Matter of Temple Emanuel of New Hyde Park, Inc. v HMJ Food Corp.

2010 NY Slip Op 31777(U)

July 7, 2010

Supreme Court, Nassau County

Docket Number: 4953-10

Judge: Timothy S. Driscoll

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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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TRIAL/IAS PART: 22
NASSAU COUNTY

In the Matter of the Application of

TEMPLE EMANUEL OF NEW HYDE PARK, INC.
n/k/a TEMPLE TIKVAH,

Index No: 4953-10
Motion Seq. Nos: 1 and 2
Submission Date: 5/5/10

Petitioner,

Pursuant to CPLR § 7503(b), to stay an
arbitration requested by

HMJ FOOD CORP. a/k/a CREATIVE CUISINE
and MICHAEL B. MIROTZNIK, ESQ.,

Respondents.

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The following papers have been read on the Order to Show Cause and Cross Motion:

Order to Show Cause, Verified Petition and Exhibits..........................x
Notice of Cross Motion, Affidavit in Opposition/Support,
Affirmation in Support and Exhibits...x
Reply Affidavit in Further Support and Exhibits.................................x
Reply Affirmation in Further Support,
Reply Affidavit and Exhibits..x

This matter is before the Court for decision on 1) the Order to Show Cause filed by Petitioner Temple Emanuel of New Hyde Park Inc. n/k/a Temple Tikvah ("Temple" or "Petitioner") on March 12, 2010, and 2) the Cross Motion filed by Respondent HMJ Food Corp. a/k/a Creative Cuisine ("Caterer" or "Respondent") on March 16, 2010, both of which were

submitted on May 5, 2010 after oral argument before the Court. [1] For the reasons set forth below, the Court 1) denies Petitioner's Order to Show Cause; and 2) grants Respondent's Cross Motion. Specifically, the Court 1) dismisses the Verified Petition; 2) directs the parties to proceed to arbitration; and 3) enjoins Petitioner and its agents, pending the determination by the arbitrator, from interfering, by summary proceedings or otherwise, with the Caterer's use and possession of the Premises, or interfering with the Caterer conducting its business at the Premises under the License Agreement. The Court vacates that portion of Judge Warshawsky's March 12, 2010 Order that temporarily stayed Respondents from proceeding with the arbitration.

BACKGROUND

A. Relief Sought

The Temple moves for an Order, pursuant to CPLR § 7503(2), permanently staying the arbitration ("Arbitration") of which Respondent has given notice, on the grounds that 1) the Caterer has failed to specify the nature of the alleged dispute; and 2) there is no dispute between the parties that is subject to arbitration.

The Caterer moves for an Order, pursuant to CPLR §§ 3211(a)(1), 7502(c) and 7503(a), 1) dismissing the Petition; 2) compelling arbitration; and 3) pending the determination by Arbitration of the parties' disputes under the License Agreement, enjoining the Temple and its agents from interfering, by summary proceedings or otherwise, with Caterer's use of the Premises, or interfering with Caterer's ability to conduct its business at the Premises.

B. The Parties' History

In its Verified Petition ("Petition") filed March 12, 2010, the Temple alleges as follows:

The Temple is the owner and licensor of premises ("Premises") located at 3315 Hillside Avenue, New Hyde Park, New York 11040 and the Caterer is the licensee of the Premises. Michael B. Mirotznik, Esq. is a named Defendant solely because he is a representative of the Caterer, and the Temple seeks no relief from him.

The Temple and the Caterer entered into a License Agreement With Caterer ("License Agreement") (Ex. 1 to OSC) dated April 6, 2006. Pursuant to Article 2, the term of the License Agreement is fifteen (15) years.

[1] The Court assumed responsibility for this matter following the recusal on March 16, 2010 by the judge to whom the matter was previously assigned.

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Article 4(e) of the License Agreement, which is part of Article 4 titled "Contributions," provides as follows:

> Starting in year 2008, the Temple reserves the right to cancel this Agreement if the Temple does not receive a minimum of $60,000 in yearly fees from affairs that are catered by the Caterer during calendar year 2008. In subsequent years the $60,000 shall increase by COLA (Cost of Living Adjustment) which is the CPI (Consumer [P]rice Index) published by the Bureau of Labor Statistics of the United States Department of Labor.

The Temple did not receive a minimum of $60,000 in yearly fees from affairs catered by the Caterer during calendar years 2008 and 2009. By letter dated February 25, 2010 (Ex. 2 to OSC), the Temple advised the Caterer that the License Agreement was canceled as a result of the Temple having not received a minimum of $60,000 in yearly fees from affairs that were catered by the Caterer during either calendar year 2008 or calendar year 2009. In that letter, the Temple also advised the Caterer that "[t]his cancellation is without prejudice to the Temple's entitlement to the $13,384.54 in contributions which the Caterer is in default in paying pursuant to Section 4(b) of the License Agreement, and for which the Caterer remains liable." Section 4(b) of the License Agreement addresses the Caterer's obligation to pay to the Temple 10% of the cost of gross sales of the food portion for parties prepared by the Caterer on the Temple premises but held outside the Temple building. The Temple subsequently served the Caterer with a Ten Day Notice to Quit dated March 3, 2010 (Ex. 3 to OSC) that directed the Caterer to vacate the Premises on or before March 22, 2010.

On or about March 8, 2010, the Temple received from the Caterer a document titled "Notice of Arbitration" (Ex. 4 to OSC). In that Notice of Arbitration ("Notice"), the Caterer demanded that the dispute existing between the Temple and the Caterer "over the meaning, interpretation, performance or non-performance of the License Agreement" be referred for determination pursuant to Section 38(a) of the License Agreement. In that Notice, the Caterer also "disputed[d] and reject[ed]" the cancellation of the License Agreement, and the demand that the Caterer remove itself from the Premises.

Section 38 of the License Agreement is titled "Arbitration." Pursuant to Section 38(a), disputes between the Temple and the Temple "over the meaning, interpretation, performance or non-performance of this Agreement" may be referred by either party for determination by an

adjustment committee. Pursuant to the License Agreement, that adjustment committee ("arbitrator") consists of one person designated by the Temple, one person designated by the Caterer, and a third person mutually agreed to by representatives of the Temple and Caterer.

The Temple alleges that the Notice does not set forth the existing dispute. The Temple also submits that there is no dispute that the Temple received less than $60,000 in annual fees in 2008 and 2009.

Counsel for the Caterer have submitted Affirmations in Opposition in which they affirm, *inter alia*, that 1) the Caterer disputes the amounts that the Temple claims the Caterer owes under the License Agreement; 2) the Caterer submits that it is entitled to certain offsets and credits against the sums to which the Temple claims it is entitled; 3) in light of the numerous future events that the Caterer has scheduled, the Temple acted in bad faith by terminating the License Agreement; 4) the Caterer made extensive improvements to the Premises that have inured to the Temple's benefit, and in which Caterer asserts an ownership interest; and 5) the Temple changed its name without first notifying the Caterer, resulting in the Caterer incurring substantial expenses in revising its advertisements and disruption to Caterer's business.

In support of its contention that all pending disputes between the parties should be referred to arbitration, the Caterer directs the Court's attention to Article 24(c) of the License Agreement which provides as follows:

> It is expressly understood and agreed that any and all disputes instituted by the Caterer or the Temple, arising under this article shall be resolved by Arbitration pursuant to the terms and provisions of article 38.

Article 24 of the License Agreement is titled "Default." Pursuant to Article 24(a), the provisions of this Article apply under certain circumstances including "[i]f the Caterer defaults in fulfilling any of the covenants of this Agreement other than the covenants for the payment of the Contributions provided herein[.]"

In his Reply Affidavit in Further Support, Merle Fishkin ("Fishkin"), President of the Temple, notes that, pursuant to Article 19(b) of the License Agreement, the Temple had the right, at any time without incurring liability to the Caterer, to change the name, number or designation by which the building was known. Fishkin also outlines the circumstances under which the Temple merged with another temple to form the new temple called Temple Tikvah

and affirms that this merger was well-publicized and was the topic of frequent discussion in the community. In light of this publicity, Fishkin submits that the Caterer's claim that he was unaware of the name change is not credible.

Fishkin agrees, however, that certain financial claims made by the Caterer, though allegedly frivolous, are arbitrable. Specifically, Fishkin concedes that the issue of the Caterer's entitlement to credits and offsets is subject to arbitration.

Fishkin submits, however, that in light of the specific provision entitling the Temple to cancel the License Agreement if the Caterer did not meet the $60,000 annual minimum, and the Caterer's concession that it failed to meet that minimum, the Temple has the right to commence a summary proceeding to regain possession of its Premises. This issue, Fishkin submits, is not appropriate for arbitration.

In his Reply Affidavit, Howard Goldstein ("Goldstein"), President of the Caterer, swears to the truth and accuracy of the Reply Affirmation submitted by his counsel, and the authenticity of the documentation annexed to that Reply Affirmation.

In his Reply Affirmation, counsel for the Caterer affirms that the Caterer made improvements to the Premises with a value of over $600,000 and that the Temple has benefitted from those improvements. Thus, the Caterer submits, the Temple demonstrates bad faith in asserting the Caterer's breach of the License Agreement based on its failure to meet the $60,000 annual minimum.

Counsel for the Caterer also affirms that, before the Caterer took possession of the Premises, there was an existing problem with the hood and exhaust system in the Caterer's kitchen of which the Temple did not give the Caterer notice. The Caterer subsequently received an Order to Remove Violations Forthwith ("Violations Order") from the Office of the Fire Marshal dated May 8, 2008 (Ex. A to Reply Aff.). The Violations Order directed the Caterer to 1) cease and desist all cooking in the lower level catering kitchen immediately; 2) replace the existing automatic fire extinguishing system; and 3) contact a licensed company to submit plans for the hood and extinguishing systems prior to installation, which required approval by the Fire Marshal before the Caterer was permitted to resume cooking in the area in question. The Caterer completed the necessary repairs, which also required an upgrade to the existing electrical system, at a cost in excess of $16,000 regarding which the Caterer provides supporting documentation

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(Ex. B to Reply Aff.).

At oral argument before the Court on May 5, 2010, counsel for the Temple conceded that the Temple is now aware, as a result of the submissions on the instant Order to Show Cause and Cross Motion, of the specific disputes raised by the Caterer. It is the Temple's position, however, that the Temple's right to reclaim possession of the Premises is not properly the subject of arbitration, in light of the provision in the License Agreement that requires the Caterer to generate a minimum of $60,000 in revenue, and its undisputed failure to meet that minimum. Counsel for the Temple conceded, on the other hand, that the Caterer's claims that it is entitled to certain credits and offsets for the improvements it made to the Premises are properly the subject of arbitration.

C. The Parties' Positions

The Temple submits that the Court should stay the Arbitration, to the extent that it addresses the Temple's right to seek possession of the Premises, on the grounds that the License Agreement clearly permitted the Temple to regain possession of the Premises in light of the Caterer's failure to reach the $60,000 minimum set forth in the License Agreement. The Temple concedes that the Caterer's other disputes regarding their right to certain credits and setoffs, though allegedly frivolous, are properly the subject of arbitration

The Caterer submits, *inter alia*, that 1) all disputed issues between the parties should be referred to arbitration because the License Agreement requires the parties to arbitrate all disputes; 2) if the Temple is permitted to proceed with a summary proceeding and that proceeding is successful, the Caterer will not be able to fulfill its obligations under its catering contracts, resulting in irreparable harm to the Caterer; and 3) it is inappropriate for the Temple to characterize the Caterer's claims as frivolous, as it is not the Court's role to pass on the merits of a dispute to be referred to arbitration.

