

Korine v Algatec Mgt., LLC

2011 NY Slip Op 34280(U)

April 25, 2011

Supreme Court, New York County

Docket Number: 102279/11

Judge: Manuel J. Mendez

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.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

In the Matter of the Arbitration between

SAUL KORINE, DAVID ASBELL, JAYSON LEVY
and ALFRED GEDULDIG, individually and on
behalf of, ALGATEC EQUITY PARTNERS, L.P.
Petitioners,
-against-

ALGATEC MANAGEMENT, LLC, ROBERT M. RUBIN
and BARRY POMERANTZ,
Respondents.

MOTION SUPPORT OFFICE
 NYS SUPREME COURT - CIVIL
 APR 29 2011

RECEIVED

INDEX NUMBER 102279/11
 MOTION DATE 03-30-2011
 MOTION SEQ. NO. 001
 MOTIONICAL NO. _____

The following papers, numbered 1 to 11 were read on this petition to/for Art. 78

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause — Affidavits — Exhibits...	<u>1-5, 6</u>
Answering Affidavits — Exhibits <u>cross motion</u>	<u>7-8, 9</u>
Replying Affidavits _____	<u>10, 11</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered and adjudged that the petition seeking provisional remedies in aid of arbitration pursuant to CPLR §7502 [c], seeking to restrain and enjoin the respondents, is partially granted. The cross-motion to dismiss the petition pursuant to CPLR 3211 (a), alternatively pursuant to CPLR §6312 and CPLR §6313, setting an undertaking is denied.

The petitioners are members of and include a limited partnership formed pursuant to agreement dated October 30, 2008 (Pet. Exh. 2) for the limited purpose of acquiring, owning, selling or otherwise disposing of Shares, making contributions and the loan to Algatec Solar AG (hereinafter referred to as "Solar"). Algatec Equity Partners LP, was formed under and apply the Delaware Revised Uniform Limited Partnership Act (DRULPA). The respondents are members of and include the general partnership, Algatec Management, LLC, which is responsible for the management of the limited partnership. The combined limited partnership and general partnership function together (hereinafter referred to as "the partnership") as a vehicle for investing in Solar.

The petitioners make this petition pursuant to CPLR §7502[c], seeking to restrain and enjoin the respondents from directly or indirectly transferring, assigning, selling, removing, or encumbering the assets of Algatec Equity Partners, L.P. (hereinafter referred to as the "limited partnership"), pending an arbitration hearing. They seek the names, addresses and full contact information of the limited partnership for the purpose of contacting and advising them of the Arbitration. They seek full access to the books and records of the partnership and an Order directing the respondents to cooperate with Solar concerning shareholder consents and an audit by KPMG. They also seek to restrain and enjoin the respondents from conducting any activities on behalf of the limited partnership until they can demonstrate good standing with the

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

Handwritten signature/initials

State of Delaware, payment of the initial capital contribution, and the authority granted by the General Partnership for Robert M. Rubin or Barry Pomerantz to manage its affairs.

The respondents oppose the petition and cross-move to dismiss pursuant to CPLR §3211[a]. They seek to dismiss the petition as to Robert M. Rubin and Barry Pomerantz on the grounds that their removal as officers of the General Partnership is a violation of DRULPA and the limited partnership agreement. Robert M. Rubin and Barry Pomerantz claim that the petitioners do not have standing or privity of contract to obtain the relief sought in the petition. They seek to dismiss the petition pursuant to CPLR §3211[a][10] on the grounds that the petitioners have failed to join necessary parties from the general partnership that are necessary for removal of officers. Respondents seek an Order pursuant to CPLR §6313[c] setting an undertaking to cover any losses that may incur to the limited partnership as a result of either the interim or injunctive relief.

The criteria for relief pursuant to CPLR §7502 [c], requires a showing that the arbitration award would be rendered ineffectual without a preliminary injunction. The movant seeking a preliminary injunction pursuant to CPLR §7502 [c], is required to demonstrate that the factors required pursuant to CPLR Article 62 and 63 concerning prejudgment preliminary injunctions also apply to the petition (See, *Erber v. Catalyst Trading, LLC*, 303 A.D. 2d 165, 754 N.Y.S. 2d 885 [N.Y.A.D. 1st Dept., 2003]; *Interoil LNG Holdings, Inc. v. Merrill Lynch PNG LNG Corp.*, 60 A.D. 3d 403, 874 N.Y.S. 2d 439 [N.Y.A.D. 1st Dept. 2009]). In order to obtain injunctive relief in aid of arbitration the petitioners must meet the three pronged analysis and show, (1) a likelihood of success on the merits of the dispute to be arbitrated;(2) irreparable injury absent the granting of the preliminary injunction;(3) and the balancing of the equities is in favor of the movant (See, *Koultukis v. Phillips*, 285 A.D. 2d 433, 728 N.Y.S. 2d 440 [N.Y.A.D. 1st Dept. 2001]). Injunctive relief is not the basis upon which a party may commence proceedings that are collateral to the arbitration. Judicial supervision should be minimal and no more than ancillary to the arbitration proceeding (See, *Koob v. IDS Financial Services, Inc.*, 213 A.D. 2d 26, 629 N.Y.S. 2d 426 [N.Y.A.D. 1st Dept. 1995] and *Matter of Nationwide General Ins. Co. v. Investors Ins. Co. of America*, 37 N.Y. 2d 91, 332 N.E. 2d 333, 371 N.Y.S. 2d 463 [1975]).

The respondents claim in the cross-motion that the petition is now moot because the deal to purchase shares of Solar Thin Films, Inc. (hereinafter referred to as "STF") is dead and neither Robert M. Rubin or Barry Pomerantz will pursue any further transactions concerning STF. Pursuant to a letter of agreement dated March 23, 2011, two individuals that offered affidavits in support of the petition, David Salomon and David Skriloff, were made managing partners of the general partnership (Cross-mot. Exh. A). The letter agreement states that Robert M. Rubin agreed to no longer serve as one of the two limited partnership representatives on the advisory board dealing with Solar (German Company). The respondents provide a printout from a Delaware website that indicates there are no longer any outstanding taxes due and the General Partnership is in good standing (Cross-mot. Exh. D).

The petitioners have submitted a demand for arbitration and declaratory relief, and a statement of claim dated February 16, 2011, to the American Arbitration Association (hereinafter referred to as "AAA")(Pet. Exh. 1). The statement of claim seeks relief in the form of an award, "(i) removing the General Partner from the partnership; (ii) designating an unaffiliated limited partner as interim general partner of

[* 3]

the partnership; and (iii) provided for a vote for a substitute general partner within 90 days of the Award ; or, (iv) as an alternative removing the General Partner, ordering dissolution of the Partnership and/or winding up of its affairs and disposition of its assets in an orderly fashion" (Pet. Exh. 1).

The petitioners claim that they are not just seeking to remove Robert M. Rubin or Barry Pomerantz as alleged in the cross-motion, instead they want the general partnership removed from management and control of "the partnership," and replaced by a group of disinterested interim managers. Petitioners do not oppose the reconfiguration of the management of the general partnership by adding David Salomon and David Skriloff as interim managers. They claim that if Robert M. Rubin remains, Barry Pomerantz must be removed and substituted by Scott Galin the second largest investor in "the partnership," to avoid excessive control by the general partnership over the interests of the limited partnership.

The petitioner's claim that the respondents have violated the partnership agreement creating a basis to substitute them with a group of disinterested managers. They claim the respondents have not proven they made the capital contribution on behalf of the general partnership as required pursuant to the partnership agreement. The respondents claim they made the capital contribution through payment of legal fees on behalf of "the partnership." Petitioners provide an affidavit from Stephen A. Weiss, the partner at the firm that provided legal services, he states that the General Partnership did not pay his legal fees and there is still a substantial amount owed to the firm (Reply Aff. in Support of Pet., Exh. B). Petitioners do not deny that proof of payment of the franchise taxes was submitted by the respondents but claim that the partnership was placed at risk by failure of the General Partnership to remain in good standing.

The petitioners seek access to the books and records of "the partnership" and its assets claiming that they are entitled to review them pursuant to Article XIV, Section 14.2 of the partnership agreement dated October 30, 2008 (Pet. Exh. 2). The petitioners also seek to obtain the names and addresses and full contact information for each of the limited partners of "the partnership" so that they can be advised of the arbitration. Petitioners claim that they are permitted the contact information under DRULPA §17-305[a][3], which provides that the limited partners are entitled to, "A current list of the name and last known business, residence or mailing address of each partner." This relief is not opposed in the respondents' cross-motion.

The petitioner's provide a letter from the respondents's attorneys dated March 10, 2011 and claim that respondent is refusing to cooperate with Solar's audit by KPMG (Reply Affirm. in Support of Pet., Exh. D). The letter at paragraph 6, seeks a copy of the engagement letter for KPMG.

Upon review of all the papers submitted, this Court finds that, pursuant to the partnership agreement and DRULPA §17-305[a][3] the petitioners are entitled to the names and addresses and full contact information for each of the limited partners of "the partnership" so that they can be advised of the pending arbitration. The petitioners are also entitled to access the books and records of, and relating to, "the partnership" including, tax returns, bank records, expense records, valuations and assets as provided in Article XIV, Section 14.2 of the partnership agreement dated October 30, 2008 (Pet. Exh. 2).

The petitioners have not sufficiently established that there are any further proposed plans by the general partnership to transfer, assign, sell, remove, or encumber the assets of the limited partnership or substitute stock with that of STF while the arbitration is pending. Petitioners seek to further substitute the general partnership with a group of disinterested interim managers but this relief is sought in the demand for arbitration and will remain for the arbitrator. The petitioners have not established a basis to grant injunctive relief concerning respondent's lack of consent to an audit of Solar by KPMG.

The respondents have not provided a sufficient basis for an undertaking pursuant to CPLR §6312 and CPLR §6313. Although CPLR §7502 [c], requires the application of CPLR article 62 and 63, the documents and records to be provided and the pending arbitration will not prevent the general partnership from representing the limited partnership under the letter agreement dated March 23, 2011. There is no need for an undertaking since the necessary business of the partnership will continue pending the arbitrator's determination. The cross-motion is denied.

Accordingly, it is ORDERED and ADJUDGED that the petition for a preliminary injunction in aid of arbitration and to enjoin the respondents is partially granted, and it is further

ORDERED, that the respondents' cross-motion to dismiss the petition pursuant to CPLR 3211 (a), alternatively pursuant to CPLR §6312 and CPLR §6313, setting an undertaking, is denied; and it is further

ORDERED, that the respondents shall provide the petitioners with the names and addresses and full contact information for each of the limited partners of "the partnership" so that they can be advised of the pending arbitration, within thirty days from service of a copy of this Order with Notice of Entry; and it is further

ORDERED, that the respondents shall provide the petitioners with access to the books and records of, and relating to, "the partnership" including, tax returns, bank records, expense records, valuations and assets as provided in Article XIV, Section 14.2 of the partnership agreement dated October 30, 2008, within thirty days from service of a copy of this Order with Notice of Entry.

This constitutes the decision and judgment of this court

Dated: April 25, 2011

ENTER:

FILED

MAY 16 2011

MANUEL J. MENDEZ
J.S.C.

COUNTY CLERK'S OFFICE
NEW YORK
MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

Norman Crisman
Clerk