
18 very thoroughly. Look, at the end of the day I disagree.
19 The Sachs non-parties don't have standing to challenge the
20 arbitration award. They were not parties to the relevant
21 Partnership Agreement between Capital Enterprises Co. and
22 Dworman. Their interest in Capital Properties Co. is
23 merely derivative of their interest in Capital Enterprises
24 Co.

25 The Sachs parties were not -- excuse me -- the
26 Sachs non-parties were not, and I quote parties, who did

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2 not participate in the arbitration under CPLR 7511(b)(2)
3 because they weren't parties to the arbitration. There
4 won't be any judgment ultimately against the Sachs
5 non-parties. That they may suffer injury consequently
6 because they have interests in Capital Enterprises Co. does
7 not confer them with, I quote, "parties standing to
8 challenge the arbitration award."

9 Even if it did, the Sachs non-parties did waive
10 their right to participate. They knew about the
11 arbitration. They did not seek to enjoin it as
12 unauthorized by Capital Enterprises. In fact, they were
13 represented by Pryor Cashman, were well aware of the
14 proceedings. They can't wait and see what happened and
15 then assert that Capital Enterprises Co. was without
16 authority to proceed.

17 The Sachs parties have no right to attack the
18 arbitration award and their motion is denied.

19 Thank you very much. I don't need to hear from
20 the other side.

21 MR. SULLIVAN: Thank you, Your Honor.

22 MR. MCGOWAN: I respectfully, except, Your Honor.

23 THE COURT: Very good. Let's move on now to
24 Motion Sequence No. 5.

25 MR. MCGOWAN: Thank you.

26 THE COURT: All right. I would appreciate that

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2 it's actually the motion by Dworman to confirm the award,
3 but my questions are really targeted here toward Capital
4 Enterprises.

5 Who will be arguing?

6 MR. SCHARF: Your Honor, we had submitted a
7 letter to Your Honor asking if Judge Saxe can address --
8 retired Judge Saxe can address certain of the issues. I
9 was going to address most of the substance. If Your Honor
10 has direct questions, I think perhaps I will stand and
11 answer those questions if Your Honor would permit.

12 THE COURT: The law in this area is very clear in
13 terms of your burden to establish by clear and convincing
14 evidence that there's a basis for vacating the award.
15 After six days of hearing testimony and argument, and I
16 think it's 63 pages -- one moment.

17 MR. SULLIVAN: Sixty-four, Your Honor.

18 THE COURT: Okay.

19 (Brief pause in the record.)

20 THE COURT: -- a 64-page decision that goes
21 through detail for detail, crediting certain testimony,
22 discrediting other testimony, finding certain testimony is
23 interested, analyzing whether or not there was an agreement
24 in March 2015, pointing to testimony, pointing to the
25 agreement itself or -- I'm sorry -- the lack of agreement,
26 the memorandum, I should say, what here even boards on

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2 irrationality?

3 MR. SCHARF: Your Honor, if it's okay, I would
4 have my partner David Saxe address that very first
5 question.

6 THE COURT: Please.

7 HON. SAXE: Thank you, Judge.

8 First of all, no relation to the other Sachs that
9 just argued their motion before you.

10 THE COURT: Okay. In fact, that principal is
11 David Sachs, too, I believe, or is it not?

12 HON. SAXE: I think so.

13 THE COURT: Okay. What a coincidence.

14 All right.

15 HON. SAXE: I think, to put this matter in
16 perspective, and Your Honor said that there are 60 some
17 pages here, 64 pages of Judge Fried's decision, the fact is
18 I'm fully appreciative of the burden -- our burden to
19 overcome an arbitration award.

20 THE COURT: And the rarity of overturning an
21 arbitration award.

22 HON. SAXE: But nevertheless, Your Honor, there
23 exists case law in New York, Court of Appeals, that says
24 that if the award meets the test of being irrational, then
25 the award must be vacated. And I think if you go through
26 the various elements here -- this is an unusual case

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2 because there's testimony on our side from a variety of
3 people, direct testimony, and in terms of the respondent,
4 there's virtually no testimony at all from the Respondent
5 Alvin Dworman and the --

6 THE COURT: There's his deposition, which was
7 admitted.

8 HON. SAXE: Right.

9 THE COURT: That's testimony.

10 HON. SAXE: Yes, but if you look at the testimony
11 of the videotaped deposition, Your Honor, [REDACTED]

12 [REDACTED]
13 [REDACTED] but in
14 terms of the way in which the question and answer, if you
15 read it, and I'm sure you have, you can --

16 THE COURT: Well, I've certainly looked at the
17 portions that you've included in the brief, but Judge Fried
18 had the ability to watch that testimony from start to
19 finish and concluded on page five of the award that
20 "Mr. Dworman, [REDACTED]
21 his demeanor and statements convincingly demonstrated that
22 he wasn't a knowing or willing partner in Palin's
23 self-interested management of the affairs."

24 HON. SAXE: Judge, you have to look at that in
25 the context of the affidavits that have been submitted [REDACTED]
26 [REDACTED]

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[REDACTED]

[REDACTED] So to take that testimony and to extract that snippet of testimony or finding from that, I think is incorrect.

THE COURT: Was there an objection to the deposition testimony coming into evidence?

HON. SAXE: Frankly, I don't remember if there was an objection, but nevertheless --

THE COURT: Because what you're basically asking me to do is to completely discount that testimony that was admitted that Justice Fried relied on. And can I do that as a Court looking at an arbitration award?

