SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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Application of

CYNTHIA ZAMORA DANIEL and CHRISTOPHER MONTALVO,

Petitioners,

For and Order Under the Federal Arbitration Act and Article 75 of the CPLR Staying Arbitration of a Certain Controversy,

-against-

LEHMAN BROTHERS HOLDINGS INC., in its capacity as Plan Administrator, on behalf of LB 1 Group Inc. and Lehman Brothers CDO Associates 2004 L.P.,

Respondent.

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DECISION AND ORDER

Index No. 656309/2016
Mot. Seq. No. 001

O. PETER SHERWOOD, J.:

Petitioners Cynthia Zamora Daniel and Christopher Montalvo bring this petition to stay an arbitration initiated by Lehman Brothers Holdings Inc., in its capacity as Plan Administrator, on behalf of LB I Group Inc., and Lehman Brothers CDO Associates 2004 L.P. (Lehman). Lehman cross-moves to compel the arbitration. Petitioners are limited partners of Lehman Brothers CDO Associates 2004, L.P. (the Delaware GP). Lehman claims that the Delaware GP is governed by the unsigned Lehman Brothers CDO Associates 2004 L.P. Limited Partnership Agreement (the Agreement, attached as Exhibit C to Curley Aff, NYSCEF Doc. No. 15) which provides for the payment of performance fees to the petitioners and includes an arbitration clause and a claw back provision, which is triggered if the relevant funds' performance drops below a certain threshold. It is undisputed that the funds' performance reached the level required to activate the claw back provision. Petitioners contend the Agreement is merely a draft agreement, and therefore it, along with the claw back and arbitration provisions, is not binding on the parties. Petitioners argue the Delaware GP is, instead, governed by the default provisions of the Delaware Limited Partnership

Act, which do not include a claw back or arbitration provision (Memo at 11, citing Del. Code Ann. tit. 6, §§ 17-101 *et seq.*).

In determining whether to stay or order arbitration, the court must resolve three narrow questions, namely, (1) whether the parties made a valid agreement to arbitrate; (2) if such agreement was made, whether the subject dispute falls within the scope of the arbitration agreement; and (3) whether the claim would have been barred by the limitation of time had it been asserted in State court (see, CPLR 7503 [a]; *Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 7 [1980]). Only the first issue is presented here.

It is disputed whether the unsigned Agreement is the governing agreement, and whether there had been mutual assent as to the arbitration clause. "In accordance with long-established principles, the existence of a binding contract is not dependent on the subjective intent of either" party (*Brown Bros. Elec. Contractors, Inc. v Beam Const. Corp.*, 41 NY2d 397, 399 [1977]). "In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look, rather, to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds, and disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain" (*Brown Bros.*, 41 NY2d at 399–400 [internal quotations omitted]). "It is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed" (*Scheck v Francis*, 26 NY2d 466, 469–70 [1970]).

Here, the intent of the parties is disputed. It is undisputed the Agreement was never finalized or signed (Opp at 5). Lehman also concedes it continued to work on the draft Agreement after 2004, making modifications as late as 2008 (Opp at 8). Accordingly, petitioners' obligation to show a prima facie case that the arbitration provision in the Agreement is not binding has been satisfied. The burden then shifts to Lehman, which argues that the petitioners showed their intent for the Agreement be binding: by their conduct in accepting benefits from the Delaware GP; as the Agreement was included with closing checklists for various funds which were sent to Daniel; as Daniel and Montalvo each signed an interest schedule, dated December 2006 and December 2005, respectively, in which each is "deemed to have executed the [Agreement]"; and as the arbitration

clause in that agreement is Lehman's standard arbitration clause (*id.* at 7, 10, 21, referring to Interest Schedule for Chris Montalvo, attached as Exhibit B to Bennett Aff, NYSCEF Doc. No. 28, at 2, and Interest Schedule for Cynthia Zamora, attached as Exhibit D to Bennett Aff, NYSCEF Doc. No. 30, at 5). Lehman also argues that its actions in continuing to work on the Agreement are of no moment, as the arbitration clause contained no "bracketed language" indicating there were still changes to be made, meaning that there was agreement to that term (Opp at 21). Additionally, Lehman contends petitioners never objected to the arbitration provision, which was non-negotiable (*id.*).

Petitioners counter that the Interest Schedules refer to the "Amended and Restated Limited Partnership Agreement of Lehman Brothers CDO Associates 2004, L.P." (Reply at 11, citing, for example, Zamora Interest Schedule, attached as Exhibit D to Bennett Aff., NYSCEF Doc. No. 30). The draft agreement at issue here is merely titled "Lehman Brothers CDO Associates 2004 L.P. Limited Partnership Agreement" (attached as Exhibit A to Bennett Aff., NYSCEF Doc. No. 27), indicating the Interest Schedules referenced a different, perhaps future, document. The signed Interest Schedules also do not match the draft interest schedule attached to the Agreement, and the documents contain some different terms (Reply at 12). An email thread from 2008 indicates the Agreement was still under discussion between the parties, with further "questions to be raised/confirmed" (McBride email to Ashvin Rao dated September 23, 2008, attached as Exhibit A to Daniel Aff, NYSCEF Doc. No. 7).

While, in some ways, the parties acted consistently with the draft Agreement, with petitioners contributing funds to the Delaware GP and receiving payments, petitioners note they objected to certain terms of the draft Agreement. They do not claim they objected to the arbitration provision (Reply at 20). However, there is no clear evidence the parties intended to be bound by the arbitration provision before the terms of the draft Agreement were finalized and a document was signed.

"It is settled that 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 must be clear, explicit and unequivocal and must not depend upon implication or subtlety" (*Waldron v Goddess*, 61 NY2d 181, 183 [1984] [internal quotation and citations omitted]). Further, "the addition of an

arbitration clause to an . . . agreement is considered a material alteration that must be "explicitly" agreed to by the parties (*S & T Sportswear Corp. v Drake Fabrics, Inc.*, 190 AD2d 598, 598 [1st Dept 1993]). Here, there is no explicit agreement to an arbitration clause. Accordingly, the petition to stay arbitration is hereby GRANTED, and the cross-motion to compel arbitration is hereby DENIED.

This constitutes the decision and order of the court.

DATED: May 8, 2017

ENTER,

O. PETER SHERWOOD
J.S.C.