SB Opportunity Tech. Assoc. Inst. LLC v National Assn. of Sec. Dealers, Inc.
2005 NY Slip Op 30572(U)
October 21, 2005
Supreme Court, New York County
Docket Number: 112203/2005
Judge: Rosalyn H. Richter

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

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SB OPPORTUNITY TECHNOLOGY ASSOCIATES INSTITUTION LLC (f/k/a SANDS BROTHERS/ AMERINDO TECHNOLOGY ASSOCIATES INSTITUTION LLC), SB OPPORTUNITY TECHNOLOGY MANAGEMENT INSTITUTION LLC (f/k/a SANDS BROTHERS/AMERINDO TECHNOLOGY MANAGEMENT INSTITUTION LLC) and SANDS BROTHERS ASSET MANAGEMENT, LLC,

Petitioners,

- against -

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., LEO R. BEUS, ANNETTE BEUS, SANDS BROTHERS & CO., LTD., MARTIN S. SANDS, STEVEN B. SANDS, and BRAD D. COHEN,

Respondents.

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Index No. 112203/2005
Interim Decision & Order

ROSALYN RICHTER, J.:

Petitioners move, pursuant to CPLR § 7503 (b), for an order staying and enjoining respondents from conducting the arbitration pending before the National Association of Securities Dealers, Inc. (NASD), entitled *Leo R. Beus and Annette Beus v Sands Bros. & Co., Ltd., et al.*, NASD Arbitration No. 02-03820 (NASD Arbitration).

Petitioners SB Opportunity Technology Associates Institution LLC (formerly known as Sands Brothers/Amerindo Technology Associates Institution LLC) ("LLC"), SB Opportunity Technology Management Institution LLC (formerly Sands Brothers/Amerindo Technology Management Institution LLC) ("SAT-M"), and Sands Brothers Asset Management, LLC ("SBAM") are each a New York limited liability company. Respondent NASD is a not-for-profit Delaware corporation. Respondents Leo R. Beus and Annette Beus are husband and wife, domiciled in

Arizona. Respondent Sands Brothers & Co. Ltd. ("Sands Brothers") is a Delaware corporation, and during the relevant period, was a broker-dealer registered with the United States Securities and Exchange Commission, and a member of NASD. Respondents Martin S. Sands, Steven B. Sands, and Brad D. Cohen are individuals.

In June 2002, the Beuses filed the NASD Arbitration against Sands Brothers and James Lawrence Palmer. On September 14, 2002, they submitted an Amended Statement of Claim (Amended SOC), naming as respondents therein Sands Brothers, LLC, SAT-M, SBAM, Amerindo Investment Advisors, Inc., Martin S. Sands, Steven B. Sands, and Brad D. Cohen, and dropping Palmer as a respondent. According to the Amended SOC, in late 1999, the LLC made a private placement of "Units" in a private managed fund through a confidential offering memorandum, dated October 13, 1999 (Offering Memo). The Beuses purchased such Units, and it is this investment that forms the basis of the damages sought in the Amended SOC.

The Offering Memorandum includes an "Operating Agreement" that contains an arbitration clause that states, in relevant part:

> "10.14 *Arbitration*. The parties agree to submit all controversies to arbitration in accordance with the provisions set forth below and understand that:
>
> All controversies which may arise between the parties concerning this Agreement shall be determined by arbitration pursuant to the rules then pertaining to the American Arbitration Association in New York City, New York . . . ."

Each of the Beuses signed the Operating Agreement as "Members" of the LLC. Petitioners argue that the arbitration should be stayed because they, as non-NASD members, have neither agreed nor consented to NASD arbitration. Rather, any disputes concerning the Beuses and the LLC, SBAM, and SAT-M are subject to arbitration before the American Arbitration Association (AAA) in New York City.

Respondents incorrectly argue that the motion should be denied because petitioners did not seek this relief within the four-month limitations period applicable to special proceedings set forth in CPLR § 217. Respondents cite no authority for their conclusion that this provision applies here, and CPLR § 7503, which governs the instant motion, does not refer to this particular limitations provision. In any event, no determination relating to petitioner was ever made by the NASD and thus, even if CPLR § 217 applies, the time period for bringing this proceeding has not expired. Similarly unavailing is respondent's argument that this court lacks jurisdiction to stay an Arizona proceeding. The court has jurisdiction to enjoin respondents from pursuing the Arizona proceeding as against petitioners, if it determines that participation in the arbitration would contravene the agreement to arbitrate all disputes pursuant to the rules then pertaining to the AAA in New York. *See H.M. Hamilton & Co. v. American Home Assur. Co.*, 21 A.D.2d 500 (1st Dept 1964), *aff'd* 15 N.Y.2d 595 (1964); *Curtis, Mallet-Prevost, Colt & Mosle, LLP v. Garza-Morales*, 308 A.D.2d 261 (1st Dept 2003).