HON. SAXE: There's a more serious problem and I think what you're talking about raises that serious problem. Mr. Dworman, when he presented himself for that videotaped deposition, [REDACTED]

[REDACTED]

Now, I know Judge Kornreich raised the issue early on, I think it was in January of 2017. She asked Mr. Sullivan, is your client directing the lawsuit? She must have had some concern. And he assured her that he's

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"The General." And I suspect that [REDACTED]

Now, fast forward a bit of time to when we made our request for a deposition. There was all sorts of opposition to that; oh, [REDACTED]

THE COURT: But who asked for his deposition?

HON. SAXE: We asked for his deposition.

THE COURT: Okay. And so then when it was admitted at the arbitration, what could be the issue?

HON. SAXE: Here's the point, Your Honor.

THE COURT: Where in the award -- on what basis do you conclude that the arbitration [REDACTED] [REDACTED] Because he allowed some of his testimony in? When I read this arbitration award, what jumps out at me is that Justice Fried found that there was -- there were so many issues credibility-wise in terms of interest for the Palins; inconsistent testimony contradicted by their own affidavits, the documentary evidence did not support

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2 Capital Enterprises' claims here.

3 So in addition -- it's not just Dworman's
4 testimony here, it's all of those inconsistencies and the
5 documentary evidence defeating basically the claims.

6 HON. SAXE: How does documentary evidence and
7 some inconsistencies support the award that was given here?
8 Here, you have a partnership of two men who came together
9 who did their business informally. That was part of the
10 direct testimony in this case. And if they had a problem,
11 if they had an issue, the two of them met for a drink after
12 work, they talked about sports -- boxing was their favorite
13 topic -- and they decided the problem that was before them,
14 they had a drink, they shook hands and they walked away.
15 This is how they did their business. This is how the
16 direct testimony came into this case.

17 So what's on the other side? What's opposing it,
18 some documents? Where is the direct testimony that opposes
19 the testimony of Mickey Palin, of Dean Palin, of the
20 accountant? Where is it? It's not there.

21 THE COURT: But all of this testimony was deemed
22 incredible. So, yes, documents along with incredible
23 testimony, you think that renders the decision irrational?
24 Irrational?

25 HON. SAXE: Your Honor, that means that all of
26 the testimony -- you're accepting the notion that all of

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2 the direct testimony was not to be believed here? That
3 respectfully --

4 THE COURT: No, I'm accepting what's in the
5 award, meaning what Justice Fried said, which is he didn't
6 outright find everything that the Palins said to be
7 incredible. In fact, he said that he accepted certain
8 testimony and not others. In fact, he denied certain
9 requests for damages because Dworman didn't meet the burden
10 of establishing their propriety.

11 In these 64 pages, Judge Fried goes through issue
12 by issue; testimony about what's credible, what's not
13 credible. He didn't wholesale reject outright everything
14 the Palins said and accept everything that the Dwormans --
15 that Mr. Dworman submitted.

16 HON. SAXE: Your Honor, there was nothing from
17 the respondent, so it seems to me that the balance was
18 completely off here and to be able to render an award based
19 on that kind of lack of balance in this case meets the test
20 of irrationality.

21 THE COURT: Okay.

22 HON. SAXE: Judge Fried basically accepted the
23 notion that Alvin Dworman had nothing whatsoever to do with
24 this partnership, he was totally kept in the dark. That's
25 at the essence of the argument of the respondents. But
26 there's clear testimony here, direct testimony, not only

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2 from Mickey Palin -- you can say, well, I'm not going to
3 believe Mickey Palin's testimony, but there's testimony
4 from the accountant, from Dworman's own accountant, that he
5 was kept in the loop. So that's suddenly or, for some
6 reason, bypassed Judge Fried.

7 THE COURT: Okay, thank you.

8 MR. SCHARF: May I try to add just briefly to
9 what my partner just said?

10 THE COURT: Go right ahead, and then I have a
11 couple of questions for the respondent.

12 MR. SCHARF: Okay. And I'd like to pick up where
13 my partner David Saxe was just talking about the concept of
14 the uninvolved[sic] by Alvin Dworman. And even if -- I
15 want to talk about the documentary evidence that's out
16 there that makes the decision that Alvin Dworman was
17 uninvolved for 35 years. Completely irrational, and there
18 is actually no basis for it.

19 And I want to start with the words of Mr. Alvin
20 Dworman, the clear and unequivocal words that he testified
21 that [REDACTED]

22 [REDACTED] I agree that those words were clear and
23 unequivocal at his deposition.

24 THE COURT: And reliable.

25 MR. SCHARF: And you know what, let's assume
26 they're reliable because if they are, that's what he did,

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okay, [REDACTED]

[REDACTED] And that's the next piece that I'd like to back into, because the next piece that we know that happened

THE COURT: Mr. Scharf, did anyone object to introduction of his deposition testimony at the arbitration?

MR. SCHARF: The only -- short answer; only the objections that were interposed at the deposition were those that were addressed and --

THE COURT: I understand. So not the admissibility?

MR. SCHARF: There were deposition designations that were made, and I believe, and I would have to check with my partner Mr. Lin if there were objections to designations, but I believe there were objections to designations that were made by both sides.

THE COURT: But not to the introduction of the deposition testimony itself?

MR. SCHARF: That is correct, Your Honor.

