| **New 110 Cipriani Units, LLC v Board of Mgrs. of 110 E. 42nd St. Condominium** |
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| 2019 NY Slip Op 31822(U) |
| June 25, 2019 |
| Supreme Court, New York County |
| Docket Number: 158138/2018 |
| Judge: William Franc Perry |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

*Justice*

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NEW 110 CIPRIANI UNITS, LLC,

Plaintiff,

- v -

BOARD OF MANAGERS OF 110 EAST 42ND STREET CONDOMINIUM,

Defendant.

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**INDEX NO.** 158138/2018

**MOTION DATE** N/A

**MOTION SEQ. NO.** 001 002 003

**DECISION, ORDER AND JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 27, 28
were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 40, 41
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33, 34, 35, 36, 37, 38
were read on this motion to/for STAY.

Motion sequence numbers 001, 002 and 003 are consolidated for disposition.

In motion sequence number 001, filed August 31, 2018, petitioner New 110 Cipriani Units, LLC ("Cipriani"), moves, under CPLR Article 78, for an order declaring that the "Update to the Third Amendment" of the Second Restatement of the Declaration and By-Laws (the "Declaration" and "By-Laws") of the 110 East 42nd Street Condominium (the "Condominium"), executed by non-parties Gotham 42nd Street, LLC ("Gotham"), and Green 110 East 42nd, LLC ("Green") (together, defined by Cipriani as the "de facto Board of Managers" of the Condominium), on May 4, 2018, is null and void. Gotham, Green, and Cipriani are the owners of several units in the commercial condominium building located at 110 East 42nd Street, New York, New York (the "Building"). In sum, Cipriani argues that the "de facto Board of Managers"

exceeded the scope of its authority by adopting and filing the "Update to the Third Amendment" without submitting the proposed amendment to Cipriani for execution as required under Article XVI of the Declaration. Article XVI states that the "Declaration may be amended only by an instrument recorded in the Register's Office of the City of New York, New York County which has been executed by all the Owners…" (Declaration, NYSCEF Doc. No. 5, p. 49).

In motion sequence number 002, filed September 25, 2018, SL Green Realty Corp. and SL Green Operating Partnership., L.P. (collectively, the "SLG Parents"), affiliates of Green, Gotham, and other unit owners that Cipriani alleges have constituted the "de facto Board of Managers" of the Condominium, move to dismiss the Petition, pursuant to CPLR 7804(f), on res judicata principles, based upon the Decision and Judgment of the Hon. O. Peter Sherwood, J.S.C., entered June 26, 2018 (the "Judgment"), in a prior action entitled *New 110 Cipriani Units, LLC, v. Board of Managers of 110 E 42nd Street Condominium, et al*, Index No. 652595/2018 (the "Prior Proceeding"). In the alternative, SLG Parents seek an order and judgment, pursuant to CPLR 7503(a), compelling Cipriani to submit to arbitration of the issues raised in the Petition, in accordance with Article VI of the By-Laws (the "Arbitration Clause"). Article VI states that "[i]n the event of any dispute pertaining to a Board of Manager's decision or action or any other dispute between the Owners…, such dispute may be submitted by any Owner for resolution to… a single arbitrator" and the American Arbitration Association (By-Laws, NYSCEF Doc. No. 6, p. 17).

In the Prior Proceeding, which sought a preliminary injunction to stay a Demand for Arbitration, dated May 11, 2018, between Cipriani and the SLG Parents regarding, *inter alia*, Cipriani's obligation to pay $2.6 million for capital improvements to the Building, Cipriani made the same arguments asserted herein, that declaratory determination of the validity of Green and Gotham's execution of the "Update to the Third Amendment" was a threshold issue that needed

to be resolved by the courts before arbitration could proceed because of, *inter alia*, the By-Laws' provision that, in the event of an arbitration, "the arbitrator shall have no power to modify any of the provisions of these [By-Laws] or the Declaration, and the jurisdiction of the arbitrator is limited accordingly." (Appellant's Brief in Prior Proceeding, NYSCEF Doc. No. 20, p. 16; *see also* Complaint in Prior Proceeding, NYSCEF Doc. No. 17, ¶ 19).

In denying Cipriani's motion for a preliminary injunction, which Justice Sherwood interpreted as an application to stay arbitration, Justice Sherwood rejected Cipriani's contention that threshold issues regarding the scope of the arbitrator's authority to determine whether the "Update to the Third Amendment" was validly executed warranted a stay of arbitration (Judgment, NYSCEF Doc. No. 16, p. 3 [citing *Zacharious v Manios*, 68 AD3d 539, 540 [1st Dept 2009] [the court "cannot assume in advance that the arbitrator will exceed his powers as delineated in the parties' narrow arbitration provision… and in the event the arbitrator does so, the arbitration award will be subject to vacatur"]). In so ruling, Justice Sherwood held that an "arbitration will not be stayed unless the entire controversy is non-arbitrable" (Judgment, NYSCEF Doc. No. 16, p. 3 [quoting *Silverman v Benmor Coats, Inc.*, 61 NY2d 299, 302 [1984]). On November 27, 2018, the Appellate Division, First Department, affirmed Justice Sherwood's Judgment, holding that, "[i]ndeed, plaintiff's claims are actually defenses to the claims asserted by defendants in the arbitration, rather than, as plaintiff contends, threshold claims beyond the scope of the arbitration agreement" (Appellate Division Decision, NYSCEF Doc. No. 40, p. 91).

Now, in motion sequence number 003, filed October 15, 2018, Cipriani moves, pursuant to CPLR 7503(b), to stay the same arbitration at issue in the Prior Proceeding, based on an Amended Notice of Intention to Arbitrate and Demand for Arbitration, dated September 24, 2018, pending resolution of the Petition. The Amended Notice of Intention to Arbitrate and Demand for

Arbitration served by the SLG Parents added expressly the issues raised in the Petition to the issues sought to be resolved at arbitration (NYSCEF Doc. No. 33). However, Cipriani argues that the issue of whether an amendment to the Declaration and By-laws must be executed by all owners is not subject to arbitration because the Arbitration Clause does not apply to disputes regarding the interpretation of the Declaration (MOL, NYSCEF Doc. No. 35, p.2).

"[U]nder New York statutory and case law, a court may address three threshold questions on a motion to compel or to stay arbitration: (1) whether the parties made a valid agreement to arbitrate; (2) if so, whether the agreement has been complied with; and (3) whether the claim sought to be arbitrated would be time-barred if it were asserted in State court" (*Smith Barney, Harris Upham & Co., Inc. v Luckie*, 85 NY2d 193, 201-02 [1995]). Once it has been determined that the claim sought to be arbitrated is properly before the arbitrator and that the arbitration of the dispute is not against the public policy of this State, any "further judicial inquiry is foreclosed" (*Board of Educ. of Patchogue-Medford Union Free School Dist. v. Patchogue-Medford Congress of Teachers,* 48 NY2d 812, 813 [1979]).

In his Judgment in the Prior Proceeding, Justice Sherwood evaluated and rejected Cipriani's argument that the arbitrator's purported lack of jurisdiction to assess the validity of the "Update to the Third Amendment" based on the provision in the Arbitration Clause that "the arbitrator shall have no power to modify any of the provisions of these [By-Laws] or the Declaration, and the jurisdiction of the arbitrator is limited accordingly" warranted that the subject arbitration be stayed (By-Laws, NYSCEF Doc. No. 6, p. 17). Notwithstanding the issue of whether the Judgment in the Prior Proceeding bars the instant proceeding in its entirety on the basis of res judicata, Cipriani is precluded under the doctrine of collateral estoppel from relitigating the issue of whether the arbitrator's purported inability to assess the validity of the

"Update to the Third Amendment" warrants that the arbitration be stayed. *(see Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 497-505, 467 N.E.2d 487, 488-93 [1984] ["The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same."]). The allegations in the Petition, despite Cipriani's attempt to rearticulate and narrow them, implicate the same issues that Justice Sherwood found were covered by the Arbitration Clause, which applies to "any dispute pertaining to a Board of Manager's decision or action" (By-Laws, NYSCEF Doc. No. 6, p. 17).

If the court were to address anew Cipriani's most recent iteration of its argument, that the Arbitration Clause limits arbitration to Board of Managers' decisions regarding maintenance and repair of the Building and excludes any disputes regarding the proper interpretation of the Declaration and By-laws, it would reach the same conclusion. (*see Matter of N. Am. Philips Co.*, 200 Misc 428, 431 [Sup Ct New York County, Special Term, Part 1 1951] [rejecting argument that provision in agreement stating Board of Arbitration shall have no power to modify or supplement provisions of the agreement precluded arbitration because the contemplated arbitration might impose on movant an obligation not explicitly imposed in the agreement, as it would exclude arbitration in practically all cases, which most often arise from the absence of a specific provision addressing the controversy sought to be arbitratred]). As most disputes regarding decisions of the Board of Managers will require an arbitrator to interpret the Declaration and By-Laws to determine whether the Board of Managers acted appropriately, Cipriani's interpretation would preclude arbitration, which is favored by the courts, in substantially all disputes.

Accordingly, it is hereby

ORDERED and ADJUDGED that the motion of Petitioner Cipriani's to stay the arbitration (motion sequence number 003) is denied; and it is further

ORDERED and ADJUDGED that the motion of Respondent Board Of Managers of 110 East 42nd Street Condominium (motion sequence number 002) to compel arbitration is granted and the parties are directed to proceed to arbitration forthwith and Respondent's counsel shall serve a copy of this order and judgment upon the arbitral tribunal; and it is further

ORDERED and ADJUDGED that the Petition of Petitioner Cipriani (motion sequence number 001) under CPLR Article 78 is severed and stayed pending the arbitration.

Any requests for relief not otherwise discussed herein have nonetheless been considered by the court and are hereby denied and this constitutes the decision, order and judgment of the Court.

6/25/2019
DATE

W. FRANC PERRY, J.S.C.

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| CHECK ONE: | [X] | CASE DISPOSED | | [ ] | NON-FINAL DISPOSITION | | |
| | [ ] | GRANTED | [ ] DENIED | [X] | GRANTED IN PART | [ ] | OTHER |
| APPLICATION: | [ ] | SETTLE ORDER | | [ ] | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | [ ] | INCLUDES TRANSFER/REASSIGN | | [ ] | FIDUCIARY APPOINTMENT | [ ] | REFERENCE |