

CITATION: Min Mar Group Inc. v. Belmont Properties LLC, 2010 ONSC 1814
COURT FILE NO.: CV-09-381678
MOTION HEARD: 20100311

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Min Mar Group Inc., Plaintiff

AND:

Belmont Partners LLC and Joseph Meuse, Defendants

BEFORE: Master Sproat

COUNSEL: F.S. Hawa, counsel for the Plaintiff

O. Niedzviecki, counsel for the Defendants

HEARD: March 11, 2010

REASONS FOR DECISION

- [1] On March 11, 2010, I heard a motion by the plaintiff for an order recognizing the Award of Arbitrator John P. Connolly (the "Arbitrator") dated January 11, 2010 in the Matter of an Arbitration between Belmont Partners LLC ("Bellmont"), Mina Mar Group Inc. ("Mina Mar") and Miro Zecevic (the "Award"). Following the recognition of the Award by this court, the plaintiff then sought an order staying the enforcement of the Award until the completion of the transfer of certain securities by Belmont to Mina Mar and, further, an order varying the Award to provide that the terms of the Award be completed within 30 days of the transfer of the said certain securities.
- [2] The parties consented to an order that the Award be recognized by this court and I endorsed the record to that effect accordingly.
- [3] The parties were opposed as the balance of the motion. Upon hearing from counsel for the parties, I dismissed the balance of the motion and ordered costs to the responding parties fixed in the amount of \$3,150 payable within 30 days, for reasons to follow. These are my reasons.
- [4] The background facts are not in dispute. The dispute between the parties emanates from three agreements for the sale of certain shares of VShield Software Corp. ("VSC"), Aztec Technologies Partners, Inc. ("Aztec") and King Resources, Inc. ("King"). Belmont alleged that Mina Mar failed to pay the amounts owing for the shares and on July 19, 2009, Belmont commenced an arbitration with the American Arbitration Association in Virginia, pursuant to terms

of the various share purchase agreements. Mina Mar counterclaimed against Belmont in the arbitration.

- [5] Prior to the commencement of the arbitration, Mina Mar had issued the within action on June 24, 2009. Mina Mar did not serve the statement of claim in this action until after the commencement of the arbitration. The allegations in the statement of claim in this action are substantially the same as the allegations in the arbitration.
- [6] This action did not proceed as a result of the settlement negotiations between the parties and further, as a result of a procedural order made August 19, 2009 by the Arbitrator concerning jurisdiction.
- [7] On or about October 23, 2009, the parties settled their dispute. By about December 7, 2009, Belmont took the position that Mina Mar had failed to fulfill the terms of the settlement agreement and brought a motion to enforce the settlement. In response, on December 14, 2009, Mina Mar brought a motion for judgment against Belmont, seeking a variety of relief including the delivery of the share certificates and an order that Mina Mar would comply with the settlement agreement.
- [8] On January 11, 2010, the Arbitrator issued the Award and required Mina Mar to comply with paras. 1 to 4 of the settlement agreement, which the Arbitrator appended to the award. The Arbitrator expressly provided that the award was in full settlement of all motions, claims, and counterclaims submitted to the arbitration and that all claims not expressly granted were denied.
- [9] Upon the hearing of the motion, the court was informed that Belmont had initiated contempt proceedings against Mina Mar in Virginia, on the basis of Mina Mar's failure to comply with the terms of the Award. Counsel for Mina Mar candidly submitted that this motion was brought in part, if not primarily, to fend off and answer the pending contempt proceedings in Virginia, which had not yet been scheduled for hearing.
- [10] It is in this context that the motion was brought.
- [11] I summarize these reasons as follows:
- The essence of the relief sought by Mina Mar was a variation of the Award. This court does not have jurisdiction to review or vary a final award of the Arbitrator. Additionally, the principles of *res judicata* apply, in light of the fact that Mina Mar has raised the same issues before the Arbitrator, without success.
 - Mina Mar is attempting to vary the terms of the settlement agreement. This court has no jurisdiction to impose additional terms on the basis of Mina Mar's alleged mistaken belief that Belmont had failed to transfer the shares to Mina Mar. If this

issue was a live issue, it ought to have been included as a term of the settlement agreement. This court cannot intervene to rectify Mina Mar's oversight.

- This motion was brought for an improper purpose of avoiding the consequences of Mina Mar's failure to comply with the Award. The court process in Ontario ought not be used as a "shield" to proceedings properly taken in another competent jurisdiction.
- There is no basis to stay the Award (or "order") in Ontario. The stay is sought for the principal reason of supporting Mina Mar's position in the Virginia contempt proceedings.

[12] Section 11 of the International Commercial Arbitration Act, R.S.O. 1990, c. 19 provides for the mechanism to enforce an arbitral award. It provides that an arbitral award recognized by the court is *enforceable* in the same manner as a judgment or order of the court. To my mind, the authority to recognize an arbitral award is for the purpose of enforcing the terms of the arbitral award. It is not open to the court to review or vary the award. Section 11 clearly speaks to enforcement.

[13] Rule 59 of the Rules of Civil Procedure does not confer authority on this court to amend or vary an arbitral award, once recognized by the court. If the plaintiff's submission in this regard were accepted, any party to any arbitral award could approach any court in any jurisdiction that would recognize the arbitral award to seek relief that he or she might otherwise not be entitled to under the arbitral proceedings in question. I see rule 59 as conferring jurisdiction to vary orders made – as opposed to recognized - by this court.

[14] In this case, Mina Mar has recourse to the Arbitrator pursuant to article 33 of the UNCITRAL Model Law on International Commercial Arbitration. There is limited recourse to the court by article 34 on certain specified grounds, none of which apply here, and it is my view that such recourse would be to the superior court in Virginia and not Ontario, since the arbitration proceeded in Virginia.

[15] *Res judicata* applies since Mina Mar has sought substantially the same relief sought on this motion in the motion to the Arbitrator. Given that the Arbitrator refused the relief, I fail to see how this court can intervene where the Arbitrator refused to do so. This court has no jurisdiction to alter or interfere with the terms of the Award.

[16] There was clearly an issue between the parties as to whether the shares had been transferred and this allegation was raised by Mina Mar in its counterclaim in the arbitration and in the statement of claim in this action. The issue could have been, but was not, addressed in the terms of the settlement agreement. This court cannot rectify Mina Mar's oversight, if indeed there was one.

[17] Lastly, it was my view that the within motion would, if successful, serve the primary purpose of protecting or shielding Mina Mar from the consequences of failing to comply with the Award. This court process ought not be used to avoid sanction in another forum of competent jurisdiction. There was no basis for the stay of enforcement that I could discern on the record.

Master Sproat

Date: March 26, 2010