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

PRESENT: HON. ROLANDO T. ACOSTA Justice

PART 61

FOX, Roger

INDEX NO. 602688/2007

MOTION DATE

- v -

MOTION SEQ. NO. 002

DORNEY, Christopher

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	(see attached)
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
NOV 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 11/26/07

SO ORDERED

ROLANDO T. ACOSTA 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 61

ROGER FOX and CYNTHIA L. FOX

Petitioners,

- against -

CHRISTOPHER DORNEY

Respondent.

DECISION/ORDER

Index No. 602688/07

Present:

Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing Roger Fox's and Cynthia L. Fox's ("petitioners") C.P.L.R. § 7503(b) motion for an order to stay the arbitration demanded by Christopher Dorney ("respondent") and respondent's cross-motion for dismissal based on numerous grounds, including C.P.L.R. §§ 304, 403(c), 3211(a)(8), 501, 503, 510, 327, and 3211(a)(7).

Papers	**Numbered**
Petitioner's Notice of Motion & Affirmation in Support of 7503(b) Motion	**1 (Exhibits 1-3)**
Respondent's Notice of Cross-Motion & Affirmation in Opposition to Petition and In Support of Cross-Motion	**2 (Exhibits A-C)**
Petitioner's Reply Affirmation & Opposition to Respondent's Cross-Motion	**3**

Background

The parties to this action are the sole members of a limited liability company, called CRC Group, LLC ("CRC"). CRC was formed on June 7, 2001 in accordance with Article 2, § 203 of the New York Limited Liability Company Law ("LLC Law") when the parties filed Articles of Organization (the "Articles") with the New York State,

Department of State. Then, on June 21, 2001, CRC executed an Operating Agreement.[1]

Notwithstanding the lack of clarity regarding the nature of the dispute, the parties have been litigating in Suffolk County and now in New York County.[2] According to the New York State Unified Court System's eCourts' database, respondent Christopher Dorney (therein plaintiff, herein respondent) filed an action against CRC commencing in 2006 in Suffolk County Supreme Court - Civil. This action produced three motion sequences beginning with defendant CRC's motion to dismiss the case or in the alternative to compel arbitration based on the aforementioned operating agreement. In an order dated July 20, 2006, the Honorable Supreme Court Justice Sandra L. Sgroi ordered the parties to arbitrate the dispute and dismissed the case. According to the submitted papers, the parties to the Suffolk County action, namely Christopher Dorney and CRC, have already commenced arbitration and discovery. According to respondent, an Interim Award was issued by the "sole-Arbitrator" in respondent's favor. According to the eCourts' database, plaintiff (herein respondent Christopher Dorney) filed a motion to confirm the arbitrator's interim award on July 27, 2007 and defendant CRC filed a motion to vacate the arbitrator's interim award on August 15, 2007. Upon information and belief, both of these motions are currently pending in Suffolk County's Supreme Court.

According to the submitted papers, the parties to the Suffolk County action did not include Roger and Cynthia Fox, as individuals, only in their capacity as members of CRC. Therefore, on July 23, 2007 Respondent Christopher Dorney served a Notice of Intent to Arbitrate upon petitioners and in response, petitioners sought a stay of arbitration and a temporary restraining order by order to show cause in New York County. The parties argued the motion before the Honorable Justice Nicholas Figueroa on August 9, 2007, and it appears that petitioner withdrew that part of the application for injunctive relief.[3]

In the instant C.P.L.R. § 7503(b) application, petitioners argue for a stay of arbitration based on the parties agreement to submit disputes to a "court certified

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[1]LLC Law, Section 102 (u) "Operating agreement" means any written agreement of the members concerning the business of a limited liability company and the conduct of its affairs and complying with section four hundred seventeen of this chapter.

[2] The Court has taken judicial notice of a related judicial proceeding in another court. *MJD Constr. v Woodstock Lawn & Home Maintenance, 299 A.D.2d 459, (2nd Dep't 2002)*.