The Caterer also contends that the Temple's reliance on *Saffra v. Rockwood Park Jewish Center, Inc.*, 239 A.D.2d 507 (2d Dept. 1997), is misplaced. In *Saffra*, the court reversed an order granting a preliminary injunction in a proceeding to compel arbitration between a rabbi and a synagogue regarding the termination of his employment contract. The Caterer submits that Saffra is distinguishable from the matter at bar because 1) in *Saffra*, the rabbi's contract had expired of its own terms whereas in this action, the Caterer has eleven (11) years left on its

License Agreement; and 2) in *Saffra*, the rabbi did not affirmatively terminate his employment whereas in this action, the Temple affirmatively sought to cancel the License Agreement.

RULING OF THE COURT

CPLR § 7501, titled "**Effect of arbitration agreement**" provides:

> A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

CPLR § 7502(c) provides as follows:

> (c) Provisional remedies. The supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose), except that the sole ground for the granting of the remedy shall be as stated above. If an arbitration is not commenced within thirty days of the granting of the provisional relief, the order granting such relief shall expire and be null and void and costs, including reasonable attorney's fees, awarded to the respondent. The court may reduce or expand this period of time for good cause shown. The form of the application shall be as provided in subdivision (a) of this section.

CPLR §§ 7503(a) and (b) provide as follows:

> A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502 [addressing limitations of time], the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

> Subject to the provisions of subdivision (c) [Notice of Intention to Arbitrate], a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.

Generally, it is for the courts to make the initial determination whether a particular dispute is arbitrable, that is whether the parties have agreed to arbitrate the particular dispute. *Nationwide General Insurance Company v. Investors Insurance Company of America*, 37 N.Y.2d 91, 95 (1975) quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570-71 (1960). The ultimate disposition of the merits, however, is reserved for the arbitrator and the courts are expressly prohibited from considering whether the claim regarding which arbitration is sought is tenable, or otherwise passing on the merits of the dispute. *Nationwide General, supra*, at 75, citing CPLR § 7501.

With regard to the scope of an arbitration clause, a broad arbitration clause should be given the full effect of its wording in order to implement the intention of the parties. *Weinrott v. Carp*, 32 N.Y.2d 190 (1973). A court may exclude a substantive issue from issues that are submitted to an arbitrator only if the arbitration clause itself specifically enumerates the subjects intended to be put beyond the arbitrator's reach. *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299 (1984).

Arbitration is favored in New York State as a means of resolving disputes, and courts should interfere as little as possible with agreements to arbitrate. *Shah v. Monpat Construction*, 65 A.D.3d 541, 543, 2009 NY Slip Op. 6132, 6134 (2d Dept. 2009). The Court must determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement. *Sisters of Saint John the Baptist v. Geraghty*, 67 N.Y.2d 997, 999 (1986). The Court's inquiry ends, however, when the requisite relationship is established between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate. *Id.*

Where the court finds that the parties may have made a valid agreement to arbitrate, but the particular agreement that they made was of limited or restricted scope and the particular claim sought to be arbitrated is outside that scope, then arbitration of that claim will be stayed.

We're Associates Co. v. Chemical Bank, 163 A.D.2d 393, 395 (2d Dept. 1990). The agreement to arbitrate must be express, direct and unequivocal as to the issue or disputes to be submitted to arbitration, and the law does not require the parties to arbitrate a claim which they did not intend to arbitrate. *Id.*

The arbitration clause in the License Agreement is a broad one covering any dispute arising "over the meaning, interpretation, performance or non-performance" under the Agreement. "Performance" may be defined as the fulfillment or accomplishment of a promise, contract or other obligation according to its terms. *R. H. Macy & Co. v. National Sleep Prods.*, 39 N.Y.2d 268, 271 (1976), quoting Black's Law Dictionary (4th ed.). The disputes at issue, which concern the Caterer's failure to meet the $60,000 minimum and the Temple's alleged failure to compensate the Caterer for lost business allegedly resulting from the Temple's conduct and the Caterer's improvements to the Premises, are related to performance and, thus, fall within the contemplation of the arbitration provision in the License Agreement. Moreover, the Agreement contains no restriction on the arbitrator's authority or power to address the alleged failure of performance by the Caterer.

