| **PNE Media, LLC v Cistrone** |
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| 2001 NY Slip Op 30054(U) |
| September 10, 2001 |
| Supreme Court, New York County |
| Docket Number: 0601390/2000 |
| Judge: Sheila Abdus-Salaam |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHEILA ABDUS-SALAAM, Justice

PART 13

P.N.E. Media

- v -

Castrone et al

INDEX NO. 601396-00

MOTION DATE 3/16/01

MOTION SEQ. NO. 02

MOTION CAL. NO. 94

The following papers, numbered 1 to ___ were read on this motion to/for ___

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: SEPTEMBER 10, 2001

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
------------------------------------X

PNE MEDIA, LLC and MARATHON OUTDOOR, L. L. C.,

Plaintiffs,

-against-

DOMINIC CISTRONE, NICK SUD, MICHAEL MILLER, LOUIS STRIAR, INC., LEN WEISTENTHAL and R. SCOTT LEWIS, P.E., P.C.,

Defendants.

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Index No. 601390/00

IAS PART 13

DECISION

SHEILA ABDUS-SALAAM, J.:

This action, which arises out of plaintiffs' purchase of two billboard locations in Long Island City, is before the court in connection with plaintiffs' motion to stay the first and second counterclaims alleged in defendants' answer, pending arbitration, or to dismiss these claims. Plaintiffs have moved pursuant to CPLR 7503 which governs applications to compel or stay arbitration. There is no arbitration proceeding currently pending. These parties were previously before this court in connection with defendant's earlier motion to compel arbitration of the plaintiffs' claims, which motion was vigorously opposed by plaintiffs. Plaintiffs claim that defendants' answer was interposed after the earlier decision denying arbitration, that the counterclaims raise wholly

independent issues from the claims in the Complaint, and that the counterclaims should be stayed pending final resolution of the main claims, **or** that they should be dismissed outright.

Defendants have cross-moved to stay the claims alleged in the Complaint if the plaintiffs' motion to compel arbitration **is** granted.

**As** explained in **my** earlier decision, plaintiffs claim that **they** have not been able to operate the billboards at issue for any significant period because the permits have been revoked by the City, that the individual defendants obtained the permits through improper permit applications, and that defendants knew that the City intended to revoke the permits. (Decision and Order, dated October 10,2000). **Also** explained in the earlier decision was the fact that **plaintiff PNE** Media, LLC ("PNE") purchased a controlling interest in Marathon Outdoor, LLC ("Marathon") from defendants. That purchase was effected pursuant to the terms of a Limited Liability Company Agreement ("'theLLC Agreement"). In the earlier motion, defendants sought to invoke **an** arbitration clause contained in the LLC Agreement, but the court found that the dispute involved the sale of billboard assets, not the internal workings of Marathon, and refused to apply the arbitration clause to compel arbitration **of** claims alleged in the Complaint. **I** found that none of the pledge agreements **or** promissory notes involved in the sale of the billboard assets had arbitration clauses and that **the** parties intended to resolve **any** disputes with respect to the pledge agreements or promissory **notes** in a court **proceeding. I further held**

that

> where there are multiple agreements between the parties, and not all contain an arbitration clause, the parties cannot be compelled to arbitrate a dispute unless it falls clearly within the type of claims agreed to be referred to arbitration. (Citations omitted).

*Id.*

In the present motion to compel arbitration of defendants' counterclaims, PNE asserts that these claims arise out of and relate directly to the LLC Agreement, previously found to contain an arbitration clause, and that these counterclaims must be arbitrated.

The Complaint alleges that on September 30, 1998, PNE agreed to purchase a majority interest in Marathon from defendants Dominic Cistrone, Nick Sud and Michael Miller (collectively, "CSM"). Complaint, at ¶ 22. The parties executed the LLC Agreement along with a non-negotiable Promissory Note and Pledge Agreement to effectuate the transaction. Rosenthal Affidavit, dated February 5, 2001, exh. A; Complaint, at ¶25. The Complaint further alleges that defendants had obtained an advertising permit that was inadequate for the use intended by Marathon and PNE, and that, as to a second billboard, defendants used improper means to obtain permits for a billboard. Both of these billboards had been represented to be viable assets of Marathon.

In the first cause of action, PNE claims that it relied upon representations and warranties contained in the Pledge Agreement, when it agreed to purchase a majority interest in Marathon, and that defendants' misrepresentations with respect to the

billboards constitutes a breach of warranty, which caused injury to plaintiff. The fourth and seventh causes of action allege that defendants' misrepresentations had the effect of fraudulently inducing PNE to purchase the majority interest in Marathon. The eighth cause of action alleges a breach of fiduciary duties owed by defendants to PNE as "members in Marathon." Complaint, at ¶ 85. The tenth cause of action, for replevin, seeks possession of Marathon's books and records on Marathon's behalf.

The first counterclaim alleges that PNE breached its fiduciary duties by failing to enforce Marathon's rights under the billboard lease, failing to pay Marathon's vendors, or the rental on the billboards, failing to provide financial information to the individual defendants regarding Marathon, and failing to exercise the skill, care and diligence required for the conduct of Marathon's business.

The second counterclaim alleges that this same conduct constituted a breach of PNE's contractual obligations as Manager of Marathon.

PNE claims that the defendants' counterclaims relate to the LLC Agreement, only, and not to the claims alleged in the Complaint, which arise under the Promissory Note and Pledge agreement. The counterclaims must be arbitrated, argues PNE, pointing to the allegation in the defendants' answer, which invokes PNE's fiduciary duties under the "Marathon Agreement."

Alternatively, PNE claims that defendants have failed to allege misconduct which rises to the level of wrong required under the contract before a claim of breach of

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fiduciary duty arises. PNE relies on section 4.2 of the LLC Agreement, which limits liability for mismanagement of the Company to intentional conduct, knowing violations of the law, gross negligence, or a transaction for which the manager receives a personal benefit.

Defendants argue that the claims alleged in their answer arise out of the same transactions, and involve common issues of fact and law, as the claims in the Complaint. Defendants claim that the LLC agreement was executed simultaneously with the Promissory Note and the Pledge Agreement, and that but for the prohibitions against Marathon's use of the billboards, imposed by the owner of the land on which the billboards were built, none of the present claim would exist.

Where arbitrable claims are inextricably bound together with claims that are not arbitrable, the court may direct that all of the claim be resolved in the same judicial forum. ***Brennan v A.G. Becker, Inc.,*** 127 AD2d 951 (3[d] Dept 1987).

PNE argues that ***Brennan*** is no longer the law, having been overturned by more recent decisions in the First Department, namely ***Cullman Ventures, Inc. v Conk,*** (252 AD2d 222 [1st Dept 1998]), and HSBC ***Bank*** USA ***v The National Equity Corp.,*** (279 AD2d 251 [1st Dept 2001]). Both ***Cullman*** and ***HSBC*** are distinguishable from Brennan. ***Cullman*** involved a New York eourt's order which enjoined an Indiana arbitration, and lawsuit, on finding that the claims advanced in Indiana involved the same allegations of fraud as had been raised in a pending New York arbitration. The Appellate Division

held that the record did not support the IAS court's finding that the Indiana claims overlapped with the claim pending in New York. Even had there been "a greater confluence of claims," held the appellate court, the IAS court lacked the authority to enjoin the Indiana proceedings, even if the court "articulated salutary grounds for doing so" since the parties had entered two separate agreements, each calling for arbitration, one in Indiana, the other in New York. *Cullman Ventures, Inc. v Conk*, supra, at 228 - 229. The IAS court could not intrude "into what clearly were binding contractual agreements," which agreements were to be "enforced according to their terms." *Id.* at 228.

In *HSBC*, the parties had contractually agreed to permit either side to seek arbitration of a portion of any dispute, while at the same time electing to seek judicial enforcement of any other portion of the same dispute. When the borrower sought to stay a judicial proceeding brought for issuance of an order of seizure of collateral, the IAS court issued the stay, finding that HSBC had made an election of remedies by commencing an arbitration proceeding first. The Appellate Division reversed, citing the holding in *Cullman:* arbitration agreements, as contractual agreements, must be enforced according to their terms. HSBC *Bunk* USA v *National Equity Corp.*, supra at 254. Issuance of an order of seizure would not determine the ultimate merits of the case, but only the issue of the right of possession of the collateral. Under the contract, and the CPLR, HSBC was free to seek judicial relief while simultaneously seeking arbitration of

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the underlying dispute.

Neither ***Cullman*** nor ***HSBC*** addresses the situation in Brennan. In *Brennan*, the plaintiff had opened three investment accounts, two as a trustee for a profit sharing plan and pension plan of his professional corporation, and one as a personal account for himself and his wife. A subsequently executed margin agreement for the personal account contained an arbitration clause. None of the documents for the other two accounts contained an arbitration clause. Plaintiff then commenced a lawsuit alleging causes of action based on all three investment accounts. The court found that the circumstances were such that all of plaintiff's claims were found to be "inextricably bound together." Despite the arbitration clause, the court ordered the parties to litigate the dispute over the personal account in the judicial forum where the commercial accounts were being litigated.

As in Brennan, defendants' counterclaims are "inextricably bound together" with the claims in the Complaint. Although PNE would have the court bifurcate the issues arising under the LLC Agreement, and those arising under the Promissory Note and Pledge Agreement, in fact the relationship between plaintiffs and defendants as limited partners in Marathon is inextricably intertwined with the claims each party raises, as to fraud, breach of fiduciary duties, and breach of contract, in their respective pleadings.

The motion to stay the counterclaims, pending arbitration, is thus denied.

Nor have plaintiffs sustained their burden of proof with respect to that branch of

the motion which seeks dismissal of the counterclaims for failure to state a cause of action. CPLR 3211(a)(7). On a motion to dismiss for failure to state a cause of action, every fact alleged must be assumed to be true and the pleading liberally construed in favor of the pleading party. *Barr v Wackman*, 36 NY2d 371 (1975). A pleading should not be dismissed so long as a cause of action exists. *Rovello* v *Orofino Realty Co.*, 40 NY2d 633 (1976). Despite PNE's interpretation of the LLC Agreement, the defendants' answer adequately pleads claims for breach of fiduciary duty and breach of contract. The branch of the motion seeking dismissal of these claims is denied.

The cross-motion to stay the Complaint is denied, as moot.

Accordingly, it is

ORDERED that the motion to stay or dismiss the first and second counterclaims is denied; and it is further

ORDERED that the cross-motion to stay the Complaint is denied as moot.

Dated: SEPTEMBER 10,2001

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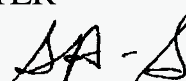

J.S.C.