

**Matter of 56th & Park (NY) Owner, LLC v 440
Park Ave. Owner Assoc. LLC**

2023 NY Slip Op 33528(U)

October 10, 2023

Supreme Court, New York County

Docket Number: Index No. 652903/2023

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ERIKA M. EDWARDS PART 10M

Justice

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APPLICATION OF 56TH AND PARK (NY) OWNER, LLC,
56TH AND PARK (NY) OWNER PARENT, LLC, 56TH AND
PARK (NY) MANAGER, LLC, CIM FUND III, L.P., AND
56TH AND PARK (NY) HOLDINGS, LLC,

Petitioners,

- v -

440 PARK AVENUE OWNER ASSOCIATES, LLC,
DAKOTAH TRAVEL CO. LLC, MP 46 EAST 57TH STREET
LLC, 432 FF&E MEZZ LLC, 432 FF&E LLC, FR-AM ONE
LLC, FR-AM TWO LLC, and HARRY MACKLOWE,

Respondents.

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INDEX NO. 652903/2023
MOTION DATE 09/07/2023, 09/07/2023
MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for STAY ARBITRATION.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, under motion sequence 001, the court grants Petitioners' 56th and Park (NY) Owner, LLC's ("Owner LLC"), 56th and Park (NY) Owner Parent, LLC's ("Owner Parent LLC"), 56th and Park (NY) Manager, LLC's ("Manager LLC"), CIM Fund III, L.P.'s ("CIM Fund"), and 56th and Park (NY) Holdings, LLC's ("Holdings LLC") (collectively, "Petitioners") Verified Petition, filed under motion sequence 001.

The court denies Respondents 440 Park Avenue Owner Associates, LLC's ("440 Park"), Dakotah Travel Co., LLC's ("Dakotah"), MP 46 East 57th Street, LLC's ("MP 46"), 432 FF&E Mezz LLC's ("432 Mezz"), 432 FF&E LLC's ("432 LLC"), FR-AM One LLC's ("FR-AM

One”), FR-AM Two LLC’s (“FR-AM Two”), and Harry Macklowe’s (“Mr. Macklowe”) (collectively, “Respondents”) motion to dismiss, filed under motion sequence 002.

Petitioners brought this proceeding against Respondents, pursuant to CPLR 7503(b) seeking an order permanently staying in part the arbitration commenced by Respondents against Petitioners on April 7, 2023, before the American Arbitration Association (“AAA”), under AAA Case No. 01-23-0001-6371. As discussed more fully below, Petitioners seek a permanent stay in the arbitration as to Petitioners Owner LLC, Owner Parent LLC, Manager LLC and CIM Fund, who were not parties to an agreement to arbitrate executed in 2011, and as to any of Respondents’ claims related to their obligations as to Unit Loan agreements which were entered into with Petitioner Holdings LLC in 2022, in which there was no agreement to arbitrate.

Respondent Mr. Macklowe, who is a prominent real estate developer, began developing a luxury condominium building located at 432 Park Avenue, New York, New York in 2006. In 2010, Petitioner Holdings LLC joined in the project by purchasing Respondent Mr. Macklowe’s interest in 432 Park Avenue. They entered into a Contingent Purchase Price Agreement (“CPPA”) for the continued development and promotion of the project, as well as other locations.

On August 5, 2011, Petitioner Holdings LLC entered into an Amended and Restated Contingent Purchase Price Agreement (“Amended CPPA”) with Respondents Mr. Macklowe, 440 Park, Dakotah and MP 46. The Amended CPPA included CIM/56th Street (NY), LLC and 3857 Realty LLC regarding the sharing of proceeds from the project. The Amended CPPA provided that “[a]rbitration is the exclusive method for resolution of any claims or disputes arising out of, or in connection with, this Agreement and the determination of the arbitrators will be final and binding on the Parties (except to the extent there exist grounds for vacation of an

award under applicable arbitration statutes)” (Amended CPPA at § 9.7[a]). The term “Parties” is defined as the individuals or entities listed in the Preamble (*id.* at § 1.1 and Preamble). The Amended CPPA also states in substance that the agreement is “binding upon the parties hereto and their respective successors, executors, administrators, legal representatives, heirs and legal assigns” (*id.* at § 9.9). Additionally, “[n]o person other than the parties hereto and their respective successors, executors, administrators, legal representatives, heirs and permitted assigns has any rights or claims under this Agreement” (*id.*). Also, the agreement does not grant any rights, benefits or privileges to any person not a party to the agreement (*id.* at § 9.13).

Petitioners further allege in substance that on April 30, 2014, in a Letter Agreement which amended the Amended CPPA, Petitioner Holdings LLC agreed to provide Respondents Mr. Macklowe, through his affiliated entities, Respondents 440 Park, Dakotah and MP, with an interest-bearing advance of \$15 Million from their future contingent payments under the Amended CPPA, if any such payments ever became due. Respondent Mr. Macklowe guaranteed their obligations.

Petitioners allege that in May 2022, Owner LLC extended Unit Loans consisting of mortgage and mezzanine loans in an amount over \$46 Million for Mr. Macklowe and his wife to purchase three luxury apartments at 432 Park Avenue. The loans were provided to Respondents 432 Mezz, 432 LLC, FR-AM One and FR-AM Two (“collectively, Unit Loan Borrowers”), which were allegedly owned and/or managed by Mr. Macklowe or his wife. Petitioners argue that the Unit Loan agreements do not contain an arbitration clause and expressly provide for disputes to be brought in New York courts. Petitioners argue that the Unit Loan agreements do not reference any other contract, nor make any of the Unit Loan Borrower’s loan obligations contingent on payments under any other contracts.

Petitioners further allege in substance that on October 1, 2022, the Unit Loan Borrowers failed to make monthly payments due under the Unit Loan agreements. On February 2, 2023, Owner LLC sent a Reservation of Rights notice to the Unit Loan Borrowers notifying them that they had failed to make timely monthly interest payments from October 1, 2022 through January 1, 2023. Additionally, the Unit Loan Borrowers failed to pay the outstanding principal or interest which were due on the maturity date of March 31, 2023, as required by the Unit Loan agreements, citing that the CPPA dispute was inextricably linked with any obligations or loans related to the property.

Petitioners further allege that On April 3, 2023, Owner LLC provided Mr. Macklowe and the Unit Loan Borrowers with written notification of their Unit Loan obligations. However, instead of paying their debt, Petitioners allege that on April 7, 2023, just four days later, the Respondents initiated the underlying arbitration proceedings.

Respondents' Demand for Arbitration indicated that Petitioner Holdings LLC was "f/k/a CIM/56th Street (NY), LLC" and it included all of the Petitioners and Respondents. Respondents claimed that the dispute involved Petitioners' breach of an agreement to distribute revenues related to the development of 432 Park Avenue. The Respondents sought an award of unpaid distributions and a declaration that Petitioners "cannot enforce certain related obligations (Respondents) incurred due to this breach (i.e., repaying loans and advances)" and additional relief.

Respondents oppose Petitioner's Verified Petition and move to dismiss it. Respondents argue in substance that the Amended CPPA and the Unit Loans are intertwined as the parties intended for the repayment of the Unit Loans to be contingent on Petitioners' performance under the Amended CPPA, which involved payments owed to Mr. Macklowe. Respondents further

argue in substance that Petitioner CIM and its affiliated entities defrauded Mr. Macklowe out of the profit participation that he was promised in the Amended CPPA that he had earned over the years by developing and promoting 432 Park Avenue in breach of their agreement. Therefore, the claims are related, the parties intended to have these claims arbitrated, and the AAA arbitration has jurisdiction of the Unit Loan claims.

Respondents further argue that the Verified Petition is procedurally defective as a matter of law. Respondents argue in substance that the AAA has sole authority to determine its own jurisdiction. The arbitration agreement delegates all arbitrability questions to the AAA and the court lacks the authority to resolve these threshold questions. Respondents further argue that the Petition is untimely and that Petitioners are precluded from moving for a stay in the arbitration, since they participated in the arbitration, and at least one of the issues is within the arbitrator's jurisdiction.

Additionally, Respondents argue in substance that even if the court had the authority to determine arbitrability, then AAA has jurisdiction over Petitioners based on the doctrines of equitable estoppel and alter ego. Respondents further argue in substance that CIM was named in the agreement and benefited from the agreement. Therefore, the court should dismiss Petitioner's Verified Petition.

Here, the court grants a permanent stay in the arbitration of Respondents' Unit Loan claims, including any Unit Loan Claims included in Respondents' request for a declaration that Holdings LLC cannot enforce certain related obligations, like repayment of loans and advances caused by the alleged breach. Additionally, the court grants a permanent stay in arbitration as to the Petitioner nonsignatories to the Amended CPPA, which include Petitioners Owner LLC, Owner Parent LLC, Manager LLC and CIM Fund.

The court is persuaded by the controlling cases relied upon by Petitioners and finds that the court has the authority to determine the threshold arbitrability issues raised in this matter. The court determines that AAA has no jurisdiction over the Petitioner nonsignatories, nor Respondents' Unit Loan claims.

The court agrees with Petitioners and finds that Respondents failed to demonstrate that the Unit Loan agreements contain a provision requiring arbitration for any claims arising in or related to the Unit Loan agreements; that the Amended CPPA and the Unit Loan agreements are completely separate and distinct agreements; and that they involve separate and distinct companies. Additionally, although CIM is included in the Amended CPPA, it is not a signatory to the agreement. The Petitioner nonsignatories to the Amended CPPA were not parties to the arbitration agreement and had no intent to arbitrate any disputes or claims arising out of the Unit Loan agreements, which contained no such provision.

Additionally, the court finds that there is nothing in the Unit Loan agreements which state that the repayment of the Unit Loans is contingent upon the money that Respondents claim are owed to Mr. Macklowe under the Amended CPPA. Furthermore, there is nothing in the Unit Loan agreements which states that any of the repayment obligations are related to performance or nonperformance of any party under the Amended CPPA. The Amended CPPA was entered into more than ten years prior to the Unit Loan agreements, it does not refer to the repayment of any future loans or advances, and the agreements involve separate and distinct parties.

The court is not persuaded by Respondents' arguments regarding alter ego, estoppel or any other arguments to the contrary.

The only signatories to the Amended CPPA are Petitioner Holdings LLC, as a successor entity, and Respondents Mr. Macklowe, 440 Park, Dakotah and MP 46. Therefore, these entities

are bound by the arbitration provision in the Amended CPPA. However, the court finds that the Petitioner nonsignatories are not bound by the arbitration provision. They did not participate in the arbitration, nor otherwise consent to the arbitration. Additionally, Petitioner Holdings LLC did not participate in the arbitration as to the Unit Loan claims, nor has it otherwise consented to arbitrate these claims. These Petitioner nonsignatories were not parties to the Amended CPPA, other than CIM, they were not mentioned in the Amended CPPA, and they did not even exist at the time the Amended CPPA was executed. Therefore, there was no intent for these companies to be bound by the arbitration provision.

Additionally, as Petitioners argue, the Unit Loan Borrowers, which include Respondents 432 Mezz, 432 LLC, FR-AM One and FR-AM Two did not exist at the time when the Amended CPPA was executed. Petitioners' argue that two of these companies are owned and/or managed by Mr. Macklowe's wife and that the Amended CPPA did not mention her, nor was the couple even married at the time that the Amended CPPA was executed.

The court finds that the individuals and entities involved in this proceeding are sophisticated, savvy, and they possess a sophisticated knowledge of large-scale real estate development, which includes complex finance negotiations. At the time that the agreements were executed, the parties to the agreements appear to have been represented by experienced, excellent attorneys, who were more than capable of determining which entities would become parties to the agreements and which provisions would be binding on the parties. Therefore, any omissions were intentional. Thus, the court defers to the express, unambiguous language of the agreements which indicate the parties' intent at the time they executed the Amended CPPA and Unit Loan agreements.

Therefore, the court grants Petitioners' Verified Petition and denies Respondents' motion to dismiss the Verified Petition.

The court has considered any additional arguments raised by the parties which were not specifically discussed herein and the court denies any additional request for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court grants Petitioner's Verified Petition filed under motion sequence 001; and it is further

ORDERED that the court denies Respondents' motion to dismiss filed under motion sequence 002; and it is further

ORDERED and ADJUDED that the court permanently stays in part the arbitration commenced by Respondents against Petitioners on April 7, 2023, before the American Arbitration Association, under AAA Case No. 01-23-0001-6371, to the extent that the court permanently stays arbitration against Petitioners 56th and Park (NY) Owner, LLC, 56th and Park (NY) Owner Parent, LLC, 56th and Park (NY) Manager, LLC and CIM Fund III, L.P. and Respondents' claims related to their Unit Loan agreements entered into with Petitioner 56th and Park (NY) Holdings, LLC, as set forth herein.

This constitutes the decision and order of the court.

Erika M. Edwards
20231010093041 EEDWARDS/PAS1/F7224E6401962D886A9127694F8

<u>10/10/2023</u> DATE					<u>ERIKA M. EDWARDS, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/>	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/>	REFERENCE