THE COURT: Okay. Go ahead.

MR. SCHARF: So what happens when Mickey Palin

says [REDACTED]

What is

that a result of? We know from the arbitration that that

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2 was a result of the creation of the Palin Agenda. Your
3 Honor has seen it. It was attached to our papers.

4 The Palin Agenda was a document that was created,
5 internal document, that Mr. Sullivan and other people were
6 involved in creating and were part of to isolate Mickey
7 Palin. Now, if he was -- if Mr. Dworman was uninvolved
8 with this partnership, what were they isolating him from?
9 It can only lead to one conclusion; the Palin Agenda was
10 created to isolate Mickey Palin from Alvin Dworman, two
11 months after they reached their March 2015 agreement on how
12 they were going to dissolve the partnership and say we want
13 to keep Mickey and Alvin Dworman separate and apart. If
14 they had no involvement over the 35 years, there would have
15 been no need for the Palin Agenda.

16 Let's go two months or three months earlier to
17 March. The documentary evidence demonstrates that these
18 men sat and they met and they discussed their business.

19 THE COURT: I don't think there's any dispute
20 that they had a meeting in March 2015.

21 MR. SCHARF: March 2015.

22 THE COURT: Yes. It's the consequences of that
23 meeting that was sharply disputed. And Judge Fried went
24 through why he found there was no enforceable Dissolution
25 Agreement.

26 MR. SCHARF: I agree with everything Your Honor

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2 just said. I'm making a different point with respect to
3 the existence of the memorandum, the existence of the
4 meeting.

5 THE COURT: Okay.

6 MR. SCHARF: I'm addressing simply the issue that
7 it is irrational for Judge Fried to have found that Alvin
8 Dworman had no involvement and no knowledge of what went on
9 in this partnership.

10 The existence of this meeting, the happening of
11 the meeting, the existence of the Palin Agenda, the washing
12 the hands, all from the Dworman side, show that there was
13 involvement before.

14 THE COURT: And that renders the decision -- the
15 64-page decision irrational?

16 MR. SCHARF: Yes.

17 THE COURT: Okay.

18 MR. SCHARF: And let me continue and tell you
19 why, because it's not just those pieces of uncontradicted
20 evidence that is documentary and testimonial and comes from
21 the Dworman side, okay? And I'm not even going to talk
22 about Mickey and Dean Palin's testimony. We're going to
23 talk about the provision of financial information;
24 undisputed. We're going to talk about Alan Hoffman's
25 testimony.

26 The testimony -- when you look at the Palin

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Agenda, there is an express acknowledgment that he was Alvin Dworman's accountant. They make a decision to shut him out because they're concerned about where his loyalty lies because he does work for both of them. Now, Mr. Hoffman came in and testified that everything that went on in this business, in essence, was provided for and known to Alvin Dworman.

Let's continue and look at the operations, okay? Did Alvin Dworman's girlfriend, did Alvin Dworman's brothers, lawyers, friends all end up in the buildings, mysteriously dropping from Mars or were these conversations between these two men saying, please put my person in there? Mickey Palin said that's what happened, okay?

But let's disregard Mickey Palin. Let's use our logic, our rationality. Our rationality must tell us that Alvin Dworman knew his friends were going into the building because there was a documentary piece of evidence that was marked as an exhibit at the hearing that expressly was a letter from Mickey to Alvin listing all of the people that are in there saying we need to deal with this rent-free situation. Alvin Dworman was not in a vacuum.

Let's continue. 969; I'm not arguing whether there should be an offset for it at all, Your Honor. I want to keep focused on Alvin Dworman's knowledge and involvement in the partnership. There is an inherent

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2 contradiction in the arbitration award as to that issue
3 which makes that topic irrational, and let me set that up
4 for you.

5 THE COURT: This is the property that Judge Fried
6 found was not subject to the partnership?

7 MR. SCHARF: Well, he first said it was intended
8 to be part of the partnership. He did say that in his
9 opinion. And later he concludes that he's not providing
10 any credits related to it, but what we have is documentary
11 evidence and Judge Fried's own finding and Alan Hoffman's
12 contemporaneous memos that says there is a fourth building,
13 and that fourth building is for tax purposes being
14 separated. And the 969 portion of it is the commercial
15 space; uncontradicted testimony in it. There is a document
16 that says that Alvin Dworman is going to deal with it and
17 it has to be adjusted as part of the partnership.

18 The uncontradicted evidence is that the
19 partnership was managed out of the building at 969. That's
20 where the management offices were. The management offices
21 moved out and Alvin Dworman, in the face of his own
22 agreement, that this was supposed to be addressed and dealt
23 with, a piece of paper between these two elderly men, who
24 at the time weren't so elderly, but had very few pieces of
25 paper among them, they documented their understanding as to
26 what was supposed to happen with that.

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2 And Alvin Dworman was not only involved in
3 separating this building into a commercial condo or co-op
4 and a residential portion, but he was involved in the sale
5 of that unit and the mortgaging of the unit and the taking
6 of the proceeds. Let's not talk about the handshake -- the
7 other handshake agreement where they agreed to true up with
8 respect to that.

9 But let's address --

10 THE COURT: All right. Again, Mr. Sharf, on page
11 58 and 59 of the award, Judge Fried discusses why the
12 documentary evidence compelled a contrary conclusion. On
13 what basis would I find that that's irrational?

14 MR. SCHARF: Because I'm building all of the
15 pieces for you, Your Honor.

16 THE COURT: Okay.

17 MR. SCHARF: I agree that if you take every -- if
18 you take a piece and you say, toss that to the side, take
19 this one, toss it to the side, I'm ultimately left without
20 a table. I've got a piece of wood on the floor.

21 THE COURT: I'm not finding one piece so far to
22 put together the pieces.

23 MR. SCHARF: Then we have a respectful
24 disagreement because what I'm trying to get to is the
25 predicate for Alvin Dworman not being involved is not
26 possible to be discerned, even if you reject all of Mickey

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2 and Dean Palin's testimony, because the documentary
3 evidence, the admissions, the words of Alvin Dworman at his
4 deposition, to the --

5 THE COURT: Did Judge Fried conclude that he
6 never -- that Dworman never had any involvement whatsoever?

7 MR. SCHARF: He made a determination, which sets
8 the predicate for the entire case, that Alvin Dworman was
9 not an individual who was knowledgeable and knowing about
10 the partnership. And then here's where you get into --

11 THE COURT: Or he was unaware of all of the
12 details of the partnership. That is what Judge Fried
13 concluded for sure.

14 MR. SCHARF: And this brings me to, I think, what
15 is a critical nuance because you and I, Your Honor, we're
16 in exactly the same jumping off point, I think, whether you
17 agree with me or not. Let's agree with Judge Freed and I
18 will agree with what Your Honor was saying so far for the
19 purpose of the next point I'm going to make. Maybe he
20 wasn't knowledgeable of everything, maybe he was
21 knowledgeable only of certain things, of certain macro
22 things, but he didn't know about the four percent.

23 Your Honor knows that Mitch Waxman testified that
24 Alvin Dworman was knowledgeable about the four percent,
25 okay? That in and of itself is the only testimony that's
26 out there. There was nobody else who could give

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testimony -- firsthand testimony, other than Mickey.
Mickey testified. Let's disregard Mickey, but Mitch Waxman said it was something that Alvin Dworman asked him about.

If we're getting so granular and Alvin Dworman is asking for calculations with respect to the four percent, I'm not going to ask you to assume that that means he was probably very knowledgeable about all of the finances, but we know with respect to the four percent he was interested, he was intrigued, he wanted calculations for it. His own inside guy Mitch Waxman gave that to him. So the finding of damages on that point is irrational.

But what I want to really talk about is let's assume -- and for that I think we need the construct of what their Partnership Agreement and how it was set up. And there are two massive pieces that Judge Fried did injustice to the actual agreement of the parties. No. 1, the construct, and I pointed this out to him at the closing argument of the arbitration, the construct of this partnership was that Alvin Dworman was the managing partner of this partnership.

The only argument that you hear with respect to that that comes from the Dworman side, is that Alvin Dworman delegated his responsibilities to Mickey Palin and then he just didn't check up on him, but that's not what the agreement says because the agreement says exactly what

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2 the relationship was between Mickey Palin and Alvin
3 Dworman. It said, Alvin, you're up top.

4 Carard Management, an entity that is sued here in
5 this Court, an entity that Judge Kornreich removed as the
6 manager, an entity that Judge Kornreich said: "There's no
7 inextricable intertwinedness between the arbitrable issues
8 and the claims against Carard."

9 Carard was responsible for the day-to-day
10 management of the business. That's why Mickey Palin knew a
11 lot of things and Alvin Dworman knew macro things. That
12 was the party's arrangement and agreement. Nobody has to
13 truly dispute that that's the way it was supposed to be.

14 THE COURT: But would that give a license to do
15 what Judge Fried found was done here?

16 MR. SCHARF: No, it would not. And, Your Honor,
17 I'm not sure that Your Honor has appreciated that we
18 haven't challenged every single element of damages with
19 respect to the findings of Judge Fried. We have looked at
20 certain items and said it's an arbitration, and when you go
21 to arbitration, there are certain things that you lose the
22 ability to later challenge, but I think a very important
23 nuance --

24 THE COURT: So you think parts are rational and
25 parts are irrational?

26 MR. SCHARF: Yes.

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2 THE COURT: Okay.

3 MR. SCHARF: Okay. And there's nothing in the
4 law that says that a court can't look at aspects of an
5 arbitrable award and make a decision that certain aspects
6 are irrational, like the four percent.

7 But one of the biggest problems we have here is
8 that Judge Fried took damages or found damages, and every
9 single one of them, for conduct that was conducted by and
10 through Carard, Mickey Palin and Dean Palin. And what he
11 said was we have to then account for all of that in the
12 windup of the Capital Enterprises and Alvin Dworman
13 partnership.

14 THE COURT: Okay. That is going to bring me to a
15 question for the respondent, but go ahead. Why don't we
16 wrap up because I have several questions for the
17 respondents?

18 MR. SCHARF: Sure. I understand, Your Honor, and
19 I appreciate the latitude and the time that you've given
20 me.

21 The conduct that was, at best, proven, whether
22 rational or irrational was -- and you just need to look at
23 the caption of the 64-page decision between Alvin Dworman
24 and Capital Enterprises. Carard is not a player in the
25 arbitration. Judge Kornreich said they can't be a player
26 in the arbitration. In fact, we argued, everyone should

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2 just get all of this thing together.

3 But the argument that came from Mr. Dworman is,
4 no. And what Judge Fried found was that Carard, as the
5 management company, under the supervision of Alvin Dworman,
6 Alvin Dworman is relieved of his supervisory powers as
7 managing partner, he was unknowing, he was unknowing, let's
8 assume, of all of the conduct that was being taken care of,
9 but the conduct that was complained of and the conduct that
10 was perhaps proven, some of which we are challenging, some
11 of which we cannot because it was an arbitration, was
12 conduct that was laid at the footsteps, not of Capital
13 Enterprises, but of Carard because Alvin Dworman knew
14 what --

15 THE COURT: Sounds like the argument the Sachs
16 non-parties were raising -- non-parties -- Sachs
17 non-parties were raising, yes.

18 MR. SCHARF: But this goes to the core of the
19 irrationality of the decision. When we say in our papers
20 that the Court relieved Alvin Dworman of his fiduciary and
21 contractual obligations to be the managing partner and he
22 threw everything at -- irrationally at the footsteps of
23 Capital Enterprises, that's because there is no evidence
24 that Capital Enterprises qua Capital Enterprises did
25 anything. All the findings and the damages that were
26 claimed and the damages that were found, you have an

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exceeding of authority by Justice Fried in making determinations that Carard and Mickey Palin and Dean Palin diminished the value of the property, did all of these bad things.

And I will raise one more point and then I will sit down. And this is the last point I'd like to make about the irrationality or highlight this point, in addition to, obviously, the ones that Your Honor has read. And that relates to and -- with tremendous respect for Judge Fried, there is this incredible nonsensical part of his decision because when you think about it, what he's saying is, Mickey Palin, who owned, let's say a quarter of these \$200 million worth of buildings, for some nickels and dimes; for some management fees, for some leasing fees, for some reduced rent was not going to maintain the building properly and cause it to diminish in value by over \$21 million.

Putting aside whether the diminution of value or the other claims have any basis in the evidence, which they don't, and the fact that they are speculative, but he's saying Mickey Palin, for nickels, robbed himself of millions of dollars. Now, everyone thinks Mickey Palin's a smart guy. Some people say he's a thief. Everyone says Alvin Dworman's a smart guy, even Judge Fried. There's no way, and this is why it's irrational at its core, that

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2 Mickey Palin embarked upon a scheme and a plan to steal
3 nickels and dimes to diminish the value of his partnership
4 when it was worth millions and millions of dollars.

5 Who would go and take their properties and flush
6 them down the toilet? It's not a situation where Mickey
7 Palin sold the properties surreptitiously, pocketed the
8 money and now we're sitting here and we're saying what was
9 the real value of the property? We're not in an
10 after-the-fact position here.

11 We're dealing with a property that the sale of it
12 and its value is before us. It may fetch a lot of money.
13 We're going through a process, which we don't think should
14 be gone through for the reasons we set forth in our papers,
15 and I won't belabor that, but there is abject irrationality
16 with respect to the concept of all of this bad conduct that
17 Mickey did it to put it in his pocket and hurt himself to a
18 larger degree. What, to hurt Alvin Dworman? They gave no
19 theory as to why. There was no theory proffered that was
20 proffered at all, let alone one that made sense, how this
21 made sense financially for Mickey. Why would he hurt
22 himself to the tune of millions of dollars to steal a few
23 hundred thousand dollars on fees?

24 THE COURT: Okay. Thank you very much.

25 MR. SCHARF: So, Your Honor, just to wrap up.
26 The interest issue and the fact that this award of -- this

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2 is not an award of damages that can be conformed. At the
3 most, if this award gets --

4 THE COURT: These are going to be your better
5 points and you wait until the very, very end. Go ahead.
6 Please make it brief because I will be focused on that as
7 well.

8 MR. SCHARF: Sure. So the respondents are
9 seeking over 21 -- \$23 million in interest, a huge interest
10 factor. In so doing, they are telling this Court that
11 Judge Fried, even though, we acknowledge, he had the
12 authority to award pre-award interest. It was asked for,
13 it was not granted. They only got interest under 502,
14 which is post-award interest. That's all Judge Fried
15 awarded. And now they're coming back to this Court instead
16 of going back to Judge Fried like they did on one occasion
17 and like we did on another occasion and say, we think you
18 missed it, you may have overlooked this, they're coming to
19 this Court and they're asking Your Honor to somehow treat
20 it as a fait accompli and somehow read it into the award.

21 THE COURT: I have serious questions about that.
22 I will be asking about them in a moment.

23 And what else did you want to say finally about
24 the award and putting it into a judgment form, assuming
25 that I find it is not completely irrational or irrational
26 at all?

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2 MR. SCHARF: Correct. If Your Honor confirms an
3 award or part of the award, the only thing that I think
4 Your Honor can do based upon the construct that was created
5 by Judge Fried in his award with the appointment of the
6 special liquidator and the like, is to say, I'm confirming
7 the award, and in the accounting, in the divvying up of the
8 proceeds, these amounts need to be accounted for. And
9 Judge Fried's corrected or his most recent corrected award
10 makes that eminently clear.

11 These are an allocation of damages that will come
12 out of salespersons --

13 THE COURT: All right. I have it in front of me
14 and that is on my mind, meaning when Judge Fried said:
15 "Such damages are to be taken into consideration in the
16 final accounting."

17 MR. SCHARF: It is not a judgment.

18 THE COURT: With that, thank you.

19 MR. SCHARF: Thank you, Your Honor.

20 THE COURT: I'm going to turn -- who is going to
21 be arguing?

22 MR. SULLIVAN: Your Honor, Chris Sullivan of
23 Mintz, Levin, for the Respondent Alvin Dworman.

24 THE COURT: All right. Good morning, Mr.
25 Sullivan.

26 MR. SULLIVAN: Good morning.

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2 THE COURT: I have several questions about what
3 to do next. If I agree that the award is not irrational,
4 why not wait, like the clarification says, until the
5 accounting and take the damages into account there, meaning
6 as a credit after the properties are sold and then there
7 would be no issue about judgment enforcement or anything
8 like that?

9 MR. SULLIVAN: I think the answer, Your Honor, is
10 that the use of partial and final awards, which candidly
11 was new to me, and when I did a little research, I found
12 out that JAMS routinely issues awards in this format and
13 the First Department has specifically approved the use of
14 partial final awards because --

15 THE COURT: I agree it's a possibility and I
16 appreciate the partial final nature and what else would it
17 mean to have a partial final award if you can't get a
18 judgment on it? However, in this particular context, with
19 the language in this award, and I have another question
20 about the interest in a moment, but why wouldn't it make
21 sense, at the very least, to get me clarification on what
22 Judge Fried intended when he said:

23 "The damages are to be taken into consideration
24 in the final accounting, which will occur after the
25 liquidation in accordance with the partnership agreement?"

26 MR. SULLIVAN: Two answers, Your Honor. I think,

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2 first of all, Judge Fried intended, by using the form of a
3 partial final award, that the award will be confirmed to
4 the extent that his liability and damage and sale protocol
5 findings are final in nature.

6 And secondly --

7 THE COURT: Say that one more time. I'm sorry.

8 MR. SULLIVAN: I think that he intended that the
9 award would be confirmed at this time to the extent that
10 the findings of the liability, damages and the direction
11 and protocol for proceeding with the sale. And that's
12 important, Your Honor, because, again, I'm not going to
13 speak for Judge Fried, but my understanding from the First
14 Department's discussion of the use of these awards, these
15 partial final awards, is that it makes sense to confirm
16 what his final, so that it facilitates what is still to
17 come.

18 In our case, that's the sale of the property.
19 It's very important --

20 THE COURT: So you are not looking for a monetary
21 judgment when you walk out of here today?

22 MR. SULLIVAN: Well, I am, Your Honor. I would
23 disagree with that. I think Judge Fried made the final
24 decision as to damages. There's no reason not to confirm
25 that part of the award that's final. And there are three
26 parts that are final; liability, damages and the direction

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2 to proceed with the sale of the property under the
3 jurisdiction of the special liquidator, the protocol, which
4 is important for buyers when they show up that this has
5 been -- the sale is pursuant to a court order. Very
6 important.

7 THE COURT: But, again, I'm asking, when you want
8 me to confirm the award, you want me to say it's confirmed
9 as to liability, it's confirmed as to the damages that are
10 found and it's confirmed in terms of there will be a final
11 accounting, which will occur after the liquidation, is that
12 all? Are you -- what I'm asking is, are you seeking entry
13 of the monetary judgment?

14 MR. SULLIVAN: Well, it's confirmed in all
15 respects. And, yes, Your Honor, I believe that Judge Fried
16 intended that the Court would grant judgment, which could
17 be supplemented upon the final accounting if that's the
18 structure that he envisioned. But as I understand the
19 First Department's decision in the International Alliance
20 case, you enter a final judgment that's derivative in
21 nature, at this time, for \$31 million plus prejudgment
22 interest. You confirm the award in all respects and all
23 that remains is the limited issue that Judge Fried retain
24 jurisdiction of, which is the sale of the property and the
25 final accounting, if you will, the proceeds go into escrow
26 and are disputed by order.

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2 I think that's what he intended and I think
3 that's the protocol the First Department has endorsed in
4 exactly this kind of situation.

5 THE COURT: I have another question about what
6 Judge Fried intended. It's not just limited to whether or
7 not he contemplated me having a judgment, a monetary
8 judgment entered, because I am not convinced that that's
9 what he intended based on that clarification.

10 The other issue that I'm not convinced that I
11 understand from the award is on page 60 when Judge Fried
12 says:

13 "Regarding prejudgment interest, it's a matter of
14 right in an arbitration."

15 What does that mean?

16 MR. SULLIVAN: Can I address your first point
17 first, Your Honor?

18 THE COURT: Go ahead.

19 MR. SULLIVAN: You said you're not convinced he
20 intended to enter a monetary judgment.

21 THE COURT: I don't know.

22 MR. SULLIVAN: Candidly, what's important here is
23 that we proceed to sell these properties and have the money
24 paid into escrow. We're not enforcing. It's a derivative
25 judgment. It needs to be dealt with by Judge Fried out of
26 the proceeds of the sale, setting off damages and so on and

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so forth from the petitioner's share of the net profits from the sale. That's what's important in terms of confirmation.

So in terms of the monetary aspect of it, no one is enforcing anything at this juncture. It's simply my understanding that that is the procedure endorsed by the First Department, but I'm not going to stand here and tell you that it's critical to Respondent Alvin Dworman that Your Honor enter a monetary judgment because it's a piece of paper.

What's important is that you confirm this award to the extent it's final so that people who buy these properties who show up know they're doing so pursuant to a court order. That is, you know, the most critical aspect of it.

The monetary judgment, yes, I do think that's what Judge Fried intended, but candidly, at the end of the day, we're still going to be sitting around the bank account with the net proceeds of the sale so that he can do the final accounting. So it's just a question, to some extent, paperwork to get there, although, again, you know, notwithstanding counsel's attempt to re-litigate all the merits of the issues, his client was caught stealing money from the partnership. That's, you know, the 800-pound gorilla in the room. He was embezzling money and he got

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2 caught.

3 All this nonsense about, oh, he delegated
4 partnership responsibility, he was caught embezzling money.

5 THE COURT: I read --

6 MR. SULLIVAN: He was caught in a lie. He's a
7 thief, Your Honor.

8 THE COURT: I read the decision.

9 MR. SULLIVAN: Again, just so we're clear on
10 that, it --

11 THE COURT: Let's switch focus for a moment.

12 MR. SULLIVAN: Yes.

13 THE COURT: Because, again, if you want to say a
14 few words about the rationality --

15 MR. SULLIVAN: No.

16 THE COURT: I appreciate it.

17 Let's focus then, as well, on the prejudgment
18 interest.

19 MR. SULLIVAN: So three points there, Your Honor.
20 First of all, Dworman asked for, in his arbitration papers,
21 prejudgment interest from the wrongdoing forward. That's
22 all we asked for. I wrote it. We quoted the sections in
23 our papers.

24 THE COURT: And that's why I'm confused about the
25 award --

26 MR. SULLIVAN: And if I can help --

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2 THE COURT: -- because you asked for it and the
3 judge said:

4 "Regarding prejudgment interest, it is a matter
5 of right in an arbitration."

6 Now, the judge then cites to a case that
7 discusses the fact that the prejudgment interest amount
8 likely should be dealt with in the arbitration. I don't
9 know that I can decide now what the date should be when
10 interest should run. I don't know that that's my job in
11 this context. That's first of all.

12 Second of all, the case that's cited deals with
13 prejudgment interest as a matter of right in a judicial
14 proceeding, meaning not -- Judge Fried refers to
15 arbitration, but that case refers to a judicial proceeding
16 and the fact that interest should run from the date of the
17 award. That's fairly straightforward and simple.

18 But the argument that you made was prejudgment
19 interest for all of the injuries, and so I am unclear as to
20 what Judge Fried meant and why shouldn't I get
21 clarification on that as well?

22 MR. SULLIVAN: Your Honor, we had a say what
23 moment ourselves when we read it because to some extent he's
24 coming and going at the same time. And I don't have any
25 problem with getting clarification from Judge Fried on
26 anything. I'm all in favor of it. But let me just offer

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2 this syllogism, if you will. We asked for prejudgment
3 interest in the form of pre-award interest. The only thing
4 we asked for. He says in his award:

5 "Respondent's request for pre-judgment interest
6 is granted."

7 He does not say what Mr. Sharf represented to the
8 Court a moment ago. He denied this and he granted that and
9 they don't even address it in their papers.

10 THE COURT: I understand that. That's why I
11 would like clarification.

12 MR. SULLIVAN: Okay. And then, if I may, Your
13 Honor, pre-judgment interest, okay, is generally -- it's
14 Court of Appeals -- a matter of right in an action for an
15 accounting. An accounting, Court of Appeals in Meisels v.
16 Uhr, U-H-R:

17 "The proper remedy in a lawsuit between partners
18 in which the Court settles an account and takes into
19 consideration breach of fiduciary duty and so on,
20 prejudgment interest is a matter of right."

21 So he's using those words.

22 Dermigny is a case in which nobody asked for
23 interest, nobody. So the trial Court said, well, no one
24 asked for it, we can't give it. And the First Department
25 came back and said, no, under CPLR 7507 you automatically
26 get post-award prejudgment interest. No one needs to ask

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for it. The arbitrator doesn't need to say anything, it's automatic.

Now, why would Judge Fried be talking about something that's automatic and he doesn't have to address it? His language is inartful. If Your Honor would like to go to him for clarification, we have no problem with it, Your Honor.

THE COURT: I absolutely want you to go to him for clarification because under authority that I've looked at, and specifically, a matter of Rothermel case and Kingdon Capital. I'll give you the cite for Rothermel; 280 AD2d 862 from 2001, a Third Department case, and Kingdon Capital Management v. Kaufman, 110 AD3d 648, a First Department case that cites the Third Department case that I just told you about. I don't know that it's my job or not even my job that I can --

MR. SULLIVAN: You can't.

THE COURT: -- figure it out. I don't think I can.

MR. SULLIVAN: Only if it's clear, Your Honor. And I completely agree with you. What the CPLR says is that the arbitrator has absolute discretion to award prejudgment interest. If he does so, it cannot be reviewed, just like all of his other findings of credibility, determinations and interpretations of the

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2 agreement cannot, as a matter of public policy, be reviewed
3 on this motion. If he doesn't award it, you can't grant
4 it.

5 So the only issue is, is it ambiguous? We were
6 going to settle a proposed judgment with the interest
7 calculation. If the Court is more comfortable, we'll go
8 back, the Court can go back, to Judge Fried on that issue
9 in terms of the calculation if Your Honor is inclined to
10 grant a monetary judgment in that regard.

