AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

125 East 84th Street Corp. — Claimant

v.

Peter Jones — Respondent

AAA Case No.: 01-15-0003-2126

INTERIM AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with an arbitration provision contained in an agreement entered into between the above-named parties, dated December 28, 2012 ("Agreement"), having been duly sworn, having duly read the proofs and allegations of the Parties, having held an evidentiary hearing on August 31, 2015, with Claimant represented by Robert Braverman, Esq., and Respondent represented by Carl LeSueur, Esq., and having reviewed post hearing submissions, do hereby issue this INTERIM AWARD, as follows:

Background

This arbitration arises from a dispute between Claimant, cooperative housing corporation ("Co-op") owning a building located at 125 East 84th Street, New York, NY ("Building") and Respondent, Peter Jones, a former shareholder in the Co-op and a current shareholder and leaseholder of an apartment on the first floor of the Co-op's building ("First Floor Unit"). In or about December, 2012, Respondent Jones entered into the Agreement in which the Co-op consented to the sale of Respondent's residential apartment on the fifth floor of the Building and to the retention of the First Floor Unit, under certain conditions. The Co-op has had a practice of prohibiting the sale of a residential apartment without selling what the Co-op called the accompanying maids' rooms on the first floor of the Building. Despite the fact that all shareholders appeared to be aware of this requirement, the policy was not set down in writing either in the proprietary lease or any governing documents of the Corporation other than an offering plan.

Nevertheless, Respondent sought an exception from this policy so that he could sell his apartment before the end of the then current year, 2012. Respondent claimed that he was under great pressure to sell as he thought interest rates "were going to go up immediately because we had tax changes in Washington coming up after the first of the year and we had believed there would be great inflation. The other wrinkle was that when my mother was ailing and when she died I would have to repay the money [I had borrowed]." Tr. at 132-133. Respondent also wanted to sell in 2012 to avoid what he thought was an impending increase in the capital gains tax in 2013. Tr. at 134.

The Agreement provided that Respondent could use the First Floor Apartment for eighteen months, but, then, he would have to vacate and sell same either to a shareholder or to the Co-op. The Co-op did not have to purchase the unit for five years, but then the Co-op would have to purchase the First Floor Unit for 75% of its then fair market value. Respondent sold the unit in December, 2012 and continued to use the First Floor Unit. Thereafter, the Co-op attempted to enforce the terms of the Agreement, and, upon Respondent's failure to comply, the Co-op commenced this proceeding pursuant to paragraph 11 thereof. Respondent counterclaimed for a finding that the Agreement is void due to duress, a finding that the First Floor Unit could be used as an apartment for a private dwelling and for additional relief. Each party moved pursuant to paragraph 11 of the Agreement for an award of attorneys' fees.

FINDING

Respondent seeks to have the Agreement vacated based upon duress and seeks to be free to sell the First Floor Unit in the open market as a residential dwelling. Whatever support Respondent may have had in the law or equity with respect to his right to sell each unit independently of the other was waived by Respondent's execution of the Agreement. Respondent failed to establish any economic duress which would otherwise deny him of his free will to refuse to sign the Agreement. *E.g., Duane Morris v. Astor Holdings*, 877 N.Y.S.2d 250 (1st Dep't 2009), *Acquaire v. Canada Dry Bottling*, 906 F. Supp. 891 (E.D.N.Y. 1995), *Austin Instruments v. Loral Corp.*, 29 N.Y.2d 126 (1971).[1] In *Austin Instruments,* the party that exerted the duress did so without any color of authority and the party that agreed to an increase in the purchase price agreed to it without any expectation of additional economic benefit except to avoid a major default under a major contract with a significant customer. Here, the Co-op had a good faith belief that it had the right to link the sale of the residential unit to the sale of the First Floor Unit, even if its belief may have been misplaced. *See, e.g,* Tr. At 40.

In this proceeding, Respondent has fallen far short of establishing the necessary elements of duress to vacate the Agreement. Respondent secured a benefit from the Agreement by accelerating the closing to 2012 and clarified his rights to the First Floor Unit. By selling his residential unit in 2012, Respondent avoided what he perceived as the potential adverse impact of impending inflation, higher interest rates and higher tax rates in 2013. But these fears were insufficient to constitute duress and deny him his free will to refuse to enter into the Agreement. He could have challenged the Co-op's position in court as did the shareholder in the case cited by Respondent's counsel. *See, Milliken v. Hatfield, NYLJ*, July 134, 1993 (Sup. Ct. N.Y.Co. 1993). In that case, the co-op was trying to unlawfully extract money from one of its shareholders; but the shareholder in that case elected to challenge the conduct of the co-op rather than acquiesce and enter into an agreement. The shareholder's approach in that case stands in stark contrast to Respondent's decision not to challenge the Co-op, but to enter into the Agreement herein.