[3]Justice Figueroa recused himself from the case on September 10, 2007, and the case was then assigned to Part 61.

mediator of the Supreme Court in the County of the principal office of the Company." Central to this dispute is the parties' disagreement about which county, New York or Suffolk, should be controlling under the terms of the agreement to mediate and/or arbitrate. The aforementioned operating agreement, in article 13.14 states:

> *any disputes between the parties or any disputes arising hereunder which the parties cannot resolve between themselves using good faith shall be referred to a court certified mediator of the Supreme Court in the County of the principal office of the Company, and shall be the exclusive remedy of the parties ... In the event that said dispute is not resolved in mediation, the parties shall submit the dispute to an arbitrator certified by the Supreme Court in the County of the principal office of the Company. The decision of the arbitrator shall be final and binding.*

The same operating agreement specifies that CRC's principal office is in New York County.[4] The respondent opposes the motion and argues, among other things: that the principal office of the parties is in Suffolk County[5]; that this court does not have jurisdiction over respondent under C.P.L.R. § 3211(a)(8) since the petition was not properly commenced according to C.P.L.R. §§ 304 and 403(c); that New York County is an inconvenient forum based on C.P.L.R. § 327; and that the petition failed to state a cause of action based on C.P.L.R. §§ 3211(a)(7). Respondent also argues for dismissal to avoid inconsistent judgments based on the pending actions in Suffolk County.

Analysis

As a preliminary matter, while it is true that a request under C.P.L.R. § 7503(b) should be commenced by the filing of a special proceeding by petition and not a notice of motion, this technical error is insufficient to warrant dismissal. C.P.L.R. §§ 3026 and 2001 permit the Court to consider the merits of this motion in spite of the titling error. Thus petitioners' application will be considered on the merits notwithstanding petitioner's error.

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[4]Article 2.7 of said agreement states the "principal office of the Company in the State of New York shall be located at 45 John Street, Suite 711, New York, New York 10038."

[5]Respondent's insistence that Suffolk County is controlling rests on the information found in CRC's Articles of Organization ("Articles"). Article 2 of the Articles, lists the county of the office of the company as "30 West Jefryn Boulevard, Deer Park, New York 11729" - an address in Suffolk County. Also, Article 9 of the Articles, titled "Management" lists the three parties involved in this action, and the 30 West Jefryn Boulevard address under each. Therefore, respondent argues that CRC's principal office is in Suffolk County, not New York County.

Consideration of petitioner's application on the merits, also disposes of respondent's argument that the application should be dismissed because petitioner failed to commence the action consistent with C.P.L.R. §§ 304, 403(c) and that consequently, the Court lacks jurisdiction over the respondent under C.P.L.R. § 3211(a)(8). However, sections 304 and 403(c) are only relevant when the authorizing statute, here C.P.L.R. § 7503, does not provide a procedure to file a petition. David D. Siegel, New York Practice 1040 (4th ed. 2005); Matter of Knickerbocker Ins. Co. (Gilbert), 28 N.Y.2d 57 (1971). Here, C.P.L.R. § 7503(c) does provide for a specific procedure to seek a stay, which petitioner has followed.[6] Therefore, respondent's jurisdictional arguments under C.P.L.R. Articles 3 and 4 are misplaced and the cross-motion for dismissal under C.P.L.R. § 3211(a)(8) are denied.

Generally, courts do not disturb the parties' clear intent in a written agreement absent evidence of fraud, overreaching, undue influence or other contract formation infirmity. In re Western Union Tel. Co. v. American Commun. Assn. C.I.O., 274 A.D. 754, 756 (1st Dep't 1948), aff'd, 299 N.Y. 177, 184 (1949) ("[w]here, as in the contract which the arbitrator was here called upon to interpret, the language is unambiguous, the words plain and clear, conveying a distinct idea, there is no occasion to resort to other means of interpretation. Effect must be given to the intent as indicated by the language employed.") (internal quotes omitted). Applying this hornbook principle of interpretation to the operating agreement, petitioners assert that the operating agreement mandates that the parties submit any mediation/arbitration disputes to the Supreme Court in New York County. Respondent, on the other hand, counters that the operating agreement is subordinate to the articles of organization, and that because the latter names a Suffolk County address and not a New York address as the place of business, this dispute should be handled in Suffolk County. Respondent also cites to LLC Law §417(a) which in relevant part states, "the members of a limited liability company shall adopt a written operating agreement that contains any provisions **not inconsistent with ... its articles of organization.**" (**emphasis added**) However, nothing about these two agreements is inconsistent and this Court does not have to read the two agreements together to give meaning to the operating agreement where, as here, the terms of the operating agreement

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[6] C.P.L.R. § 7503(c) states in relevant part: "An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded. Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. Service of the application may be made upon the adverse party, or upon his attorney if the attorney's name appears on the demand for arbitration or the notice of intention to arbitrate."

are clear and unambiguous.

Furthermore, respondent himself relied on the operating agreement to initiate arbitration proceedings, and the same agreement refers to New York County as CRC's principal office. Clauses of a contract should be read together contextually in order to give them meaning. HSBC Bank USA v. National Equity Corp., 279 A.D.2d 251, 253 (1st Dep't 2001). Thus, petitioners are correct is asserting that New York County is the correct forum, pursuant to the clear terms of the parties' agreement, for any dispute arising under the operating agreement.

Turning to respondent's cross motion to dismiss on inconvenient forum grounds, respondent argues that the parties' residences are in Suffolk County, that CRC's place of business is in Suffolk County, the relevant evidence is in Suffolk County, and that the pertinent facts took place in Suffolk County. Respondent's arguments fail inasmuch as the parties' operating agreement provides that matters related to the mediation and/or arbitration of any dispute between the parties be handled by the Supreme Court in New York County. Aaacon Auto Transport, Inc. v. Rosenbaum, 50 A.D.2d 180 (1st Dep't 1975) (the doctrine of forum non conveniens was inapplicable because the petitioner was required to bring the proceeding in New York County, as provided in the parties' agreement).

Likewise, that branch of respondent's cross motion to dismiss the petition based on C.P.L.R. § 510 fails when balanced against petitioner's right to have his case heard in the county of his choice. C.P.L.R. § 509; Andreadis v. Long Island R. Co., 166 A.D.2d 338 (1st Dep't. 1990). Respondent's arguments to the contrary, this Court is not convinced that a change of venue is warranted. The parties' contractually agreed to submit disputes to arbitration and/or mediation in New York County. Petitioners exercised their statutory right to have this petition decided in the county designated by the parties' agreement. Absent proper grounds, the Court will not disturb the parties unambiguous agreement. CPLR §§ 501, 510(2); A.C.E. Elevator Co. v. V.J.B. Construction Corp., 192 Misc.2d 258 (Sup.Ct.Kings Co. 2002) (a mechanic's lien foreclosure action in which the parties' contractual choice of venue was held to supersede the rule in C.P.L.R. § 507 that real property actions must be brought in the county where the property is located). Furthermore, as stated above, the respondent is conveniently relying on portions of the operating agreement to initiate and enforce arbitration proceedings against petitioners. DeSola Group, Inc. v. Coors Brewing Co., 199 A.D.2d 141 (1st Dep't 1993)(doctrine of separability is inapplicable where a party alleges fraud as to parts of a contract, but wants to enforce a forum selection clause found in the same contract).

Respondent's argument for dismissal pursuant to C.P.L.R. § 3211(a)(7) must also

be denied. Petitioner is in essence seeking a stay based on respondent's failure to adhere to a condition precedent to arbitration, namely "court certified mediation." The absence of a court mediation process pre-note of issue is irrelevant to petitioner's request inasmuch as the Court may certify private mediation.[7] To be sure, petitioner is simply requesting adherence to the terms of the contract to mediate prior to arbitration. In similar circumstances, the Second Department ordered a permanent stay of the arbitration finding that the parties had not complied with two contractually required condition precedents, including that the parties' claim be referred to mediation prior to arbitration of the dispute. Lakeland Fire Dist. v. East Area General Contractors, Inc., 16 A.D.3d 417 (2nd Dep't 2005). Thus, petitioners' request is cognizable under the law, and the respondent's cross motion to dismiss pursuant to C.P.L.R. § 3211(a)(7) is denied.

Respondent's final argument is that any decision from this Court to stay the arbitration proceedings may conflict with the current motions before the Supreme Court in Suffolk County. As noted above, the two motions pending before the court in Suffolk County are for confirmation of the arbitrator's interim award, and to vacate the arbitrator's interim award between Christopher Dorney and CRC. Although respondent contends that he has moved to join the individual petitioners to the Suffolk County action, there is no evidence that they have been joined. Even if the Supreme Court of Suffolk County joined the individuals, Cynthia L. Fox and Roger Fox to that action, that would not conflict with a decision by this Court to stay arbitration pending the parties submission to mediation, as provided in their agreement. Accordingly, it is

ORDERED that the petitioners' application for a stay of arbitration is granted; and it is further

ORDERED that the respondent's cross-motion is denied in its entirety.

This constitutes the Decision and Order of the Court.

ENTER

FILED
NOV 28 2007
COUNTY CLERK'S OFFICE
NEW YORK

SO ORDERED

Dated: November 26, 2007

Rolando T. Acosta, J.S.C.

ROLANDO T. ACOSTA
J.S.C.

[7] While the Supreme Court, New York County does not have a court certified mediation program, it does order court supervised mediation between the parties upon the filing of the note of issue prior to trial.

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