11 But I do want to come back to the point that the
12 use of partial final absolutely reflects, I believe, Judge
13 Fried's understanding that the decision to dissolve and
14 liquidate, liquidate and wind up through the sale of the
15 property, should be confirmed because otherwise, you impede
16 the sale. We're marketing these properties, these three
17 Midtown Manhattan apartment buildings, to bidders. We need
18 the court order in place confirming the arbitrator's award
19 to proceed. And I do think that's why Judge Fried used
20 this somewhat hackie phraseology, "partial final award,"
21 although I do note, the First Department has approved the
22 use of JAMS's awards in that matter.

23 THE COURT: Okay. I appreciate what you've said.

24 After reviewing all of the parties' papers, I
25 find no basis whatsoever to conclude that any portion of
26 the monetary awards or the partial final award looked at in

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its totality is irrational. I certainly don't find that there's clear and convincing evidence that the determination was irrational, again, in a 64-page decision analyzing thoroughly the credibility of the witnesses after hearing the testimony, after seeing the videotape. After looking closely at all of the documents, the decision is reasoned. It's not wholesale acceptance of any one party's position, but rather, a detailed analysis in terms of why certain claims were credited, others were not.

Based on that thorough analysis and the standard of review set forth in cases such as NRT N.Y. LLC v. Spell, 166 AD3d, 438, and that's a First Department 2018 case, Franco v. Dweck, 165 AD3d 551, a First Department 2018 case, this award is not subject to vacatur.

I will confirm the decision to the extent that all of the findings are confirmed and the amount of liability is confirmed. However, I am not going to enter any monetary judgment based on the award subject to any clarification by Judge Fried. And that's based on -- well, again, I accept the fact that partial final awards can be subject to a monetary judgment -- entry of a monetary judgment immediately. Here, in the clarification of the award, Judge Fried said:

"Such damages are to be taken into consideration in the final accounting, which will occur after liquidation

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2 in accordance with the Partnership Agreement."

3 So I'm not going to issue or have a judgment
4 entered on any monetary award at this time.

5 This determination is also without prejudice to
6 any clarification that Judge Fried issues with respect to
7 the prejudgment interest because, again, I am unclear as to
8 what Judge Fried intended in terms of proceedings, and
9 since he retains jurisdiction and I'm not entering a final
10 monetary judgment at this time, there is the perfect
11 opportunity to get clarification of that issue one way or
12 the other so I can be sure that I am confirming the award
13 in exactly the manner that was intended.

14 Thank you. Let's move on now to Motion
15 Sequence -- it's a different action, I'm sorry.

16 MR. SCHARF: If I may before that, Your Honor. I
17 would request, Your Honor, Mr. Sullivan said we're
18 currently marketing the property. We're not. We're in a
19 process where the special liquidator has retained a
20 brokerage firm that is in the process of going out to
21 market. I think the plan is to go out and market -- begin
22 the outward facing marketing phase of this at the end of
23 January, the beginning of February. We have weekly calls
24 with the special liquidator, retired Judge Allen
25 Hurkin-Torres, who is overseeing the process.

26 We understand Your Honor's ruling. We intend to

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2 take an immediate appeal of it and seek a stay because
3 especially we don't want the sale process moving forward
4 because we believe it will be harmful to the properties and
5 to the value of the properties if Judge Fried's arbitration
6 award is overturned by the Appellate Division. Therefore,
7 I'm just asking for an interim ten-day period, which will
8 not butt up against the current projected period of time
9 for outward marketing. I'm only seeking a stay for ten
10 days to go to the Appellate Division, so that shouldn't be
11 advanced, Your Honor.

12 THE COURT: I really don't stay my decisions.
13 You can go to the Appellate Division immediately, okay?

14 MR. SCHARF: Thank you, Your Honor.

15 THE COURT: All right. Let's move on. This is
16 Capital Enterprises against Hoppe.

17 MR. MCGOWAN: Your Honor, a point of
18 clarification. As far as the Sachs motion, are you so
19 ordering the transcript so we can also take that to the
20 Appellate Division.

21 THE COURT: Absolutely.

22 And every movant is to get me a copy of the
23 transcript within 30 days and I'll also issue a gray sheet
24 setting forth that the determination is issued in
25 accordance with the ruling that I made on the transcript.

26 Thank you.

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2 MR. MCGOWAN: I will give you our piece as
3 opposed to the whole thing?

4 THE COURT: What was that?

5 MR. MCGOWAN: As far as the Sachs entity
6 argument, I'll give you the transcript portion of that.

7 THE COURT: Wonderful. Yes, you can just eFile
8 the transcript. It's as simple as that.

9 Thank you.


10 MR. MCGOWAN: Thank you.

11 THE COURT: Okay. Let's move on.

12 MR. SULLIVAN: Yes.

13 * * * * *

14 I, Laura L. Ludovico, a senior court reporter for
15 the State of New York, do hereby certify that the foregoing
16 is a true and accurate transcription of my original
17 stenographic notes.

18 

19 Laura L. Ludovico
20 Senior Court Reporter

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NYSCEF DOC. NO. 222

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2	accounted [1] 32/8	any [14] 4/4 4/14 9/4 19/19 22/10 24/6 29/20
2001 [1] 41/13	accounting [11] 32/7 32/16 33/5 33/24 35/11	39/24 42/25 43/8 43/19 43/19 44/4 44/6
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2016 [1] 1/6	accurate [1] 46/16	anything [5] 28/25 33/7 37/6 39/26 41/2
2017 [1] 13/24	acknowledge [1] 31/11	apart [1] 19/13
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