| **Matter of Liebeskind v Park Ave. Radiologists P.C.** |
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| 2008 NY Slip Op 32890(U) |
| September 30, 2008 |
| Surrogate's Court, Nassau County |
| Docket Number: 350223 |
| Judge: John B. Riordan |
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Petition of Franklin H. Julie, as Executor of the Estate of

ARIE L. LIEBESKIND,

File No. 350223

Deceased,

-against-

Dec. No. 442

Park Avenue Radiologists P.C. and Dr. Albert V. Messina, to Discover Property Withheld and Belong to the Estate of Arie L. Liebeskind and to Stay Arbitration and against Marc Liebeskind, M.D. and Kitchen Table Associates, LLC, parties to said arbitration,

Respondents.

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Petition of Franklin H. Julie, as Executor of the Estate of

DOREEN S.P. LIEBESKIND,

File No. 346612

Deceased,

-against-

Dec. No. 443

Park Avenue Radiologists P.C. and Dr. Albert V. Messina, to Discover Property Withheld and Belong to the Estate of Arie L. Liebeskind and to Stay Arbitration and against Marc Liebeskind, M.D. and Kitchen Table Associates, LLC, parties to said arbitration,

Respondents.

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Before this court are two miscellaneous SCPA 2103 discovery proceedings commenced, by order to show cause, by Franklin H. Julie, as executor of the estates of Arie Liebeskind and

Doreen Liebeskind. Doreen Liebeskind and Arie Liebeskind were husband and wife. Doreen Liebeskind died on March 16, 2007 leaving a will dated March 12, 2007, which was admitted to probate on May 24, 2007. Letters testamentary issued to Franklin H. Julie on that date. Arie Liebeskind died on January 22, 2008 leaving a will dated March 12, 2007, which was admitted to probate on February 28, 2008. Letters testamentary issued to Franklin H. Julie as executor of Arie's estate. Doreen and Arie were survived by three children, Marc Liebeskind ("Marc"), David S. Liebeskind and Elise Liebeskind Hotaling.

At one point in time, Doreen and Arie were shareholders in a radiology practice known as Park Avenue Radiologists, P.C. ("Park Avenue") together with Drs. Albert Messina ("Messina") and Gary Halpern. Petitioner, in his capacity as executor of each estate, has commenced a separate discovery proceeding against Park Avenue and Messina seeking the recovery of retirement benefits he claims are being improperly denied to Doreen's estate and Arie's estate by Park Avenue at Messina's direction. In addition, the petitioner asks the court to stay the arbitration proceedings instituted by Messina against Marc and an entity known as Kitchen Table Associates. Messina has now moved for an order dismissing the petitions in their entirety, or, in the alternative, either staying the discovery proceedings until after final resolution of the ongoing arbitration proceedings, or transferring the petitions to the Supreme Court in New York County.

**BACKGROUND**

It is undisputed that at some point in time Doreen, Arie, Messina and Dr. Halpern were all shareholders of Park Avenue Associates. At some point in time, Dr. Halpern left Park Avenue

and reached an agreement with the remaining shareholders. In addition, MLLH Realty Corp. ("MLLH") and Imaging Services Company of New York, LLC are entities related to Park Avenue. Another entity, Kitchen Table Associates, is a limited liability company under which Marc derives a portion of his interest in MLLH and Imaging Services Company of New York MLLH was established to own the office space of the Park Avenue office. Imaging Services Company of New York, LLC was created to provide equipment, space, maintenance and administrative services to support Park Avenue.

In 2002, the shareholders of Park Avenue entered into an agreement with a broad arbitration clause designating the American Arbitration Association as the forum for arbitration of disputes arising under that agreement. That agreement was signed by Arie, Doreen, Messina and Dr. Halpern. Marc was not a signatory to the 2002 Agreement. In 2004, however, another shareholders' agreement was signed by Doreen, Arie, Marc and Messina. Dr. Halpern no longer possessed an interest in Park Avenue, and, therefore, was not a signatory to the 2004 Agreement. Paragraph 23 of the 2004 Agreement provides that: "[a]ny dispute arising under this agreement shall be settled under the rules and auspices of the AHLA Alternate Dispute Resolution Service."

**PETITIONER'S ARGUMENT**

Petitioner claims that in May 2006, Arie retired from Park Avenue. Arie, who had previously transferred a portion of his Park Avenue interests to Marc, transferred his remaining interests to Doreen at that time. On or about May 24, 2006, in accordance with Arie's wishes, Park Avenue transferred to Arie the ownership of life insurance which Park Avenue owned on Arie's life pursuant to the shareholders' agreement and changed the primary beneficiary to

Doreen and the secondary beneficiary to Arie's children. Furthermore, on or about August 6, 2006, Arie transferred his 25% interest in MLLH Realty to Marc.

