Matter of Gramercy Advisors LLC v J.A. Green Dev. Corp.
2015 NY Slip Op 30538(U)
April 13, 2015
Supreme Court, New York County
Docket Number: 650166/2014
Judge: Marcy S. Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

In the Matter of

The Arbitration of Certain Controversies Between GRAMERCY ADVISORS LLC; GRAMERCY CAPITAL RECOVERY FUND II LLC,

Petitioners,

– and –

J.A. GREEN DEVELOPMENT CORP; JAGI, INC.; and JAGI VERDE LLC

Respondents.

Index No.: 650166/2014

DECISION/ORDER

Petitioners Gramercy Advisors LLC and Gramercy Capital Recovery Fund II LLC (Gramercy or Gramercy entities) bring this Petition, pursuant to CPLR 7503 (a) and the Federal Arbitration Act (9 USC § 1, et seq.) (FAA), to compel respondents J.A. Green Development Corp., JAGI, Inc., and JAGI Verde, LLC (Green entities) to arbitrate certain claims, and to enjoin them from further prosecuting an action in Texas. Respondents oppose the Petition and "cross-move" for an order staying arbitration pending resolution of the Texas litigation.[1]

Background

This matter arises out of petitioners' execution of investment transactions in connection with a tax shelter on respondents' behalf. After the Internal Revenue Service disallowed respondents' losses, respondents sued petitioners and others in Texas for damages related to the

[1] Although respondents did not file a formal cross-motion, their request for a stay will be considered by the court.

tax shelter. Petitioners contend that respondents have released all claims against them, and now seek to arbitrate the enforceability of the release, which they claim respondents breached by commencing the Texas action.

The material facts are not in dispute. As alleged in the Petition, the Gramercy entities are asset managers and investment funds specializing in investing in distressed debt in foreign markets. (Pet. ¶ 9.) Respondents consulted with the accounting firm BDO Seidman LLP (BDO) and the law firm Sidley Austin LLP (Sidley Austin) to devise a tax shelter. (Id. ¶ 10.) From 2001 through 2004, respondents engaged Gramercy in connection with the tax shelter to execute investment transactions in foreign distressed debt. (Id. ¶ 11.)

In 2001, Gramercy Advisors, L.L.C. entered into a separate Investment Management Agreement (IMA) with each of the Green entities, pursuant to which it performed the services. (Pet. ¶ 11; Ans. ¶ 11.) The IMAs exculpate Gramercy for its good faith acts or omissions unless they constitute "willful misconduct, gross negligence, a violation of applicable securities laws or criminal wrongdoing." (Mar. 14, 2001 IMA, § 7 [a] [Pet. Ex. 1].)[2] They also provide that Gramercy "is not required to inquire into or take into account the effect of any tax laws or the tax position of the Client in connection with managing the Account." (Id. § 7 [b].) In addition, the IMAs include provisions obligating respondents to indemnify Gramercy and its affiliates and others against various claims and losses. (Id. §§ 7 [d], [e].) The IMAs provide that these provisions "shall remain operative and in full force and effect regardless of the expiration or any termination of [the respective IMAs]." (Id. § 7 [g].) None of the IMAs contains an arbitration clause.

On June 24, 2004, the parties entered into an agreement (the Termination Agreement)

[2] All quotations are to the March 14, 2001 IMA, as there is no claim that the IMAs differ in any material respect.

(Pet., Ex. 2), which terminated the IMAs as of that date. Section 2 of the Termination Agreement provides that "[a]ll rights and obligations of the parties under the IMAs, other than those rights and obligations which the IMAs expressly provide will remain operative after their termination, shall be of no further force and effect." It also provides that respondents "have neither received from nor relied upon Gramercy or its affiliates for any legal or tax advice" and "shall not have any claim against Gramercy or its affiliates, in relation to any investments managed or previously managed by such parties." (Id.)

Section 4 (c) of the Termination Agreement, entitled "Arbitration," provides in relevant part:

> "Any controversy or claim arising out of or relating to any interpretation, breach or dispute concerning any of the terms or provisions of this Agreement, which is not settled in writing within thirty (30) days after it arises, shall be resolved exclusively by final and binding arbitration in New York, New York, in accordance with the laws of the State of New York and under the rules then obtaining of the American Arbitration Association (or any successor thereto) . . . ."

Section 4 (d) of the Agreement, entitled "Governing Law," further provides: "This Agreement shall be governed by and construed in accordance with the laws of the State of New York (without regard to its conflict of law doctrine)."

On December 18, 2008, the Internal Revenue Service issued a notice of audit to respondents for tax year 2000, and subsequently disallowed their claimed capital loss of approximately $35 million. (Pet. ¶ 25; Ans. ¶ 25.)

On June 17, 2009, respondents filed a lawsuit in Texas state court (the Texas action) against petitioners (there, defendants) and others, including the accounting firm, BDO Seidman, and the law firm, Sidley Austin (collectively the Texas defendants). (Pet. ¶¶ 10, 26; Ans. ¶ 26.) The Second Amended Petition (Texas Petition) in this action pleads claims against the Texas

defendants for "breach of fiduciary duty, negligence/professional malpractice, negligent misrepresentation, disgorgement of unethical, excessive and illegal fees, fraudulent inducement, fraudulent concealment, declaratory judgment, fraud, civil conspiracy to commit fraud, breach of contract, and violations of the Deceptive Trade Practices Act." (Texas Pet. ¶ 17 [Pet., Ex. 8].) These claims are based on the allegation that BDO and Gramercy "counseled and advised [the Green entities] to execute the Distressed Debt Strategy" even though they "knew or should have known that [it] would not and could not yield the investment results or tax treatment claimed." (Id. ¶ 18.) As further alleged, BDO's and Gramercy's "primary motive in their scheme was to exact millions of dollars in fees and commissions from [the Green entities]." (Id.)

By Special Appearance dated August 29, 2009, the Gramercy entities sought to dismiss the Texas action for lack of personal jurisdiction. (Pet. ¶ 27; Special Appearance ¶¶ 26-62 [Deary Aff., Ex. 1].) The Gramercy entities filed an Answer, also dated August 29, 2009, containing affirmative defenses and special exceptions, which was expressly made "Subject to their Special Appearance." (Texas Ans. [Deary Aff., Ex. 2].)[3] In September and October, 2009, BDO and Sidley Austin moved to compel arbitration of the Green entities' claims against them. (Pet. ¶ 28.) By motion dated December 8, 2009, the Gramercy entities sought, subject to their special appearance, to stay the action against them pending conclusion of the arbitrations sought by BDO and Sidley Austin. (Motion [Deary Aff., Ex. 3].) By order dated December 14, 2009, the Texas trial court denied the motions of BDO and Sidley Austin to compel arbitration and to stay the proceedings. (Order [Deary Aff., Ex. 4].) In December 2009, the Gramercy entities responded to a statutory request for limited written disclosure by the Green entities, setting forth

[3] Under Texas law, a "special exception" is used to point out with particularity a "defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations" of a pleading. (Tex R Civ P 91.)

such information as their legal theories and names of potential expert and other witnesses. (Dec. 21, 2009 Response [Deary Aff., Ex. 8].)

BDO and Sidley Austin appealed the denial of their motions to compel arbitration. On January 27, 2010, the Texas action was stayed pending these appeals, and on November 9, 2010, the Court of Appeals of Texas, Dallas, reversed the trial court's denial of the motions to compel arbitration, and stayed proceedings pending the arbitrations with BDO and Sidley Austin. (Pet. ¶¶ 28, 29.) On January 16, 2013, respondents moved to lift the stay of the Texas action based on the resolution of the claims against BDO and Sidley Austin. This motion was granted, and the stay was vacated on April 8, 2013. (Id. ¶ 30.) The Texas action was thus stayed for over three years between January 27, 2010 and April 8, 2013, with the exception that on March 1, 2011, it was reopened – over the Gramercy entities' objection, again subject to their special appearance – to permit the Green entities to add a new defendant. (Pet. ¶ 29; Gramercy Response to Plaintiffs' Motion to Reopen Case [Deary Aff., Ex. 5].)

Subsequent to the April 2013 vacatur of the stay, and as of the filing of the instant petition on January 17, 2014, the parties were engaged in jurisdictional discovery in the Texas action. (Pet. ¶ 31.) By order dated December 12, 2013, the Texas trial court granted in part and denied in part a motion by the Green entities to compel jurisdictional discovery. ("Agreed Order" [Deary Aff., Ex. 7].) The Petition alleges, and the Answer admits, that "[m]erits discovery has not been reached. (Pet. ¶ 31; Ans. ¶ 31.)

