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SCANNED ON 4/14/2010

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

PRESENT: Joan B Lobis PART 6

Index Number : 116115/2009

- PETITO, ORAZIO

vs

ANTONINI, VITTORIO

Sequence Number : 001

COMPEL/STAY ARBITRATION

INDEX NO. _____

MOTION DATE 1/11/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of ~~Motion~~ Petition/ Order to Show Cause — Affidavits — Exhibits ...	1-8
Answering Affidavits — Exhibits	Xmot. 5-13
Replying Affidavits	14-15; 16-19

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion petition

Petition
THIS ~~MOTION~~ IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

~~A judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).~~

Dated: 4/8/10

J.S.C.

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

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

----------X

ORAZIO PETITO and ROCCO PETITO,

Petitioners,

- against -

VITTORIO ANTONINI,

Respondent.

----------X

Index No. 116115/09

Decision, Order and Judgment

JOAN B. LOBIS, J.S.C.

Petitioners Orazio Petito ("O. Petito") and Rocco Petito ("R. Petito") bring this special proceeding for an order pursuant to C.P.L.R. § 7503(c), permanently staying arbitration of all claims set forth in respondent Vittorio Antonini's statement of claim. Respondent cross-moves for an order compelling arbitration pursuant to C.P.L.R. § 7503(a), and appointing an arbitrator to decide the dispute pursuant to C.P.L.R. § 7504.

This action arises out of a written settlement agreement dated April 6, 2009 (the "Agreement"), which settled several prior lawsuits between and amongst the following parties to the Agreement: Antonini; Robert Caraballo; Victor Efremenkov; Daniel Greaves; O. Petito; R. Petito; Alexander Zhitnik; Bridgeview at Broadway, LLC ("Bridgeview"); Dean Street Apts, LLC ("Dean Street"); N. 9th LLC ("N. 9th"); Starko Contracting LLC ("Starko"); and 129 MacDougal Street Associates, Inc. (129 MacDougal").[1] As of the date of the Agreement, Antonini, Caraballo,

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[1] Antonini v. Petito, New York County Index Number 603513/07, referred to in the Settlement Agreement as the "Bridgeview Action"; Antonini v. Petito, New York County Index Number 601141/08, referred to in the Settlement Agreement as the "Dean Street Action"; Petito v. Antonini, Kings County Index Number 7421/08, referred to in the Settlement as the "N. 9th Action".

Efremenkov, Greaves, O. Petito, R. Petito, and Zhitnik had partial interests in some of the various companies; for example, Antonini, Caraballo, O. Petito, and R. Petito each had a 25 percent interest in Starko, and Antonini, O. Petito, and R. Petito each had roughly a one-third interest in Bridgeview. The Agreement set forth that the parties wished to amicably resolve the disputes between them in accordance with the terms of the Agreement. In pertinent part, with respect to Bridgeview, the owners Antonini, O. Petito, and R. Petito consented to amend Bridgeview's operating agreement, such that upon the closing of the Agreement,

> only Antonini and [O. Petito] shall be the managing members of Bridgeview; their unanimous consent is required with respect to any decision required to be made, under the Operating Agreement or applicable law, by the managing members of Bridgeview; and that in the event of a dispute between Antonini and [O. Petito] concerning any said decision required to be made by the managing members ("Disagreement"), the said Disagreement shall be submitted to Alessandro Marra, Esq., or to any successor individual consented to by Antonini and [O. Petito], who shall attempt to mediate a resolution of the Disagreement agreeable to both Antonini and [O. Petito]. If Antonini and [O. Petito] are unable to reach an agreement at said mediation, the parties agree that Gary Sunden, Esq. is hereby appointed to arbitrate the Disagreement and that Antonini, [O. Petito] and Bridgeview shall be bound by the arbitrator's decision. Bridgeview shall pay the costs of the mediation/arbitration.

(the "Arbitration Clause").

On or about October 22, 2009, Antonini served a demand for arbitration and statement of claim upon O. Petito and R. Petito. The statement sets forth that Antonini and O. Petito are the co-managing members of Bridgeview, that R. Petito is a member of Bridgeview, that Antonini owns 50 percent of the membership interest in Bridgeview, and that O. Petito and R. Petito each have a 25 percent interest in Bridgeview. Bridgeview was formed in 2006 to acquire and

develop property located at 146-150 Broadway, Brooklyn, New York (the "Premises"). Bridgeview purchased the Premises in September 2006 with a loan from BRT Realty Trust, which included construction financing. Antonini's statement of claim sets forth that O. Petito and R. Petito's "bad faith conduct" caused the development to be "mired in unnecessary delays" and he alleges that the development is overdue by two years. Antonini seeks damages from O. Petito and R. Petito, and sets forth that the matter must be arbitrated because of the Arbitration Clause in the Agreement. He also sets forth that Mr. Marra (the mediator designated in the Arbitration Clause) had already advised the parties, on September 22, 2009, that he would not entertain any further requests for mediation due to the parties' failure to communicate and cooperate. However, a review of respondent's papers indicates that the only two issues to have been submitted to the mediator were the selection of a general contractor and Antonini's inability to access Bridgeview's checking account.

