

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORKIn the Matter of the Application of
G.K. LAS VEGAS LIMITED PARTNERSHIP,

Petitioner,

to compel arbitration against
BOIES SCHILLER & FLEXNER LLP,

Respondent.

Index No. 651632/2010

**CORRECTED VERIFIED
PETITION
TO COMPEL ARBITRATION**

Petitioner G.K. Las Vegas Limited Partnership (“GKLV”), by and through its attorneys, Kennedy Johnson Gallagher LLC, as and for their petition for an order (i) compelling arbitration pursuant to CPLR §§ 7502-03, (ii) appointing the American Arbitration Association as arbitrator pursuant to CPLR § 7504 and 9 U.S.C. §5, and (iii) ordering Respondent to deposit certain disputed attorneys’ fees into an interest-bearing escrow account pursuant to NYCRR 1200.15(b)(4), state and allege as follows:

Nature of the Dispute

1. The renowned trial lawyer David Boies (“Boies”) and his firm, respondent Boies Schiller & Flexner LLP (“BSF”), are not above the law. Petitioners bring this special proceeding to compel BSF to participate in a fee arbitration that Petitioner commenced by filing a Demand for Arbitration (“Demand”) with the American Arbitration Association (“AAA”), on September 15, 2010 pursuant to a binding arbitration clause (“Arbitration Clause”) contained in a retainer agreement under which BSF agreed to provide legal services to GKLV (“Retainer Agreement”). A copy of the Demand for Arbitration, together with the Retainer Agreement, is attached hereto as Exhibit A.

2. BSF, in a blatant and disloyal act of forum shopping, has ignored the Demand and moved before a Nevada State Court for the appointment of an arbitrator, strongly suggesting that the Court appoint a retired federal judge who mediated the settlement of the underlying litigation and who, therefore, should have no involvement at all in a fee arbitration. BSF's unjustifiable refusal to participate in the AAA proceeding commenced by Petitioner is a breach of its contractual and ethical obligations to Petitioner, and its end-around attempt to persuade a Nevada court to designate an arbitrator of BSF's choice is contrary to the public policy of this State.

3. Petitioner also seeks to require BSF to deposit the disputed fees, paid under protest, in a separate, interest-bearing escrow account ("**Segregated Escrow Account**") until the fee disputed is finally resolved. BSF's refusal to segregate the disputed fees from other BSF funds violates section 1200.15(b)(4) of the New York Code of Rules and Regulations (the "**Rule**"), and provides a ground for suspension from practice under the Rule as construed by the Appellate Division, First Department.

4. The Arbitration concerns a fee dispute between Petitioner and BSF, who agreed that Boies would serve as Petitioner's lead counsel in a now-settled federal court action¹ ("**Nevada Action**"). Having already paid BSF about \$5,000,000.00 in hourly fees, Petitioner has disputed BSF's entitlement to another \$5,045,000 in hourly and contingent fees (the "**Disputed Fees**"). Petitioner contests that such Disputed Fees are owed because, among other reasons, BSF breached its agreement that Boies would serve as lead counsel, and otherwise repeatedly shirked its professional responsibilities to Petitioner. Not only did Petitioner hire and pay substantial fees for co-counsel to handle tasks assigned to BSF, worse,

¹ *G K. Las Vegas Limited Partnership v. Simon Property Group, Inc., et al.*, Case No. CV-S-04-1199-DAE (GWF).

Petitioner lacked such confidence in BSF, and in Boies' commitment to serve as lead counsel, that it settled its Nevada Action claims for a fraction of their value shortly after Boies advised the trial judge that he would not make himself available to try the case as scheduled. Even if BSF's conduct were not a material breach of its Retainer Agreement, the contingency fee should be eliminated or reduced under New York law as "disproportionate to the value of the services rendered."

5. The parties' fee dispute falls squarely within the scope of the Arbitration clause, which requires binding arbitration of "any dispute arising out of or related to . . . [BSF's] representation" of Petitioner. However, because the Arbitration Clause does not specify the forum for arbitration of the parties' dispute, the AAA has indicated that it cannot proceed with the Arbitration absent *either*: (i) consent from BSF to arbitrate before the AAA, or (ii) a court order appointing the AAA as arbitrator. Although BSF has advised the Nevada court that it objects to the AAA serving as the arbitral forum, it has provided no reason for the objection and it should be compelled to participate in the Arbitration.

6. BSF should also be compelled to deposit the Disputed Fees, paid to BSF under protest, into an interest bearing escrow account pending the outcome of the Arbitration. Petitioner informed BSF, shortly before settling the Nevada Action, that it contested BSF's entitlement to the Disputed Fees. BSF, however, reacted by demanding that a clause be included in the settlement agreement in the Nevada Action ("**Nevada Settlement Agreement**") requiring that a portion of the proceeds from that settlement, representing the full amount of Disputed Fees, be wired directly to BSF. Petitioner objected to this arrangement, but ultimately consented to allow the proceeds to be wired to BSF, while demanding that BSF immediately deposit the Disputed Fees into Segregated Escrow Account

pending the resolution of the parties' fee dispute. BSF refused to do so, based apparently on Boies' unilateral assessment that "the amount to be wired to our firm is due our firm and belongs to our firm."

7. The Rule imposes an unwavering statutory obligation on BSF to deposit the Disputed Fees into a Segregated Escrow Account until the parties' fee dispute is finally decided. On information and belief, BSF has deposited the Disputed Fees into its general account, where they are being comingled with BSF's own funds, and may well have been distributed as profits to partners. Accordingly, Petitioner is entitled to an order requiring BSF immediately to deposit an amount equal to the Disputed Fees into a Segregated Escrow Account pending the final outcome of the Arbitration.

Parties

8. Petitioner GKLV is limited partnership organized under the laws of the State of California with its principal offices in Connecticut. GKLV is managed by Sheldon Gordon ("Gordon") in his role as President of Gordon Group Holdings., Ltd. GKLV's general partner. Gordon is a pioneer in the development of retail entertainment space.

9. Respondent BSF is limited liability partnership engaged in the practice of law in New York and elsewhere.

Jurisdiction and Venue

10. Jurisdiction is proper pursuant to CPLR §§ 301 and 302 because BSF resides in and is doing business in the state of New York.

11. Venue is proper pursuant to CPLR §7502(a)(i), because BSF is doing business in New York County.

Background

A. The Retainer Agreement and Arbitration Clause

12. The issues that Petitioner seeks to arbitrate arise out of BSF's agreement, in 2003, to represent Petitioner in the dispute that gave rise to the Nevada Action. In the Nevada Action, Petitioner sought, among other things, to rescind an agreement to sell its interest in a project for the development of a shopping center in Las Vegas.

13. To encourage Petitioner to retain Respondent as counsel, Boies met personally with Gordon in about 2003, and agreed to serve as Petitioner's lead counsel. This agreement was important to Petitioner, in light of the complexity (and considerable value) of Petitioner's claims, because Boies has a reputation as a uniquely skilled and experienced litigator, and because a trusted colleague of Gordon had specifically recommended Boies.

14. On May 22, 2004 the parties executed the Retainer Agreement, which provides that BSF "would be pleased to accept the representation of [GKLV]," in connection with the Nevada Action, and that "[w]e shall assume the role of determining the legal strategy, prosecuting any litigation, conducting discovery, and handling all other aspects of case management."

15. The Retainer Agreement contains an Arbitration Clause, which states that "[w]e and you agree that any dispute arising out of or related to the retention or the Firm's representation will be resolved by binding arbitration." The Arbitration Clause does not specify any particular forum in which the "binding arbitration" should take place. BSF drafted the Arbitration Clause, with no input from Petitioner. At no time did BSF disclose that the Clause in any way permitted BSF to determine the identity of the Arbitrator or to select the arbitral forum.

16. As initially negotiated, the Retainer Agreement provided for compensation to BSF in the form of: (i) “a one-time engagement fee of \$250,000,” which was to be “non-refundable,” (ii) “hourly rates for the Firm’s lawyers and other personnel, discounted to 80% of our standard fees,” and (iii) a “success fee” consisting of 10% of “the total recovery, less \$250,000.” The non-refundable aspect of the Retainer Agreement was itself a breach of BSF’s ethical duties to its client, as NYCRR § 1200.5 prohibits attorneys from charging or collecting “a nonrefundable retainer fee.”

C. BSF and Boies Repeatedly Breach their Obligations to Petitioner

17. Having agreed to serve as lead counsel, Boies promptly turned the matter over to a less experienced “counsel” and junior associates, and when the “counsel” took a leave of absence for health reasons, BSF had no senior lawyer paying any meaningful attention to the matter at all. Accordingly, Petitioner, in about January 2007, obtained assistance from another law firm, Davis Polk & Wardwell, LLP (“**Davis Polk**”). For approximately two years, Davis Polk took primary responsibility for representing Petitioner in the Nevada Action, charging its regular hourly rates and billing more than \$7.6 million.

18. By 2008, Petitioner’s litigation budget was depleted, even though the Nevada Action had not yet passed the summary judgment phase. Unable to continue paying Davis Polk’s monthly fees, Petitioner requested that BSF fulfill its professional obligations to Petitioner, with Boies renewing his commitment to serve as lead counsel. Recognizing that Petitioner lacked the cash to pay even discounted monthly fees, Boies used the opportunity to increase BSF’s percentage “success fee,” agreeing to forego billing any further hourly fees except for limited work to be done by BSF’s Nevada office.

19. The parties reflected this agreement in a November 5, 2008, amendment to the Retainer Agreement (“**Amended Fee Provision**”). Under the Amended Fee Provision, Petitioner was excused from paying the hourly rates of the attorneys in BSF’s New York and Armonk offices, but agreed to pay 80% of the hourly rates of the attorneys in BSF’s Las Vegas office. This arrangement was acceptable to Petitioner because BSF promised that its New York and Armonk office, where Boies was based, would perform the substantive legal work. The Amended Fee Provision granted BSF a “success fee” calculated as a percentage of Petitioner’s “total recovery”; but, unlike the original Retainer Agreement, the Amended Fee Provision did not deduct from the “success fee” the \$250,000 “non-refundable” engagement fee. Ex. A. All other provisions of the Retainer Agreement were to “remain in effect.”

20. Despite his renewed promise and agreement to serve as lead counsel, Boies continued to neglect the Nevada Action. For example, he skipped one mediation session and arrived four hours late to another session, attended by a retired federal judge, counsel for both parties, and the Nevada defendant’s President. Worse, Boies destroyed any semblance of credibility he had as lead counsel by reporting to the mediation attendees that he was “stuck on the tarmac” at the Los Angeles airport when, as the attendees learned shortly thereafter while watching television, Boies was giving a live interview broadcast over CNN. That conduct prompted opposing counsel to write a letter to the trial judge detailing Boies’ apparent dishonesty, and criticizing Petitioner’s commitment to the mediation process.

21. Boies also abruptly departed, without explanation, a meeting to prepare him to argue a critical summary judgment motion, forcing Petitioner to hire Davis Polk to prepare for and make the argument on just days’ notice, for which Davis Polk billed Petitioner.

22. BSF also took advantage of Petitioner's agreement to pay hourly fees for what they had agreed would be limited services to be provided by BSF's Nevada office, directing its Nevada office, rather than its Armonk or New York City offices, to perform the majority of the substantive work done by BSF in the Nevada Action, and charging Petitioner substantial hourly fees that were not contemplated upon the execution of the Amended Fee Provision.

23. Boies' failure to participate in the Nevada Action was so conspicuous that, at a hearing in 2009 (BSF was hired in 2003), the trial court was still unsure about the identity of Petitioner's lead counsel, as evidenced by the following exchange with an attorney from BSF:

THE COURT: . . . are you lead counsel for [Petitioner]?

MR. POCKER: I'm one of many counsel, your Honor.

THE COURT: I know. But I asked are you lead counsel?

MR. POCKER: I'm not lead counsel. No, your Honor.

THE COURT: Okay. Who is lead counsel?

MR. POCKER: David Boies.

THE COURT: Is he going to be here at trial?

MR. POCKER: He'll be here at trial. Absolutely.