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[1] "To establish that economic duress, or business coercion, induced the formation of a contract, the claimant must allege that he "was subjected to a 'wrongful threat precluding the exercise of ... free will.' " *Warnaco, Inc. v. Farkas,* 872 F.2d 539, 546 (2d Cir.1989) (quoting *Austin Instrument, Inc. v. Loral Corp.,* 29 N.Y.2d 124, 130, 324 N.Y.S.2d 22, 25, 272 N.E.2d 533, 535 (1971)). Stated differently, a party relying on this defense to enforcement of a contractual obligation must show: "(1) a threat, (2) which was unlawfully made, and (3) caused involuntary acceptance of contract terms, (4) because the circumstances permitted no other alternative." *Gulf & Western Corp. v. Craftique Productions, Inc.*, 523 F.Supp. 603, 610 (S.D.N.Y.1981). An additional and essential element of the defense is that the party's acceptance of the contractual terms was "precipitated solely by duress and without hope of personal gain." *National American Corp. v. Federal Republic of Nigeria,* 448 F.Supp. 622, 644 (S.D.N.Y.1978), aff'd, 597 F.2d 314 (2d Cir.1979)." *Acquaire v. Canada Dry Bottling, supra.*

The issues cited by Respondent as generating the elements of duress are common to any seller who has a dispute with a buyer or a cooperative corporation or condominium. *Fear* of rising interest rates, rising taxes or, even, changes in financing are not sufficient duress to deny Respondent of his free will. *See, e.g., Regent Partners, Inc. v. Parrs Development Co..,* 980 F. Supp. 607, (E.D.N.Y. 1997). Respondent may have been right that, without reference in the proprietary lease or the bylaws or some other corporate document, the Co-op had no right to link the sale of the two units and act as it had, but, Respondent elected to waive his right to challenge those corporate documents and the conduct of the Co-op by signing the Agreement; and he cannot, now, disavow that decision. The Agreement was the product of negotiation between at least two attorneys and went through a number of drafts.

The result would have been no different had Respondent reserved his rights under the Agreement. The failure to vacate the Agreement arises not from a failure to reserve his rights, but from Respondent's failure to put forth any substantial basis for establishing duress sufficient to deny Respondent his 'free will." Respondent's failure to move timely to vacate the Agreement simply reaffirms the absence of duress. Respondent was free to challenge the Co-op had he elected to choose that path, but, rather, he elected to settle so that he could sell his apartment within his time frame. He is now bound by that decision. *See, generally, Kojovic v. Goldman,* 35 A.D.3d 65, 823 N.Y.S.2d 35 (1st Dep't 2006).

The Agreement provides quite clearly that the "losing party shall be responsible for the costs charged by the AAA and/or the arbitrator and for the reasonable attorney's fees of the prevailing party." Agreement, ¶11. The Arbitrator has no discretion on this matter. Accordingly, I direct that Respondent pay to Claimant the costs and disbursements of this proceeding in addition to reasonable legal fees.

Thus, by reason of the above, I find as follows:

1. I direct that Respondent pay over to Claimant the moneys due under the proprietary lease through the date hereof, as properly billed, and that Respondent continue to pay over to Claimant the moneys due on a current basis until such time as the First Floor Unit is sold.

2. I find that the Agreement is valid and enforceable pursuant to its terms.

3. I direct that, within one week of receipt of this Interim Award, Claimant provide Respondent with a statement of expenses incurred in this proceeding, including legal fees, and that Respondent have one week within which to object to same. Upon the expiration of three weeks, the AAA shall forward to the Arbitrator the statement of expenses requested, at which time, the Arbitrator shall render a Final Award including legal fees.

4. The above sums are to be paid within thirty (30) days of the issuance of a Final Award.

David M. Rubin — Date: 10/22/2015

I, David M. Rubin, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Interim Award.

David M. Rubin — Date: 10/22/2015