On December 13, 2013, petitioners filed a Statement of Claim with the American Arbitration Association (AAA), seeking arbitration of claims against respondents in New York pursuant to the Termination Agreement. (Pet. ¶ 32; Ans. ¶ 32.) Specifically, petitioners seek "to enforce the contractual provisions by which Respondents are obligated to indemnify Gramercy,

to advance legal fees to Gramercy, and to release Gramercy from wrongdoing." (Statement of Claim ¶ 13 [Pet., Ex. 11].) Petitioners allege that respondents breached those provisions "by improperly bringing the Texas Action in contravention of the IMAs and the Termination Agreement." (Pet. ¶ 33; Statement of Claim ¶¶ 11-13.) Respondents have refused to participate in the New York arbitration. (Pet. ¶ 35; Ans. ¶ 35.)

Discussion

Respondents oppose the Petition on two grounds: First, they claim that petitioners have waived their right to arbitrate by their unreasonable delay and conduct in the Texas action inconsistent with their alleged right to arbitrate. (Resps.' Memo. at 9-10.) They further argue that this court lacks jurisdiction under CPLR 7503 (a) to issue an order compelling arbitration, and that petitioners must seek such relief in Texas. (Id. at 14.) Petitioners contend that the concept of waiver by participation in litigation is not implicated, or is "irrelevant," because they seek only to arbitrate their own claims under the Termination Agreement, and merely to stay the Texas action pending their arbitration. (Pets.' Reply Memo. at 5-7.) Petitioners also oppose any finding of waiver on the merits.

Waiver

As a preliminary matter, the court rejects petitioners' contention that the waiver issue need not be reached. There is authority that "[w]here claims are entirely separate, though arising from a common agreement, no waiver of arbitration may be implied from the fact that resort has been made to the courts on other claims." (Sherrill v Grayco Bldrs., Inc., 64 NY2d 261, 273 [1985].) Here, however, the court does not find that petitioners' claims in the arbitration are "entirely separate" from respondents' claims in the Texas action. On the contrary, the Texas action alleges that petitioners "actively participated in a fraudulent scheme to convince

Respondents to enter into a tax shelter, which the IRS subsequently disallowed." (Resps.' Memo. at 2.) According to petitioners, the "crux" of their arbitration claims "is that the Termination Agreement extinguished Respondents' ability to bring their claims under the IMAs," entitling them to damages. (Pets.' Reply Memo. at 5.) The Petition to compel arbitration pleads that "a determination of Gramercy's claims in arbitration is a necessary predicate to any litigation of Respondents' claims in Texas state court, and indeed Gramercy believes that its arbitration will dispose of the Texas claims against Gramercy in their entirety." (Pet. ¶ 37.) As petitioners further argue in support of the Petition, "[f]ollowing arbitration, the Texas claim will either be extinguished by virtue of the arbitration panel's ruling on the Termination Agreement, or they will be able to proceed." (Pets.' Reply Memo. at 5-6.) As petitioners themselves acknowledge that the claims in the Texas action and the arbitration are intertwined, the court will reach the waiver issue.

The parties dispute whether federal or state law governs the determination of whether petitioners have waived the right to arbitrate by virtue of their participation in the Texas litigation. Determination of the applicable law requires a threshold inquiry into whether the Federal Arbitration Act applies to the parties' arbitration agreement. The FAA applies to "a contract evidencing a transaction involving commerce. . . ." (9 USC § 2.) As explained by the Court of Appeals, "where a contract containing an arbitration provision 'affects' interstate commerce, disputes arising thereunder are subject to the FAA." (Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp., 4 NY3d 247, 252 [2005]; Citizens Bank v Alafabco, Inc., 539 US 52, 56 [2003] [applying FAA to debt restructuring agreements].)

Although respondents contend that New York law governs the determination of the waiver issue, they do not dispute that the transaction affects interstate commerce. (Resps.'

Memo. at 12.) The Gramercy entities have their principal place of business in Connecticut, and the Green entities are Delaware or New York corporations with their principal place of business in Connecticut. (Pet. ¶¶ 1-5; Ans. ¶¶ 1-5.) The services provided by Gramercy involved investment in foreign debt. As respondents themselves plead in the Texas action, all or a substantial part of the events giving rise to their claims occurred in Texas. (Texas Pet. ¶ 3.) The court accordingly holds that the FAA is applicable to the agreement to arbitrate.

The parties also do not dispute that it is for the court, not the arbitrator, to determine whether the right to arbitrate was waived by petitioners' participation in the Texas litigation. Their submission of this issue to the court is consistent with substantial precedent. In Cusimano v Schnurr (120 AD3d 142, 149 n 9 [1st Dept 2014], lv granted 24 NY3d 909), this Department recently held, citing several federal Circuit Courts of Appeal, that dicta in Diamond Waterproofing (4 NY3d at 252) and Howsam v Dean Witter Reynolds, Inc. (537 US 79, 84 [2002]) did not change the long-standing rule under the FAA that the issue of waiver by litigation conduct is for the court. The Cusimano Court further held that the fact that the arbitration agreements referenced the AAA rules did not require the issue of waiver to be decided by the arbitrator. (120 AD3d at 149, n 8.) In the instant action, similarly, the provision in section 4 (c) of the Termination Agreement that the arbitration shall be resolved under the rules of the AAA does not require the arbitrator to decide the waiver issue.

The more difficult issue, and the subject of the parties' dispute, is whether state or federal law governs the standards for determining waiver. In claiming that state law applies, respondents rely on the choice of law provisions in sections 4 (c) and (d) of the Termination Agreement. (Resps.' Memo. at 5-6.) They further contend that under New York law, unlike federal law, waiver may be found based on mere delay. (Id. at 9.) Petitioners argue that delay,

without prejudice, does not constitute waiver (Pets.' Reply Memo. at 9), and that Gramercy's participation in the Texas action did not effect a waiver because it has been "defensive, minimal, and limited to contesting personal jurisdiction." (Id. at 12.)

Contrary to respondents' apparent contention (Resps.' Memo. at 12), a choice of law provision does not as a matter of law preclude application of the FAA. Rather, a choice of law provision in an arbitration agreement will only be enforced if it evidences the parties' intent to apply state law to the particular issue in dispute (a matter of contract interpretation), and if it is not inconsistent with the policy underlying the FAA of ensuring the enforceability of private agreements to arbitrate. (See Volt Info. Sciences, Inc. v Board of Trustees of Leland Stanford Jr. Univ., 489 US 468, 472 [1989] ["While the FAA therefore pre-empts application of state laws which render arbitration agreements unenforceable, it does not follow, however, that the federal law has preclusive effect in a case where the parties have chosen in their arbitration agreement to abide by state rules"] [internal quotation marks, brackets and citations omitted]; Matter of Smith Barney, Harris Upham & Co., Inc. v Luckie, 85 NY2d 193, 201 [1995], rearg denied 85 NY2d 1033, cert denied 516 US 811 [holding that under Volt, "the parties are at liberty to include a choice of law provision in their agreement, and the parties' choice will be honored unless the chosen law creates a conflict with the terms of, or policies underlying, the FAA"].)

In cases subject to the FAA, federal law generally controls the issue of whether a waiver of the right to arbitrate has occurred as a result of participation in litigation. (See Singer v Jefferies, 78 NY2d 76, 84-85 [1991].) There is authority applying New York substantive law to determine this waiver issue, at least where the arbitration agreement contains a choice of law clause that provides that New York law governs the agreement and its enforcement. (Volpe v Interpublic Group of Cos., Inc. (118 AD3d 482 [1st Dept 2014], affg 2013 WL 3989040 [Sup Ct,

NY County 2013].)[4] However, the court need not determine whether New York or federal waiver standards govern, as the court holds that there is no material difference in the standards.[5]

Under federal law, in light of the presumption in favor of arbitration, "a waiver of arbitration 'is not to be lightly inferred.'" (Kramer v Hammond, 943 F2d 176, 179 [2d Cir 1991] [quoting Rush v Oppenheimer & Co., 779 F2d 885, 887 [2d Cir 1985].) "Nevertheless, a party does waive this right when he engages in 'protracted litigation' that results in prejudice to the opposing party.'" (Kramer, 943 F2d at 179 [internal citation omitted].) Litigation of "substantial material issues may amount to waiver." (Leadertex, Inc. v Morganton Dyeing & Finishing Corp., 67 F3d 20, 25 [2d Cir 1995].) "[T]he amount of litigation . . . , the time elapsed from the commencement of litigation to the request for arbitration, and the proof of prejudice are all factors to be considered." (Id.) An inquiry into waiver is not subject to "bright line rules." (Thyssen, Inc. v Calypso Shipping Corp., S.A., A.M., 310 F3d 102, 105 [2d Cir 2002], cert denied 538 US 922 [2003].)

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[4] In Volpe, an FAA case with a choice of law clause which provided that New York law governed both the agreement and its enforcement, the Court held that the issue of waiver was to be decided by the Court. The Court then, without discussion, applied New York cases in determining that a waiver had occurred. In Cusimano (120 AD3d at 149-150), an FAA case, the Court held that the waiver issue was for the Court, and then applied both federal and state cases in determining whether a waiver had occurred. The decision does not indicate whether the arbitration agreement provided for application of New York law.

