

Rausman v Hurwitz

2023 NY Slip Op 34088(U)

November 14, 2023

Supreme Court, New York County

Docket Number: Index No. 653675/2023

Judge: Nicholas W. Moyne

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

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MOTION SEQ. NO.	001									
DECISION + ORDER ON MOTION										
NORMAN RAUSMAN										
Plaintiff,										
- v -										
BASSIE HURWITZ,										
Defendant.										
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HON. NICHOLAS W. MOYNE:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41
were read on this motion to/for STAY

Upon the foregoing documents, it is

Preliminary Statement

On July 31, 2023, Petitioner Norman Rausman (Rausman) commenced this special proceeding, pursuant to CPLR § 7502(c), seeking a declaratory judgment compelling Respondent, Bassie Hurwitz (Hurwitz) to arbitration, and a preliminary injunction and temporary restraining order under CPLR § 6301 preventing Respondent from calling a special meeting of the shareholders of the Northern Manhattan Nursing Home, Inc. (NMNH).

On August 1, 2023, the Court held virtual oral arguments setting a September 8, 2023 return date for the oral arguments on the proposed order to show cause and preliminary injunction and enjoined the respondents from calling the proposed August 1, 2023 meeting of the NMNH shareholders. The September 8, 2023 oral arguments were adjourned to September 27, 2023, when in person oral arguments were held before the Court.

Statement of Facts

In 1993, Martin Rausman (Martin) and Abraham Klein (Abraham) formed NMNH to build and operate the nursing home, as well as formed Manhattan Nursing Home Realty, Inc., a holding corporation for the underlying real estate. Martin and Abraham agreed that each of their respective families would own fifty percent of both corporations and memorialized these terms in a Memorandum Agreement signed by both Martin and Abraham. Martin and Abraham have since passed away. Petitioner is Martin Rausman's son and respondent is Abraham Klein's sister. The Memorandum, in a footnote, stated that Abraham would immediately be transferring twenty five percent of his shares to the respondent.

Rausman asserts that upon Martin's retirement and per the Memorandum that he was duly appointed and designated to serve as President of NMNH. Hurwitz does not contest that Martin and Abraham executed the Memorandum and claims that subsequent to the forming of the corporation, her brother Abraham transferred twenty five percent of his shares in NMNH and Manhattan Nursing Home Realty, Inc. to her. However, Hurwitz claims that prior to the onset of this dispute, she did not have any knowledge of the Memorandum and was not even aware of its existence despite knowing that she was a shareholder in NMNH as a result of a transfer from her brother, the exact transfer outlined in the Memorandum. Rausman does not dispute that respondent owns twenty five percent of NMNH.

Declaratory Judgment

Various disputes have arisen between Rausman and Hurwitz concerning the former's management and/or operation of the nursing home. The petitioner believes that respondent is obligated to arbitrate these disputes pursuant to the Memorandum even though she was not a signatory because she obtained her shares through the Memorandum. Respondent again asserts

that she had no prior knowledge of the Memorandum and asserts that she is not bound by its mandatory arbitration clause.

The First Department is clear that “[t]he issue of whether a party is bound by an arbitration agreement it did not execute is a threshold issue for the court, not the arbitrator to decide.” (*215-219 W. 28th St. Mazal Owner LLC v Citiscape Builders Grp. Inc.*, 177 AD3d 482, 483 [1st Dep’t 2019]; see also *KPMG LLP v. Marc S. Kirschner, in His Capacity of the Millennium Corp.*, 182 AD3d 484, 484-85 [1st Dep’t 2020]).

Petitioner asserts that any disputes are subject to arbitration pursuant to the Memorandum. Pet. ¶ 28. The Memorandum states:

“Any dispute between the parties hereto shall be determined by Benjamin Fischoff¹, and if he is not available, then by arbitrators, with each party selecting one arbitrator and the two arbitrators selecting a third arbitrator, in accordance with the rules of the American Arbitration Association then in effect.”

Memorandum ¶ 28.