The court rejects the Temple's contention that neither the Court nor the arbitrator need address the cancellation of the License Agreement because it has already occurred. The *Yellowstone* authority which established the rule regarding terminated leases does not address a cancellation of a license agreement which does not provide for notice or an opportunity to cure. The very purpose of a Yellowstone injunction is to preserve the cure period. Moreover, to prevent reinstatement a landlord must establish that the lease was terminated in strict accordance with its terms. *First Nat. Stores, Inc. v. Yellowstone Shopping Center*, 21 N.Y.2d 630, 637 (1968).

In addition, the Caterer has alleged a breach of good faith and fair dealing by the Temple which may bear on the determination of the parties' performance under the License Agreement. *See, e.g., Richbell Info. Servs. v. Jupiter Partners*, 309 A.D.2d 288, 302 (1st Dept. 2003), *app. den.*, 2004 N.Y.App. Div LEXIS 1272 (1st Dept. 2004) (even an explicitly discretionary contract right may not be exercised in bad faith so as to frustrate the other party's right to the benefit under the agreement). *See also Jamaica Hospital v. Oxford Health Plans*, 58 A.D.3d 686, 687 (2d Dept. 2009) (trial court properly determined that plaintiffs' claims all arose from or related

to their contracts with defendants and, therefore, were within scope of broad arbitration provisions in those contracts).

Finally, the Court concludes that the *Saffra* case, discussed *supra*, is distinguishable from the case at bar. In *Saffra*, the Second Department noted that the rabbi's employment contract expired by its own terms and concluded that there was, therefore, no arbitrable controversy regarding the termination of his employment. 239 A.D.2d at 507. Given the lease term of the License Agreement, and the fact that it was not scheduled to end for many years, the Court cannot conclude that the Temple's right to regain the premises is so clear-cut as to entitle it to the relief it seeks. The Court's decision is buttressed by the fact that, as conceded by the Temple, the parties' relationship will already be the subject of arbitration regarding offsets and credits. In essence, then, judicial economy would be well-served by directing that the entire matter proceed to arbitration, rather than the piecemeal adjudication in different fora that would result from the course of action suggested by the Temple.

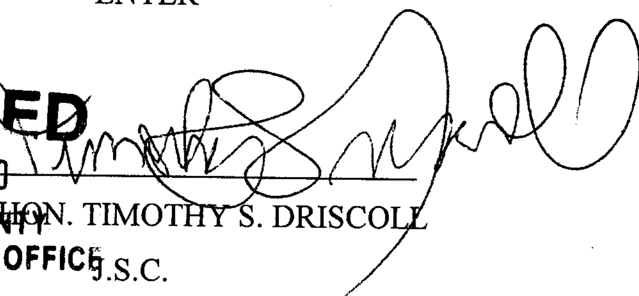
In light of the foregoing, the Court determines that all issues raised by the parties should be referred by arbitration. Accordingly, the Court 1) denies Petitioner's Order to Show Cause; and 2) grants Respondent's Cross Motion. Specifically, the Court 1) dismisses the Verified Petition; 2) directs the parties to proceed to arbitration; and 3) enjoins Petitioner and its agents, pending the determination by the arbitrator, from interfering, by summary proceedings or otherwise, with the Caterer's use and possession of the Premises, or interfering with the Caterer conducting its business at the Premises under the License Agreement. The Court vacates that portion of Judge Warshawsky's March 12, 2010 Order that temporarily stayed Respondents from proceeding with the arbitration.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
July 7, 2010



HON. TIMOTHY S. DRISCOLL
J.S.C.