The Court is not persuaded that the motion should be denied on the grounds of laches. *See generally, Blimpie Intern., Inc. v. D'Elia*, 277 A.D.2d 69 (1st Dept 2000); *Martin v. Briggs*, 235 A.D.2d 192 (1st Dept 1997). Respondents have failed to establish any significant prejudice to them arising from the fact that this motion was brought on the eve of the arbitration. No witnesses had yet been called and respondents will still be allowed to arbitrate this dispute, albeit in a different forum, even if petitioners prevail on the stay application. Furthermore, the arbitration involving the NASD members can proceed, under the terms of the modified TRO issued by this Court, and thus respondents will, even while the motion is pending, be able to pursue their claim.

Respondents final argument, that petitioners are bound to the arbitration agreement and

obligation of their related company Sands Brothers because there is direct control between petitioners and the other Sands entities that were involved in the effort to sell the investment, cannot be resolved without a hearing on this limited issue. It is undisputed that petitioners are not NASD members, and none of them qualifies as a "person associated with a member", or an "associated person of a member," because that designation only applies to natural persons as indicated in the qualifying language in the NASD By-Laws. *Burns v. New York Life Ins. Co.*, 202 F.3d 616, 620 (2nd Cir. 2000). Thus, petitioners could not be compelled to arbitrate before the NASD as an associated person. However, to prevent fraud or to achieve equity, a non signatory to an arbitration agreement may be bound to arbitrate under that agreement if the entity is an alter-ego. *TNS Holdings, Inc. v. MKI Securities Corp.*, 92 N.Y.2d 335, 339 (1998).

According to Quinton F. Seamons, Esq., a member of the Arizona law firm representing the Beuses in the NASD Arbitration, who states that he has personal knowledge of the facts set forth in his affidavit, in late 1999, Sands Brothers recommended that the Beuses invest in four Units of the LLC totaling $1 million. The investment relationship was not maintained by Sands Brothers, the NASD member, but was maintained by petitioners and other affiliated entities of Sands Brothers, such as SBAM. The Amended SOC contains allegations that Sands Brothers, the entities that had been originally managing the Beuses accounts, created the investment vehicles and petitioners steered the Beuses into these, allegedly, unsuitable investments, and failed to adequately supervise the accounts and investments. Seamons also states, however, that after the NASD Arbitration was filed, the Beuses received reports and indications that Sands Brothers was transferring assets and maneuvering to avoid any obligation to pay an award.

In particular, respondents argue that all the entities are controlled by the same individuals

and that petitioners operate out of the same office as Sands Brothers. They contend that Martin and Steven Sands are the decision-makers for each of the entities. Petitioners, citing another case involving the Sands Brothers, note that they have been found not be to subject to arbitration before the NASD as not being an associated person. However, that legal conclusion does not resolve the question of whether there is an alter-ego relationship between the various entities here such that they all should be compelled to arbitrate in one proceeding before the NASD. To be sure, interrelatedness, standing along, is not sufficient to subject a nonsignatory to arbitration, *TNS Holdings v MKI Sec. Corp.*, 92 N.Y.2d at 340, but here factual allegations have been put forward to suggest that significant control was exercised by the Sands Brothers over the various entities and facts have been proffered to show that the dominance may have led to fraud and malfeasance. The parties papers, and the oral argument held before this Court, raise questions of fact as to the extent of overlap between the various entities and whether they are alter egos of each other and thus, a hearing is warranted. *See generally, Mason v. Dupont Direct Financial Holdings, Inc.*, 302 A.D.2d 260 (1st Dept 2003); *Application of Parish*, 246 A.D.2d 449 (1st Dept 1998); *Welton Becket Associates v. LLJV Development Corp.*, 193 A.D.2d 478 (1st Dept. 1993); CPLR § 410. The parties shall appear for this hearing in Part 24 on Nov. 3 at 11:00 am. If this date is not convenient, counsel can contact chambers to re-schedule. The Court also requests that counsel contact the Court by conference call several days in advance of the hearing to discuss a proposed witness list.

Oct. 21, 2005

Justice Rosalyn Richter