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

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ALTERNATIVE GLOBAL SIX, LLC

Plaintiff,

- v -

DURHAM HOMES LLC,

Defendant.

INDEX NO. 653837/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for COMPEL ARBITRATION.

In this action arising from defendant's alleged breach of contract for failing to make payments on a note, defendant moves, by order to show cause, for an order pursuant to CPLR 2201, CPLR 7503(a), and 9 USC § 1 compelling arbitration and staying the instant action. Plaintiff opposes the motion.

Background

Plaintiff Alternative Global Six, LLC (plaintiff) is one of six investment vehicles of a non-party investment fund. Defendant Durham Homes LLC (defendant) is a builder of custom homes in the South Carolina market. On July 10, 2020, the parties entered into a Revolving Note and Security Agreement (the Note), securing monies that plaintiff advanced to defendant for building and selling custom homes (NYSCEF # 1 – complaint, ¶ 7).

Pursuant to the Note, defendant, as borrower, shall repay the loan to plaintiff and make interest payments on the first day of each month at an interest rate of 15% (*id.*, ¶¶ 9-10; NYSCEF # 8 – Note, §§ 2A, 3A, 3C, Ex. A). The Note also provides that defendant's failure to make timely payments will give rise to an "Event of Default," upon which plaintiff may elect to accelerate all principal and interest due and raise the interest rate to a "Default Rate" of 18% (complaint, ¶¶ 12, 14-15; *see also* Note, §§ 8A, 8B, 3B).

According to the complaint, plaintiff loaned defendant a total of $5,995,000 from July 2020 through March 2021 (complaint, ¶ 11). Plaintiff alleges that defendant defaulted and has made only two interest payments on the Note: one on July 30, 2021, in the amount of $332,885.82, and another one on March 18, 2022, in the amount of $200,000 (*id.*, ¶ 16). On April 1, 2022, plaintiff elected to accelerate all payment obligations and started to apply the 18% Default Rate for interest from the following day (*id.*, ¶¶ 18-19).

The Note contains a choice of forum clause, expressly providing that any disputes arising under the Note are subject to the jurisdiction of the state and federal courts of New York, New York (*id.*, ¶ 4; Note, § 9A).[1] On October 17, 2022, plaintiff commenced this action by filing a summons and complaint, alleging one cause of action for breach of contract against defendant for failing to pay $5,995,000 in principal and $1,282,969.18 in interest, which continues to accrue at a rate of 18% per annum (complaint, ¶¶ 25-30).

On November 23, 2022, defendant moved to compel arbitration and stay this action, arguing that, instead of the Note, a joint venture agreement entered by the parties (JV Agreement) governs this dispute so the arbitration provision it contains mandates that this matter be submitted to arbitration.[2] In particular, defendant alleges that the parties formed a joint venture to build homes to be sold to consumers in the United States real estate market. Under the JV Agreement, plaintiff shall provide all the necessary capital while defendant shall manage and oversee the business. Defendant alleges that the $5,959,000 advanced by plaintiff was not a loan but its capital contribution to the joint venture. Defendant alleges that the parties created the Note merely to secure the interest payment for plaintiff's investment under the joint venture. Defendant additionally argues that the Note has long been terminated, leaving the JV Agreement as the sole effective agreement. In this connection, defendant alleges the $200,000 it paid on March 18, 2022 was not an interest payment on the Note, but rather a payment in consideration of canceling the Note.

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[1] The relevant provision in the Note states that:

> "Borrower and Lender irrevocably consent and submit to the non-exclusive jurisdiction of the state courts of New York, New York and the United States District Court serving New York, New York and waive any objection based on venue or forum non conveniens with respect to any action instituted therein arising under this [Note] or any of the other Loan Documents or in any way connected with or related or incidental to the dealings of the parties thereto in respect of this [Note] or any of the other Loan Documents or the transactions related hereto or thereto, in each case whether now existing or thereafter arising, and whether in contract, tort, equity or otherwise, and agree that any dispute with respect to any such matters shall be heard only in the courts described above ..." (Note, § 9A.a.ii).

[2] The arbitration provision in the JV Agreement states that:

> "Any controversy or claim arising out of or relating to this Agreement, or the breach hereof, shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof." (NYSCEF # 7 – JV Agreement, § 10).

In opposition, plaintiff maintains that the Note's choice of forum clause governs since the Note is more specific and detailed than the JV Agreement regarding repayment of monies, which is the basis of plaintiff's claim. Further, plaintiff argues that applying the arbitration provision in the JV Agreement would render the Note's choice of forum clause meaningless. Lastly, plaintiff contends that the Note was not terminated, and even if it was, the choice of forum clause survived the termination of the loans.

Discussion

Under CPLR 7503, courts must direct the parties to arbitrate if "there is no substantial question whether a valid agreement was made or complied with and the claim sought to be arbitrated is not barred by limitation" (CPLR 7503[a]). The Federal Arbitration Act also provides that "a written arbitration provision in a contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable" (*Diamond Waterproofing Sys. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 [2005]; 9 USC § 2). Meanwhile, "a party cannot be compelled to submit to arbitration unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute" (*Gerling Global Reins. Corp. v Home Ins. Co.*, 302 AD2d 118, 123 [1st Dept 2002]). The burden is on the party seeking arbitration to demonstrate a "clear and unequivocal" agreement to arbitrate the claim (*id.*).

As a preliminary matter, defendant has not sufficiently shown that the Note was terminated and rendered ineffective. The Note has a termination clause, which only applies when defendant prepays the loan with accrued interest prior to the maturity date (Note, § 2B.a.i). Here, defendant does not allege that it terminated the Note by prepaying the loan, but contends that both parties agreed to terminate the Note, with defendant providing $200,000 as consideration. However, defendant does not proffer any written evidence and relies solely on the affidavit of Michael Dazzo, plaintiff's former manager (NYSCEF # 6 – Dazzo aff). Plaintiff, on the other hand, maintains that the parties never agreed to terminate the Note, citing to a deposition transcript in which the current manager of plaintiff testified that the $200,000 paid by defendant was in fact an interest payment on the Note and not an exchange for terminating the Note (NYSCEF # 23 – Pltf's Opp at 5-6). In light of the conflicting narratives and the lack of written evidence, the court cannot find that the Note was terminated or that the choice of forum clause is ineffective (*see also* Note, § 10G [any subsequent oral agreements of the parties are ineffective]).

As both agreements are valid and effective, the issue is which one—the choice of forum clause in the Note, or the arbitration provision in the JV Agreement—applies to the dispute at issue. The parties chose Florida state law as the governing law for both agreements (JV Agreement, § 13; Note, § 9A.a.i).

Significantly, plaintiff's claim is entirely premised on defendant's payment obligations under the Note, not the JV Agreement (complaint, ¶¶ 25-30). The complaint alleges that defendant breached the Note for defaulting on the interest payments, and seeks damages for the full amount of principal as well as interest at the increased "Default Rate" of 18% since plaintiff accelerated the amount due (*id.*). Although the Note may be a part of the parties' joint venture project of building custom homes for sale, it provides more specific and detailed terms regarding the repayment of monies than the JV Agreement. For instance, the Note sets forth terms regarding interest payment, events of default, and remedies upon an event of default, which form the grounds for plaintiff's claim. Under the general principle that "a specific provision dealing with a particular subject will control over a different provision dealing only generally with that same subject," the Note governs for purposes of determining the forum (*Papunen v Bay Natl. Title Co.*, 271 So3d 1108, 1111 [Fla 3d DCA 2019]; *see also Katzin v Mansdorf*, 624 So2d 810, 811 [Fla 3d DCA 1993] [reversing the trial court's order which compelled arbitration, since "the promissory notes sued upon [] contain no express terms requiring the parties to arbitrate" and the arbitration provision in the parties' partnership agreement does not include the instant promissory notes]).

The New York cases relied on by defendant are inapposite. In *Astoria Equities 2000 LLC v Halletts A Dev. Co., LLC* (47 Misc 3d 171 [Sup Ct, Queens County 2014]), there was a conflict between the parties' operating agreement, which required claims arising under it to be brought in New York courts, and an arbitration provision in the parties' sale agreement. The court in *Astoria* found that the parties had a clear intent to arbitrate the matter because the "dispute over the consideration to be received by the plaintiff for the sale of its property" "goes to the heart of the sale agreement itself," despite that the consideration was expressed in the operating agreement (*id.* at 182). In the present case, unlike *Astoria*, the Note and the JV Agreement are not shown to be "treatable as one instrument or as mutually dependent" (*id.* at 181-182).[3] Further, the holding in *Astoria* also suggests that the Note controls, since a dispute over defendant's default on interest payments "goes to the heart of" the Note rather than the JV Agreement (*id.*).

Onyx Asset Mgt. LLC v 9th & 10th St. LLC (2016 NY Slip Op 30875[U] [Sup Ct, NY County 2016]), another case cited by defendant that compelled arbitration, is distinguishable. The promissory note in that case did not contain any dispute resolution clause; thus, there was no conflict with the arbitration provision in the parties' subscription agreement (*id.*). In contrast, here, the Note includes a choice of forum clause in which the parties expressly and unequivocally agreed to resolve the dispute before a court in New York (*Terminix Intl. Co., L.P. v Michaels*, 668 So2d 1013, 1015 [Fla 4th DCA 1996] [noting that "contracts providing for arbitration will

[3] Although entered on the same day, the JV Agreement and the Note contain no reference to each other.

be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be so submitted"]).[4]

Moreover, if the court were to accept defendant's argument and apply the arbitration provision in the JV Agreement to this Note-based claim, it would render the Note's choice of forum clause meaningless and inconsistent. Although instruments entered contemporaneously to be part of the same transaction should be read together, "it does not follow ... that the arbitration clause in [one instrument] applies to all disputes arising out of any of the documents related to this transaction" (*Smith v Shields Sales Corp.*, 22 AD3d 942, 943 [3d Dept 2005]). As courts are obligated to "construe contracts in such a way as to give reasonable meaning to all provisions" (*Moore v State Farm Mut. Auto. Ins. Co.*, 916 So2d 871, 877 [Fla 2d DCA 2005]), the only reasonable interpretation is that the Note and JV Agreement each have their own scope of applicability since the express, distinct language in the two instruments "demonstrate that the parties intended that the remedy would differ depending on which document was at issue" (*Smith*, 22 AD3d at 943).

Accordingly, the Note's choice of forum clause shall apply to this action and defendant's motion to compel arbitration and stay the action is denied.

Conclusion

In view of the above, it is

ORDERED that defendant Durham Homes LLC's motion to compel arbitration and stay the action is denied; and it is further

ORDERED that defendant shall serve an answer or move to dismiss the complaint within 20 days of the entry of this order.

4/5/2023
DATE

MARGARET A. CHAN, J.S.C.

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

[4] Defendant's reliance on *DS-Concept Trade Inv. LLC v Wear First Sportswear, Inc.* (128 AD3d 585 [1st Dept 2015]) is also misplaced. *DS-Concept* addresses a distinct issue – when a contract was assigned, whether the assignee is bound by the arbitration clause set forth in the said contract (*id.*).