Similarly, petitioner alleges that in early 2007, Doreen retired from Park Avenue. Park Avenue transferred to Doreen ownership of two life insurance policies on her life, which in turn were transferred by her to an inter vivos trust. In January 2007, Doreen held a 50% ownership interest in Park Avenue, a 33-1/3% interest in HTC Imaging, PLLC and a 25% interest in MLLH. In January 2007, Doreen transferred 1% of her interest in MLLH to Marc and filed a gift tax return. Petitioner claims that Doreen then transferred all of her remaining interests in Park Avenue and the related entities, consisting of her 24% interest of MLLH, 50% of Park Avenue, 33-1/2% of HTC Imaging PLLC and 75% of Kitchen Table Associates LLC. to Marc for valuable consideration. Petitioner states that Marc signed a note obligating him to pay for the interest conveyed to him by Doreen. Arie, acting as Doreen's attorney-in-fact, signed the transfer documents. Thus, petitioner claims that, as a result of these transfers, neither Arie nor Doreen owned any shares in Park Avenue or the related entities at the time of their respective deaths, and that Marc, by virtue of these transfers, acquired their interests.

According to petitioner, pursuant to the provisions of the 2004 Agreement, Park Avenue is obligated to pay to each of Arie and Doreen (or their respective estates) retirement benefits of $100,000 per year up to $1,000,000. Petitioner contends that Messina has caused Park Avenue not to make these payments in retaliation for certain actions taken by Marc. On July 13, 2007, Marc commenced a proceeding in Supreme Court, New York County for dissolution of Park Avenue. After Marc commenced the dissolution proceeding, Messina served a Demand for

Arbitration before the American Arbitration Association ("AAA"). Marc opposed the arbitration demand claiming that the parties were deadlocked on the issue, and, therefore, arbitration was barred. In addition, Marc argued that pursuant to the 2004 Agreement any arbitration had to be before the AHLA. By order entered December 31, 2007, Justice Louis B. York of the Supreme Court, New York County ordered that the dispute was subject to arbitration but not before the AAA (per the 2002 Agreement) but instead before the AHLA pursuant to the 2004 Agreement.

Petitioner claims that Messina is using the arbitration forum to assert and have resolved claims, including a claim to the proceeds of life insurance, against Doreen's and Arie's estate which may only be made in Surrogate's Court. Petitioner argues that Messina's claims to the insurance proceeds should be heard in Surrogate's Court so that Arie and Doreen's other children, who are not parties to the arbitration, may be heard.

**RESPONDENT MESSINA'S ARGUMENT**

Messina argues that the petitions should be dismissed and the court should decline to stay the arbitration. Messina contends that although the controversy appears rather complicated, there is essentially only one issue that must be decided and that is who owns Park Avenue. That dispute, per Justice York's decision, is subject to arbitration before the AHLA. Messina acknowledges that Marc claims to be an owner of Park Avenue and the related entitles by virtue of transfers made by Arie and Doreen. Messina argues, however, that although Arie and Doreen might have had the right under the 2004 Agreement to make those transfers, the purported transfers were invalid and ineffective.

In addition, Messina argues that the issues in dispute in the SCPA discovery proceedings

before this court are specifically included in the arbitration demand. If Arie and Doreen died owning shares at the time of their respective deaths as Messina contends, then, the 2004 Agreement provides that Park Avenue is entitled to buy back those shares at Messina's request. Messina claims that he has made such a request. The Agreement further provides that the buyout is to be funded by the life insurance proceeds on the policy purchased by Park Avenue. Thus, if it is determined that Doreen's shares are subject to buyback, then Doreen's estate is entitled to the insurance proceeds. If, however, Doreen did not die owning her shares, her estate is not entitled to the proceeds. Accordingly, a determination of the insurance issue depends on the result of the ownership dispute, which is subject to arbitration.

Messina also claims that the issue of whether Arie and Doreen are entitled to a retirement benefit from Park Avenue is dependent upon the outcome of the ownership issue. The retirement benefit issue is similarly determined by whether Arie or Doreen died owning shares of Park Avenue or by whether each of them sold back their shares and retired prior to death. Thus once a determination is made on the issue of ownership, the question of entitlement to retirement benefits is answerable under the provisions of the 2004 agreement. Accordingly, Messina argues that the estates are required to honor the agreements to arbitrate made by Doreen and Arie. In addition, he argues that the discovery proceedings are barred by res judicata and collateral estoppel, and, thus, the proceedings should be dismissed, or, at the very least, stayed pending the outcome of the arbitration.

Messina also contends that the branch of the order to show cause which seeks to stay the arbitration must be denied because it was not made within the 20-day period allowable under

CPLR 7503©. CPLR 7503( c) provides that “[a]n 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.” Messina argues that neither Doreen’s estate or Arie’s estate (or Arie, when he was alive) moved for a stay within 20 days of being served with Messina’s first demand for arbitration before the AAA in July 2007 nor within 20 days of service of the second demand for arbitration (the one before the AHLA) in January 2008. After the second demand was served, Messina filed a Supplemental and Amended Demand for Arbitration before the AHLA which was served in May 2008. Petitioner contends that this triggered a new 20-day period to move for a judicial stay. Messina argues, however, that a new 20-day period was not triggered by the Supplemental and Amended Demand, and, in fact, Messina points out that the AHLA specifically ruled that “[t]he Panel’s permission to file such a pleading and filing of same does not reflect a finding as an admission, and shall not be used to argue that Demand for Arbitration dated January 3, 2008 was defective or deficient in any respect.”

Additionally, Messina argues that the estates waived any right to seek a stay because the estates have actively participated in the arbitration. Messina claims that the estates have appeared in the arbitration, answered the demand, participated in selecting arbitrators, signed compensation agreements with arbitrators, provided deposits for fees, and appeared at multiple hearings, both in-person and by telephone.

In response to Messina’s allegations regarding waiver, petitioner disputes that the estates’ actions have constituted a waiver of their right to object to arbitration. Petitioner agues that Justice York’s September 26, 2007 order specifically stated that “[t]he parties by participating in

administrative matters before the AAA . . . shall not be deemed to have waived any and all objections to arbitration before AAA or otherwise." Similarly, Justice York's October 12, 2007 interim order provided that "[t]his determination is without waiver of any of the respondents [sic] right to contest or object to such arbitration proceedings as is being considered at this time by this court."

**LEGAL ANALYSIS**

The Court of Appeals has held that arbitration is strongly favored (*Stark v Molod*, 9 NY2d 59 [2007]). Thus, courts should interfere as little as possible with the freedom of consenting parties to arbitrate (*Matter of 166 Mamoroneck Ave. Corp. v 151 E. Post Rd.*, 78 NY2d 88 [1991]). When faced with a broad arbitration clause, the only inquiry for the court to make is whether there is a reasonable relationship between the subject matter of the dispute and the underlying contract (*Matter of Board of Educ. of Waterfront City School Dist*, 93 NY2d 132 [1999]). Historically, public policy precluded the arbitration of a dispute concerning the probate or construction of a will, but this prohibition does not extend to all disputes that impact upon the distribution of a decedent's estate (*Matter of Spanos*, NYLJ, Sept 23, 1992 at 27, col 1 [Sur Ct, Nassau County]; *Matter of Kalikow,* 13 Misc 3d 1222A [Sur Ct, Nassau County, 2006]). Where the decedent is a party to the agreement, issues concerning termination of the agreement (*Matter of Cassone,* 63 NY2d 756 [1984]) or its enforcement (*Matter of Salaway,* NYLJ, April 12, 2004 at 31, col 1 [Sur Ct., Suffolk County]) are subject to arbitration. The court must only consider: (1) whether the parties agreed to arbitrate the subject matter in dispute and (2) whether this

particular dispute is encompassed within an arbitration clause (*Matter of Spectrum Glen Cove Corp. v Legend Yacht and Beach Club*, 18 Misc 3d 1146 [Sup Ct, Nassau County 2008]).

In the instant case, Doreen and Arie, as signatories to the 2004 Agreement, agreed to arbitrate disputes arising under that agreement. Their estates, therefore, are bound by the agreement to arbitrate. The only issue is whether this dispute over retirement benefits and insurance proceeds constitutes a dispute arising under the 2004 agreement and, therefore, is subject to arbitration.

The court agrees with the respondent that the issues presented in the discovery proceedings are subject to arbitration since entitlement to the retirement benefits and insurance proceeds are issues which are necessarily and logically dependent on a determination of who owns Park Avenue. Justice York has already decided that the issue of who owns Park Avenue, which involves a determination as to the validity of the purported transfers to Marc and Messina's right to a buyback, is a dispute arising under the 2004 Agreement subject to arbitration by the AHLA. Thus, the issues of whether Arie's and Doreen's estates are entitled to the retirement benefits and the insurance proceeds is similarly a dispute arising under the 2004 Agreement which is subject to arbitration before the AHLA.

Accordingly, having determined that the disputes that are the subject of the discovery proceedings are subject to arbitration, it is not necessary to address Messina's other grounds for dismissal based upon collateral estoppel, untimeliness or waiver. Lastly, the court notes that petitioner's argument that submitting the issues in the discovery proceeding to arbitration will deprive Arie and Doreen's other children of an opportunity to be heard is unavailing. If

Messina's claim to the insurance proceeds was asserted in Surrogate's Court, the petitioner as the fiduciary of the estate would be the interested party charged with defending the estate against the claim. The children's only remedy would be a surcharge against the fiduciary in the accounting proceeding if he failed to properly defend the claim. Arie and Doreen agreed during their lifetimes to arbitrate disputes arising under the 2004 Agreement. Accordingly, their estates and, as a result, their beneficiaries, are bound by the decedents' agreement.

For all of the foregoing reasons, the motion to dismiss the petitions is granted.

Settle order.

Dated: September 30, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court