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

PRESENT: YORK Justice PART 2

LIEBESKIND, M.D., MARC

INDEX NO. 111075/07

-v-

MOTION DATE

ALBERT U. MESSINA, M.D., ET AL.

MOTION SEQ. NO. 03

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
DEC 31 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 12/20/07

LOUIS B. YORK 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: IAS PART 2

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In the Matter of the Application of
MARC LIEBESKIND, M.D., for stay of arbitration
Petitioner,
For a Judgment Under Article 78 of the Civil Practice and Rules

Index No. 111075/07

-against-

ALBERT V. MESSINA, M.D.,
Respondent.

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LOUIS B. YORK, J.:

Sequence numbers 001, 002 and 003 are consolidated for disposition.

Dr. Mark Liebeskind has brought a petition to dissolve the medical practice where he and respondent Dr. Albert Messina share 50% voting rights, although Liebeskind possesses a 66 2/3 interest and Dr. Messina has a 33 1/3 interest.

An understanding of the history of this practice sheds light on how the parties have arrived at the impasse they now face. The practice was originally formed by Doctors Arie Liebeskind and Dr. Messina. After a brief stint as an employee, Arie Liebeskind's wife, Doreen, joined the practice as a shareholder. Then Gary Halpern joined the practice. Eventually, Arie and Doreen retired from the practice. Petitioner claims that when they retired, they assigned their shares to him. Respondent, Dr. Messina, claims that Marc Liebeskind obtained his mother's shares through fraudulent means, and who gets her shares has to be determined.

In the meantime, Dr. Halpern left the practice and reached an agreement with the remaining shareholders (Marc Liebeskind and Albert Messina) as to the payout for his interest. He was paid for a time, and then the payments stopped because of insufficient funds.

Relations between the two remaining doctors Liebeskind and Messina have reached a low point and now they hardly communicate with each other. Besides the claim that Marc fraudulently obtained his mother's interest, there are claims between them of incompetency, maintaining staff of inferior quality, unilateral purchasing of expensive equipment, and alleged threats to report Messina's incompetence to the regulators in order to get Messina to sell his interest to Liebeskind.

In order to finish paying off Dr. Halpern as well as the practice's other financial obligations, plaintiff seeks a loan from his bank. The bank is willing to grant the loan provided the practice renews its lease. Liebeskind refuses to sign the new lease. The bank has extended the period for obtaining the loan several times, but has warned Messina that if it cancels the loan because of a failure to sign the lease, penalties currently well over $400,000 and periodically increasing will be assessed.

As a result of the foregoing which seriously impedes the functioning of the practice, Liebeskind filed the petition for foreclosure. Shortly thereafter, plaintiff served a Demand for Arbitration before the American Arbitration Association, and for a stay of the dissolution

petition. Liebeskind originally challenged the adequacy of service of the demand but has since indicated his abandonment of that issue. Liebeskind moved to stay arbitration.

The Petition for Dissolution was stayed while the arbitration issue has been in litigation. I originally stayed the arbitration and then ordered that administrative matters could be undertaken but no hearing was to commence until I lifted that portion of the stay.

Liebeskind claims that because the parties are deadlocked, there can be no arbitration. Moreover, he claims that the current agreement in force states that arbitration can only be before the AHLA, Alternate Dispute Resolution Service. Messina counters that the American Arbitration Association ("AAA") is the only place where all the parties' issues can be resolved. Messina also claims that he now has the right to buy the- practice from Liebeskind.

In 2002, the parties entered into a shareholder agreement with a broad arbitration clause designating the AAA as the forum for arbitration. All of the parties to the current dispute, including Dr. Halpern, signed this agreement, except for Marc Liebeskind. But Marc obtained his shares from his mother and father who did sign the agreement. In 2004, another shareholder agreement was entered into which was signed by all the shareholders, including Marc Liebeskind who now possessed an interest. Gary Halpern was not a party to the omnibus agreement because he no longer possessed any interest in the practice, and the agreement specifically stated that it did not apply to him.

The omnibus agreement states that it supersedes the 2002 agreement. The language is clear and unequivocal. Therefore, this agreement is the one to address with regard to the issues in this case. It also states at paragraph 23

> **Any dispute arising under this agreement shall be settled under the rules and auspices of the AHLA Alternate Dispute Resolution Service.**

The Court notes that the executor of Doreen's estate supports Liebeskind's Petition for Dissolution, but also contends that the matter is subject to the jurisdiction of the Nassau County surrogate since the distribution of her shares are involved.

The broad arbitration clause in the omnibus agreement can subject a claim for dissolution to arbitration (***Steinberg v Steinberg***, 38 AD2d 57,58, 327 NYS2d 245 [1st Dept 1971], *affd* 32 NY2d 671, 343 NYS2d 133 (1973). In ordering a Petition for dissolution was subject to arbitration, the Court can stay the petition while the arbitration continues (***Matter of J&J Perlman's, Inc.***, 81 AD2d 686, 438 NYS2d 679 [3rd Dept 1981]). In ***Assael v Assael***, 132 AD2d 48, 521 NYS2d 226 [1st Dept 1987], in ordering arbitration where there was a petition for dissolution, it will subject the parties to arbitration where there is a broad arbitration clause. The Court distinguished the Court of Appeals decision in ***Sherril v Sherril***, 64 NY2d 261, 468 NYS2d 159 [1985]. There, the plaintiff actively participated in litigation for three years, after which he first pursued arbitration. His active participation over such a prolonged period of time amounted to a waiver of the right to arbitration. Here, on the contrary, Messina opted for arbitration immediately following the service of the

Petition for dissolution. There is, therefore, no waiver.

In attempting to invoke the 2002 contract, Messina seeks to utilize the clause in the omnibus agreement that says that all outstanding disputes should be resolved in one proceeding. The only agreement which encompasses everyone, including Halpern, who is not bound by the omnibus agreement, is the 2002 agreement which requires arbitration before the AAA. Although Liebeskind did not sign that agreement, he would be bound by it because his shares derive from his parents, who did sign the agreement. But this argument ignores the fact that Messina and Liebeskind, currently the two owners of their practice, are no longer bound by that agreement. The only solution can be that the AHLA is the only arbitration forum available to them. If Halpern wishes to resolve his issues there, he is free to do so, or to pursue his claim by alternate means.

The actual relief that Messina is seeking is to buy-out the interest of Liebeskind pursuant to §14(a)(iv) of the omnibus agreement, which provides for such a buy-out where a party brings a petition for dissolution. Such a provision is also subject to arbitration. (***Johnson v ACP Distribution***, 31 AD3d 172, 814 NYS2d 142 [1st Dept 2006]; ***Matter of Howard***, 91 AD2d 996, 457 NYS2d 858 [2d Dept 1983]).

The fact that there is a deadlock does not prevent arbitration where the matters in dispute, as they are here, are subject to arbitration (***Moscowitz v Surrey Sleep Products***, 30 AD2d 820, 292 NYS2d 748 [2d Dept 1968]). [50% of shareholders moved to compel arbitration and the others moved for the appointment of a receiver and a stay of arbitration.

Held: Proceeding to for dissolution should have been stayed pending arbitration.]

As far as the executor for Doreen Liebeskind's estate is concerned, his admission that whether petitioner or respondent prevails, the estate will not recover any interest in her property, deprives the estate of any recovery, and therefore of a transfer to Surrogate's Court. However, the Court will leave it to the arbitrators as to his participation in the arbitration. I have considered the parties' remaining arguments and find them to be without merit.

Accordingly, it is

ORDERED that the stay of arbitration is vacated and the parties shall proceed to arbitration before the AHLA Alternative Dispute Resolution Service; and it is further

ORDERED that the American Arbitration Association is permanently stayed from arbitrating this dispute.

Dated: 12/20/07

Enter:

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.