

**Creston Ave. Baptist Church of Christ v CMC Dev.,
LLC**

2011 NY Slip Op 33959(U)

November 18, 2011

Supreme Court, Bronx County

Docket Number: 302135/11

Judge: Jr., Kenneth L. Thompson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

STAY PENDING ARBITRATION

C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20

THE CRESTON AVENUE BAPTIST CHURCH OF
CHRIST and 2445 CRESTON AVE, LLC,

Index No. 302135/11

Plaintiff,

DECISION/ORDER

-against-

Present:
HON. KENNETH L. THOMPSON, Jr.

CMC DEVELOPMENT, LLC, SHAUN M. BELLE,
WILLIAM NELSON, BPD BANK AND NMR REALTY
ABSTRACT SERVICES, LTD,

Defendants.

The following papers numbered 1 to ___ read on this motion, _____

No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	_____
	Answering Affidavit and Exhibits-----	_____
	Replying Affidavit and Exhibits-----	_____
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants' CMC DEVELOPMENT, LLC, SHAUN M. BELLE, WILLIAM
NELSON (CMC) motion for an Order pursuant to CPLR §§ 3211(a)(1) and (7)
dismissing the Complaint is **DENIED**.

This matter is **STAYED** pending the resolution of arbitration/mediation between
the parties as required by the relevant Operating Agreement.

Defendants' motion for an Order disqualifying Henry B. Nachtman, Esq. as
Plaintiff 2445 CRESTON AVE, LLC's (2445) counsel is **DENIED**.

Motion to Dismiss

CMC contend that this action should be dismissed because it and 2445 entered
into an Operating Agreement which required that:

In any dispute over the provisions of this operating agreement and in other disputes among the members, if the members cannot resolve the dispute to their mutual satisfaction, the matter shall be submitted to mediation. The terms and procedure for mediation shall be arranged by the parties to the dispute.

(S.M. Belle Aff at Ex. B at § VI(4).)

2445 argues that the Court should not accept this Agreement as evidence because “[i]t has not been authenticated by anyone.” (H.D. Nachtman Aff Opp at ¶ 7.) CMC proffered the Affidavit of Shaun M. Bell, a principal member of CMC (Ver Amend Compl at ¶ 16), who avers that the annexed document is the Operating Agreement executed by and between CMC and 2445. (S.M. Belle Aff at ¶ 7.) Mr. Belle’s signature also appears on the document on behalf of CMC. Thus, it has been authenticated. See Prince, Richards on Evidence § 9-101 (stating that “[a] writing is ordinarily not relevant on trial unless evidence has been introduced to show that it was made, signed or adopted by a particular person”). This finding, however, does not serve CMC’s purposes.

There is a strong State policy of giving broad full effect to arbitration clauses. Where ... , there is a broad arbitration agreement, the scope of the arbitration clause is determinable by arbitration. Once the courts have performed the initial screening process, determining that the parties have agreed to arbitrate the subject matter in dispute, their role has ended.”

Blatt v. Sochet, 199 A.D.2d 451, 453.

2445 alleges, among other things, that CMC defrauded it, embezzled it, misappropriated and converted its funds, breached the Operating Agreement between the parties, and exceeded its authority to act on its behalf. (Amend Ver Compl at ¶¶ 32,

35, 43, 52, 56, 62, 69, 89-94, 104). As such, the Court finds that 2445 is seeking to resolve a dispute against another member of the LLC, regarding provision of the Operating Agreement. Therefore, this matter should be subjected to arbitration/mediation as agreed to by the parties. This does not, however, result in the dismissal of the Complaint.

“An agreement to arbitrate is not a defense to an action. Thus, it may not be the basis for a motion to dismiss.” Allied Bldg. Inspectors International Union of Operating Engrs v. Office of Labor Rel. of City of N.Y., 45 N.Y.2d 735, 738. (citations omitted).

Instead,

A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. ... 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.

CPLR § 7503(a).

This Court has determined that the parties should arbitrate/mediate this matter as agreed. The Court is unmoved by 2445's argument that this clause is inapplicable based on its allegations of fraud against CMC, since there is no evidence or allegation that CMC fraudulently induced it to enter into the Operating Agreement. See Chris Keefe Bldrs., Inc. v Hazzard, 71 A.D.3d 1599, 1602 (finding that “the ... defendants are ... deemed to have admitted that they fraudulently induced plaintiff to enter into the second contract, which contained the arbitration clause”).

Since the Court may not dismiss the action, it is treating CMC's motion as one to compel arbitration/mediation. See Marshall Ray Corp. v. C. Haedke & Co., 16 N.Y.2d 967 (affirming Special Terms decision to "consider[] defendant's motion [to dismiss] as one to stay action and compel arbitration and granted said motion"). Thus, it is staying this action pending this arbitration/mediation. See CPLR § 2011 (requiring that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just"): see also Allied Bldg. Inspectors, 45 N.Y.2d at 738 (holding that "[s]ince, as noted, a dismissal is improper, the appropriate remedy is a stay of the judicial proceeding").

Disqualification

CMC contends that Henry D. Nachtman should be disqualified from representing 2445 because "it is a clear conflict of interest for counsel to represent the party adverse to my client, and represent my clients' interest in the foreclosure action and simultaneously file a lawsuit against my clients claiming fraud and misrepresentation in regards to the same transaction underlying the foreclosure proceeding." (B.K. Robinson Aff Supp at ¶ 13.) While Defendant BPD BANK (BPD) argues that, "to allow Nachtman to continue to represent CABC and/or the LLC in this action and the foreclosure would violate a number of Rules of Professional Conduct." (E.S. Feldman Aff at ¶ 11.)

Under DR 5-108 (A) (1), a party seeking disqualification of its adversary's lawyer must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse. Satisfaction of these three criteria by the moving

party gives rise to an irrebuttable presumption of disqualification.

Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 131 (citations omitted).

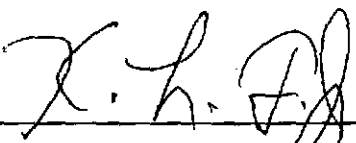
The Court must deny CMC's motion because it has failed to establish the first element. There is no evidence that CMC, Mr. Belle or Mr. Nelson ever had an attorney-client relationship with Mr. Nachtman. Ergo, they were never Mr. Nachtman's current or former clients. See Black's Law Dictionary 7th ed. at 247 (defining "client" as "[a] person or entity that employs a professional for advice or help in that professional's line of work"). Additionally, there is no evidence that Mr. Nachtman ever dealt directly with CMC, Mr. Belle or Mr. Nelson. It appears rather, that all communications regarding CMC went through Mr. Robinson. Furthermore, "[a] lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7." 22 N.Y.C.R.R. § 1200.00 Rule 1.13(d). As such, there is no basis to disqualify Mr. Nachtman from representing CABCO. Consequently, 22 N.Y.C.R.R. § 1200.00 Rule 1.6, 1.7, 1.8, 1.9 and 1.13(a) do not apply to this situation.

Finally, there is no evidence that Mr. Nachtman ever represented CMC, Mr. Belle or Mr. Nelson's interests in the underlying foreclosure action. That action does not list them as Defendants. And, 2445's Answer claims that BPD failed to disclose its relationship with CMC, Mr. Belle and Mr. Nelson, and that CMC, Mr. Belle and Mr. Nelson engaged in a conspiracy to defraud 2445 as Affirmative Defenses. (BPD v. 2445, et al, Index No. 380746/10, Ans at ¶¶ 14 & 15.) Indeed, Mr. Nachtman is 2445's counsel (S.M. Belle Aff at Ex. A), as such his loyalty lies with that entity and not its

individual members. Thus, he was required to bring this lawsuit if he discovered that members were possibly engaging in activities that would be detrimental to his client—
2445. See Campbell v. McKeon, 75 A.D.3d 479, 480 (stating that “[c]ounsel for an organizational client is required to act as is necessary in the best interests of the client when an individual associated with the client may have violated legal duties which are likely to result in substantial injury to the organization”); see also 22 N.Y.C.R.R. § 1200.00 Rule 1.13(b).

The foregoing shall constitute the decision and order of this Court.

Dated: NOV 18 2011



J.S.C.
KENNETH L. THOMPSON, JR.