There are eight separately enumerated claims set forth in the statement of claims, including, inter alia, claims that O. Petito and R. Petito have failed to pay their share of certain costs and payments; that O. Petitio has failed to provide Antonini access to Bridgeview's bank account or an itemized list of the work required to complete the development of the Premises; that O. Petitio failed to actively seek bids for contractors and only sought one bid for the work, from his cousin, Daniel Greaves, who is a signatory to the Agreement; that O. Petito has failed to cooperate with the broker for the development; that O. Petito, as the person with sole control of Bridgeview's bank account, failed to pay the electric bill, resulting in the electricity being turned off, and has caused Bridgeview to incur charges to restore the power; and that O. Petito has caused the development of the Premises to be unnecessarily delayed. Antonini demands that O. Petito reimburse him for the

unnecessary expenses, costs and fees which he incurred as a result of the delayed completion of the development of the Premises, that O. Petito be removed as the co-managing member, and that Antonini be appointed as the sole managing member of Bridgeview until the development is competed and the Premises is rented and producing income.

Petitioners maintain that the claims sets forth in the statement of claim are not arbitrable under the Agreement. Petitioners argue that the clause "unanimous consent is required with respect to any decision required to be made, under the Operating Agreement or applicable law, by the managing members of Bridgeview" (emphasis added) means that only disputes regarding "management decision[s]," such as the managing members' choice of a contractor, are subject to mediation and/or arbitration. Petitioners assert that Antonini's claims seeking damages, removal of O. Petito as a managing member, and arbitrator's fees are not "Disagreement[s]" as that term is defined in the Arbitration Clause, i.e., "a dispute between Antonini and [O. Petito] concerning any said decision required to be made by the managing members[.]" Since the parties did not agree to arbitrate breach of contract claims against each other or disputes for damages resulting from the legal relationship amongst and between them as members and/or managing members of a limited liability company, petitioners maintain that the arbitration must be permanently stayed.

In opposition to the petition and in support of his cross-motion, respondent Antonini argues that the claims are arbitrable because the clause "any decision required to be made, under the Operating Agreement or applicable law" (emphasis added) includes every aspect of the management of Bridgeview, including adjustments in membership interests and damages. Antonini maintains that

the Arbitration Clause is broad and encompasses every claim that he made. Further, he maintains that there is no dispute that a valid arbitration clause exists, and that the condition precedent to arbitration (mediation by Mr. Marra) has been satisfied.

"Whether a dispute is arbitrable is generally an issue for the court to decide unless the parties clearly and unmistakably provide otherwise." Zachariou v. Manios, 68 A.D.3d 539 (1st Dep't 2009) (citation omitted). The proponent of arbitration has to demonstrate that the parties agreed to arbitrate the dispute in question. Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v. Torino Jewelers, Ltd., 44 A.D.3d 581, 583 (1st Dep't 2007). If the arbitration clause is a broad arbitration clause, such that all disputes or claims that arise would be subject to arbitration, a presumption of arbitrability arises and even collateral issues are arbitrable if issues under the contract are implicated. Gerling Global Reinsurance Corp. v. Home Ins. Co., 302 A.D.2d 118, 126 (1st Dep't 2002), citing Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2d Cir. 2001). But, if the clause is narrow, the court must read the clause "conservatively". See Gangel v. DeGroot, 41 N.Y.2d 840, 841 (1977). Collateral issues generally fall outside a narrow clause and are not subject to arbitration thereunder. Gerling, 302 A.D.2d at 126.

Despite respondent's contention otherwise, the arbitration clause applies only to specific disputes—i.e., disagreements regarding decisions required to be made by the managing members of Bridgeview that have already been subjected to an attempt at mediation—so it is considered a narrow arbitration clause. See FCI Group, Inc. v. City of New York, 54 A.D.3d 171, 175 (1st Dep't 2008). First, with respect to the condition precedent, the only two issues that were

submitted to the mediator prior to the demand for arbitration—the selection of a general contractor and Antonini's inability to access Bridgeview's checking account—have apparently been resolved. According to petitioners' papers, access to the bank account has already been provided, and according to respondent's statement of claim, Antonini and O. Petito have already agreed that they will be the general contractors of record for the project. Thus, the condition precedent that the dispute first be submitted to a mediator has not been met as to any of the remaining viable claims in the statement of claim. Second, the arbitration clause only covers disagreements between Antonini and O. Petito, and not R. Petito, because R. Petito is not a managing member under the Agreement. Even if the claims are arbitrable, R. Petito is not subject to the narrow arbitration provision. Third, the court finds that the narrow arbitration clause does not encompass any disputes other than those disputes regarding decisions "required to be made by the managing members" of Bridgeview. The majority of the "disputes" claimed by Antonini in the statement of claims are really allegations that his co-manager, O. Petito, has failed to act in good faith, and are not Disagreements about decisions requiring the unanimous consent of both managing members as defined as arbitrable under the Arbitration Clause. The court agrees with petitioners that breach of contract claims against each other or disputes for damages resulting from the legal relationship amongst and between them as members and/or managing members of Bridgeview are not the type of disputes arbitrable as Disagreements under the Arbitration Clause. Even had the condition precedent of submission to the mediator been met, the bad faith claims are not disputes that are arbitrable as Disagreements under the Arbitration Clause. For all of these reasons, the arbitration must be stayed.

Accordingly, it is hereby

ORDERED that the arbitration proceeding between petitioners and respondent with respect to respondent's October 22, 2009 demand for arbitration and statement of claim, is hereby permanently stayed; and it is further

ORDERED that the cross motion is denied; and it is further

ORDERED and ADJUDGED that the petition is granted and the proceeding is dismissed.

This constitutes the decision, order, and judgment of the court.

Dated: April 8, 2010

JOAN B. LOBIS, J.S.C.