

SCLiquor, LLC v Empire Invs., Inc
2022 NY Slip Op 34117(U)
December 2, 2022
Supreme Court, New York County
Docket Number: Index No. 654466/2022
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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SCLIQUOR, LLC,

Plaintiff,

- v -

EMPIRE INVESTMENTS, INC,

Defendant.

INDEX NO. 654466/2022

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 104

were read on this motion to/for SEAL/PRELIMINARY INJUCTION.

Upon the foregoing documents, it is

Petitioner SCLiquor, LLC (SC) moves pursuant to CPLR 6301 and 7503(b) for an order enjoining respondent Empire Investments, Inc. (Empire) from pursuing new claims against SC before the American Arbitration Association (AAA), Case No. 01-22-0000-1787.

The parties are embroiled in a dispute regarding D’Usse LLC’s (D’Usse) operating agreement which contains an arbitration provision. (NYSCEF 12, March 6, 2012, Operating Agreement between Bacardi’s Empire Investment Inc. and SC Liquor, LLC. [Operating Agreement], §12.5.) SC initiated the arbitration proceeding by filing a demand for arbitration on January 13, 2022, describing the disputes as: “Claimant exercised a Put Option under Article 8 of D’Usse LLC’s Operating Agreement, by which Respondent is required to purchase Claimant’s 50% Interest in D’Usse. The Parties

have a number of disputes regarding the valuation process pursuant to Article 8, including regarding the cut-off date for the valuation of Claimant's Interest, the selection of an investment banking firm, etc.” (NYSCEF 42, Demand for Arbitration.) AAA issued a procedural order, after a hearing and comments by the parties, (NYSCEF 43, Procedural Order No. 1) which reiterates AAA’s jurisdiction and states: “

The Parties further agree . . . that this Tribunal shall have jurisdiction to finally determine such disputes as the Parties (jointly or individually) may present for resolution arising out of or relating to the sale of SC’s interest in D’Usse pursuant to SC’s Put Option exercise in October 2021, to the extent such disputes are within the scope of the arbitration clause of the Operating Agreement, and that the Tribunal’s jurisdiction over such disputes will only terminate based on a jurisdiction termination stipulation of the Parties, or pursuant to the terms of AAA’s Commercial Arbitration Rules.” (*Id.* ¶ 3.)

The Operating Agreement also contains an appraisal provision which focuses on the selection of a neutral investment bank to perform the appraisal. (NYSCEF 12, Operating Agreement §8.3[b].) The parties selected JP Morgan Securities LLC (JPM). (NYSCEF 14, February 11, 2022 JPM Agreement.) The JPM Agreement provides that “any claim, controversy or dispute arising under or related to the Agreement, shall be governed by and construed in accordance with the laws of the State of New York.” (*Id.* §4[c].)

In the petition before this court, SC seeks a permanent injunction enjoining Empire from pursuing arbitration of three new issues Empire raised by letter to AAA on October 28, 2022: “(i) whether SC should be ordered to specifically perform its obligation to proceed with the retention of a consultant, consistent with J.P. Morgan's direction; (ii) whether SC retains any right to post-valuation-date D'Usse profits or any oversight rights with respect to D'Usse-including any rights to enforce (or seek to cause D'Usse to enforce) the Services Agreement; and (iii) whether SC has breached its

confidentiality obligations and, if so, the appropriate remedy for such breach.”

(NYSCEF 46, Empire letter October 28, 2022 3/9.¹)

The controversy here centers on issue i, not ii² or iii.³ (See Transcript December 1, 2022.) J.P. Morgan informed the parties that it needs a five-year financial forecast to perform its appraisal. (NYSCEF 111, SC’s Opening Brief to AAA, July 2, 2022; NYSCEF 26, September 2, 2022, Third Partial Final Award ¶ 55;.) JPM suggested that the parties retain a consultant to develop a forecast. (NYSCEF 32, September 14, 2022, email chain at 6-7.) Empire asserts that SC has refused to cooperate in the selection of a consultant, while SC asserts that Empire’s October 28, 2022, letter to AAA prematurely cut off discussions with JPM on the consultant topic. (See December 1, 2022, Transcript.) Empire contends that the Operating Agreement’s requirement to retain an investment bank to conduct an appraisal includes an obligation for SC to cooperate with the process set out by JPM for completing that appraisal. SC insists issue i arises under the JPM Agreement, while Empire frames its issue i as a breach of the Operating Agreement’s good faith covenant which requires cooperation.

“A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party’s favor.” (*Doe v Axelrod*, 73 NY2d 748, 750 [1988])

¹ References NYSCEF pagination.

² Issue ii involves the Services Agreement which is between D’Usse and Bacardi International Limited which are not the parties to the Operating Agreement and are not before AAA. (NYSCEF 13, Services Agreement)

³ In issue iii, Empire alleges a breach of the Operating Agreement’s confidentiality provision. (See Transcript December 1, 2022.)

[citation omitted].) Accordingly, SC must establish a likelihood of success on the merits of its claim for a permanent injunction. To be clear, SC seeks to enjoin the addition of the new issues to the pending arbitration, not to stay the arbitration SC initiated in January 2022 revolving around the put. (See, December 1, 2022, Transcript.)

As to issue i, SC contends that the parties have no agreement to arbitrate whether to retain a consultant to aid JPM, the quintessential reason to stay arbitration of a particular issue. Rather, in its reply, SC asserts that CPLR 7601⁴ is the appropriate legal authority for specific performance of an appraisal agreement.

A permanent injunction enjoining an arbitration of certain claims is extraordinary relief. (See *Margolies v Encounter, Inc.*, 42 NY2d 475, 479 [1977].) Whether issue i is arbitrable by AAA under the Operating Agreement in the pending arbitration or not is for the arbitrators to decide. (*Henry Schein, Inc. v Archer & White Sales, Inc.*, 139 S Ct 524, 529 [2019]; see also *Revis v Schwartz*, 192 AD3d 127, 141-42 [2d Dep't 2020], *aff'd*, 38 NY3d 939 (2022) (where the arbitrability question is delegated to an arbitrator, it would “be error to inquire into the scope of the arbitration agreement, under state and federal law”). Here, the Operating Agreement provides that the arbitrators will decide “any dispute concerning the scope of this arbitration provision.” (See NYSCEF 40, Operating Agreement § 12.5.)

⁴ CPLR 7601 provides: “A special proceeding may be commenced to specifically enforce an agreement that a question of valuation, appraisal or other issue or controversy be determined by a person named or to be selected. The court may enforce such an agreement as if it were an arbitration agreement, in which case the proceeding shall be conducted as if brought under article seventy-five of this chapter. Where there is a defense which would require dismissal of an action for breach of the agreement, the proceeding shall be dismissed.”

This is not one of the limited circumstances where courts are compelled to enjoin an arbitration. Rather, the parties have entered an arbitration agreement and whether any of issues i, ii, or iii fall within the scope of that agreement is for the arbitrators to decide. While “appraisal resolves only a valuation question leaving all other issues for resolution at a plenary trial,” (*Penn Central Corp. v Consolidated Rail Corp.*, 56 NY2d 120, 127 [1982]), here, the parties have agreed to resolve “all other issues” under the Operating Agreement by arbitration. (See Alexander, Practice Commentaries, McKinnery’s Cons Law of NY, CPLR 7601 [“The parties litigate the main controversy in a plenary action or arbitration.” [emphasis added].) Appraisal of one issue is in aid of the arbitration to resolve the entire controversy.

Similarly, this is not a case where rival proceedings have been initiated to select a consultant. Neither party has initiated a proceeding under CPLR 7601. Empire argues that selecting a consultant to prepare a forecast to aid JPM’s appraisal is the equivalent of selecting an appraiser, which could trigger a CPLR 7601 special proceeding. SC mentions a CPLR 7601 special proceeding in its reply brief for the first time, which is entitled to no consideration. (*Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624 [1st Dept 1995].) Accordingly, SC’s motion for a preliminary injunction is denied without prejudice to the decision of the AAA arbitrators.

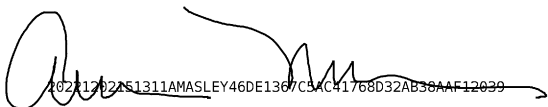
Motion 01, as to the seal, is submitted for decision without argument.

Accordingly, it is

ORDERED that SC’s motion as to the preliminary injunction is denied without prejudice; and it is further

ORDERED that the parties are directed to submit the transcript of the December 1, 2022, argument, which supplements this decision, to be so ordered; and it is further

ORDERED that the parties shall read and comply with Part 48 procedures, including using NYSCEF numbers, filing documents that are searchable, and describing documents in NYSCEF in a meaningful way; describing a document as "exhibit 1" is useless.



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12/2/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE