

Matter of Mushell v Park Vista Holding Group LLC

2023 NY Slip Op 31858(U)

June 1, 2023

Supreme Court, Kings County

Docket Number: Index No. 504155/2023

Judge: Reginald A. Boddie

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At an IAS Term Commercial Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 1st day of June 2023.

P R E S E N T:
Honorable Reginald A. Boddie
Justice, Supreme Court

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In the Matter of the Application of
SHLOMO MUSHELL,

Petitioner,

Index No. 504155/2023

-against-

Cal. No. 7-8 MS 1-2

PARK VISTA HOLDING GROUP LLC,

Respondent.

Decision and Order

For a Judgment Compelling the Production of
Books and Records Pursuant to CPLR Article 78

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The following e-filed papers read herein:

NYSCEF Doc Nos.

MS 1

1-6; 13-19

MS 2

20-27; 33-39

Petitioner’s petition to inspect the books and records of respondent and respondent’s motion seeking an order compelling petitioner to arbitrate and dismissing the subject action are decided as follows:

Petitioner, Shlomo Mushell (petitioner or Mushell) is a 15% member of respondent, Park Vista Holding Group LLC (PVHG), which was formed to operate skilled, assisted, and independent living health care facilities. Although petitioner represents that he is co-manager of PVHG, the record reflects that petitioner was removed as co-manager by vote at a special meeting held on or around July 20, 2021. Petitioner claims, however, that he was not validly removed as a manager and that, accordingly, he remains a manager to this day.

With the instant petition, Mushell seeks an order compelling PVHG to furnish him with the books and records, as set forth in his “Schedule of Books and Records Demanded.” According to petitioner, PVHG’s books and records are sought “to carry out his fiduciary and managerial duties to the company, to investigate and prosecute wrongdoing by Respondent’s other members, to value his membership/ownership interests, and to establish if the other members have exploited, to his detriment, the personal guarantees he gave on Respondent’s behalf” (NYSCEF Doc. No. 6, 5). Petitioner contends that he has an absolute right to inspect the corporate books and records under the relevant operating agreement, Delaware statutory law, and common law.

In opposition to the petition and in support of its motion to compel arbitration and dismiss this action, PVHG argues that Mushell is attempting to circumvent the mandatory arbitration provision contained in PVHG’s operating agreement. Additionally, PVHG points out that petitioner commenced a prior litigation in 2021 which resulted in the parties submitting a stipulation to the court (Velasquez, J.) agreeing to arbitration and discontinuing the case. However, PVHG submits that petitioner chose not to follow through on the commencement procedures required by the selected arbitration panel and instead, nearly two and a half years later, brought the instant petition with new legal counsel seeking relief under the operating agreement.

In opposition to PVHG’s motion, Mushell avers that he attempted to resolve this dispute via arbitration and sent the other members of PVHG a demand for arbitration (“Demand”) on November 4, 2021. Petitioner further avers that, as part of the Demand, he specifically requested a review of the books and records for PVHG including financials and certain engineering reports related to PVHG’s property, but that his Demand went unheeded by respondent, specifically by Israel Orzel (“Orzel”). Further, that Orzel has repeatedly ignored petitioner’s request to arbitrate and resolve this matter. Petitioner avers, that on or around August 16, 2022, he emailed Rabbi Sherman of Business Halacha Institute (“BHI”), the Beit Din referenced in the operating

agreement and stipulation, seeking assistance in bringing Orzel to the table. Upon following up with BHI, petitioner avers that Rabbi Sherman responded on August 22, 2022, stating that he had “tried reaching Mr. Orzel several times but have not gotten through to him yet.” According to petitioner, Orzel has no intention of submitting the parties’ dispute to a Beit Din, as contemplated by the operating agreement. Petitioner contends that Orzel is not interested in submitting to arbitration as section 10.08 of the operating agreement merely suggests, but does not require, the parties to submit disputes to the Beit Din. In this regard, petitioner emphasizes that the operating agreement requires the parties first to use “reasonable best efforts to resolve the Dispute” and that, if unsuccessful, the parties are to “make good faith efforts to agree upon and engage a third-party arbitrator...” If that consensual selection fails, then “the parties *may* submit to final and binding arbitration” (emphasis added).

In reply, PVHG points out that the final sentence of section 10.08, which reflects that arbitration is mandatory, reads:

“The parties hereto agree that this Section 10.08 has been included to rapidly and inexpensively resolve any disputes between them with respect to the matters described above, *and that this paragraph shall be grounds for dismissal of any court action commenced by any party with respect to a dispute arising out of such matters*” (emphasis added).

Additionally, PVHG contends that the parties agreed by stipulation to arbitrate during the pendency of the first litigation. Moreover, that petitioner has made clear, when commencing the first litigation, that his dispute is not simply about examining the books and records of PVHG but entail allegations that he has been cut out of PVHG financially, among other things.


Discussion

It is well established that “[a]n agreement to arbitrate must be clear, explicit and unequivocal, and must not depend upon implication or subtlety” (*Schwartz v Schwartz*, 79 AD3d 1006, 1011 [2d Dept 2010]). Here, even if this court found that the parties’ operating agreement did not contain a mandatory arbitration provision, it is clear that the parties agreed to arbitrate their dispute before BHI pursuant to the stipulation dated February 17, 2022, which was entered into during the first litigation.

Notwithstanding the foregoing, petitioner claims that PVHG has refused to participate in arbitration and ignored his requests and overtures to resolve this dispute before BHI. PVHG fails to directly refute petitioner’s claim in this regard. PVHG cannot, on the one hand, insist that this matter be dismissed in favor of arbitration based on the parties’ agreement, and then on the other hand, refuse to cooperate and participate in an arbitration with petitioner. Although PVHG asserts that petitioner “chose not to follow through on the commencement procedures required by the selected arbitration panel,” PVHG does not explain what those procedures were or otherwise support this contention.

Based on the foregoing, the court denies that part of PVHG’s motion (MS 2) seeking dismissal of this action in favor of arbitration. However, the court hereby grants that part of PVHG’s motion compelling petitioner to arbitrate to the extent that the parties are afforded 60 days from the date of this order to commence arbitration proceedings before BHI. The petition (MS 1) is held in abeyance pending an update on the arbitration. Thus, a virtual status conference shall be held on August 10, 2023 at 9:30 AM.

E N T E R:



Honorable Reginald A. Boddie
Justice, Supreme Court