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

PRESENT: Hon Joan A. Madden Justice PART 11

Index Number : 600392/2010
N.J.R. ASSOCIATES
VS.
TAUSEND NICOLE
SEQUENCE NUMBER : 001
COMPEL OR STAY ARBITRATION

INDEX NO.
MOTION DATE 4/8/10
MOTION SEQ. NO.
MOTION CAL. NO.

on this ~~motion~~ petition to/for stay arbitration

	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 is decided in accordance with the annexed decision, order + judgment

UNFILED JUDGMENT
This 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: October 5, 2010

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: PART 11

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N.J.R. ASSOCIATES, a New York Limited Partnership,

Petitioner,

Index No.: 600392/10

DECISION ORDER & JUDGMENT

-against-

NICOLE TAUSEND, a limited partner of N.J.R. ASSOCIATES,

Respondent.

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JOAN A. MADDEN, J.:

Petitioner N.J.R. Associates (NJR) moves, pursuant to CPLR 7503, to stay certain fraud-based counterclaims asserted by respondent Nicole Tausend (hereinafter Respondent) in an arbitration proceeding, and to impose sanctions on Respondent's attorneys (motion sequence number 001). Respondent opposes the petition and separately moves to dismiss NJR's petition (motion sequence number 002), and for sanctions (motion seq. no. 003)[1]. NJR opposes the motions.

BACKGROUND

NJR is a limited partnership which was originally formed on September 30, 1985, by Respondent's father, Ronald Tausend (R. Tausend), as an investment vehicle for him and his children, through the acquisition of real estate in Manhattan. Respondent is an American citizen currently residing in Italy, and holds a

[1]Motion seq. numbers 001, 002 & 003 are consolidated for disposition.

20% interest in NJR. R. Tausend is the managing partner of NJR, holding a 60% interest in NJR, and the remaining 20% interest is held by Respondent's brother and R. Tausend's son, Jeffrey Tausend (J. Tausend). NJR was totally funded by R. Tausend, who gifted the combined 40% interest to his children.

The NJR Limited Partnership Agreement ("the Partnership Agreement")provides, under Article XIII, that "[a]ny dispute or controversy among the Partners arising in connection with (a) this Agreement or any amendment thereof, or (b) the breach thereof, or (c) the formation, operation or termination of the Partnership shall be determined and settled in arbitration in New York, New York, by a panel of arbitrators in accordance with the rules of the American Arbitration Association." Article XIV provides the "[t]his Agreement shall be governed by, and construed in accordance with, the laws and decisions of the State of New York."

In 1970, Dorothy Tausend, who was R. Tausend's mother and Respondent's and J. Tausend's grandmother died. Of relevance here, she created three residuary trusts for the benefit of R. Tausend, J. Tausend and Respondent which were administered as one residuary trust by Bankers Trust Company, as trustee. At the time of her death, the property owned by Dorothy Tausend included 44-46 East End Avenue and 48-50 East Avenue, New York, NY (hereinafter "the East End Properties"). The East Avenue

Properties were distributed to the residuary trust established under her will.

The trust created for R. Tausend's benefit initially provided that he was to receive income from the trust for his life, and Respondent and J. Tausend were named as the remaindermen. Further, upon R. Tausend 's death, the corpus of R. Tausend's trust was to be distributed equally to J. Tausend and Respondent in ten annual installments.

Also, pursuant to the terms of the will, the trustee was given very broad discretion with respect to investments. Specifically, Article 15 of the will states:

> I direct that my Trustees be most liberal in exercising the discretion herein specifically granted to them and in no event shall my Trustees be accountable to anyone for any loss which may ultimately be sustained in connection with such investment.

In or about December, 1985, NJR purchased the East End Properties from the trustee for $1.9 million. Prior to the sale, the trustee, which was represented by counsel, obtained an appraisal for the properties, which indicated a value of $1.8 million. However, Respondent maintains that this appraisal expressly excluded the value of the air rights.

Both J. Tausend and Respondent signed a consent to the 1985 sale of the East End Avenue properties, and a Memorandum of Understanding on October 25, 1985, regarding the transaction, in which it was specified that J. Tausend and Respondent would have

an interest in NJR at least equal to their interests in the trusts with respect to the receipt of income.

On July 10, 1987, the Surrogate's Court appointed a guardian ad litem to protect the interests of J. Tausend 's and Respondent's unborn issue, whose role was noted in the interim accounting filed with the Surrogate's Court on May 15, 1990. The guardian consented to the interim accounting, which covers the period from February 15, 1977, through April 24, 1986. The accounting was approved and settled by the Surrogate's Court on May 15, 1990, and the trustees were released and discharged of all liabilities with respect to that accounting.

A final settlement, in the form of a Receipt and Release, was signed by J. Tausend and Respondent on July 18, 2005, and each acknowledged receipt of one-half of their trusts' principals, and the trustees were thereby released from any and all liabilities.

In 2005, R. Tausend decided to forego his lifetime income distributions from the trust, and the corpus of the trust was therefore immediately distributed to J. Tausend and Respondent, each receiving thereby approximately $1 million.

