

Matter of Theresa Group, LLC v Oksman
2015 NY Slip Op 30241(U)
February 20, 2015
Supreme Court, New York County
Docket Number: 154607/2014
Judge: Shirley Werner Kornreich
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SHIRLEY WERNER KORNREICH
J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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In the Matter of the Application of:

Index No.: 154607/2014

THERESA GROUP, LLC and EILON AMIDOR,

DECISION & ORDER

Petitioners,

-against-

HENRY C. OKSMAN,

Respondent,

For a judgment staying any arbitration brought under
Respondent's Notice of Intention to Arbitrate dated
April 22, 2014.

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SHIRLEY WERNER KORNREICH, J.:

Theresa Group, LLC (the Company) and Eilon Amidor petition the court, pursuant to CPLR 7502 and 7503, to stay arbitration against respondent Henry C. Oksman. The petition is denied for the reasons that follow.

I. Procedural History & Factual Background

The facts recited are taken from the petition and the documentary evidence submitted by the parties.

The Company, a New York LLC, was founded by Amidor and Oksman in February 2004. The Company is a residential construction business. Amidor ran the business and oversaw all construction, and Oksman provided the capital. Between February 2004 and August 2006, Amidor and Oksman worked to successfully finance, develop, and sell a home in Mamaroneck, New York. On August 12, 2006, Amidor and Oksman executed an operating agreement (the Agreement). *See* Dkt. 2 at 12. The Agreement provides that Amidor and Oksman are each 50% members of the Company and memorializes their respective roles as

manager and investor. *See id.* at 21, 32. The Agreement prohibits Amidor and Oksman from withdrawing from the Company or alienating their membership interest in any way except in accordance with the procedure set forth in Article 9. *See id.* at 25-26. The Agreement, which is governed by New York law, prohibits oral modifications and requires all disputes between members to be arbitrated with the American Arbitration Association. *See id.* at 28.

On April 22, 2014, Oksman served Amidor with a notice that he intended to commence an arbitration proceeding to resolve a dispute over Oksman's claims for his share of the Company's profits and for a return of his capital contribution. On May 12, 2014, Amidor filed the instant petition to enjoin that arbitration. Oksman filed an answer on June 16, 2014. *See* Dkt. 8. This motion practice followed.

Amidor's seeks to avoid arbitration, contending that Oksman is no longer a member of the Company and, therefore, cannot avail himself of the Agreement's arbitration clause.¹ Article 9 of the Agreement, however, governs alienation of membership, and Amidor does not allege that Article 9 was followed. Nonetheless, Amidor claims that, on two occasions, Oksman voluntarily withdrew from the Company.

The first withdrawal allegedly occurred in 2007 in connection with a loan the Company used to finance the construction of a home in Scarsdale, New York. Amidor claims Oksman's

¹ Amidor also avers that Oksman's claims are time-barred. Since the subject arbitration is governed by New York law, and not the FAA, this is an issue for the court, not the arbitrator. *See ROM Reinsurance Mgmt. Co., v Continental Ins. Co.*, 115 AD3d 480, 481 (1st Dept 2014), accord CPLR 7503(b). Here, however, Amidor's statute of limitations arguments are not a bar to arbitration. Oksman's claims are for breach of the Agreement, and thus are subject to CPLR 214(4)'s 6-year statute of limitations. Claims accruing before April 22, 2007 would be time barred. Nothing in the record indicates that any time-barred claim is being asserted. The record sheds little light on what years Oksman's claims relate to, as the merits of his claims are not before the court. In any event, in reply, Amidor clarifies that his statute of limitations argument is limited to the issue of Oksman's alleged withdrawal in 2007. The court, however, rules against Amidor on this claim.

withdrawal was required before the bank would lend money to the Company. No documentation of a 2007 withdrawal is in the record.

The second withdrawal allegedly occurred on January 18, 2012, when Oksman stated in a letter that he withdrew from the Company in December 2009. *See* Dkt. 2 at 38. Oksman supposedly wrote this because, in August 2011, after the family who purchased the Scarsdale home, the Furgangs, moved in, they complained of serious construction problems and threatened to sue. Amidor allegedly convinced Oksman that if he wrote in a letter that he was not a member of the Company, this would somehow negate any potential liability in a lawsuit by the Furgangs. Article 9's withdrawal procedure was not followed. The Furgangs ultimately filed a lawsuit against Amidor, Oksman, and the Company in Westchester County Supreme Court (Index No. 56128/2012), which was settled and discontinued in November 2012. After the settlement, Amidor refused to "reinstate" Oksman as a member.

Additionally, Amidor claims that his decision to stop providing Oksman with Schedule K-1s after 2007 is proof that Oksman has not been a member since that time. Amidor further maintains that Oksman's failure to file K-1s with the IRS estops him from claiming that he is a member. As explained below, Amidor is wrong.²

II. Discussion

New York has a "long and strong public policy favoring arbitration." *Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 (2007), quoting *Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 49 (1997). "However, the obligation to arbitrate depends on an *agreement* to arbitrate." *People v Coventry First LLC*, 13 NY3d 108, 113 (2009) (emphasis in original); *see*

² The context of this litigation bears mentioning. Amidor is married to Oksman's daughter, Toby. They married in 2000, four years before Amidor and Oksman formed the Company. Toby recently commenced divorce proceedings against Amidor, and such proceedings appear to be the impetus for this litigation.

Cammarata v InfoExchange, Inc., 122 AD3d 459, 459-60 (1st Dept 2014). For an arbitration agreement to be enforceable, it must be “clear, explicit and unequivocal and must not depend upon implication or subtlety.” *Waldron v Goddess*, 61 NY2d 181, 183-84 (1984) (citations omitted). “[W]hether there is a clear, unequivocal and extant agreement to arbitrate the claims, is for the court and not the arbitrator to determine.” *Primex Int’l Corp. v Wal-Mart Stores, Inc.*, 89 NY2d 594, 598 (1997). Where “parties enter into an agreement and, in one of its provisions, promise that any dispute arising out of or in connection with it shall be settled by arbitration, any controversy which arises between them and is within the compass of the provision must go to arbitration.” *Gomez v Brill Secs., Inc.*, 95 AD3d 32, 36 (1st Dept 2012), quoting *Exercycle Corp. v Maratta*, 9 NY2d 329, 334 (1961).

Amidor concedes, as he must, that the type of claims asserted by Oksman are subject to mandatory arbitration if such claims are deemed to be between members of the Company. He contends Oksman is not a member. Amidor’s contention presents somewhat of a chicken-and-egg problem – namely, Oksman’s status as a member being a predicate for arbitration while, at the same time, disputes over membership status under the Agreement are subject to arbitration. In other words, Amidor’s argument, taken to its logical conclusion, would require the court to determine Oksman’s membership status in order to decide this motion. Membership status itself, however, is an issue for arbitration.³ To the extent there is any doubt about Oksman’s

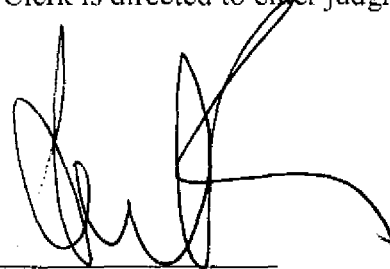
³ This argument, in truth, may well be but a red herring, since the Agreement provides that withdrawal of membership can only occur pursuant to Article 9, a method not adhered to in Oksman’s purported withdrawal. Also, Amidor’s estoppel argument, improperly raised for the first time in reply [see *McDonald v Edelman & Edelman, P.C.*, 118 AD3d 562 (1st Dept 2014) (argument raised for first time in reply need not be considered by the court)], fares no better. Amidor relies on the rule that “[a] party to litigation may not take a position contrary to a position taken in an income tax return.” *Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 (2009). This rule applies in situations where a party has made an admission through his income tax filing adverse to his litigation position, such as where a plaintiff claims his income was an

membership status, arbitration would be required because “[a]ny doubts as to whether an issue is arbitrable will be resolved in favor of arbitration.” *State v Philip Morris Inc.*, 30 AD3d 26, 31 (1st Dept 2006), citing *Smith Barney*, 91 NY2d at 49-50; *see also Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 589-90 (1st Dept 2007) (collecting cases). Accordingly, it is

ORDERED that the petition of Theresa Group, LLC and Eilon Amidor to stay arbitration against respondent Henry C. Oksman is denied, and the Clerk is directed to enter judgment dismissing the petition with prejudice.

Dated: February 20, 2015

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J.S.C.

amount different than reported on his return. *See Naghavi v N.Y. Life Ins. Co.*, 260 AD2d 252 (1st Dept 1999). The cases cited by Amidor do not stand for the proposition that failure to file a required schedule on a tax return has a preclusive effect in subsequent litigation. *See, e.g., Naghavi*, 260 AD2d at 252 (plaintiff bound by his tax return’s reporting of his “annual income of \$100,000 in the years in question”); *see also Peterson v Neville*, 58 AD3d 489 (1st Dept 2009) (plaintiff bound by the capital account balance in partnership tax returns). Moreover, Amidor’s unilateral decision not to issue K-1s to Oksman, and the circumstances of this decision and its legal implications are subject to mandatory arbitration because member disputes regarding the Company’s tax returns fall under the Agreement’s broad arbitration clause. Furthermore, Oksman’s alleged failure to protest the tax treatment of his membership interest is, as with his January 18, 2012 letter, not a valid basis to effect a withdrawal under Article 9.