

Onyx Asset Mgt., LLC v 9th & 10th St. LLC
2016 NY Slip Op 30875(U)
May 10, 2016
Supreme Court, New York County
Docket Number: 653940/15
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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 13ONYX ASSET MANAGEMENT, LLC, MYLES WITTENSTEIN
and CHICKEREE CHICK LLC,
Plaintiff,INDEX NO. 653940/15MOTION DATE 03-16-2016MOTION SEQ. NO. 001

- v -

9TH & 10TH STREET LLC,
Defendant.

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion and cross motion Pursuant to CPLR 7503(a) compelling arbitration and pursuant to CPLR 3211 dismissing the action or staying the action pending arbitration and pursuant to 3212 for summary judgment and pursuant to CPLR 2001 correcting a mistake or defect.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits _____

3-4

Replying Affidavits _____

5Cross-Motion: ☒ Yes ☐ No

Upon a reading of the foregoing cited papers, it is ordered that this Motion Pursuant to CPLR § 7503(a) to compel arbitration is granted, this action is stayed pending arbitration, defendant's motion to dismiss for lack of capacity to sue and lack of standing is denied. Plaintiffs' cross motion for summary judgment is denied, Plaintiff's cross-motion to correct misspelling of Chickaree's name is granted.

Plaintiffs and defendant entered into 14, identical, written " SUBSCRIPTION AGREEMENT FOR SUBORDINATED NOTE AND COMPANY INTERESTS" (hereinafter referred to as "Agreements") the first one dated January 28, 2010 and the last one dated February 28, 2012 by which plaintiff agreed to lend defendant money in exchange for "Unsecured Subordinated Promissory Notes"(hereinafter referred to as "Notes") and "Class A Company interest"(hereinafter referred to as "Interests"). The Agreements make reference to the Notes and Interests in its paragraphs 1,2,3(a) through 3(l), 4 and 5. Paragraph 7 of the agreement contains an arbitration clause which states:

"Any dispute, claim or controversy arising out of or relating to this agreement or the breach, enforcement, interpretation or validity hereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in New York, New York, before one arbitrator..."

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

The Notes which were signed contemporaneously with the Agreements, are referenced in the Agreements and annexed to all Agreements (except for the 9th Agreement) do not contain an arbitration clause.

Plaintiffs brought suit against defendant for its failure to pay on the 14 promissory notes referred to in the Agreements. The suit does not allege a violation of the Agreement, only failure and refusal of defendant to pay any portion of the Notes. Defendant moved pre-answer to compel arbitration and to stay this matter pending arbitration, to dismiss the causes of action by Onyx Management LLC, (hereinafter "Onyx"), as it is not authorized to do business in this state, and to dismiss the causes of action asserted by Chickeree Management LLC, (hereinafter "Chickeree") as it was not a signatory to the Agreement.

Defendant argues that the Notes which were signed contemporaneously, referenced and annexed to the Agreements are part of the Agreements and the arbitration clause in the Agreements apply to the Notes; therefore, any disputes pertaining to the Notes must be arbitrated. Plaintiffs argue that since the Notes do not contain an arbitration clause, the arbitration clause in the Agreements do not apply to the Notes. Furthermore, Plaintiffs cross move for summary judgment claiming it is evident that defendant has defaulted on all the Notes.

" It is well settled that a contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms and the reasonable expectation of the parties."(MHR Capital Partners, LP v. Presstek, Inc., 12 NY3d 640, 912 N.E. 2d 43, 884 N.Y.S. 2d 2011[2009]; Kimso Apartments, LLC, v. Gandhi, 104 A.D. 3d 742, 961 N.Y.S. 2d 242 [2nd. Dept. 2013]).

"Although arbitration is favored in New York State as a means of resolving disputes, and courts interfere as little as possible with agreements to arbitrate, a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent 'evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. The agreement to arbitrate must be clear, explicit and unequivocal.'"(See Matter of Miller, 40 A.D. 3d 861, 835 N.Y.S. 2d 728 [2nd. Dept. 2007] denying motion to compel arbitration of claims regarding a promissory note absent evidence that the parties agreed to arbitrate claims).

"The terms 'arising out of' or 'related to' evince a broad arbitration clause". (State v. Phillip Morris Inc., 30 A.D.3d 26, 813 N.Y.S.2d 71 [1st. Dept. 2006]). A broadly worded arbitration clause encompassing matters "arising out of" or "related to" an arbitrable agreement sufficiently demonstrates the parties' intent to submit their dispute to arbitration (Conifer Realty LLC, v. Envirotech Services Inc., 106 A.D.3d 1251, 964 N.Y.S.2d 735 [3rd. Dept. 2013]).