In other contexts, courts determining whether threshold arbitrability issues should be determined by a court under state law or by the arbitrator have distinguished between choice of law clauses which merely govern the agreements and those which govern both the agreements and their enforcement. (Compare Matter of Smith Barney v Luckie, 85 NY2d at 202 [holding that where choice of law clause provided that New York state law "would govern 'the agreement and its enforcement'" statute of limitations issue was for the court] [emphasis in original] with Diamond Waterproofing, 4 NY3d at 252-253 [distinguishing Luckie and holding that where choice of law clause provided that New York law would govern the agreement but did not also include the "more critical language concerning enforcement," issue of timeliness was a subject for arbitration]; see also Matter of Smith Barney Shearson Inc. v Sacharow, 91 NY2d 39, 49 [1997] [holding that eligibility of claim for arbitration under NASD Code was for the arbitrator on the ground, among others, that the arbitration agreement provided that New York law would govern the agreement, and did not also provide that that New York law would govern its enforcement; the court also reasoning that "[w]hile a choice of law clause incorporates substantive New York principles, it does not also pull in conflicting restrictions on the scope of the authority of arbitrators. . ."].)

[5] The statement in All Metro Health Care Servs., Inc. v Edwards (25 Misc 3d 863, 868 n 3 [Sup Ct, NY County 2009]) to the contrary is dictum to which the court does not adhere upon further consideration.

It is well settled that, under federal law, "[t]he key to a waiver analysis is prejudice." (Thyssen, 310 F3d at 105.) The federal cases have recognized two types of prejudice – "substantive prejudice and prejudice due to excessive cost and time delay." (Id.) "Prejudice can be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration, or it can be found when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur unnecessary delay or expense." (Id. [quoting Kramer, 943 F2d at 179]; see also Cusimano, 120 AD3d at 149-150 [summarizing federal waiver doctrine].)

Under New York law, courts also recognize the State's "'long and strong public policy favoring arbitration,'" and "'interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration.'" (Stark v Molod Spitz DeSantis & Stark, P.C., 9 NY3d 59, 66 [2007] [quoting Matter of Smith Barney v Sacharow, 85 NY2d at 49-50].) As explained by the Court of Appeals in De Sapio v Kohlmeyer (35 NY2d 402 [1974]), which remains the lead case on waiver by participation in litigation:

> "The crucial question, of course, is what degree of participation by the defendant in the action will create a waiver of a right to stay the action. In the absence of unreasonable delay, so long as the defendant's actions are consistent with an assertion of the right to arbitrate, there is no waiver. However, where the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer in the particular case, his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory. Thus, entering a stipulation to extend the time to answer is a purely defensive action and is not inconsistent with a later attempt to force arbitration. In contrast, contesting the merits through the judicial process is an affirmative acceptance of the judicial forum and waives any right to a later stay of the action."

(Id. at 405 [internal citations omitted]; accord Stark v Molod Spitz, 9 NY3d at 66-67 [approvingly quoting above text from De Sapio].)

The court rejects respondents' contention that New York law differs from federal law in permitting a court to find waiver based on "mere delay." (Resps.' Memo. at 9.) Although the federal cases state that "delay in seeking arbitration does not create a waiver unless it prejudices the opposing party" (Leadertex, 67 F3d at 25), as discussed above, the federal concept of prejudicial delay consists of "unnecessary" delay that results in excessive costs to the opposing party. (Thyssen, 310 F3d at 105; Kramer, 943 F2d at 179.) This court thus finds that the federal standard comports with the state standard under which delay must be "unreasonable" in order to support a finding of waiver. (See De Sapio, 35 NY2d at 405.)[6]

Waiver under both federal law and New York law generally requires that a party have engaged in conduct manifesting an affirmative acceptance of the judicial forum. Federal courts have thus "refused to find waiver in a number of cases where delay in trial proceedings was not accompanied by substantial motion practice or discovery." (Thyssen, 310 F3d at 105.) State cases have similarly found waiver based not merely on delay, but on a party's affirmative acceptance of the benefits of the judicial forum. Although the Court in De Sapio stated that there is no waiver "[i]n the absence of unreasonable delay, so long as the defendant's actions are consistent with an assertion of the right to arbitrate," the Court in fact held that defendant's interposition of a cross-claim in the judicial action against a non-party to the arbitration, and procurement of a deposition in the action, were each "a sufficiently affirmative use of the judicial process so as to be inconsistent with a later motion to stay." (De Sapio, 35 NY2d at 406; see also Flores v Lower E. Side Serv. Ctr., Inc., 4 NY3d 363, 371-372 [2005], rearg denied 5 NY3d 746

[6] If respondents were correct that New York law imposes a less demanding waiver standard than federal law, the enforceability of the choice of law provision would be questionable, given the strong presumption favoring arbitration under the FAA, and the resulting mandate that "any doubts concerning the scope of arbitration issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." (See Moses H. Cone Mem. Hosp. v Mercury Constr. Corp., 460 US 1, 24-25 [1983]; Singer v Jefferies, 78 NY2d at 84-85.)

