[* 1]

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

PRESENT: Freedman Justice PART 39m

In the matter of Penrosh LTD

INDEX NO. 602275/07

MOTION DATE

- v -

MOTION SEQ. NO. 001

MOTION CAL. NO.

Burlowa Center Assoc

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: October 15, 2007

Helen E. Freedman J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

- -X

In the Matter of the Application of
PENRUSH, LTD.,

Index No. 602275/07

Petitioner,

For a Judgment Staying the Arbitration
Commenced by

BURLOWA CENTER ASSOCIATES,

Respondent.

- X

HELEN E. FREEDMAN, J.:

Petitioner Penrush, Ltd. ("Penrush") moves to stay arbitration (CPLR 7502[b] and 7503[b]) on the ground that there is no valid agreement to arbitrate. In a related proceeding (Matter of Burlington et ano., Index No. 602274/07) decided simultaneously herewith, petitioners Burlington I.K. Associates ("Burlington") and Filip Di Sanza ("Di Sanza") move to stay arbitration on the grounds that (1) the claims against Burlington are barred by the statute of limitations and/or are not otherwise the subject of a valid agreement to arbitrate, and (2) the claims against Di Sanza are not the subject of an agreement to arbitrate, in that there is no agreement whatsoever between Burlington and Di Sanza providing for arbitration. Burlowa Center Associates ("Burlowa"), the respondent in both proceedings, opposes the motions on the ground that petitioners

are collaterally and judicially estopped from raising objections to arbitration before the court by reason of their successful motion to compel arbitration in Iowa state court.

Background/Prior Proceedings

The facts and procedural background of this matter were set forth at length in the October 31, 2006 judgment and order of the Eighth Judicial District Court for the State of Iowa (Brown, J.)(the "October Iowa Order"), familiarity with which is presumed. As is relevant here, Burlowa is an investor and the ground lessee of a shopping center in Burlington, Iowa. In 1981, Burlowa executed a promissory note and mortgage in favor of Burlington, and later a sublease (the "Sublease"). Burlowa executed a new promissory note (the "Replacement Note") in 1990, which Burlington purportedly assigned to Penrush in 1998. Di Sanza, president of Burlington and principal in various related entities, was a signatory to a number of the relevant transactional documents.

Paragraph 36 of the Sublease provides as follows:

> In the event of any difference arising between the parties with respect to the interpretation or enforcement of any part of this sublease, the same shall be submitted to arbitration in New York City pursuant to the then prevailing rules and regulations of the American Arbitration Association.

In 2005, Penrush commenced an action against Burlowa for alleged defaults under the Replacement Note. Burlowa answered in 2006, asserting counterclaims against Penrush and impleading Burlington and Di Sanza. Penrush then moved to compel arbitration of the counterclaims pursuant to paragraph 36 of the Sublease. By order dated May 1, 2006 (the "May Iowa Order"), the Iowa state District Court (Linn, J.) denied the motion without prejudice. The court stated:

> If the assertions made by Burlowa in its answer, counterclaims, and third-party claim are true, then this entire lawsuit should be stayed and all disputes should be submitted to arbitration. However, the court is not in a position to make those findings of fact simply on the allegations in the pleadings. It is correct that the sublease between Burlowa and Burlington I.K. contains a requirement for arbitration. But at this stage of the litigation, it does not appear that the arbitration clause in the sublease agreement would require the court to stay the litigation between Penrush and Burlowa. The court is unwilling to make a finding that the replacement note and mortgage and the sublease are "inextricably interrelated."

Burlington and Di Sanza subsequently made their own motion to compel arbitration. Penrush appeared at the hearings on the motion and was given an opportunity to be heard, and supported

the submission of the matters arising under the Sublease to arbitration. In the October Iowa Order, the court found:

> It is clear that the mortgages, notes, and sublease are all part of one business transaction between Burlowa and I.K. [Burlington]. As such, it is clear that these instruments and their interpretation and enforcement against the parties are interrelated. Therefore, all matters before the Court concern the sublease. While Penrush was not a party to the overall business transaction between I.K. and Burlowa, it takes I.K.'s place as assignee of the replacement mortgage. The change in the replacement note removing the offset provisions specifically changes the interpretation or enforcement of the sublease, which is subject to arbitration. Moreover, the errors or discrepancies in the mortgages and note and assignment further change the interpretation or enforcement of the sublease. The fact that Penrush was assigned the replacement mortgage does not change the interrelatedness of the instruments involved in this business transaction. Therefore, all non-tort claims between all of the parties should be submitted to arbitration in New York pursuant to the terms of the sublease because all claims are related to the sublease. Any remaining tort claims, should they exist, should therefore be bifurcated and stayed in the instant proceedings until such time as the non-tort claims have been arbitrated.

In May 2007, Burlowa served a demand for arbitration against Burlington, Di Sanza and Penrush. The instant motion to stay arbitration followed.

Discussion

The motion to stay arbitration is denied. The petitioners in both actions are estopped from resisting arbitration by virtue of their conduct in demanding arbitration in the Iowa litigation and the effect of the October Iowa Order granting that precise relief. "[T]he doctrine of judicial estoppel is intended to prevent abuses of the judicial system by which a party obtains relief by maintaining one position, and later, in a different action, maintains a contrary position" (D & L Holdings, LLC v RCG Goldman Co., LLC, 287 AD2d 65, 71 [1st Dept 2001]). Moreover, the Iowa ruling that the claims between "all of the parties should be submitted to arbitration in New York pursuant to the terms of the sublease" forecloses this court from revisiting whether petitioners Di Sanza and Penrush may be compelled to arbitrate under principles of collateral estoppel (see Port Auth. of NY & NJ v Office of Contract Arbitrator, 254 AD2d 194 [1st Dept 1998]).

Petitioners nevertheless argue that under New York law, the court, not the arbitrators, must resolve the issues of the statute of limitations and the existence of a valid arbitration agreement (see CPLR 7502[b], 7503; Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp., 4 NY3d 247 [2005]; TNS Holdings v MKI Sec. Corp., 92 NY2d 335 [1998]).

Whatever the merits of that argument in the general case, it has no force here because CPLR 7503(b) affords the right to move for a stay only to "a party who has not . . . made . . . an application to compel arbitration." Petitioners therefore waived their right to judicial review of the threshold questions by seeking arbitration in the Iowa courts (see Matter of Shearson Lehman Bros., 156 Misc 2d 773 [Sup Ct, NY County 1993][party who prevailed in New Jersey action on motion to compel arbitration in New York barred from seeking court stay on limitations ground]). Had they desired to preserve that right, the proper procedure would have been to make a motion for a stay in the sister state court rather than a motion to compel here (id.). Having failed to do so, petitioners must submit all questions to the arbitral tribunal.

Accordingly, it is

ORDERED that the motion to stay arbitration is denied and the petition is dismissed; and it is further

ORDERED that the parties are directed to proceed to arbitration forthwith.

Dated: October 15, 2007

ENTER:

Helen E. Freedman J.S.C.