SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Petition by the Executor of the Estate of

ANTHONY P. STAPLETON,

Deceased,

File No. 2016-3795/C

for Turnover of the Value of Harlem Properties Pursuant to SCPA 2103

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ANDERSON, S.

The executor of the estate of Anthony P. Stapleton has commenced a proceeding for the turnover of approximately $1.3 million by Cogswell Realty Group, LLC (the "Company"), in which decedent held a 9.5238% interest at his date of death (SCPA §2103). Presently before the court are cross-motions, one by the Company, seeking an order either staying or dismissing the proceeding and directing the parties to go to arbitration pursuant to the Company's Operating Agreement; and the other by petitioner, seeking an order dismissing the Company's counterclaim for arbitration.

The following facts are undisputed. Decedent and several other individuals founded the Company in 1996. The Operating Agreement, as amended and restated on January 1, 2004, designates decedent as an "original member," or, alternatively, an "A" member, of the Company, the rules of which differ from those of members with other designations.. Decedent died on July 30, 2016, and his surviving spouse (petitioner) became fiduciary of his estate on October 21, 2016. Petitioner commenced this proceeding to compel the Company to turn over to the estate a sum she has calculated to be the value of decedent's "A" membership interest, in accordance with the terms of the Agreement which require petitioner to sell and the Company to purchase decedent's interest. The Company values the interest at only a fraction of the figure that

petitioner proposes.

Only three sections of the 17 Articles of the Agreement are presented here. The first is §10.4, which requires the representative of a deceased "A" member's estate to sell decedent's entire interest to the Company, subject to "[t]he terms of ... purchase and sale ... set forth in Article XI...." Article XI contains each of the other two arguably relevant sections, *i.e.*, 11.1 and 11.4.

Section 11.1 governs the mandatory sale to the company of a deceased member's interest by the representative of his or her estate The section prescribes the basis for determining the price of such member's interest, and it provides that the Company's determination as to price "shall be final and binding upon the ... representatives [of the estate of a deceased member] unless [such representatives] elect [] to contest such determination by electing to pursue the arbitration remedies set forth herein."

By contrast, §11.4, "Sale of Original Member Interest...." requires an "A" member wishing to sell his interest to offer it first to the other members. Subsection (f) of §11.4(f) reads as follows:

> "For the purpose of this Section, if there is a dispute as to [the purchase price] ... the Members shall refer such dispute to an acceptable arbitrator ... (the "Arbitrator") for arbitration at the main offices of the American Arbitration Association (or its successor) in New York, New York, in accordance with the Commercial Arbitration Rules thereof, and judgement [sic] upon the award rendered by the Arbitrator may be entered in any court having jurisdiction thereof."

In sum, §11.1 mandates a sale of membership interests under certain circumstances and it gives the seller the option to submit to arbitration any dispute as to the Company's determination of a sale price. On the other hand, § 11.4 (i.e., the right of refusal by non-selling members)

requires that a dispute as to the purchase price be referred by members to arbitration. In view of the foregoing provisions, the court must decide whether petitioner may be compelled to arbitrate her dispute with the Company.

The Company contends that it is for the arbitrator to determine if it has the right to consider to resolve the parties' dispute. According to the Company, precedent is clear that the availability of arbitration is an issue for the arbitrator (rather than for the court) if the parties' contract "clearly and unmistakably [so] provides" *Smith Barney Shearson v Sacharow*, 91 NY2d 39, 47 (1997). Precedent also establishes that there is such clarity and certainty where the arbitration clause in question provides that disputes be resolved under the rules of a specified arbitrational forum and those rules, as in the case of the American Arbitration Association, give the arbitrators jurisdiction to determine their own jurisdiction *(Matter of Level Export Corp.*, 305 NY 82, 86 [1953]). In view of these precedents, if §11.4 indeed applied to this case, the court's present task would be limited to granting the Company's motion for a stay, leaving the parties to the arbitration forum they had chosen to resolve a §11.4 dispute.

However, as indicated above, the Operating Agreement contains two separate arbitration clauses, one mandating arbitration under a limited circumstance (§11.4) and the other making arbitration an option available to an estate representative such as petitioner (§11.1). Had the two clauses been contained in separate instruments, it would have been apparent that petitioner could not be compelled to submit her §11.1 dispute to arbitration if, as here, she did not wish to do so. The fact that the two different arbitration clauses are contained in the same instrument does not alter their substance and therefore should not be deemed to alter their effect. Simply put, the circumstance triggering mandated arbitration has not arisen here and the representative of the

deceased member's estate has not "elect[ed]" to submit her §11.1 issue to arbitration. Section 11.1 gives petitioner two options: either to accept the Company's valuation or to elect arbitration. Petitioner did not agree to submit any issue to arbitration, therefore there is no occasion to refer the threshold question of whether there should be resolution by arbitration or on the merits by the court.

Based upon the foregoing, the Company's motion is denied in its entirety and petitioner's motion to dismiss the Company's counterclaim for mandatory arbitration is granted. In the absence of an election by petitioner to arbitrate under §11.1, other issues raised by the pleadings remain for litigation in this court.

This decision constitutes the order of the court.

Dated: August 28, 2019

SURROGATE