Petitioner asserts that the Memorandum is a valid and enforceable contract binding on both petitioner and respondent. Petitioner further asserts that whether an issue should be arbitrated should be resolved by arbitrators. Pet. ¶ 32 (citing *Skyline Steel, LLC v PilePro LLC*, 139 AD3d 646, 646 [1st Dept 2016]). In *Skyline*, there was a binding arbitration clause and JAMS rule incorporated within the clause that conferred the authority on the arbitrators to resolve the issue of arbitrability. The subject Memorandum contains no such clause and therefore New York law governs and the determination as to whether the respondent is bound by the arbitration agreement is for the court to determine. Unlike in *Skyline*, here neither petitioner, nor respondent were signatories of the Memorandum, which was signed by Martin Rausman and

¹ Benjamin Fischoff is deceased. Rausman Aff. ¶ 6.
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Abraham Klein. Furthermore, as set forth above, respondent asserts that she “never agreed to arbitrate anything . . . [and] never signed any agreement to arbitrate.” Rausman Aff. ¶ 2.

The party seeking to demonstrate the binding nature of an agreement on a non-signatory bears the burden of proving so under an “equitable estoppel/direct benefit grounds” (*See KPMG LLP*, 182 AD3d at 485). Notably, the memorandum states that “Klein has indicated that one-half of his shares will be transferred to Bassie Hurwitz.” Memorandum at 2, fn. 1. Petitioner asserts that respondent is a “successor-in-interest” of Klein with respect to NMNH. Pet. ¶ 18.

Respondent asserts that she is an “assignee” rather than a “successor-in-interest.” Hurwitz Aff. ¶ 7. Petitioner asserts that Respondent received her shares “from her brother Abraham as part of what appears to have been the settlement of their recently deceased father’s estate.” NYSCEF No. 35, Petitioner Memorandum of Law in Opposition to Cross-motion and in further Support of Motion at 15. fn. 5.

It should also be noted that it is unclear at this juncture exactly what is the nature of the dispute the petitioner wishes to arbitrate with respondent Hurwitz. As set forth below, the petitioner is not entitled to an injunction preventing respondent from seeking to remove him as president and therefore there is no valid argument that the arbitrators would have jurisdiction or exclusive jurisdiction over any lawful attempt to remove the petitioner. There may be other disputes that fall within the arbitration clause if the respondent is bound by the Memorandum, but the present record has not indicated what those disputes are. While the scope of arbitration is generally left to the arbitrators to determine in the first instance, the petitioner may need to clarify its intentions if the respondent is found to be otherwise bound by the arbitration clause in the Memorandum. At this juncture, petitioner’s demand for arbitration may well be moot as a result of this court’s denial of the motion for a preliminary injunction.

These are disputed factual issues which cannot be resolved on the papers. Accordingly, the Court denies Petitioner's request to compel Respondent to binding arbitration, pending an evidentiary hearing for further factual development on whether (1) Respondent, who is not a signatory to the memorandum, is bound by the arbitration clause located therein, and (2) whether Respondent is bound under a theory of equitable estoppel/direct benefits (*see 215-219 W. 28th*, 177 AD3d at 483).

Preliminary Injunction

Pursuant to CPLR § 7502(c), “[t]he supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state . . . only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.” (CPLR § 7502[c]; *see County Natwest Sec. Corp. v Jesup, Josephthal & Co.*, 180 AD2d 468, 469 [1st Dep’t 1992]).

Petitioner seeks a permanent injunction enjoining Respondent from “calling or purporting to hold any meeting of the NMNH’s shareholders” or “taking any actions interfering with [Petitioner’s] operation of NMNH in the ordinary course of business.” Pet. ¶ 26.

Respondent seeks for the NMNH to hold a meeting to elect directors, which has not occurred for “many years” and which the NMNH “badly needs.” Hurwitz Aff. ¶ 9.

On August 1, 2023, the Court enjoined the calling and holding of the August 1, 2023 meeting of the NMNH shareholders, “pending the hearing of this motion.” NYSCEF No. 21, Order to Show Cause at 2. The August 1, 2023 date for the proposed meeting has past and this portion of the Petition is moot.

A preliminary injunction may only be granted when the proponent of such relief clearly demonstrates (1) a likelihood of success on the merits; (2) irreparable injury if the relief is not granted; and (3) a balancing of equities in their favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005] [*citing Doe v Axelrod*, 73 NY2d 748, 750 [1988]]). Although conclusive proof is not required, an injunction is an extraordinary preliminary remedy and therefore the threshold inquiry is “whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action” (*see 1234 Broadway LLC v W. Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011]; *Chester Civic Imp. Ass'n, Inc. v New York Tr. Auth.*, 122 AD2d 715, 717 [1st Dept 1986]). “An injunction should be granted only with great caution. It is inappropriate unless a clear right to such relief is shown” (*Chrysler Corp. v Fedders Corp.*, 63 AD2d 567, 568-569 [1st Dep’t 1978][*citing Xerox Corp. v Neises*, 31 A.D.2d 195, 197 [1st Dep’t 1968]]).

Likelihood of Success on the Merits

Petitioner is unlikely to succeed in enjoining Respondent from calling a special meeting or annual meeting of the NMNH. The NMNH Bylaws state: “Special meetings of the shareholders, for any purpose or purposes . . . shall be called by the President at the written request of shareholders holding at least twenty-five percent (25%) of the voting shares of the Corporation.” NYSCEF No. 13, NMNH Bylaws at 2. Petitioner asserts that he is President of the NMNH, Rausman Aff. ¶ 3, and has received Respondent’s written request for a special meeting, *id.* ¶ 14. Petitioner does not dispute that respondent is a 25% shareholder of the NMNH. Rausman Aff. ¶ 9. Petitioner does not contest the applicability of the NMNH Bylaws. *See generally id.* Respondent is seeking to apply the NMNH Bylaws. Hurwitz Aff. ¶ 10.

New York Business Corporation Law (BCL) Section 603, provides the process for calling a meeting to elect a board of directors and provides shareholders of ten percent of voting shares the option to “in writing, demand the call of a special meeting for the election of directors” *See* BCL § 603. BCL § 603(a) in relevant part provides:

“If such special meeting is not called by the board within two weeks after the expiration of such period or if it is so called but there is a failure to elect such directors for a period of two months after the expiration of such period, holders of ten percent of the votes of the shares entitled to vote in an election of directors may, in writing, demand the call of a special meeting for the election of directors specifying the date and month thereof, which shall not be less than sixty nor more than ninety days from the date of such written demand. The secretary of the corporation upon receiving the written demand shall promptly give notice of such meeting, or if he fails to do so within five business days thereafter, any shareholder signing such demand may give such notice. . . .”

BCL § 603(a).

On August 2, 2023, respondent sent a “Demand for Special Meeting for Election of Directors pursuant to New York Business Corporation Law Section 603.” Hurwitz Aff. ¶ 13. On August 14, 2023, petitioner’s counsel responded with a letter urging arbitration and stating the special meeting notices were “facially defective.” NYSCEF No. 31, Petitioner’s Counsel Letter at 2.

On August 15, 2023, Respondent issued a “Notice of Special Meeting” to the NMNH shareholders calling for a meeting on October 10, 2023. Hurwitz Aff. ¶ 15. The NMNH Corporation Secretary Michael Rausman, petitioner’s son, signed and delivered to the shareholders a similar notice.” *Id.* ¶ 16. To date, the record is silent as to whether the noticed October 10, 2023 meeting was held. Nevertheless, respondent’s right to call the meeting is supported by the NMNH Bylaws, the New York Business Corporation Law, and the actions of the NMNH Corporate Secretary Michael Rausman.

Further, the NMNH Bylaws require that “[t]he annual meeting of shareholders shall be held on such date in each calendar year as fixed by the Board of Directors for by any officer so designated by the Board) [sic] and the shareholders shall then elect a Board of Directors and transact sch other business as may properly be brought before the meeting.” NYSCEF No. 13, NMNH Bylaws at 1. Respondent states: “All I want is for the Corporation to hold a meeting and elect directors – something that is long overdue.” Hurwitz Aff. ¶ 8. BCL § 602(b) states: “A meeting of shareholders shall be held annually for the election of directors and the transaction of other business on a date fixed by or under the by-laws.” BCL § 602(b).

As, the NMNH’s own Bylaws and the BCL require that the NMNH hold an annual meeting, it is unclear how petitioner can succeed in characterizing the mandated holding of an annual meeting and election of a board of directors as “actions interfering with [Petitioner’s] operation of NMNH in the ordinary course of business.” Pet. ¶ 26. To the contrary, as President of the NMNH, petitioner’s failure to hold the annual meeting and elect a board of directors over many years appear to violate both the NMNH Bylaws and the BCL.

Accordingly, Petitioner is unlikely to succeed in asserting that calling a special meeting to elect of board of directors or an annual meeting pursuant to the NMNH Bylaws and or the BCL, can constitute an interference in the ordinary course of NMNH’s business.

Irreparable Injury

Petitioner points to respondent’s July 18, 2023 letter stating that petitioner’s failure to purchase respondent’s shares “at a set price and with a series of conditions by July 28th, then [Petitioner] would be ‘deemed to have resigned’ and/or removed from [his] position.” Rausman Aff. ¶ 13. Petitioner views the letter as an apparent threat against his control of NMNH and fears that respondent plans on unlawfully removing him from the board if he does not agree to buy her

shares at her desired price. Assuming the letter did not constitute such a threat, there is no evidence or analysis offered as to how the respondent could effectuate her planned takeover. Any efforts to remove petitioner from the position of President are subject to the NMNH Bylaws, which provide the Board of Directors, not shareholders the authority to appoint a person to the position of President. NYSCEF No. 13 at 7. As discussed above, there is currently no Board of Directors to effectuate petitioner's removal from the position of President. It is unclear how any actions by respondent as currently alleged raise to the level of threatened irreparable harm.

The Court declines to consider potential hypotheticals regarding the removal of Petitioner as President, as the relief sought here is the enjoining of respondent from calling any special or annual meetings. Accordingly, respondent's letter alone is insufficient to demonstrate a form of irreparable injury to Petitioner.

Balancing of Equities in its Favor

The balancing of equities usually requires the court to look to the relative prejudice to each party accruing from the granting or denying of the requested relief (*Ma v Lien*, 198 AD2d 186, 187 [1st Dept 1993]). A balance of equities analysis typically favors maintaining the status quo pending the ultimate determinations of issues at controversy (*Gramercy Co. v. Benenson*, 223 A.D.2d 497, 498 [1st Dep't 1996]). Here, the relative harm to the petitioner by allowing respondent to call for a special meeting and/or annual meeting to elect a board of directors for the NMNH is minimal given that this is mandated by the NMNH Bylaws and BCL. The Court declines to issue an injunction preventing respondent from effectuating the election of a board of directors for the NMNH. The status quo of having no board of directors over multiple years is untenable and the Court urges that a board is elected subject to the proper procedures, to the benefit of both petitioner and respondent.

CONCLUSION

For the reasons set forth hereinabove, it is hereby:


ORDERED that an evidentiary hearing be held determining whether (1) Respondent, who is not a signatory to the memorandum, is bound by the arbitration clause located therein, and (2) whether respondent is bound under a theory of equitable estoppel/direct benefits.

ORDERED that the petitioner’s first cause of action seeking a permanent injunction barring respondent from calling a special meeting and/or an annual meeting to elect a board of directors to the NMNH is Denied.

ORDERED that the petitioner’s second cause of action seeking declaratory judgment is stayed pending the evidentiary hearing and respondent’s cross-motion to stay arbitration is granted pending the evidentiary hearing before the Court. The parties shall contact the court with proposed dates for the evidentiary hearing.

This constitutes the decision and order of the court.

11/14/2023
DATE



NICHOLAS W. MOYNE, J.S.C.

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	<input type="checkbox"/>	GRANTED			<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER				SUBMIT ORDER	
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