For purposes of interpretation, contemporaneous agreements which are part of the same transaction should be read together (*Teletech Europe B.V. v. Essar Services Mauritius*, 83 A.D.3d 511, 921 N.Y.S.2d 62 [1st. Dept. 2011]). A broad arbitration clause in an agreement applies even to a Promissory Note that was not contemporaneously signed with the agreement (*In re Miller*, 40 A.D.3d 861, 835 N.Y.S.2d 728 [2nd. Dept. 2007]), whether or not it is attached to the agreement (*Bayly, Martin & Fay, Inc., v. Glasser*, 92 A.D.2d. 850, 460 N.Y.S.2d 575 [1st. Dept. 1983]).

The arbitration clause in the Agreements are broad. The Agreements were signed contemporaneously with the Notes and reference the Notes throughout five of their seven paragraphs. The Notes, which were signed contemporaneously with the agreements, did not have to be annexed to them to have the Agreements' arbitration clause apply. There is a reasonable relationship between the subject matter of this dispute and the subject matter of the Agreements, requiring the application of the broad arbitration clause in the Agreement (*DS-Concept Trade Inv. LLC, v. Wear First Sportswear, Inc.*, 128 A.D.3d 585, 10 N.Y.S.3d 60 [1st. Dept. 2015]). Additionally, in accordance with the arbitration clause in the agreements, whether the arbitration clause in the Agreements applies is an issue for the arbitrator to resolve (*Baker v. Bajorek*, 133 A.D.3d 421, 18 N.Y.S.3d 530 [1st. Dept. 2015]).

The court is staying this action pending arbitration, instead of dismissing it, so that the parties may make a motion in this action to confirm or vacate any eventual arbitral award instead of having to commence a new action (see *DS-Concept Trade Inv. LLC v. Wear First Sportswear, Inc.*, *Supra*).

The court is denying dismissal for lack of capacity to sue. Plaintiff Onyx is a Limited Liability Company which according to the parties has now filed its registration to do business in the State of New York and in accordance with the CPLR may maintain an action in the courts of this State.(See CPLR §§802(b) and 808(a)).

With respect to the misspelling of plaintiff Chickeree's name, CPLR §2001 allows for the correction of mistakes, omissions, defects or irregularities in a pleading to be corrected upon such terms as may be just. Misspelling of plaintiffs Chickaree's name is a mistake which does not prejudice a substantial right of the defendant and can be ordered corrected by the court. The caption needs to be amended to reflect the correct spelling of the plaintiff's name as CHICKAREE in place and stead of CHICKEREE, thereby correcting the error in the pleading.

Accordingly, it is ORDERED that defendant's motion pursuant to CPLR 7503(a) to stay this action and compel arbitration is granted, and it is further

ORDERED that this action is stayed pending arbitration, and it is further

ORDERED that the parties are directed to arbitrate this matter in accordance with Paragraph 7(d) of the Subscription Agreements for Subordinated Notes and Company Interests annexed to the papers, and it is further

ORDERED that defendant's motion to dismiss for lack of capacity to sue and for lack of standing is denied, and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied, and it is further

ORDERED that plaintiff's cross motion to correct the misspelling of plaintiff Chickaree's name is granted, and it is further

ORDERED that the caption and the pleadings are amended to correct the misspelling of plaintiff CHICKAREE'S name and the caption and pleadings as amended will reflect that the name of this plaintiff is "CHICKAREE CHICK LLC," in place and stead of "CHICKEREE CHICK LLC", and it is further

ORDERED that the caption shall read as follows:

**ONYX ASSET MANAGEMENT, LLC, MYLES WITTENSTEIN and
CHICKAREE CHICK LLC,**

Plaintiffs

-Against-

9th & 10th STREET LLC,

Defendant.

And it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon the General Clerk's Office Trial Support Clerk (Room 119) and the County Clerk (Room 141B) pursuant to e-filing protocol at genclerk-ords-non-mot@nycourts.gov who are directed to amend the caption of this action accordingly.

ENTER:

Dated: May 10, 2016

MANUEL J. MENDEZ

J.S.C.

Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

4 of 4

Check if appropriate:



DO NOT POST



REFERENCE