In 2007, NJR converted one of the East End Avenue properties to condominium ownership, and on December 31, 2007, the property was sold for $10.25 million, resulting is a substantial distribution to Respondent through her 20% interest in NJR.

Respondent also received a substantial distribution as the result of the sale of the other East End property.

In addition, Respondent received $2,500 per month, since February, 2008, as advance payments from NJR for any taxes due on profits, and tax deductions for any losses. Between 1985 and 2007, Respondent was given one of the apartments in one of the East End Avenue properties, which she alternately resided in or rented out, retaining any rental income therefrom.

In May of 2008, Respondent commenced an Article 78 proceeding in this court against NJR and R. Tausend, seeking production of documents and an accounting. On September 29, 2008, NJR filed a Demand for Arbitration with American Arbitration Association (AAA) and a determination of the capital accounts of the general and limited partners of NJR, pursuant to Article XIII of the Limited Partnership Agreement.

On October 10, 2008, Respondent filed a petition seeking to stay the arbitration, arguing that the Limited Partnership Agreement should be found void and unenforceable for the following reasons: (1) she was only 19 years of age when she signed the agreement and lacked any knowledge of business; (2) she was not aware of the consequences of agreeing to the terms of the agreement; (3) her signature was procured by fraud or undue influence; and (4) R. Tausend breached a fiduciary duty by encouraging her to sign the agreement when it was against her

best interest to do so.[2]

R. Tausend and J. Tausend filed a cross motion to dismiss Respondent's application to stay arbitration, arguing that there was no fraud as a matter of law, that any claims that Respondent may have are against the trustee, and that any fraud claims are barred by the statute of limitations.

On April 27, 2009, NJR's, R. Tausend's and J. Tausend's cross motion was granted. In granting that cross motion, the court stated, among other things:

> "Now, I think certainly any claim for breach of fiduciary duty is barred by the Statute of Limitations, and I have some serious question as to whether or not the fraud claim is barred by the Statute of Limitations.
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> * * *
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> In any event, I find it very difficult to understand why she couldn't have discovered that she was fraudulently induced to enter into an agreement in 1985 until more than 20 years later.
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> * * *
>
> The claim based on fiduciary -- there's no continuation. That was your argument: it's like a continued treatment by a physician. I disagree with that completely. We've done some research on that. I think that the matter should go to arbitration.
> I'm granting the motion in the petition. The parties should go to arbitration and resolve the dispute within the framework of the arbitration agreement. This constitutes the judgment of the Court."

Motion, Ex. K, at 2-4.

Respondent appealed this decision, which was affirmed by the

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[2]On October 28, 2008, Respondent filed a complaint in this court against NJR, R. Tausend and J. Tausend alleging fraud, undue influence, and breach of fiduciary duties, but apparently never purchased an index number.

Appellate Division, First Department on November 5, 2009, in which the Court stated:

> The court correctly granted [NJR's] motion to dismiss the petition to stay arbitration. There is insufficient evidence on the record to substantiate petitioner's [Respondent's] claim that she was induced by fraud to enter into the arbitration agreement, and it has not been shown that the entire partnership agreement was permeated by fraud so as to invalidate the arbitration provision (*see Matter of Weinrott [Carp]*, 32 NY2d 190, 197 [1973])."

Pet, Ex. O.

On January 27, 2010, Respondent submitted her answer to Demand for Arbitration filed by NJR on September 29, 2008 arbitration proceeding before the American Arbitration Association (AAA), in which she asserts, among other things, counterclaims for undue influence, fraud, breach of fiduciary duty and unjust enrichment.

On February 16, 2010, NJR filed the instant petition to stay the arbitration of Respondents' counterclaims on the ground that the claims are barred by the statute of limitations, and that Respondent is estopped from asserting those claims as they are barred under the doctrines of collateral estoppel and based on the earlier courts' determinations.

Respondent counters that the timeliness of maintaining her causes of action are governed by the Federal Arbitration Act ("FAA"), 9 USC § 1, *et seq.*, and that the arbitrators are not bound by such determinations previously made by the New York

courts. In support of her contention that the FAA applies to the case at bar, Respondent states that she lives in Italy and J. Tausend resides in California, NJR's accountants are located in New Jersey, NJR and its wholly-owned subsidiary, East End River House LLC, maintain at least three bank accounts at Commerce Bank, N.A. in New Jersey, and that NJR recently made a payment to a resident of New Jersey.

Respondent also argues that NJR is precluded from maintaining the instant proceeding because it did not file the petition to stay the arbitration within 20 days of filing its notice of intent to arbitrate as required under CPLR 7503(c), and that by participating in the arbitration, it has waived its right to object.

Respondent further contends that R. Tausend fraudulently induced her to become a partner of NJR, and that until she retained counsel in 2008, she was unaware of the terms of her grandmother's will. Further, Respondent argues that in affirming the trial court, the Appellate Division only addressed the issue of fraud, and did not comment on the statute of limitations issue.

DISCUSSION

The first issues to be addressed concern Respondent's motion to dismiss the petition as untimely under 7503(c) and based on NJR's participation in arbitration.

CPLR 7503(c), provides, in relevant part, that "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 precluded." As NJR's stay application is addressed to Respondent's counterclaims, the twenty days would run from the service of Respondent's answer and counterclaims, and not from the service of the demand for arbitration, as argued by Respondent. See Calvin Klein Company v. Minnetonka, Inc., 88 AD2d 503 (1st Dept 1982). Here, this proceeding was commenced on February 16, 2010, or twenty days after the date of the answer and counterclaims.

In any event, as the answer and counterclaims do not include the language stating that any application to stay will be precluded unless made within twenty days, any failure to move within twenty days would not render NJR's petition to stay untimely. Id., at 503 (where answer and counterclaim did not include twenty-day preclusion language, court erred in denying application to stay counterclaims based on failure to move for relief in twenty days).

Next, although a party may be deemed to waive its right to object to arbitration after it has participated in the arbitration process (Morfopoulos v Lundquist, 191 AD2d 197 [1st Dept 1993]; CPLR 7502[b]), NJR's initiation of the arbitration process does not constitute its waiver of any right to challenge Respondent's assertion of counterclaims in the arbitration. See SCM Corporation v. Fisher Park Lane Co., 40 NY2d 788, 792

(1976)(holding that tenant who initiated arbitration proceeding and participated in proceeding for two years was not barred from seeking to stay counterclaims asserted in amended answer). Moreover, NJR did not participate in the arbitration with respect to the counterclaims but timely sought a stay of arbitration. Accordingly, NJR did not waive its right to seek to stay of Respondent's counterclaims.

Accordingly, the court will address the merits of the petition to stay Respondent's counterclaims seeking to recover based on theories of undue influence, fraud, breach of fiduciary duty and unjust enrichment.[3]

Here, instead of answering the NJR's arbitration demand, Respondent petitioned the court to stay the arbitration, arguing that the Limited Partnership Agreement should be found void and unenforceable based on claims of fraud, undue influence and breach of fiduciary duty, and then appealed the denial of her petition, and lost. The factual predicate for these claims asserted in the litigation, provide the basis for the counterclaims asserted in the arbitration proceeding.

Under these circumstances, Respondent has forfeited her right to arbitrate the counterclaims by initially choosing to litigate, rather than arbitrate, these issues. The "affirmative use of the judicial process to prosecute claims also encompassed

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[3]Respondent has also asserted counterclaims for production and inspection of books and records, and accounting, but NJR does not challenge these counterclaims.

by an arbitration agreement ... results in a waiver of the right to arbitration." Tengtu Intern. Corp. v Pak Kwan Cheung, 24 AD3d 170, 172 (1st Dept 2005). As stated by the Court in LZG Realty, LLC v H.D.W. 2005 Forest, LLC (71 AD3d 642 [2d Dept 2010]), "[t]he courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration [quotation marks and citations omitted]."

Moreover, contrary to Respondent's position, New York arbitration law, and not the FAA, governs here since the Partnership Agreement concerns a New York partnership engaging in real estate investments in New York City and does not implicate interstate commerce (Laszlo N. Tauber & Associates I., LLC v. American Management Ass'n, 304 AD2d 413 [1st Dept 2003]). In any event, even if the FAA applied, as under New York law, Respondent would be barred from arbitrating the fraud-based counterclaim based on her participation "'in protracted litigation'" which resulted in prejudice to NJR which was required to expend time and resources. See Advest, Inc. v. Wachtel, 253 AD2d 659, 660-661 (1st Dept 1998), quoting, Cotton v. Sloan, 4 F3d 176, 179 (2d Cir 1993); See also Apple & Eve, LLC v Yantai North Andre Juice Co., Ltd., 610 F Supp 2d 226 (ED NY 2009).

As Respondent waived her right to arbitrate her fraud based counterclaims based on her participating in litigation, the court need not reach whether the counterclaims are barred by the

applicable statute of limitations or precluded under the doctrine of collateral estoppel and/or res judicata.

Accordingly, the petition to stay the arbitration of Respondent's counterclaims of undue influence, fraud, breach of fiduciary duty and unjust enrichment is granted.

NJR's and Respondent's respective requests for sanctions are denied.

CONCLUSION

In view of the above, it is

ORDERED AND ADJUDGED that the N.J.R Associates' petition (motion sequence number 001) seeking to stay arbitration of respondent's counterclaims for undue influence, fraud, breach of fiduciary duty and unjust enrichment is granted and its request for sanctions is denied; and it is further

ORDERED that Respondent's motion to dismiss to petition (motion sequence number 002) is denied; and it is further

ORDERED that Respondent's motion for sanctions (motion sequence number 003) is denied; and it is further

ORDERED that the parties shall proceed forthwith to arbitration of NJR's claims and Respondent's remaining counterclaims.

DATED: October 5, 2010

J.S.C.