[holding that arbitration was waived by party's election to "fully participate" in the litigation for more than 16 months "through discovery and the filing of a note of issue"]; Gabor v Spicyn, 99 AD2d 1000, 1000-1001 [1st Dept 1984] [holding that where defendant engaged in motion practice for several months over discovery and raised demand for arbitration eight months after plaintiffs' commencement of action and in response to plaintiffs' motion to strike defendants' answer for failure to submit to deposition, "such manifestation of defendants' acceptance of a judicial forum to dispose of the claim on the merits, coupled with defendant's unreasonable delay . . . in serving a proper demand, constitutes a waiver of the right to now seek arbitration"] [internal quotation marks, citations, and brackets omitted]; Friedman v CYL Cemetery, Inc., 99 AD3d 857, 858 [2d Dept 2012] [finding that respondents' "conduct" was inconsistent with demand for arbitration, where respondents failed to raise defense of arbitration in their answers, moved for a change of venue, sought discovery, participated in preliminary conferences, moved to dismiss cross-claims, and waited more than eight months after service of their answers and one year after interposition of cross-claims before moving to compel arbitration].)

Applying either federal or state standards, the court holds that Gramercy has not waived the right to arbitrate. The 4 1/2 year period between the Green entities' commencement of the Texas action and Gramercy's demand for arbitration is unquestionably extensive. As review of the proceedings shows (supra at 4-5), however, the action was stayed for over three years. Moreover, at the outset of the Texas action, the Gramercy entities entered a special appearance contesting personal jurisdiction. Within three months of the June 2009 commencement of the action, Gramercy's co-defendants, BDO and Sidley Austin, moved to stay the proceedings pending arbitration. The Texas action was stayed between January 2010 through April 2013 pending resolution of the co-defendants' arbitrations. After those arbitrations were resolved, in

the eight months between the April 2013 vacatur of the stay and Gramercy's December 2013 arbitration demand, the Gramercy and Green entities were engaged in jurisdictional discovery. Apart from a limited discovery response at the outset of the action and stay-related motion practice, both made subject to Gramercy's special appearance, Gramercy's sole involvement in the Texas action has been defensive action contesting personal jurisdiction. Significantly, the Green entities do not contend that Gramercy obtained a deposition or other merits discovery from them or any other advantage that would not have been available in an arbitration.

The court holds that by engaging in this defensive conduct, petitioners have not "manifest[ed] an affirmative acceptance of the judicial forum . . . ." (De Sapio, 35 NY2d at 405.) To the contrary, petitioners have consistently denied the Texas forum's authority to decide any substantive questions relating to the parties' dispute.

Respondents emphasize that petitioners' answer contains affirmative defenses and special exceptions, but does not assert a right to arbitrate. (Resps.' Memo. at 10.) Under both federal and New York law, however, "[t]here is no per se rule that arbitration must be pleaded in the answer in order to avoid waiver." (Thyssen, 310 F3d at 105-06 [stating the Second Circuit rule]; MCC Dev. Corp. v Perla, 81 AD3d 474, 475 [1st Dept 2011], lv denied 17 NY3d 715 [holding under New York law that the acts of interposing answers with affirmative defenses or counterclaims may be "fairly characterized as necessary protective measures, not acts that are clearly inconsistent with defendants' contractual rights to arbitration"]; see also Rush v Oppenheimer, 779 F2d at 888-889 [concluding that defendants' pre-answer motion to dismiss for failure to state a claim, answer asserting thirteen affirmative defenses that failed to raise agreement to arbitrate, and participation in pretrial discovery, did not singly or in combination require a finding of waiver].)

Nor do respondents persuasively argue that they have been prejudiced because they have "spent time and resources" pursuing their own claims in the Texas action and seeking jurisdictional discovery related to petitioners' special appearance. (See Resps.' Memo. at 9-10.) This argument ignores well-established federal precedent that "pretrial expense and delay – unfortunately inherent in litigation – without more, do not constitute prejudice sufficient to support a finding of waiver." (Leadertex, 67 F3d at 26-27 [finding prejudice where a party's "existence as a going business was threatened"]; accord Blimpie Intl., Inc. v D'Elia, 277 AD2d 69, 70 [1st Dept 2000].) Respondents' expenditure of approximately $50,000 in the Texas action (Deary Aff., ¶ 12) does not qualify as an "extraordinary expense" that constitutes prejudice. (See Leadertex, 67 F3d at 26.)

Finally, respondents do not cite any federal or New York case finding a waiver of arbitration based on delay which, even if extensive, is largely attributable to a defense of lack of personal jurisdiction. The authority is to the contrary. In Kramer v Hammond (943 F2d 176, supra), an often cited Second Circuit case, the Court found a waiver where the defendant engaged in "aggressive [] protracted litigation" over a four year-period in two state court actions. (Id. at 179.) In a South Carolina action, the defendant engaged in motion practice and extensive appeals over personal jurisdiction. "More significantly" according to the Court, the defendant's conduct in a New York action included interposition of an answer with counterclaims, service of a notice to take the plaintiff's deposition and of a motion for summary judgment, and appeals of the trial court's stay of proceedings pending resolution of the South Carolina action. (Id.) The defendant did not move to compel arbitration until 1 1/2 years after losing the jurisdictional battle in South Carolina. (Id. at 178.) The Court pointedly noted that the challenge to personal jurisdiction might not alone have established waiver, stating: "Though the resistance to the

assertion of personal jurisdiction in South Carolina might not alone have established waiver of arbitration, the excessive litigation in New York, where jurisdiction was not in doubt, substantially augmented the total delay and expense and focused on the merits of the dispute, thereby establishing waiver." (Id. at 179.)

In Matter of Sedco, Inc. v Petroleos Mexicanos Mexican Natl. Oil Co. (767 F2d 1140, 1144, 1150 [5th Cir 1985]), a case decided under an analogous arbitration Convention authorized by the FAA, the Court found no waiver where the defendant did not file an answer asserting the right to arbitration until nearly three years after commencement of the action, during which time defendant disputed jurisdiction over it. The Court found that this litigation, which it described as "jurisdictional jousting," was not prejudicial. Most recently, Davis v Cascade Tanks LLC, 2014 WL 3695493 * 11 [US Dist Ct, D Ore, 3:13 Civ 02119, Mosman, J. 2014]) expressly held that "a party does not act inconsistently with its right to compel arbitration of claims brought against it by contesting whether it may be haled into court in the first place, even if relatively extensive litigation of the jurisdictional issue is required as a result."

This court holds, similarly, that the delay and the expenses incurred by respondents in opposing petitioners' challenge to personal jurisdiction are primarily the result of respondents' own choice of forum, as well as their efforts to avoid arbitration with BDO Seidman and Sidley Austin. While petitioners' jurisdictional and stay-related motion practice may have contributed to the substantial delay in the litigation, the court does not find on this record, under either federal or state authority, that petitioners' conduct was unreasonable or inconsistent with an intent to arbitrate.

Jurisdiction

The court rejects respondents' further claim that a New York court lacks jurisdiction to

compel arbitration and that the motion to compel should have been brought in the Texas action. (Resps.' Memo. at 14-15.) Respondents base this claim on CPLR 7503 (a), which provides that "[i]f 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." All of the cases on which respondents rely involved special proceedings commenced in New York to compel arbitration, despite the pendency of New York actions involving the issues claimed to be arbitrable. The Courts held that CPLR 7503 (a) precluded maintenance of the special proceedings, and that the motions to compel should have been made in the pending actions. (See e.g. D.M.C. Constr. Corp. v A. Leo Nash Steel Corp., 70 AD2d 635, 635 [2d Dept 1979], appeal dismissed 49 NY2d 1040 [1980].) This Department has also expressly held that CPLR 7503 (a) does not require dismissal of a New York special proceeding seeking to stay an out of state action and to compel arbitration in this State. (PromoFone, Inc. v PCC Mgmt., Inc., 224 AD2d 259, 260 [1st Dept 1996].)

Respondents fail to establish a defense to arbitration based on waiver or jurisdiction. The Petition to compel arbitration will accordingly be granted.

Injunctive Relief

Petitioners also request that the court "enjoin Respondents from prosecuting the Texas state action pending arbitration." (Pets.' Memo. at 2.) They argue that, without an injunction, they "could be forced to endure wasteful and costly Texas proceedings that will be rendered moot by the decision of the arbitration panel," and that they will also "face the potential of inconsistent results in the Texas Action and the arbitration, and the danger of litigating claims subject to arbitration." (Id. at 16.)

This Department adheres to the "long-settled principle that a party seeking to enforce a valid agreement to arbitrate in New York under CPLR 7503 (a) is entitled, as a matter of course, to injunctive relief against further prosecution of proceedings in tribunals of other jurisdictions concerning matters within the scope of the arbitration agreement." (Matter of Curtis, Mallet-Prevost, Colt & Mosle, LLP v Garza-Morales, 308 AD2d 261, 263 [1st Dept 2003], rearg denied 2003 NY App Div LEXIS 14515.) Even where, as acknowledged here, the litigation sought to be enjoined also involves "non-arbitrable" claims (see Pets.' Reply at 3, 5), an injunction is appropriate if the issues to be determined in arbitration are "inextricably interwoven" with the issues involved in the litigation. (County Glass & Metal Installers, Inc. v Pavarini McGovern, LLC, 65 AD3d 940, 940 [1st Dept 2009] ["Where arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where, as here, the determination of issues in arbitration may well dispose of nonarbitrable matters"] [internal quotations and citation omitted]; Cohen v Ark Asset Holdings, Inc., 268 AD2d 285, 286 [1st Dept 2000] [same]; Berg v Dimson, 151 AD2d 362, 363 [1st Dept 1989], lv denied 75 NY2d 703 [1990], rearg denied 75 NY2d 947; see also PromoFone, Inc., 224 AD2d at 260 [lower court "properly enjoined" litigation pending in California even though it involved "separate and distinct claims"].)

The claims in the Texas action and the arbitration meet the inextricably intertwined standard. If petitioners are successful in arbitrating their release claim, the arbitration may well dispose of respondents' claims in the Texas action. If the Texas action proceeds on the merits of respondents' claims, petitioners will likely be forced to raise provisions of the Termination Agreement in defense, exposing them to discovery and determinations inconsistent with their right to arbitrate. An injunction will serve the strong policy favoring arbitration, while delaying

respondents' Texas litigation only until they have fulfilled their contractual obligation to arbitrate key controversies relating to the Termination Agreement. Petitioners' motion for a stay will accordingly be granted, and respondent's cross-motion to stay the arbitration will be denied.

Other Requests For Relief

Respondents request that they be allowed to conduct discovery on their other defenses to the Petition, in the event the court "does not find waiver or that it lacks jurisdiction. . . ." (Resps.' Memo. at 18.) Their Answer raises 11 defenses to arbitration, including that the Termination Agreement and arbitration provision were procured by fraud (Sixth Affirmative Defense) and that the issues as to which arbitration is sought are not within the scope of the arbitration provision (Seventh Affirmative Defense). Respondents make no showing whatsoever that the defenses would be for the court rather than the arbitrator to determine, or that discovery may lead to evidence necessary to establish the defenses. Their perfunctory request for discovery will therefore be denied.

Petitioners also claim that they are entitled to attorney's fees and costs as the prevailing party to this proceeding, pursuant to section 4 (l) the Termination Agreement. (Pets.' Memo. at 18.) In their opening brief, they purport to quote a section 4 (l) which by its terms authorizes the prevailing party in a proceeding to enforce an arbitration demand to recover attorney's fees. (See id.). However, as respondents correctly point out, the quoted provision does not in fact exist in the Termination Agreement, section 4 (l) of which provides that "[e]ach party hereunder shall bare [sic] its own costs in relation to any arbitration or litigation commenced hereunder provided that Gramercy and its affiliates have certain rights pursuant to Section 7 of the IMAs applicable hereto." Petitioners do not address this error in their reply brief, and do not continue to assert the claim for attorney's fees there. The court therefore deems the request abandoned. This holding

will not, however, bar petitioners from seeking in the arbitration any attorney's fees to which they may be entitled.

It is accordingly hereby ORDERED that the Petition is granted to the following extent: Respondents are directed to arbitrate petitioners' claims in New York, New York, in accordance with the terms of the Termination Agreement; and it is further

ORDERED that respondents are stayed and enjoined from taking any further steps in the Texas action pending the completion of the arbitration; and it is further

ORDERED that respondents' cross-motion to stay the arbitration is denied, and it is further

ORDERED that petitioners' request for costs and attorney's fees in connection with this Petition to compel arbitration is denied without prejudice to seek in the arbitration any costs and attorney's fees to which they may be entitled, including but not limited to costs or fees in connection with this Petition.

This constitutes the decision and order of the court.

Dated: New York, New York
April 13, 2015

MARCY FRIEDMAN, J.S.C.