24. Yet, on April 28, 2010, Boies sent a letter, without notifying Petitioner, let alone obtaining its consent, advising the Court that he would not be available as lead counsel for the scheduled September 7, 2010 trial date because he was scheduled to try another case with more money at stake. He wrote:

This is, as I hope you understand, an embarrassing letter for me to write. We have received the Court's order rescheduling the trial in the *G.K. Las Vegas LP v. Simon Property Group, Inc.* matter to commence September 7. I recognize that that trial setting was the Court's accommodation to the fact that I had a trial scheduled before Judge Rakoff at the time that your honor originally set our trial to begin.

Unfortunately, the two weeks commencing September 7 is a time that I am in trial before Judge Peck in the Southern District of New York Bankruptcy Court, in a case in which the Trustee and Creditors Committee of the Lehman Brothers Bankruptcy Estate are seeking to recover between \$8 and \$12 billion from my client, Barclays Bank. Because that trial was previously set and because of the number of parties involved and the significance of the matter to the debtor's estate, I have been unable to arrange to delay or advance that trial.

25. Boies' express abandonment of his role as lead counsel was highly prejudicial to Petitioner. Because the Nevada Action trial judge was based out of Hawaii, there was no other available trial date until the following June. Believing that it was against its interest to adjourn the trial date until the Spring of 2011, and having lost all confidence that Boies would actually serve as lead counsel in any event, Petitioner settled the matter for much less than BSF had recommend as the settlement value.

D. Petitioner Disputes Respondent's Entitlement to the Disputed Fees

26. Before executing a settlement of the Nevada Action, Petitioner told Boies and his partner, Richard Weill, that it did not believe BSF was entitled to the full amount of its claimed hourly and contingent fees because BSF had neglected its obligations as counsel.

27. Boies reacted by insisting that a portion of the settlement proceeds, representing the full amount of the Disputed Fees, be wired directly to BSF by the defendant in the Nevada Action, stating in an email that "we are not taking the risk that we will not be paid all we are owed." Petitioner initially objected, but ultimately consented to have the Disputed Fees wired directly to BSF while simultaneously notifying BSF via email that it disputed BSF's entitlement to said fees and requesting that BSF immediately deposit those funds "in a trust account for [Petitioner]," pending resolution of the fee dispute, to prevent the "improper comingling of [Petitioner's] settlement proceeds with other funds."

28. Petitioner's general counsel asked Boies, via email, "[w]hen can I expect an email from you . . . setting forth BSF's position regarding the escrow issue"; in response, Boies unilaterally declared that ". . . the amount to be wired to our firm is due our firm and belongs to the firm. . . . we do not believe that what account of the firms receives the wired funds is relevant to you." In taking that stance, Boies and BSF breached the Rule, and its ethical obligations to Petitioner.

E. The Demand for Arbitration and Related Correspondence

29. On September 15, 2010, Petitioner commenced the Arbitration. The Demand identifies the amount of the claim as \$5,045,000.00, and describes the Nature of the Dispute, as follows:

Having paid Respondent approximately \$5,000,000.00 in legal fees, Claimant seeks a determination that Respondent is not entitled to another \$5,045,000.00 in hourly and contingency fees demanded by Respondent on the grounds, among others, that Respondent materially breached its legal obligations to Claimant, that Respondent and, particularly, lead counsel David Boies, abandoned its representation of Claimant and that the contingency fee demand is "disproportionate to the value of the services rendered.

30. Along with a copy of the Demand, Petitioner sent BSF a letter, dated September 15, 2010, once again requesting that the Disputed Fees be deposited into an interest bearing escrow account pending the resolution of the fee dispute. A copy of this September 15, 2010 letter is attached as Exhibit B.

31. The September 15, 2010 letter quotes from the Rule, which imposes an affirmative obligation on "[a] lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law" to maintain those funds "in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm." The Rule further states that:

Funds belonging in part to a client or third party and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due **unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.**

Id. § 1200.15(b)(4) (emphasis added).

32. The September 15, 2010 letter states in part:

We understand that GKL V unmistakably notified your firm that it disputed your firm's claimed entitlement to \$5,045,000 in unpaid fees, above the approximately \$5,000,000.00 in fees already paid, and demanded, consistent with the Rule, that your firm place the settlement agreement proceeds in a separate, interest bearing account until this dispute is finally resolved. *See, e.g.*, Emails dated August 27, 2010 to Richard Weill, Esq. Your firm was obliged to honor that request. In any event, given our filing of the Demand for Arbitration, there can be no question over the fact that GKL V disputes your firm's claimed entitlement to the disputed fees, and that your firm must, therefore, comply with the Rule.

33. After receiving the Demand, the AAA notified the parties that, because the Arbitration Clause does not identify the AAA as the arbitral tribunal, it would close the case unless BSF consented within one week to proceed with the arbitration before the AAA. BSF has refused to so consent.

34. BSF has also refused to confirm that a sum equal to the Disputed Fees – or that many of the fees it has collected from Petitioner—has been deposited into a segregated, interest bearing escrow account. Rather, by letter dated September 20, 2010, Boies claimed confusion over the amount of fees in dispute, and refused to confirm that any fees are being held in a separate escrow account. A copy of BSF's September 20, 2010 letter is attached as Exhibit C.

35. By letter dated September 22, 2010, Petitioner's counsel disputed that there were any legitimate question over the amount of the Disputed Fees. Petitioner's counsel stated:

Both my letter and its accompanying Demand for Arbitration clearly state that GLKV disputes your firm's entitlement to \$5,045,000 in fees. To borrow your phrase, you and your firm are therefore "on notice" (and have been on notice) that \$5,045,000.00 is the amount of fees in dispute. As we understand it, this includes both the contingency portion of the parties' fee arrangement, as well as fees billed for services rendered by your Las Vegas office that exceeded the parties' mutual understanding of the limited role to be played by that office.

Having now clarified any purported confusion over the amount of fees in dispute (*i.e.*, \$5,045,000.00), we ask again that you confirm that your firm has placed this entire amount in a segregated, interest-bearing escrow account, as required by the Rule, and that such disputed fees will remain in said account until the dispute is finally resolved. Your failure to confirm this request will result in our seeking judicial intervention, and in GLKV's instituting disciplinary proceedings against your firm. We certainly hope that such measures can be avoided.

A copy of the September 22, 2010 letter is attached as Exhibit D.

F. The Nevada Motion

36. BSF and Boies have not responded to the September 22, 2010 letter. Rather, on September 29, 2010, BSF purportedly commended a proceeding against GKL V, Gordon Group, Holdings, Ltd. and Sheldon Gordon in the District Court for Clark County, Nevada by filing a Motion for an Order Pursuant to NRS 38.226(1) for the Appointment of an Arbitrator ("**Nevada Motion**"). The Motion alleges that Petitioner had commenced the Arbitration, and states that, "while BSF agrees to arbitrate the fee disputes with GKL V and Gordon, BSF is not willing to submit this dispute to the American Arbitration Association in New York." In yet another example of BSF's dishonesty in its dealings with its client, the motion also falsely declares that Petitioner's Demand "did not specify the specific portion of the fees paid which

were in dispute or the legal grounds for this dispute.” A copy of the Nevada Motion, together with exhibits, is attached hereto as Exhibit E.

37. By filing the Motion, BSF is angling for the appointment of former United States District Judge Layn R. Phillips, who served as the mediator in the Nevada action, as the arbitrator here. BSF seeks to justify former Judge Phillips’ appointment on the ground that the arbitration would purportedly involve the details of the confidential settlement, and that former Judge Phillips’ appointment would not raise any confidentiality concerns because he is already privy to the confidential information. Yet, Petitioner is opposed to former Judge Phillips’ appointment precisely because he was involved in mediating the settlement, and it would be nearly impossible for him to resolve the arbitration based on his review of the evidence, rather than on views he may have formed as a result of his participation in the mediation. Neither Boies nor BSF ever disclosed to Petitioner, when Petitioner consented to former Judge Phillips’ designation as mediator, that former Judge Phillips could somehow be involved in arbitrating the parties’ fee dispute.

COUNT I
(CPLR § 7502-04)

38. Petitioner incorporates by reference the foregoing averments of this Petition.

39. The Retainer Agreement contains a valid and binding Arbitration Clause, which provides that “any dispute arising out of or related to. . . [BSF’s] representation [of Petitioner] will be resolved by binding arbitration.”

40. The Arbitration Clause does not specify any particular arbitral tribunal or any method for selecting an arbitrator.

41. Pursuant to the Arbitration Clause, Petitioner commenced the Arbitration against BSF, before the AAA, on September 15, 2010.

42. The issues raised in the Arbitration fall squarely within the scope of the Arbitration Clause, because Petitioner seeks a determination as to BSF's entitlement to the Disputed Fees, which BSF claims to have earned, pursuant to the Retainer Agreement, as compensation for its "representation" of Petitioner.

43. BSF has failed to comply with the Arbitration Clause by refusing to participate in the Arbitration or otherwise consent to proceed before the AAA.

44. By angling to appoint the Nevada Action mediator as arbitrator by means of the Nevada Motion, BSF seeks to violate the public policy of this State, which prohibits the use of an arbitration clause as a means of choosing an attorney's favored form for resolving a fee dispute.

COUNT II
(NYCRR 1200.15)

45. Petitioner incorporates by reference the foregoing averments of this Petition.

46. In about August 2010, the Disputed Fees, in the amount of \$5,045,000, were wired, under protest by Petitioner, directly to BSF under the terms of the Nevada Settlement Agreement.

47. BSF has claimed that it is entitled to the Disputed Fees as compensation for legal services performed pursuant to the Retainer Agreement.

48. Petitioner has raised an arbitrable dispute challenging BSF's entitlement to the Disputed Fees.

49. Petitioner has repeatedly requested that BSF comply with the Rule by depositing the full amount of the Disputed Fees into a segregated, interest bearing escrow account pending the resolution of the parties' fee dispute, but BSF has refused to do so.

50. The Rule requires that BSF deposit full amount of the Disputed Fees into a segregated, interest bearing escrow account, pending the final resolution of the parties' fee dispute.

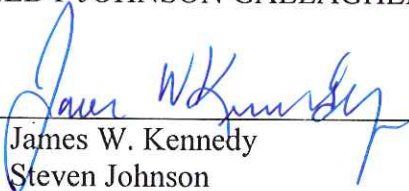
51. No previous application for the relief requested herein has been sought or granted.

WHEREFORE, Petitioner respectfully requests that this Court grant their Verified Petition for an order (i) compelling BSF to participate in the Arbitration, (ii) appointing the American Arbitration Association as arbitrator, and (iii) ordering BSF to deposit \$5,045,000 into an interest-bearing escrow account pending the resolution of the Arbitration. A proposed order and a supporting memorandum of law are submitted herewith.

Dated: New York, New York
October 7, 2010

KENNEDY JOHNSON GALLAGHER LLC

By: _____


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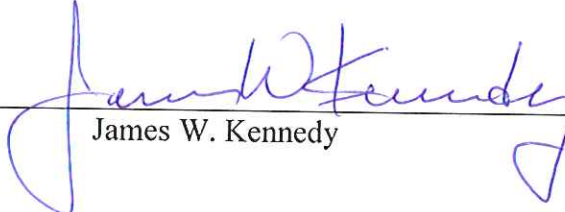
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ATTORNEY VERIFICATION

JAMES W. KENNEDY states as follows:

1. I am a member of Kennedy Johnson Gallaher LLC, counsel for G.K. Las Vegas Limited Partnership (“GKLV”), Petitioner in this proceeding.
2. GKLV’s principal offices are located in Greenwich, Connecticut.
3. I have read the annexed Corrected Verified Petition to Compel Arbitration and know the contents thereof; the corrections reflect errors that had been brought to my attention by our client in providing his initial verification, but that were inadvertently left uncorrected in the filed petition.
4. I hereby verify that the contents of the Corrected Verified Petition are true and accurate based upon my knowledge of those matters as to which I have personal knowledge, discussions with my client, and my review of pertinent documents.
5. I make this verification pursuant to CPLR § 3020(d)(3), because GKLV is not located within New York County, which is the county where Kennedy Johnson Gallagher LLC has its office.

Dated: New York, New York
October 7, 2010


James W. Kennedy