

Suratwala v Gandhi
2019 NY Slip Op 31859(U)
June 27, 2019
Supreme Court, New York County
Docket Number: 652089/2019
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK

PART

IAS MOTION 53EFM

Justice

-----X

TANSUKH SURATWALA, NEHA SURATWALA, TRUPTI
SURATWALA, TANSUKHSURATWALA SPOUSAL ACCESS
TRUST, TRUPTI T. SURATWALA FAMILY TRUST

Plaintiff,

- v -

SAILESH GANDHI, SHASHIN GANDHI, STACY GANDHI, SHEILA
GANDHI FAMILY TRUST,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 24, 25, 26, 27,
28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for

STAY

Borrok, J.:

This is a petition to stay arbitration pursuant to CPLR § 7503.

Reference is made to:

- (1) a certain Operating Agreement of Jai Ambe LLC (the **Original Jai Agreement**), dated _____, by and among the Company and the persons executing this Agreement (Petition, Ex. B; NYSCEF Doc. No. 3), as amended and restated by a certain Amended and Restated Operating Agreement of Jai Ambe LLC (the **Amended and Restated Jai Agreement**), dated October 29, 2018, by and among the Company and such persons identified as Members on the, attached Schedule 1 (Petition, Ex. I; NYSCEF Doc. No. 10);
- (2) a certain Operating Agreement of Om Vinthal LLC (the **Original Om Viththal Agreement**), dated _____, by and among the parties whose names are set forth on Schedule A attached to this Agreement (Petition, Ex. D, NYSCEF Doc. No. 5), as amended and restated by a certain Amended and Restated Operating Agreement of Om Viththal (the **Amended and Restated Om Viththal Agreement**), dated October 29, 2018, by and among the Company and such persons identified as Members on the attached Schedule 1 (Petition, Ex. K, NYSCEF Doc. No. 12);

- (3) a certain Operating Agreement of Om Vagzei LLC (the **Original Om Vagzei Agreement**), dated _____, by and between the undersigned, as members of Om Vagzei, LLC (Petition, Ex. F; NYSCEF Doc. No. 6), as amended and restated by a certain Amended and Restated Operating Agreement of Om Vagzei LLC (the **Amended and Restated Om Vagzei Agreement**), dated October 29, 2018, by and among the Company and such persons identified as Members on the attached Schedule 1 (Petition, Ex. J, NYSCEF Doc. No. 11);
- (4) a certain Operating Agreement of Newberg Hotel Partners LLC (the **Original Newberg Agreement**), dated “November 20, 19997,” by Tansukh R. Suratwala as sole member (Petition, Ex. F; NYSCEF Doc. No. 7), as amended and restated by a certain Amended and Restated Operating Agreement of Newberg Hotel Partners LLC (the **Amended and Restated Newberg Agreement**), dated October 29, 2018, by and among the Company and such persons identified as Members on the attached Schedule 1 (Petition, Ex. M; NYSCEF Doc. No. 14);
- (5) a certain Operating Agreement of Om Sidhdhy Vinayak LLC (the **Original Om Sidhdhy Agreement**), dated _____, by and between the undersigned, as members of Om Sidhdhy Vinayak LLC (Petition, Ex. G; NYSCEF Doc. No. 8), as amended and restated by a certain Amended and Restated Operating Agreement of Om Sidhdhy Vinayak LLC (the **Amended and Restated Om Sidhdhy Agreement**), dated October 29, 2018, by and among the Company and such persons identified as Members on the attached Schedule 1 (Petition, Ex. L; NYSCEF Doc. No. 13);
- (6) a certain Operating Agreement of Aum Viththal LLC (the **Original Aum Viththal Agreement**; the Original Jai Agreement, the Original Om Viththal Agreement, the Original Om Vagzei Agreement, the Original Newberg Agreement, the Original Om Sidhdhy Agreement, together with the Original Aum Viththal Agreement, hereinafter, collectively, the **Original Operating Agreements**), dated _____, by and among the parties whose names are set forth on Schedule A attached to this Agreement (Petition, Ex. H; NYSCEF Doc. No. 9), as amended and restated by a certain Amended and Restated Operating Agreement of Aum Viththal LLC (the **Amended and Restated Aum Viththal Agreement**; the Amended and Restated Jai Agreement, the Amended and Restated Om Viththal Agreement, the Amended and Restated Om Vagzei Agreement, the Amended and Restated Newberg Agreement, the Amended and Restated Om Sidhdhy Agreement, together with the Amended and Restated Aum Viththal Agreement, hereinafter, collectively, the **Amended and Restated Agreements**), dated October 29, 2018, by and among the Company and such persons identified as Members on the attached Schedule 1 (Petition, Ex. N; NYSCEF Doc. No. 15)

Section 6.1(b)(a) of the Original Jai Agreement requires that any amendment to the Original Jai Agreement must have unanimous consent of its members. To wit, it provides:

- (b) the following actions shall require the consent of all of the Members:
 - (a) any amendment to the Agreement or to the Articles.

Section 10 of the Original Aum Vithnal Agreement, and Section 13.4 of Original Newberg Agreement also require unanimous consent of the members to amend the Original Aum Vithnal Agreement and the Original Newberg Agreement.

However, Section 10.1 of the Original OM Viththal Agreement only requires “the consent of the Members holding 75% of the Membership Interests” to amend the Original OM Viththal Agreement (NYSCEF Doc. No. 5, § 10.1).

And, pursuant to Section 11.1 of the Original Om Vagzei Agreement and Section 11 of the Om Sidhdhy Vinayak Agreement, only a “majority of the LLC Interests” is required to amend the Original Om Vagzei Agreement and the Om Sidhdhy Agreement.

Section 10.04 of each of the Amended and Restated Agreements requires that disputes arising under the agreements shall be submitted to arbitration with the American Arbitration Association.

Unlike the other Original Agreements, the Original Om Vagzei Agreement and the Original Om Sidhdhy Agreement required disputes arising under those agreements to be submitted to arbitration. However, the arbitration clause in those agreements required arbitration in Bergen County, New Jersey. For the avoidance of doubt, the Original Jai Agreement, the Original Aum Vithnal Agreement, the Original OM Viththal Agreement and the Original Newberg Agreement do not contain a provision requiring arbitration.

Following certain disputes among the members of the captioned entities, certain members served a demand, dated March 29, 2019, for arbitration pursuant to the Amended and Restated Agreements (NYSCEF Doc. No. 2). The petitioners have moved by order to show cause to stay arbitration, arguing that the Amended and Restated Agreements are invalid in that the consent required to amend the Original Agreements was not obtained. More specifically, petitioner Tansukh Surutwala alleges that his signature on the Amended and Restated Agreements was forged and that he never consented to the amendments of the Original Operating Agreements.

With respect to Om Vagzei LLC and Om Sidhdhy Vinayak LLC, amendment of the original operating agreements only required “a majority of the LLC Interests” to amend such operating agreements. Schedule A of the Original Om Vagzei Agreement indicated that Mr. Suratwala has no membership interest in that entity and the other petitioners Neha Suratwala and Trupti Saratwala, collectively, only had a 22% interest. Accordingly, even taking Mr. Surutwala’s forgery allegation as true and assuming that Neha Suratwala and Trupti Suratwala both did not consent to the amendment, there is no basis to stay the arbitration as it relates to Om Vagzei LLC

or Om Sidhdhy Vinayak LLC because the petitioners have failed to allege a basis to find that the Amended and Restated Vagzei Agreement or the Amended and Restated Om Sidhdhy Agreement are not valid. In addition, with respect to Om Sidhdhy Vinayak LLC, Schedule A of the Original Om Sidhdhy Agreement does not indicate that Mr. Suratwala had a membership interest in that entity and none of the other petitioners are listed as members. Similarly, with respect to Om Viththal LLC, neither the Original Om Viththal Agreement, nor the Amended and Restated Om Viththal LLC Agreement list Mr. Tansukh Suratwala as a member. Accordingly, based on the submissions of the petitioners, there simply is no basis to understand how he has standing to challenge the Amended and Restated Viththal LLC Agreement. Furthermore, the Amended and Restated Om Viththal Agreement was signed by of the requisite 75% of its members so the consent of members holding 75% of the Membership Interests appears to have been met.

Finally, with respect to Aum Viththal LLC, Jai Ambe LLC, and Newberg Hotel Partners LLC, inasmuch as the Petitioners argue that the Aum Viththal Amended and Restated Agreement, the Jai Amended and Restated Agreement, and the Newberg Amended and Restated Agreement are invalid, at first blush, the petitioners' application would seem to be governed by the United States Supreme Court analysis in *Nitro-Lift Tech., LLC. v Howard* (568 US 17 [2012]) and *Prima Paint Corp. v Flood & Conklin Manufacturing Co.* (388 US 395 [1967]). In *Nitro-Lift*, the Court wrote:

attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance, not by a federal or state court (568 US at 20-21 [quotation and citation omitted]).

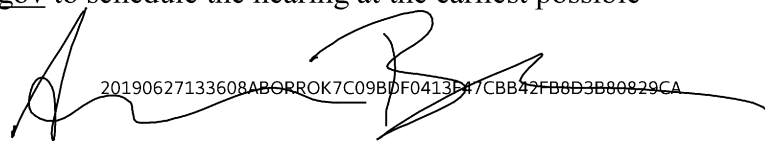
In *Prima Paint*, the Court held that claims of fraud in the inducement of the contract **generally** are to be determined by the arbitrator (388 US at 403-404). The Court explained that, "if the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the 'making' of the agreement to arbitrate – the [] court may proceed to adjudicate it" in the first instance (*id.*).

However, a closer examination at the basis for the petitioners' assertion that the Amended and Restated Agreements are invalid necessarily brings this case outside of this *Prima Paint* holding. The basis for the Court's ruling in *Prima Paint* was that the arbitration clause was severable from the agreement at issue in that case. Unenforceability based on fraud in the factum is a question not squarely addressed by the *Prima Paint* Court. As the court in *Kyung In Lee v Pacific Bullion (NY) Inc.* (788 F Supp 155, 157 [ED NY 1992]) aptly observed:

if a party's signature were forged on a contract, it would be absurd to require arbitration if the party attacking the contract as void failed to allege that the arbitration clause itself was fraudulently obtained.

Therefore, arbitration is stayed solely with respect to Aum Viththal LLC, Jai Ambe LLC, and Newberg Hotel Partners LLC, and an evidentiary hearing is ordered to determine if the signature of Tansukh Suratwala on the Amended and Restated Agreements of those entities is a forgery, and the arbitration is stayed until such hearing occurs. The parties are directed to jointly contact

the Clerk of Part 53 at SFC-Part53@nycourts.gov to schedule the hearing at the earliest possible date.


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6/27/2019

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

☐

DENIED

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GRANTED IN PART

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OTHER

APPLICATION:

☐

SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE