

Cenni v Cenni

2020 NY Slip Op 33221(U)

September 30, 2020

Supreme Court, New York County

Docket Number: 656216/2019

Judge: Carol R. Edmead

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

ADRIAN CENNI,

Plaintiff,

- v -

REBECCA CENNI, ATRIUM STAFFING LLC, ATRIUM STAFFING OF NEW JERSEY LLC, ATRIUM STAFFING OF CALIFORNIA LLC, ATRIUM PAYROLL SERVICES LLC, ATRIUM AVIATION SERVICES LLC, ATRIUM MANAGED SERVICES LLC, ATRIUM STAFFING SERVICES LTD.

Defendant.

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INDEX NO. 656216/2019
MOTION DATE 9/24/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 33, 34, 35, 41, 42

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

ORDERED that defendants' motion to compel arbitration and to stay this action is granted; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that plaintiff Adrian Cenni shall arbitrate his claims against defendants in accordance with the operating agreement; and it is further

ORDERED that all proceedings in this action are hereby stayed except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate and modify this stay upon the final determination of the arbitration; and it is further

ORDERED that counsel for defendant shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this commercial action, all named defendants move for an order, pursuant to CPLR 7503 (a), compelling arbitration of plaintiff's claims alleged herein, or, in the alternative, staying the nonarbitrable claims, which seek equitable relief, pending arbitration of the remaining claims.

BACKGROUND FACTS

Adrian Cenni (ACenni) and Rebecca L. Cenni (RCenni) are former spouses and co-owners of the Atrium Entities, a group of limited liability companies and one corporation, each of which is governed by an Amended and Restated Operating Agreement (the operating agreement). All of these operating agreements contain an arbitration provision mandating arbitration of all legal claims "arising . . . with respect to" the agreements (the arbitration clause).

The language of the arbitration clause is identical in all of the operating agreements:

"Any claim, controversy or dispute arising between the parties with respect to this Agreement (a "Dispute"), to the maximum extent allowed by applicable law, shall be submitted to and finally resolved by, binding arbitration. . . . The arbitrator shall render a decision within 10 days of the completion of the hearing, which decision may include an award of legal fees, costs of arbitration and interest. . . . The decision of the arbitrator shall be final, binding and conclusive upon the parties. Each party shall have the right to have the decision enforced by any court of competent jurisdiction. Notwithstanding any other provision of this Section, any Dispute in which a party seeks equitable relief may be brought in any court having jurisdiction"
(Mahler affirmation, exhibit A, § 13.02.)

The operating agreements do not contain any conditions precedent to arbitration. RCenni is the 51% managing member and Chief Executive Officer of Atrium Staffing LLC, Atrium Payroll Services, LLC, Atrium Managed Services LLC, Atrium Staffing of California, LLC, and Atrium Staffing of New Jersey, LLC. RCenni is the 51% shareholder and sole director of Atrium Staffing Services Ltd., and plaintiff is the 49% member, officer, and shareholder of the Atrium Entities.

In 2016, the parties had a dispute concerning the enforceability of a management contract ACenni had entered into on behalf of the Atrium Entities. In a 2017 arbitration of that dispute, RCenni alleged that ACenni attempted to bind the Atrium Entities in unauthorized service agreements with his wholly owned United States Virgin Islands company. The arbitrator ruled that ACenni did not have the authority to enter into those service agreements on behalf of the Atrium Companies. In a January 4, 2018 “Disposition of Motion,” the arbitrator found:

“The organizational and operating documents of the Atrium Companies uniformly support Claimant’s allegation that she is the majority owner and sole managing member of the Atrium Companies; and, as such, she is singularly responsible for approving all contracts and agreements entered into by the Atrium companies. “Atrium VI” is not one of the Atrium companies; rather, it was formed by Respondent in the US Virgin Islands with Respondent as its sole member. Respondent is also the 49% owner and President of the Atrium Companies”

(Mahler affirmation, exhibit H, at 8).

In a March 21, 2018 Final Award, the arbitrator declared and decreed that:

“c. [ACenni] lacks authority to make or enter into any contract, agreement or other arrangement with a counterparty in which he has a direct or indirect ownership interest without the approval of [RCenni].

2a. The Removal Resolution is valid and binding on [ACenni]; b. Respondent is removed as the Atrium Companies' "President - Operations", effective November 7, 2017; c. Respondent has no authority or involvement in connection with the Atrium Companies' day-to-day operations, including, but not limited to, human resources, finance, sales, operations, marketing, information technology, purchasing, and leasing of facilities or equipment; d. Respondent has no authority to interfere with Claimant's authority as Majority Member to effectuate a "Change of Control" as such term is defined in Section 1.08 of the Atrium Companies' operating agreements; and e. Respondent is i. Prohibited from entering the Atrium Companies' offices or other premises without the expressed consent of Claimant; ii. Not authorized to have remote access to the Atrium Companies' electronic files and servers, including e-mail; and iii. Not authorized to communicate with any officer, employee, client, customer, or vendor of the Atrium Companies in connection with the Atrium Companies' business affairs. 3. Claimant's Second Cause of Action is GRANTED, and Respondent shall pay to Claimant the sum of \$196,500.00 within thirty days of the date of this Award, plus interest at the New York legal rate from the date of this Award until said sum is paid in full”

(Mahler affirmation, exhibit H at 12).

In a November 15, 2018 decision, the arbitration award was confirmed by the Honorable W. Franc Perry of the Supreme Court, New York County (Mahler affirmation, exhibit I). That decision was affirmed by the Appellate Division, First Department (*Cenni v Cenni*, 180 AD3d 509 [1st Dept 2020]). This affirmance does not affect the decision.

In his complaint herein, ACenni essentially seeks recognition as a managing member of the Atrium Entities. Since the arbitrator rendered his decision, ACenni has not been permitted on the physical grounds of any of the Atrium Entities' offices, he has been unable to access email and the computer systems for the companies, he is not provided any notice of company action, not given the right to deliberate nor vote on any company action, not given timely reporting and accounting information, and not given any information about day-to-day business affairs at the companies he founded.

Plaintiff's first cause of action seeks to hold RCenni liable for breach of fiduciary duty by allegedly impeding ACenni from performing his duties as a managing member; Plaintiff's second claim seeks a declaratory judgment "clarifying" that ACenni is a managing member; and ACenni's third claim seeks a permanent injunction directing RCenni to perform her fiduciary duties and recognize ACenni as a managing member. ACenni's fourth claim seeks contractual indemnification for the judgement and attorneys' fees incurred in the 2017 arbitration and subsequent litigation, and ACenni's fifth cause of action seeks, without any support, attorneys' fees in connection with this lawsuit.

The crux of the complaint is set forth in the allegations concerning ACenni's managerial rights in the Atrium Entities:

"The remaining judgment against the Plaintiff did not and could not dispense with the Plaintiff's liabilities, rights, and duties in his capacity as a "Managing Member" of the Defendants Atrium Entities, deriving from the parties' Operating Agreement and deriving from the various relevant state laws governing the Atrium Entities.

Therefore, the Plaintiff retains all the rights and duties as the Managing Member of the Defendants Atrium Entities that derive from the parties' Operating Agreement and from the relevant state laws under which the Atrium Entities were organized.”

(complaint, paras. 30-31).

ACenni has brought this action against RCenni and the Atrium Entities seeking, *inter alia*, a declaratory judgment and injunctive relief against all defendants concerning his rights as a managing member.

DISCUSSION

RCenni moves to compel arbitration with regard to the claims set forth in the complaint, arguing that the arbitration clause in the operating agreements mandates arbitration of those claims. RCenni argues that ACenni’s demand for a permanent injunction is a “thinly-veiled attempt to avoid arbitration of the very issue that Plaintiff plainly agreed to arbitrate: whether the operating agreements make him a managing member of the Atrium Entities” (memo in support at 2).

RCenni argues that each and every one of ACenni’s claims seeks an interpretation of the language of the operating agreement, and are, therefore, arbitrable. With respect to the third cause of action, which seeks a permanent injunction, RCenni argues that this claim also essentially seeks a ruling on the same language:

“Plaintiff cannot avoid arbitrating the question of whether he is a managing member simply by styling his third cause of action as a claim for a permanent injunction directing Rebecca to recognize him as a managing member. Whether Plaintiff is a managing member of the Atrium Entities is a straightforward issue of contract interpretation that Plaintiff agreed to arbitrate. Appending a request for an injunction to that issue does not avoid applicability of the Arbitration Clause”

(memo in support at 8).

In opposition, ACenni argues that he is primarily seeking equitable relief against all the defendants in the form of a declaratory judgment and injunction to establishing his rights, duties,

and responsibilities as pertaining to the Atrium Entities. He argues that money damages would not be an adequate remedy to address the issues he has raised concerning RCenni's withholding of his rights and responsibilities as a managing member of the Atrium Entities, his ability to obtain information, his ability to participate in the management of the companies, and his ability to vote and have a voice over company business, and, therefore, the language in the arbitration clause permitting the parties to bring a claim for equitable relief in court is the controlling language here, barring arbitration. Finally, ACenni argues that his claims that seek all other relief are "ancillary" to the main claims for equitable relief. Those claims, he argues, cannot form the basis for a decision to compel arbitration.

On the question of the favorability of arbitration, the Court of Appeals has stated: "[w]e have repeatedly recognized New York's 'long and strong public policy favoring arbitration'" (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007][internal citation omitted]). "Therefore, New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration" (*id.* [internal quotation marks and citation omitted]).

"It is a well-settled principle of law in this State that a party cannot be compelled to submit to arbitration unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute" (*Matter of Trump (Refco Props)*, 194 AD2d 70, 74 [1st Dept 1993] [internal quotation marks and citation omitted]). Pursuant to CPLR 7503 (a), the court may compel arbitration where:

"A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502,¹ the court shall direct the parties to arbitrate."

¹ Section 7502 (b) addresses the limitation of time to file demands to arbitrate, and whether the arbitration may proceed when "at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the

In determining whether to compel arbitration, Courts consider three threshold inquiries: (i) whether the parties made a valid agreement to arbitrate, (ii) whether, if such an agreement was made, it has been complied with, and (iii) whether the claim sought to be arbitrated would be barred by a limitation of time had it been asserted in a court of the State (*Matter of Rockland Cty. [Primiano Const. Co.]*, 51 NY2d 1, 6-7 [1980]). The second inquiry includes the question of whether there has been compliance with any condition precedent (*id.* at 7).

Here, the court finds that the causes of action set forth in this action are arbitrable pursuant to CPLR 7503 (a). The parties agree that they have a valid agreement containing an arbitration clause, and that there are no conditions precedent that have not been met. The focal issue here is whether the nature of ACenni's claims are essentially equitable, and, thus, whether they are barred by the final sentence in the arbitration provision. As an initial matter, on this question, the court agrees with RCenni that each and every cause of action herein, including the third cause of action, seeks an interpretation of the terms of the operating agreement. Specifically, the causes of action seek a determination of the parties' duties and responsibilities under that agreement. As the dispute involves the application of a provision of the operating agreement, the matter is subject to arbitration.

The arbitration provision set forth in the operating agreements is broad, as it mandates, without detail or specificity, arbitration with the American Arbitration Association (AAA) of "[a]ny claim, controversy or dispute arising between the parties with respect to this Agreement

claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state."

... to the maximum extent allowed by applicable law” (Mahler affirmation, exhibit). The term “dispute” is defined in the Operating Agreement as “[a]ny claim, controversy or dispute arising between the parties with respect to this Agreement.” (*id.*).

The final sentence of the arbitration clause permits a party seeking equitable relief to litigate those claims in court “[n]otwithstanding any other provision of this Section, any Dispute in which a party seeks equitable relief may be brought in any court having jurisdiction” (*id.*). ACenni opposes RCenni’s motion to compel arbitration on the ground that this sentence is a carve out of, or an exception to, the arbitration clause in the Operating Agreements. ACenni offered this same argument before the court in the previous action to oppose the confirmation of the March 21, 2018 final award. In its May 2018 decision confirming that award, the court found that this argument was meritless. The Court found that the use of the word “may” in the provision provides the parties with a choice “to pursue equitable relief in court or in arbitration; it is not, as [ACenni] incorrectly asserts, a ‘carve out’ and it does not deprive the AAA of jurisdiction to arbitrate any dispute as mandated” by the broad language of the clause (Mahler affirmation, exhibit I at 4).

In support of its finding, the court cited *Baldwin Tech Co., Inc. v Printers’ Serv. Inc.*, (2016 WL 354914, 2016 US Dist LEXIS 10086 [SD NY January 27, 2016]) for the proposition that:

“where a contract has both a broad arbitration clause and a clause permitting the parties to seek injunctive relief before a court, courts in this District have construed the latter clauses as permitting the parties to seek “injunctive relief... in aid of arbitration, rather than ... transforming arbitrable claims into nonarbitrable ones depending on the form of relief prayed”

(*Baldwin Tech Co., Inc.*, 2016 WL 354914, *4, 2016 US Dist LEXIS 10086, *9, fn 4).

This court agrees with this reasoning as applied to this proceeding. Here, the parties are signatories to an agreement with a broad arbitration provision, requiring the parties to submit any controversy under the operating agreement to arbitration. ACenni's claims for the restoration of his managerial duties require an interpretation of the terms of that operating agreement. The provision permitting the parties to bring a claim for equitable relief in the courts does not undermine this mechanism under the operating agreement in any way. That provision does not prohibit the parties from arbitrating claims for equitable relief, but, instead, permits the parties to bring such claims in a court of law. It does not function as an exception.

It would not be consistent with the parties' intentions as set forth in their broad agreement to arbitrate, or with the case law in New York, favoring arbitration, if this court were to deny arbitration on the ground that ACenni is seeking a directive to be restored to his managerial responsibilities. It is plain from the circumstances of this case that arbitration is the most fit and appropriate tribunal to determine what role, responsibilities and duties ACenni is entitled to under the operating agreement (*see Sutphin Retail One, LLC v Sutphin Airtrain Realty, LLC*, 143 AD3d 972, 974 [2d Dept 2016]) ["Therefore, the appropriate inquiry is whether the dispute is governed by the arbitration agreement and not whether the arbitrator has the authority to award the specific relief sought by the plaintiff in the complaint"].

The court, therefore, grants defendants' motion, pursuant to CPLR 7503 (a), to compel arbitration of the claims set forth in plaintiff's complaint.

CONCLUSION

In accordance with the foregoing, it is

ORDERED that defendants' motion to compel arbitration and to stay this action is granted; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that plaintiff Adrian Cenni shall arbitrate his claims against defendants in accordance with the operating agreement; and it is further

ORDERED that all proceedings in this action are hereby stayed except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate and modify this stay upon the final determination of the arbitration; and it is further

ORDERED that counsel for defendant shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.


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9/30/2020
DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE