

**Block v Ghirimoldi**

2011 NY Slip Op 32606(U)

October 4, 2011

Supreme Court, New York County

Docket Number: 106697/11

Judge: Doris Ling-Cohan

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY**  
**PRESENT: Hon. Doris Ling-Cohan, Justice** **Part 36**

**CLAIRE BLOCK and JERRY BLOCK,**

**Petitioners,**

**STEPHANO GHIRIMOLDI,**

**Respondent.**

**INDEX NO. 106697/11**

**MOTION SEQ. NO. 001**

The following papers, numbered 1-6 were considered on this motion to stay arbitration and cross-motion to compel arbitration:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits	<u>1, 2</u>
Answering Affidavits — Exhibits	<u>5</u>
Replying Affidavits	<u>6</u>
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<u>3, 4</u>

**FILED**

**OCT 07 2011**

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided as indicated below.

NEW YORK  
COUNTY CLERK'S OFFICE

Petitioners Claire Block and Jerry Block (collectively Petitioners) commenced this special proceeding against respondent Stephano Ghirimoldi (Ghirimoldi) to stay an arbitration. Petitioners are shareholders of Voice Writing, Inc. (VWI). According to the pleadings and the within submissions, on or about April 1, 2010, Petitioners entered into a shareholders agreement (Shareholders Agreement), with respect to VWI, with Ghirimoldi, chief operating officer of VWI.

Ghirimoldi mailed an arbitration demand dated April 21, 2011 (Arbitration Demand) to Petitioners on or about May 30, 2011. The Arbitration Demand was based on claims of fraud and misappropriation. Thereafter, Petitioners commenced this special proceeding for an order: (a) permanently staying the arbitration; or in the alternative, (b) temporarily staying the arbitration to allow for discovery. Ghirimoldi cross-moved to compel arbitration.

Petitioners contend that a permanent stay is necessary since the matter in controversy is outside

the scope of the arbitration provision (Arbitration Clause) in the Shareholders Agreement and since the claims alleged arose over one year prior to the service of the Arbitration Demand. Petitioners contend that the Arbitration Clause contains a time limitation of one year from the date a claim or controversy arises. As such, Petitioners argue that the Arbitration Demand was untimely. Additionally, Petitioners state that the matters alleged in the Arbitration Demand assert personal wrongdoing by Petitioners which do not pertain to VWI. Petitioners also contend that a temporary stay is needed to conduct and complete discovery which would be unavailable absent court intervention.

Ghirimoldi seeks an order, pursuant to CPLR 7503, compelling and directing the parties to arbitrate their claims. In support of his motion, Ghirimoldi proffers a copy of the business school permit for VWI. Ghirimoldi maintains that the claims asserted in the Arbitration Demand arose out of the corporation's business and pertain to the corporation. Ghirimoldi contends that Petitioners breached the Shareholders Agreement, their fiduciary duty, co-mingled and misappropriated corporate funds and committed corporate waste; all are matters pertaining to the corporation and within the scope of the Arbitration Clause. Ghirimoldi also maintains that his demand for arbitration was timely as he claims that VWI did not start doing business until August 2010, as evidenced by the business school permit.

The Arbitration Clause, paragraph 15 of the Shareholders Agreement, states in pertinent part:

Any claim or controversy among and between the parties arising out or pertaining to the Corporation, or to any matter contained in this Agreement, or any difference or dispute as to the interpretation or performance of any of the provisions of this Agreement,...shall be settled by arbitration in New York City, New York, before a panel of three (3) arbitrators of the American Arbitration Association in accordance with the Commercial Arbitration Rules of said association then obtaining. Any such arbitration proceeding shall be commenced within one (1) year from the date the claim or controversy arises. The failure to institute arbitration proceedings within such one (1) year period shall constitute an absolute bar to the institution of such proceeding and a waiver of all such claim or claims."

"In deciding an application to compel arbitration pursuant to CPLR 7503(a), the court is required to first make a determination whether the parties have entered into a valid arbitration agreement and, if

so, whether the issue sought to be submitted to arbitration falls within the scope of that agreement.” *Koob v IDS Financial Services, Inc.*, 213 AD2d 26, 30 (1<sup>st</sup> Dep’t 1995) (internal quotation marks and citations omitted). The parties do not dispute that there is a valid Shareholders Agreement and Arbitration Clause contained therein. As such, the remaining issue is whether the alleged claims are covered by the Arbitration Clause. In *State of New York v Philip Morris Inc.*, 8 NY3d 574, 581 (2007), the Court of Appeals has rearticulated the rule that, for an arbitration provision to be enforceable, it must “expressly and unequivocally encompass...the subject matter of the particular dispute.” (internal quotation marks and citations omitted).

