

Matter of Katz v Alpert
2014 NY Slip Op 30614(U)
March 10, 2014
Supreme Court, New York County
Docket Number: 652269/2013
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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In the Matter of the Application of LOIS KATZ and FAYA COHEN, Individually and as Executors of the ESTATE OF ABRAHAM ALPERT and the ESTATE OF SARAH ALPERT, and as Trustees of the 1996 A. ALPERT TRUST, the 277 ABRAHAM ALPERT TRUST, and the 1990 SARAH ALPERT TRUST, and SUSAN WEILAND and BETTE GROSSMAN, Individually and ALPERT REALTY, LLC,

Petitioners,

DECISION AND ORDER

For an Order Pursuant to Article 75 of the CPLR Staying Arbitration Before the American Arbitration Association

-against-

**Index No.: 652269/2013
Mot. Seq. No. 001**

CHARLES ALPERT, Individually and as Executor of the Estate of JOSEPH ALPERT,

Respondents.

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O. PETER SHERWOOD, J.:

I. OVERVIEW

Respondents, Charles Alpert and the Estate of Joseph Alpert, initiated an arbitration against the Estate of Abraham Alpert (the "Estate") and some of the Petitioners under the terms of a 1964 agreement (the "1964 Agreement"). The Court stayed the arbitration as to those individuals and entities, who were not parties to the 1964 Agreement.

Respondents have now filed a Second Amended Claim in the arbitration to add claims against the Estate. In this proceeding, Petitioners (who as a result of the stay are not parties to the arbitration) assert that while they are not named as respondents in the arbitration, the claims in the Second Amended Claim will affect their rights and interests, and therefore the claims related to their interests should be stayed. Respondents claim that Petitioners are merely "nominees" to the Estate's interests and that disputes as to those interests are properly resolved in the arbitration.

II. BACKGROUND

Petitioners are the Estate, certain family members of Abraham Alpert (“Abraham”) (the family members being Lois Katz, Faya Cohen, Susan Weiland, and Bette Grossman), trusts and an LLC that Abraham and/or his survivors organized.

Respondents commenced an arbitration against the Estate in October of 2008, seeking declaratory relief and money damages related to a “death buy out” provision in a 1964 Agreement between and among Abraham, William Alpert, and Jack Alpert. The 1964 Agreement provided that upon the death of one of the signatories, the decedent’s real estate interests in a family real estate business (the “Office”) must be offered for sale to the survivors at a specified value. The 1964 Agreement contains an arbitration clause providing that “any controversy or claim arising out of or relating to this agreement, or the breach thereof shall be settled by arbitration in the City of New York . . . in accordance with the rules then obtaining of the American Arbitration Association.” The original statement of claim in the arbitration also contained claims against Abraham’s widow and daughters in their individual capacities. The claim asserted that the family members had received, without consideration, transfers from Abraham of certain interests in the Office. The Supreme Court stayed the arbitration as to the individuals. The Appellate Division affirmed (*see re Katz v. Alpert*, Sup Court, NY County, May 18, 2009, Ramos, J. Index No. 603061/2008, *aff’d* 68 AD 3d 640 [1st Dept 2009]).

In June 2009, Respondents filed an Amended Statement of Claim in the arbitration, removing therefrom all direct claims against Abraham’s family members, adding claims against the Estate, and adding the 1996 A. Alpert Trust (“Trust”) as a party. A petition by the Trust to stay the arbitration as to it was granted. The decision was appealed. The Appellate Division affirmed. (*see In re Katz v. Alpert*, Sup Court, NY County, Sept 9, 2009, Ramos, J. Index No. 602045/2009, *aff’d* 82 AD 3d588 [1st Dept 2011]).

In February 2011, Respondents filed a Second Amended Statement of Claim in the arbitration to remove the Trust as a party and to add claims against the Estate. On March 3, 2011, the Estate filed an answer in the arbitration.

In this proceeding, Petitioners seek another stay, claiming that the Second Amended Statement of Claim effectively continues to seek relief in arbitration against them despite the prior

stay orders. Petitioners argue the relief sought in the Second Amended Statement of Claim would strip them of their record and beneficial ownership of certain property interests and would return those property interests to the Estate to be offered for sale to Respondents. Petitioners request that all claims in the Second Amended Statement of Claim that would impact the property rights of any party other than the Estate, be stayed. Those claims against the Estate not affecting the interests of non-parties to the 1964 Agreement would continue.

Respondents argue that because certain individual Petitioners received interests in real estate from Abraham without any consideration, they are merely his “nominees” with respect to those interests. Respondents assert that the interests Petitioners hold in the property properly belong to the Estate and thus are part of the arbitration.

III. DISCUSSION

It is for the court in the first instance to determine whether the parties have agreed to arbitrate (*see Matter of Fiveco, Inc. v Haber*, 11 NY3d 140, 144 [2008]; *MF Global, Inc. v Morgan Fuel & Heating Co., Inc.*, 71 AD3d 420 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010]). “The governing principle remains: a court will not order a party to submit to arbitration absent evidence of that party’s ‘unequivocal intent to arbitrate the relevant dispute’” (*Pharmacia & Upjohn Co. v Elan Pharmaceuticals, Inc.*, 10 AD3d 331, 333 [1st Dept 2004] [internal citations omitted]). As the court has already held, Petitioners are not signatories to the 1964 Agreement and may not be required to participate in the arbitration.

Respondents argue that (1) Petitioners (other than the Estate) have no standing to seek a stay because they are not parties to the arbitration; (2) Petitioners cannot request a stay because the Estate has already answered the Statement of Claim and therefore has waived any right to challenge arbitrability; (3) all of the claims in the arbitration relate to Office interests owned by the Estate, and therefore are proper subjects in the arbitration; (4) since the Petitioners admit that at least some of the claims in the arbitration are arbitrable, the arbitration should not be stayed; and (5) the claims to which Petitioners are now objecting were included in the original Statement of Claim.

Respondents claim that the arbitration would only result in money damages and an “order requiring the Estate to ‘recapture’ those Office Interests for purposes of the buyout provisions of the

1964 Agreement” (Response at 13). Although Respondents have not named Petitioners in the arbitration they nevertheless claim “that Abraham’s transferees (his widow and children) are bound by the substantive obligations of the 1964 Agreement requiring that they offer those interests for sale to Respondents (*id.* at 24). They seek to have the arbitration panel direct the Estate to recover the disputed property from Petitioners for sale to Respondents.

Petitioners are not parties to the arbitration and thus lack standing to seek a stay (*see Investec Trustees (New Jersey) Ltd. v Oppenheimer, Inc.*, 85 AD 3d 565 [1st Dept 2011]). A court will not stay arbitration unless the entire controversy is nonarbitrable (*see Silveman v Benmor Coats, Inc.*, 61 NY 2d 299,0301[1984]). The Court may not assume that the arbitration panel will exceed its powers and impair the rights of individuals who properly are not parties to the arbitration proceeding (*see Zachariou v Manios*, 68 AD 3d 539, 540 [1st Dept 2009]).

Petitioners are not parties to the arbitration agreement and their participation in that proceeding may not be coerced. For the same reason Petitioners do not have standing to stay the arbitration. Respondents are undoubtedly seeking to obtain an award in the arbitration directing the Estate to recover the disputed property for sale to Respondents. Thus, Respondents seek to accomplish indirectly the participation of Petitioners in the arbitration which participation the court has held Petitioners have not agreed to do (*see In re Katz*, 68 AD 3d at 641). Nevertheless, the Court will not assume that the arbitration panel will render an award that requires pursuit of a non-party to the arbitration merely for the benefit of a party thereto. The Court notes that there is pending litigation commenced by Respondents against petitioners, Sara Alpert, Faya Alpert, Lois Katz, Bette Grossman, and Susan Weiland in which Respondents seek return of the same property at issue in the arbitration (*see Alpert v Alpert*, Sup Ct, New York County, Index No. 26735/2009).

Accordingly, it is hereby

ORDERED that the petition to stay arbitration is DENIED.

This constitutes the decision and order of the court.

DATED: March 10, 2014

ENTER,


O. PETER SHERWOOD
J.S.C.