74 Misc.3d 1226(A)
Unreported Disposition
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This opinion is uncorrected and will not be published in the printed Official Reports.
Supreme Court, Bronx County, New York.

Lester Scipio, Plaintiff,
v.
225 Bowery LLC and ACE GROUP BOWERY LLC, Defendants.

Index No. 35616/20E
|
Decided on March 30, 2022

Attorneys and Law Firms

Counsel for Bowery: The Law Firm of Guy S. Halperin, PLLC

Counsel for Ace: Akerman LLP

Opinion

Fidel E. **Gomez**, J.

***1** In this action for personal injuries arising from the negligent maintenance of a premises, defendant 225 BOWERY LLC (Bowery) moves seeking an order pursuant to CPLR § 7503(b), staying the arbitration proceeding initiated by defendant ACE GROUP BOWERY LLC (Ace). Bowery avers, *inter alia*, that insofar as Ace interposed a cross-claim against it for contractual indemnification, Ace has waived the right to seek arbitration on this and other related claims. Ace opposes the instant motion, asserting, *inter alia*, that the dearth of litigation in this action precludes the conclusion that Ace waived its right to arbitrate the claims between the parties.

For the reasons that follow hereinafter, Bowery's motion is denied.

The instant action is for personal injuries arising from the negligent maintenance of a premises. The complaint, filed on December 23, 2020, alleges that on October 27, 2020, plaintiff was slashed/stabbed while within the premises owned, operated, and maintained by defendants and located at 225 Bowery, New York, NY, 10002 (225). It is alleged that defendants were negligent in the maintenance of 225, in that they failed to provide adequate security for persons lawfully therein. It is further alleged that defendants were negligent in the hiring and training of the security personnel within 225. Plaintiff alleges that his injuries were a result of defendants' negligence.

Bowery's answer, dated March 25, 2021, contained several affirmative defenses, had discovery requests appended thereto, but did not contain any cross-claims. Aces's answer, dated May 5, 2021, contained several affirmative defenses and a cross-claim against Bowery for indemnification. Said cross-claim alleged that on July 22, 2014, Ace entered into a Hotel Management Agreement (HMA) with Bowery's predecessor in interest, KAL Realty LLC, VNAA LLC and Tllule LLC, whereby Ace agreed to manage 225 when built. Section 15.2 of the HMA states that

[o]wner shall, and does hereby agree to indemnify, save, defend, pay and hold harmless Manager and its Affiliates and their respective directors, members, trustees, officers, employees, agents and assigns (collectively, the "Manager Indemnified Parties") for, from and against any and all claims that any Manager Indemnified Party may incur, become responsible for, or pay out to the extent caused by (a) Owner's (including Owner's Affiliates and Owner's corporate personnel), grossly negligent or willful acts, (b) any Event of Default by Owner under this Agreement, (c) the presence or removal of Hazardous Materials on the Premises, or anywhere in the Project, including, without limitation, in the Hotel, or the violation of any Environmental Laws, except to the extent caused by the gross negligence or willful misconduct of Manager or Manager's corporate personnel, (d) Owner's failure to maintain insurance coverage that Owner is required to maintain pursuant to the provisions of this Agreement, (e) liabilities stemming from general corporate matters of Owner or its Affiliates, and (f) any other matters relating to the ownership or operation of the Hotel for which Manager is not expressly liable or responsible pursuant to the terms of this Agreement.

***2** Ace alleges that on March 22, 2020, due to the Covid-19 pandemic, Bowery shut down 225, a hotel. Bowery then entered into another agreement with the New York City Department of Homeless Services (NYCDHS) to re-purpose 225 as a homeless shelter. On June 4, 2020, Bowery barred Ace from managing 225, thereby preventing Ace from performing its obligations under the HMA between Ace and Bowery. Because the incident alleged by plaintiff occurred

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when Ace had no control over 225, Ace alleges that it is not responsible for plaintiff's injuries and per the HMA is entitled to indemnification for costs, fees, and expenses incurred by Ace in defending this action.

On May 25, 2021, Bowery amended its answer, asserting two cross-claims against Ace. The first cross-claim alleges that pursuant to section 15.1 of the HMA, Ace was required to indemnify Bowery for, from and against any and all claims that any Owner Indemnified Party may incur, become responsible for, or pay out to the extent caused by. . . (b) any Event of Default by Manager under this Agreement, . . . [and] (d) Manager's failure to maintain insurance coverage that Manager is required to maintain pursuant to the provisions of this Agreement.

Pursuant to section 8.2, Ace was required to procure and maintain commercial liability insurance. It is alleged that Ace failed to provide the insurance required by the HMA, such that Ace breached the HMA and is required to indemnify Bowery. The second cross-claim is for declaratory judgment where Bowery seeks a declaration that in failing to procure the foregoing insurance, Ace defaulted under the agreement, thereby allowing Bowery to terminate the HMA. In support thereof, Bowery alleges that in light of the Covid-19 pandemic, which required the closure of 225, it advised Ace of Bowery's intent to re-purpose the hotel and operate it as a homeless shelter via an agreement with NYCDHS. Despite the foregoing, which was necessary to preserve 225 and prevent foreclosure, on June 5, 2020, Ace notified Bowery that by entering into the foregoing agreement with NYCDHS, Bowery had defaulted on the HMA. This, Bowery alleged, failed to account for section 16.15 of the HMA, which states that

[e]xcept as specifically limited herein, hereof, if either Party's failure to comply with, perform or satisfy any representation, warranty, covenant, undertaking, obligation, standard, test or condition set forth in this Agreement is caused in whole or in part by an Extraordinary Event(s), such failure shall not constitute an Event of Default or default under this Agreement.

Section 1.1 of the HMA defines extraordinary event to include "disease," and "epidemic."

On June 14, 2021, Ace interposed an answer to Bowery's cross-claims, denying them.

Bowery's motion seeking to stay the arbitration commenced by Ace is denied. Significantly, Ace's participation in this action - limited to interposing an answer, albeit with a cross-claim - is not inconsistent with Ace's subsequent claim that the parties herein are obligated to settle their differences by arbitration. Accordingly, Ace's actions are not tantamount to a waiver of its right to arbitrate the issues between the parties as authorized by the HMA.

Pursuant to CPLR § 7503(b),

a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.

While not an enumerated basis under the CPLR, it is well settled that the right to arbitrate promulgated by an agreement between the parties can be waived. Significantly, "[a]n arbitration provision can be modified by a subsequent agreement based upon a consideration, or waived or abandoned by the agreement or action of the parties" (*Zimmerman v Cohen*, 236 NY 15, 19 [1923]; *see Cusimano v Schnurr*, 26 NY3d 391, 400 [2015] ["Like contract rights generally, a right to arbitration may be modified, waived or abandoned" [internal quotation marks omitted].; *Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007]; *Sherrill v Grayco Builders, Inc.*, 64 NY2d 261, 272 [1985]; *City of Yonkers v Cassidy*, 44 NY2d 784, 785 [1978]; *Great N. Assoc., Inc. v Cont. Cas. Co.*, 192 AD2d 976, 978 [3d Dept 1993]; *Flynn v Labor Ready, Inc.*, 6 AD3d 492, 493 [2d Dept 2004]; *Zuber v Commodore Pharm., Inc.*, 24 AD2d 649, 650 [2d Dept 1965]). Indeed, "the right to arbitrate is not unfettered and irrevocable" (*Spirs Trading Co., Ltd. v Occidental Yarns, Inc.*, 73 AD2d 542, 543 [1st Dept 1979]; *United Paper Mach. Corp. v DiCarlo*, 19 AD2d 143, 144 [4th Dept 1963], *affd sub nom. United Paper Mach. Corp. v Di Carlo*, 14 NY2d 814 [1964]), and a party by his conduct can waive the right to arbitrate granted by an agreement between the parties (*Esquire Indus., Inc. v E. Bay Textiles, Inc.*, 68 AD2d 845, 846 [1st Dept 1979] ["Indeed by reason of its conduct in obtaining a judgment staying arbitration on the ground that plaintiff had waived the right to arbitration by bringing an action at law, defendant should be deemed estopped from claiming that plaintiff is barred by the arbitration clause from suing at law."]; *In re*

Redmond, 39 AD2d 527, 527 [1st Dept 1972], *affd sub nom. Redmond v Redmond*, 32 NY2d 644 [1973]; *Zuber* at 650; *United Paper Mach. Corp.* at 144 ["Both of the parties may abandon this method of settling their differences, and under a variety of circumstances one party may waive or destroy by his conduct his right to insist upon arbitration."]).

***3** The relevant inquiry with respect to waiver is whether there is evidence of the relinquishment of a known right and/or an intent to abandon the right to arbitrate (*Spirs Trading Co., Ltd.* at 543). As it relates to arbitration and the waiver thereof by conduct, the specific inquiry is whether the proponent of arbitration, by his actions. has elected to proceed and/or resolve the otherwise arbitral dispute between the parties in the "judicial arena" (*id.* at 543; *see Zimmerman* at 19 ["Upon these facts, whatever right the defendant may have had under his contract and the Arbitration Law to enforce arbitration he deliberately waived; he chose and elected to proceed by an action in court for the determination of the respective claims."];*Flynn* at 493; *Great N. Assoc., Inc.* at 978-979; *Esquire Indus., Inc.* at 846 ["Indeed by reason of its conduct in obtaining a judgment staying arbitration on the ground that plaintiff had waived the right to arbitration by bringing an action at law, defendant should be deemed estopped from claiming that plaintiff is barred by the arbitration clause from suing at law."]). In addressing waiver, courts usually consider "the amount of litigation that has occurred, the length of time between the start of the litigation and the arbitration request, and whether prejudice has been established" (*Cusimano* at 400; *NBC Universal Media, LLC v Strauser*, 190 AD3d 461, 461 [1st Dept 2021]).

Generally, the initiation of a plenary action by a party who would otherwise be entitled to arbitration results in the waiver of the right to then seek arbitration (*Cusimano* at 400; *Spirs Trading Co., Ltd.* at 543; *Hadjioannou v Avramides*, 40 NY2d 929, 931 [1976]; *Esquire Indus., Inc.* at 846; *Solow* at 786; *In re Redmond* at 527; *Great N. Assoc., Inc.* at 979). However, the mere fact that a party who would otherwise be entitled to arbitration participates in a judicial action or avails itself of a remedy accorded to it by a court is not, in and of itself, a waiver (*Stark* at 67; *Sherril* at 273). This is particularly true with respect to a defendant, who seeks arbitration, but against whom a plenary action is brought. As the court in *De Sapio* noted

[t]he crucial question, of course, is what degree of participation by the defendant in the action will create a waiver of a right to stay the action. In the absence of unreasonable delay, so long as the defendant's actions are consistent with an assertion of the right to arbitrate, there is no waiver. However, where the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer in the particular case, his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory(*id*. at 405). In other words, the lynchpin of waiver as it relates to otherwise arbitral claims, is a party's use of the judicial process to the extent which is "clearly inconsistent with its later claim that the parties were obligated to settle their differences by arbitration" (*Cusimano* at 400 [internal quotation marks omitted]). Thus, in *De Sapio*, where the defendant, when sued, interposed a cross-claim and demanded to depose the plaintiff, the court denied defendant's motion to stay the plenary action so that the parties could proceed to arbitration (*id*. at 406). In *Zimmerman*, the court denied defendant's application to stay the trial of the plenary action and enforce arbitration when the defendant interposed an answer to the complaint, raised a substantive defense, interposed a counterclaim demanding money damages, served a notice fo trial and also moved to depose a witness (*id.* at 19). In *Sherril*, the court granted plaintiff's motion to stay arbitration because the defendant filed an answer, amended its answer after it sought arbitration asserting, by cross claims and counterclaims, all the claims sought in the arbitration, subpoenaed a witness, and then deposed him (*id*. at 270-271). The court in *Sherril* held that defendant's litigation activity manifested a preference "clearly inconsistent with his later claim that the parties were obligated to settle their differences by arbitration" (*id*. at 272 [internal quotation marks omitted]), such that defendant waived its right to arbitration (*id*. at 271). By contrast, in *Stark*, the court granted defendants' application to compel arbitration despite a lengthy litigation history in court. Significantly, the court essentially held that because all of the defendants' actions were defensive in nature, they had not waived the right to arbitrate the claims asserted by plaintiff in the plenary action (*id*. at 67). Specifically, the court stated that [h]ere, the [defendants] opposed plaintiff's June 2003 application and cross-moved for affirmative relief related solely to its fees and disbursements in enumerated personal injury lawsuits that plaintiff sought to retain. In June 2003, the [defendants] entered into a stipulation resolving disputes over substitution of counsel in these lawsuits, the transfer of files, and the timing of its reimbursement for disbursements. The [defendants] specifically reserved its right to attorneys' fees, and later moved in the trial courts to recover attorneys' fees and disbursements in lawsuits covered by the stipulation and litigated to conclusion by plaintiff. Additionally, the

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[defendants] at one point moved to enforce the stipulation. We conclude that these forays into the courthouse, cumulatively, do not as a matter of law manifest an affirmative acceptance of the judicial forum such that the [defendant's] actions were then inconsistent with its later claim that only the arbitral forum was satisfactory for resolving the employment-related claims subsequently advanced by plaintiff.

***4** (*id*. at 67 [internal citations and quotation marks omitted]). In *Two Cent. Tower Food, Inc. v Pelligrino* (212 AD2d 441 [1st Dept 1995]), the court granted defendants' motion to stay the plenary action and refer the claims therein to arbitration holding that "defendants' limited participation in the action did not constitute a waiver of their right to compel arbitration" (*id*. at 442). Significantly, the court noted that while defendants interposed an answer, the same was bereft of affirmative defenses or counterclaims (*id*. at 442). The court also noted that defendant did not engage in any discovery (*id*. at 442). In *Stoianoff v New Am. Lib.* (148 AD2d 600 [2d Dept 1989]), the court granted defendant's motion to stay the plenary action and compel arbitration when defendant's participation in the plenary action was limited to moving to dismiss the action for lack of capacity or alternatively seeking a stay to compel arbitration (*id*. at 601). The court held that the foregoing "cannot be said to manifest a preference to litigate inconsistent with [defendant's] present claim that the parties are obligated to settle their differences by arbitration" (*id*. at 601). In *NBC Universal Media, LLC*, the court denied petitioner's application to stay arbitration, holding that beyond the service of amended pleadings, there had been no motion practice nor discovery in a related plenary action so as to constitute a waiver (*id*. at 461).

Significantly, the foregoing - that a party who either affirmatively seeks to have a court resolve otherwise arbitral claims or who in defending a claim avails itself of the remedies available in such forum ought not be allowed to proceed to arbitration - is premised on the notion that "[i]f the parties wish the procedures available for their protection in a court of law, they ought not to provide for the arbitration of the dispute" (*De Sapio* at 406). In other words, "[t]he courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration" (*id*. at 406).

Notably, a party's participation in a judicial proceeding is mitigated if and when its use of the judicial forum is due to an "urgent need to preserve the status quo[,which] requires some immediate action which cannot await the appointment of arbitrators" (*Sherril* at 273; *see Stark* at 67; *Preiss/ Breismeister v Westin Hotel Co.-Plaza Hotel Div.*, 56 NY2d 787, 789 [1982] ["We agree that the motion to compel arbitration was properly granted. There is neither waiver nor an election of remedies where, as here, plaintiff moves in court for protective relief in order to preserve the status quo while at the same time exercising its right under the contract to demand arbitration."]). Thus, under such circumstances, there is no waiver of the right to arbitration (*Stark* at67; *Preiss/ Breismeister* at 789; *Sherril* at 273).

In addition to the extent to which a party who seeks to arbitrate claims participates in judicial proceedings, another factor is whether the claims before the court are the same as those sought to arbitrated (*Sherrill* at 272 ["There can be no doubt on this record that the pivotal issue in the litigations as well as the arbitrations — made all the more evident upon consolidation — is the purported modification of the underlying agreements by Sherrill's attempted termination, resignation or retirement, an issue arising out of or in connection with the partnerships and therefore under the agreements subject to arbitration."]; *Denihan v Denihan*, 34 NY2d 307, 310 [1974] ["As to the claims sought to be redressed in judicial proceedings, there can be no question but that the respondent has waived his right to arbitrate."]; *Hosiery Mfrs.' Corp. v Goldston*, 238 NY 22, 27-28 [1924] ["It is now urged that the agreement for arbitration provided only for controversies arising out of the principal contracts and that the accounts and trade acceptances sued on are independent causes of action as to which there was no agreement to arbitrate and that a stay of the trial of those actions was, therefore, unauthorized under Arbitration Law, section 5, which in terms applies only to issues referable to arbitration. But the principal contracts which provided for arbitration were entire. The actions on the acceptances and for the goods sold and delivered were, therefore, subject to the defense that there had been no full performance and no obligation to pay until performance was complete."]; *Empire Core Group, LLC* at 1033 [Respondent's claim to compel arbitration was denied because, *inter alia*, "[t]he issues at the heart of the PPA counterclaim and the demanded arbitration are intertwined."]). Thus, generally, when the claims sought to be arbitrated have been asserted, affirmatively or defensively in a plenary action, arbitration proceedings will be stayed. Where, however, the claims asserted in court are distinct from those sought to arbitrated, arbitration should be allowed to proceed (*Radzievsky v Macmillan*, Inc., 170 AD2d 400, 400 [1st Dept 1991]). In *Sherrill*, which concerned two separate actions seeking to both rescind agreements and declare the rights of the parties pursuant thereto, defendant's application

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to stay arbitration was denied (*id*. at 272-275). Significantly, in rejecting defendant's assertion that the issues sought to be arbitrated and those before the court were unrelated, the court held that the issues sought to be arbitrated, namely plaintiff's position within the parties' partnership were, if not identical, then substantially related (*id*. at 273 ["This is not a case where two agreements with different signatories, though related in overall subject matter, impose independent obligations, so that provision for arbitration in the first may not, without incorporation, carry into the second. Here, the same parties were signatories, the later agreements referred back to and modified the earlier ones, and the focal issue of the litigation was a question fundamental to the partnership and thus under the earlier agreements subject to arbitration" [internal citations omitted].).

***5** The length of any delay in seeking to arbitrate claims subject to arbitration after the initiation of a plenary action is also a factor relevant to the issue of waiver (*id.* at 273 ["If Gray had meant to preserve for arbitration the issue of Sherrill's status in the two ventures, it was incumbent on him to do so instead of singly pursuing the litigation over an extended period."]; *De Sapio* at 405 ["In the absence of unreasonable delay, so long as the defendant's actions are consistent with an assertion of the right to arbitrate, there is no waiver."]; *Spatz v Ridge Lea Assoc., LLC.*, 309 AD2d 1248, 1249 [4th Dept 2003][Court held that defendants did not waive the right to arbitration when they made a motion to compel arbitration approximately 28 months after the initiation of the plenary action.]; *Two Cent. Tower Food, Inc.* at 442 [Court held that defendants did not waive right to arbitration when issue was joined on June 15, 1994, they substituted attorneys two months later, and less than a month later they sought to stay the proceedings and compel arbitration."]). Generally, the longer the delay, the more it militates towards a finding of waiver. However, the length of time between the start of the litigation and the time arbitration is sought, by itself, is generally insufficient to constitute a waiver (*NBC Universal Media, LLC* at 461 ["Although the length of time between the start of the litigation and the demand for arbitration (in this case 26 months) is an element to be reviewed when considering waiver, it is not, alone, enough to effectuate a waiver."]).

Lastly, prejudice is also a factor in determining whether arbitration has been waived (*id*. at 461; *Cusimano* at 400 ["The majority of federal courts have taken the position that waiver cannot be established in the absence of prejudice."]). Specifically, when arbitration would result in prejudice, the same should be stayed (*Louisiana Stadium & Exposition Dist. v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F3d 156, 159 [2d Cir 2010] ["[T]he key to a waiver analysis is prejudice. Waiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated" [internal quotation marks omitted].). With respect to waiver there two types of prejudice - substantive prejudice and procedural prejudice - the former is the loss of some substantive advantage accorded by the judicial forum if arbitration is allowed to proceed (*Cusimano* at 401 ["As to substantive prejudice, the court pointed out that granting the motion to arbitrate would allow the plaintiff to avoid the motion to dismiss, the substance of which had been related in the deficiency letter."]; *Louisiana Stadium & Exposition Dist* at 159 ["MLPFS would also be substantively prejudiced if it were compelled to arbitrate. If LSED succeeds in compelling arbitration, it would be able to preempt consideration of the defendants' inevitable motion for judgment on the pleadings which was plainly foreshadowed by the detailed deficiency letter the defendants had sent to LSED."]). The latter, is where the opponent of arbitration, has by litigation in the judicial forum, incurred "unnecessary delay or expense" (*Kramer v Hammond*, 943 F2d 176, 179 [2d Cir 1991]), and any "other surrounding circumstances beyond the burdens and expenses that would result from a grant of arbitration" (*Louisiana Stadium & Exposition Dist.* at 160 [internal quotation marks omitted].; *see NBC Universal Media, LLC* at 461-462 ["[Plaintiff] has not expended excessive costs litigating the NJ Action since that action has not proceeded against it and its position that it will not be able to properly defend the arbitration due to the passage of time is conclusory."]).

In support of its application, Bowery submits the pleadings in this action, which were already discussed above.

Bowery also submits a stipulation of partial discontinuance, dated October 5, 2021, wherein plaintiff discontinues all claims asserted in this action against defendants. The stipulation states that it "does not intend to discontinue any cross-claims asserted by either of the defendants against each other."

Bowery submits Ace's 43 page Request for Arbitration (RA), dated January 4, 2022. With regard to the nature of the arbitration, the RA states that

[t]his arbitration arises out of Owner's unequivocal anticipatory repudiation and breach of the hotel management agreement (the "HMA") with Manager regarding the Sister City Hotel ("Hotel") in the Bowery neighborhood of Manhattan, Owner's concomitant termination of Manager's exclusive management of the Hotel, and Owner's violation of Ace Group's intellectual property rights . . . More specifically, under the pretext of COVID-19 and purported "Extraordinary Events," Owner made a purely self-serving financial decision to unilaterally transition the new boutique Sister City Hotel — the first of a planned launch of the Sister City brand of hotels — into a homeless shelter. In doing so, Owner physically ousted Manager (and its employees) from the Hotel, completely severed Manager from the Hotel, and otherwise destroyed the Sister City brand, all of which constitute material and incurable breaches and defaults of the HMA. The RA further alleges that once Bowery began to use the hotel as a homeless shelter, beyond changing the name of the hotel, Bowery continued to use the aesthetic design of the courtyard, lobby, and hotel rooms, all of which maintain the unique collection and assortment of minimalist artwork, furniture and fixtures inspired by Finnish saunas, Japanese architecture, rock-cut cliff dwellings of prehistory and John Cage's 4'33," which were designed for and unique to the Sister City brand.

***6** To the extent that the foregoing design and aesthetic comprises Ace's intellectual property, Bowery's use of the same violates the law and further misleads the public into believing that the hotel is "is affiliated with, sponsored by or otherwise associated with Sister City or the Ace Hotel brand generally." Based on the foregoing, and because article 13 [1] of the HMA, states that [e]xcept as otherwise specified in this Agreement, any dispute, controversy, or claim arising out of or relating to this Agreement shall be settled by arbitration in New York, New York, except to the extent inconsistent with this Agreement, in accordance with the Rules of Arbitration of the International Chamber of Commerce (or any similar successor rules thereto) as are in force on the date when a notice of arbitration is received, Ace seeks arbitration of several causes of action arising from HMA. Ace asserts four causes of action for breach of contract, saliently premised on Bowery's breach of the HMA by entering into an agreement with NYCDHS, whereby it converted the hotel into a homeless shelter, terminated Ace's employees, and operated the hotel as an Airbnb hotel. Ace asserts a cause of action for trademark infringement and unfair competition under 15 USC § 1114 and 1125(a), insofar as, without Ace's permission, Bowery "sold, offered to sell, marketed, distributed, and advertised — and is currently selling, offering for sale, marketing, distributing, and advertising," the hotel as Airbnb hotel "using Ace Group's distinctive Sister City Mark without Ace Group's permission." Ace asserts a cause of action for false designation of origin under 15 USC § 1125(a) insofar as in using "Sister City Trade Dress and the Sister City Mark in connection with the sale of rooms and operation of the Airbnb hotel, Owner has created a false designation of origin and a misleading representation of fact as to the origin and sponsorship of the Sister City Trade Dress and the Sister City Mark." Lastly, Ace asserts a cause of action for trade dress infringement and unfair competition under the foregoing statute, inasmuch as Bowery has used Ace's Trade Dress, which is distinctive and famous.

1 The arbitration provision quoted in the RA is, in fact, the arbitration provision in the HMA.

Bowery submits the HMA. The relevant sections of the HMA have already been discussed and noted above. Bowery submits an assignment agreement, dated February 14, 2017, wherein Bowery's predecessor in interest, KAL Realty LLC, VNAA LLC and Tllule LLC, assigned the HMA between the predecessors in interest and Ace to Bowery. Bowery submits an email its agent sent Ace's agent on May 25, 2020, wherein Bowery apprised Ace that it would be entering into an agreement with NYCDHS to use 225 to house the homeless, provided Ace with the agreement and asked Ace what role it would play upon execution of the agreement. In emails dated May 26, 2021, submitted by Bowery, Ace's agent expresses concern with regard to Bowery's decision to use 225 to house the homeless. In an email dated May 30, 2021, submitted by Bowery, Ace's attorney apprises Bowery that the execution of the agreement with NYCDHS violates the HMA between Ace and Bowery and that Ace would consider such action as a breach of the HMA.

Bowery submits the agreement between the Hotel Association of New York City (HANYC) and NYCDHS. The agreement states that it is effective June 4, 2020 through October 12, 2020. Per the agreement, all rooms within 225 would be used "as temporary housing for homeless individuals." Bowery submits an extension agreement dated October 6, 2020, wherein the agreement between NYCDHS and HANYC to use the rooms within 225 to house homeless persons was extended through June 30, 2021.

Bowery submits a letter sent to it by Ace, dated June 5, 2020, wherein Ace asserts that Bowery had defaulted under HMA

by the execution of the agreement between NYCDHS and HANYC. Bowery submits a letter sent by it to Ace, dated June 4, 2020, wherein counsel for Bowery, in response to Ace's email regarding the breach of HMA, states that HMA precludes Bowery's default when actions taken are the result of extraordinary events such as diseases and epidemics. In light of the Covid-19 pandemic, Bowery asserts that it was required to take actions to protect 225 from the financial impact resulting from the Covid-19 pandemic.

Based on the foregoing, Bowery's motion must be denied.

Preliminarily, the Court disagrees with Ace's contention that the issue of waiver ought to be decided by the arbitrator at arbitration. While it is true that federal jurisprudence holds that the issue of waiver should be decided by arbitrators (*LeRoy v Amedisys Holding LLC*, 2022 WL 394568, *5 [WDNY Feb. 9, 2022] ["In particular, the presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability" [internal quotation marks omitted].), it is equally true that this Court is empowered to determine the issue of waiver (*Sherrill* at 272 ["The claim being that Gray's courthouse conduct constituted the election — a claim which involves neither the merits of the dispute nor conditions incidental to conduct of the arbitration — it is entirely appropriate that the court and not the arbitrators should determine this threshold issue."]).

***7** As noted above, the relevant inquiry with respect to waiver is whether there is evidence of the relinquishment of a known right and/or an intent to abandon the right to arbitrate (*Spirs Trading Co., Ltd.* at 543). Specifically, the inquiry is whether the proponent of arbitration, by his actions, has elected to proceed and/or resolve the otherwise arbitral dispute between the parties in the "judicial arena" (*id.* at 543; *see Zimmerman* at 19; *Flynn* at 493; *Great N. Assoc., Inc.* at 978-979; *Esquire Indus., Inc.* at 846). In addressing waiver, the courts consider "the amount of litigation that has occurred, the length of time between the start of the litigation and the arbitration request, and whether prejudice has been established" (*Cusimano* at 400; *NBC Universal Media, LLC* at 461). Additionally, the mere fact that a party who would otherwise be entitled to arbitration participates in a judicial action or avails itself of a remedy accorded to it by a court is not, in and of itself, a waiver (*Stark* at 67; *Sherril* at 273). This is particularly true with respect to a defendant, who seeks arbitration, but against whom a plenary action is brought (*De Sapio* at 405).

Here, contrary to Bowery's assertion, the fact that Ace interposed a counterclaim in this action to which Ace was made a defendant by plaintiff does not, under the circumstances, evince Ace's intent to litigate its claims in Court and otherwise abandon the right to arbitrate all claims arising under the HMA.

First, the cross-claim interposed by Ace was limited to indemnification, and to a large extent, necessary to protect itself in this litigation by ensuring that if plaintiff prevailed and Ace was found liable by operation of law, Ace could prevent the payment of damages or alternatively recoup the same from Bowery. Moreover, the cross-claim would ensure that Ace could recover any fees incurred in this litigation at a time, when on this record, it appears that it was not managing 225. Indeed, as noted above, a party's participation in a judicial proceeding is mitigated if and when its use of the judicial forum is due to an "urgent need to preserve the status quo[,which] requires some immediate action which cannot await the appointment of arbitrators" (*Sherril* at 273; *see Stark* at 67; *Preiss/Breismeister* at 789 [1982]. Under such circumstances, there is no waiver of the right to arbitration (*Stark* at67;*Preiss/Breismeister* at 789; *Sherril* at 273). Thus, the cross-claim here, falls within the ambit of necessary defensive action taken in the judicial forum, which could not wait until the matter was arbitrated. Bowery's position that Ace should have born the risk attendant in this litigation under threat of waiver is simply untenable and unavailing. In other words, under these circumstances, Ace's need to protect itself and mitigate its exposure and potential damages could not wait until arbitration, which conceivably, and on this record, could not have reasonably occurred until this action came to a close. Indeed, but for Bowery's refusal to discontinue its cross-claims and allow Ace to discontinue its cross-claim, all the claims asserted by both Ace and Bowery in this action would have proceeded to arbitration.

Second, the amount of litigation in this action has been minuscule. Indeed, until Bowery made the instant motion, requiring several virtual appearances, there has been a dearth of litigation in this action. To be sure, beyond the interposition of the pleadings and the execution of the stipulation of discontinuance and general release, there has been no other court involvement in this case. Indeed, there has been no discovery and as noted, no motion practice beyond Bowery's instant motion. Thus, this too warrants denial of Bowery's motion (*Two Cent. Tower Food, Inc.* at 442; *Stoianoff* at 601; *NBC Universal Media, LLC* at 461).

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Third, while some of the breach of contract claims asserted by Ace in the RA are dispositive of Ace and Bowery's indemnification cross-claims in the present action, the claims in the RA are not, as urged by Bowery, the same. Nor are the infringement claims asserted by Ace in the RA remotely similar to the cross-claims herein. While it is true that generally when the claims sought to be arbitrated have been asserted, affirmatively or defensively in a plenary action, arbitration proceedings should be stayed (*Sherrill* at 272; *Denihan* at 310; *Hosiery Mfrs.' Corp.* at 272; *Empire Core Group, LLC* at 1033), where the claims asserted in court are distinct from those sought to arbitrated, arbitration should be allowed to proceed (*Radzievsky* at 400). Here, a review of the RA establishes that four of the seven causes of action are for breach of the HMA and three sound in trademark infringement. The cross-claim interposed by Ace in this action seeks indemnification. Thus, the cross-claim herein is not completely identical to any of the claims in the RA. That said, while it is true that the determination of the cross-claim interposed by Ace requires a determination of whether Bowery ousted Ace from 225 and such determination may be dispositive of the first four causes of action in the RA, this is not tantamount to complete identity. Moreover, and of course, the cross-claim has nothing in common with the three infringement claims asserted by Ace in the RA. Thus, this too warrants denial of Bowery's motion.

***8** Fourth, on this record, the delay between the time Ace sought arbitration and the time plaintiff discontinued this action is not inordinate. The length of any delay in seeking to arbitrate claims subject to arbitration after the initiation of a plenary action, is also a factor relevant to the issue of waiver (*id.* at 273; *Spatz* at 1249; *Two Cent. Tower Food, Inc.* at 442). Generally, the longer the delay the more it militates towards a finding of waiver. However, the length of time between the start of the litigation and the tender of a demand for arbitration, by itself, is insufficient to constitute a waiver (*NBC Universal Media, LLC* at 461). In *Spatz*, the Court held that defendants did not waive the right to arbitration when they made a motion to compel arbitration approximately 28 months after the initiation of the plenary action (*id*. at 1249). In *NBC Universal Media, LLC* , the Court held that the 26 months, between the start of the litigation and the demand for arbitration, was not by itself dispositive (*id*. at 461). Here, while the instant action was commenced on December 23, 2020 and arbitration was not sought until January 4, 2022, this one year delay in seeking arbitration is not inordinate because arbitration was sought approximately three months after the instant case was discontinued and after it became clear that Bowery intended to proceed with the litigation of the cross-claims in this action. Thus, rather than indicate an intent to abandon its right to arbitrate, the delay here is consistent with Ace's belief that arbitration would proceed soon after this case concluded. When it became clear that Bowery had different plans and attempts to settle the claims between Ace and Bowery proved fruitless, Ace served the RA relatively soon thereafter. To be sure, plaintiff discontinued this action on October 5, 2021 and on January 4, 2022, three months thereafter, with service of the RA, Ace demanded arbitration.

Lastly, the record is bereft of any evidence that allowing arbitration to proceed would in any way prejudice Bowery. Prejudice is also a factor in determining whether arbitration has been waived (*NBC Universal Media, LLC* at 461; *Cusimano* at 400). Specifically, when arbitration would result in prejudice, the same should be stayed (*Louisiana Stadium & Exposition Dist.* at 159). With respect to waiver there two types of prejudice - substantive prejudice and procedural prejudice - the former is the loss of some substantive advantage accorded by the judicial forum (*Cusimano* at 401; *Louisiana Stadium & Exposition Dist* at 159), the latter is the where the opponent of arbitration, has by litigation in the judicial forum, incurred "unnecessary delay or expense" (*Kramer* at 179), and any "other surrounding circumstances beyond the burdens and expenses that would result from a grant of arbitration" (*Louisiana Stadium & Exposition Dist.* at 160 [internal quotation marks omitted].; *see NBC Universal Media, LLC* at 461-462). Here, the record is bereft of any assertion by Bowery that engaging in arbitration would result in any prejudice, let alone any evidence of the same. Accordingly, the instant motion is denied for this additional reason.

As noted above, resolution of the Ace's cross-claim, as well as those interposed by Bowery, is likely to be dispositive of several of the claims in the arbitration. Similarly, resolution of the breach of contract claims in arbitration should resolve the cross-claims in this action. Accordingly, in order to avoid inconsistent adjudications, the Court shall, *sua sponte*, stay this action pursuant to CPLR § 2201 until the conclusion of the arbitration.

CPLR § 2201 states that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." It is well settled that "a court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, application of proof and potential

waste of judicial resources." (*In re Tenenbaum*, 81 AD3d 738, 739 [2d Dept 2011]; *Zonghetti v Jeromack*, 150 AD2d 561, 562 [2d Dept 1989]). Moreover, "where arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where the determination of issues in arbitration may well dispose of nonarbitrable matters" (*Lake Harbor Advisors, LLC v Settlement Services Arbitration and Mediation, Inc.*, 175 AD3d 479, 480 [2d Dept 2019]; *Weiss v Nath*, 97 AD3d 661, 663 [2d Dept 2012]). Here, there is enough congruity between the cross-claim and some of the causes of action in the RA warranting a stay of this action. This is particularly true now since given the Covid-19 pandemic, this Court is facing a massive backlog in the disposition of its cases. Thus, where as here, arbitration is likely to conserve judicial resources, there is no reason to allow this case to proceed until the conclusion of the arbitration proceeding initiated by Ace. It is hereby

***9 ORDERED** that this action be stayed until such time as the parties notify the Court that the arbitration between them has concluded. It is further

ORDERED that Ace serve a copy of this Order with Notice of Entry upon Bowery within thirty days (30) hereof.
This constitutes this Court's decision and Order.

March 30, 2022

Bronx, New York

HON. FIDEL E. GOMEZ, AJSC

All Citations

Slip Copy, 74 Misc.3d 1226(A), 2022 WL 965317 (Table), 2022 N.Y. Slip Op. 50230(U)

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