The law is clear that, as the party seeking to enforce the instant clause, Ghirimoldi bears the burden of proving that the dispute herein is encompassed by said clause. See *Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 (1<sup>st</sup> Dep’t 2007). Here, a reading of the plain language of the Arbitration Clause makes clear that the issues in dispute in this proceeding are unequivocally encompassed therein. When interpreting unambiguous contract provisions “matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument.” See *Chimart Assoc. v Paul*, 66 NY2d 570, 572-573 (1986). The Arbitration Clause clearly states that “any claim or controversy...between the parties arising out of or pertaining to the Corporation...shall be...arbitrated.” Despite Petitioners’ contention that Respondent only asserts personal wrongdoing by Petitioners, which fall outside the Arbitration Clause, the claims in the Arbitration Demand include, *inter alia*, breach of the Shareholders Agreement, breach of fiduciary duties, corporate waste, and co-mingling/misappropriation of funds of the corporation. These allegations unquestionably pertain to the corporation and therefore, Ghirimoldi’s allegations are within the scope of the Arbitration Clause.

However, “[t]he parties to the [Shareholders Agreement] were free to draft conditions precedent

to the exercise of the right to arbitrate, and a clearly stated time limitation is one such valid prerequisite.” *Jack Kent Cooke, Inc. v Saatchi & Saatchi North America*, 222 AD2d 334, 334 (1<sup>st</sup> Dep’t 1995)(internal citations omitted). The Arbitration Clause clearly contains a one year limitation, which all parties refer to, to support their positions. Ghirimoldi argues that arbitration should be compelled as his claims against Petitioners’ arose within one year of the Arbitration Demand, thus he is not precluded from arbitration. According to Ghirimoldi, the facts which gave rise to his claims did not occur until VWI began doing business, which was not until August 2010, after a permit was obtained for VWI. Ghirimoldi’s affirmation in support of his cross-motion, states that “[o]nce the [Corporation] did begin operations, I learned of Petitioner paying off personal credit cards with [the Corporation] funds, and conversely Petitioners using [the Corporation] credit cards to pay personal expenses.” Ghirimoldi affirmation, ¶ 12. As stated above, in further support of his cross-motion, Ghirimoldi proffers a copy of the business school permit for VWI, effective August 4, 2010. As Ghirimoldi clearly states, his claims arose after VWI began doing business. Ghirimoldi served the Arbitration Demand on or about May 31, 2011, well within a year from August 4, 2010, the date the permit was obtained for the school to conduct business.

Despite this, Petitioners claim that the allegations arose in excess of one year prior to the service of the Arbitration Demand. However, Petitioners have failed to provide any information, aside from conclusory and self-serving statements, on when the claims arose. Moreover, any claims arising prior to one year from service of the demand to arbitrate are presumably time barred, to be determined at the subject arbitration. As such, Ghirimoldi’s cross-motion to compel arbitration is granted and Petitioner’s motion, to the extent that it seeks a permanent stay of the arbitration, is denied.

Lastly, Petitioners move for a temporary stay of the arbitration for discovery. CPLR 3102 states that “disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be

obtained, but only by court order.” The Court of Appeals has found that “[w]hile a court may order disclosure to aid in arbitration...courts will not order disclosure except under extraordinary circumstances.” *De Sapio v Kohlmeyer*, 35 NY2d 402, 406 (1974)(internal quotations omitted). Moreover, “[c]ourt-ordered disclosure is not justified except where it is absolutely necessary for the protection of the rights of a party.” *International Components Corp. v Klaiber*, 54 AD2d 550, 551 (1<sup>st</sup> Dep’t 1976). Here, Petitioners argue that a temporary stay is required to conduct and complete discovery. In support, Petitioners merely argue, in a conclusory fashion, that depositions and documentary discovery is material and necessary to the defense of Ghirimoldi’s claims and would be unobtainable without court intervention. However, Petitioners failed to even allege extraordinary circumstances which would require court-directed discovery. Absent a showing of necessity of court intervention or extraordinary circumstances, a temporary stay of the arbitration for discovery is not justified. *Id.* at 551. As such, the portion of Petitioner’s motion seeking a temporary stay of the arbitration for discovery is denied.

Accordingly, it is

ORDERED that Petitioners’ motion to stay arbitration is denied in its entirety; and it is further

ORDERED that Respondent’s cross-motion to compel arbitration is granted; and it is further


ORDERED that Respondent shall arbitrate his claims against Petitioners’ in accordance with the Shareholders Agreement; and it is further

ORDERED that within 30 days of entry of this order, Respondent shall serve a copy of this order with notice of entry, upon Petitioners.

**FILED**

**OCT 07 2011**

Dated: 10/4/11

  
NEW YORK  
COUNTY CLERK'S OFFICE  
DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST

NON-FINAL DISPOSITION

J:\Arbitration-ADR\Block v Ghirimoldi - stay arb and compel arb.wpd