

**FPG Cobble Hill Acquisitions, LLC v Palm Cove Mgt.
LLC**

2023 NY Slip Op 34482(U)

December 20, 2023

Supreme Court, New York County

Docket Number: Index No. 653501/2023

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

Justice

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FPG COBBLE HILL ACQUISITIONS, LLC, FPG CH
AMITY/HENRY HOLDINGS, LLC, FPG CH HOLDING, LLC,

Petitioner,

INDEX NO. 653501/2023

MOTION DATE 12/13/2023

MOTION SEQ. NO. 002

- v -

PALM COVE MANAGEMENT LLC, MENASHE FRANKEL,
MF RIVER PARK, LLC, MF COBBLE HILL MANAGER
LLC, COBBLE HILL ACQUISITIONS, LLC, LAKESTAR
PROPERTIES, LLC

**DECISION + ORDER ON
MOTION**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 1 - 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for COMPEL ARBITRATION.

The petition to compel arbitration is denied.

Background

Petitioners seek to compel arbitration of claims alleged by respondent Palm Cove Management LLC (“Palm Cove”) in an action filed in the Superior Court of New Jersey on June 19, 2023. In the New Jersey case, Palm Cove asserted *inter alia* a breach of fiduciary duty claim against respondent Menashe Frankel relating to his conduct as a manager of Palm Cove as well as claims for breach of a promissory note against petitioners. Petitioners insist that only petitioner FPG Cobble Hill Acquisitions LLC has made a full document production in the New Jersey action.

The New Jersey dispute arises out of a real estate funding scheme. Respondent Frankel allegedly created Palm Cove as a vehicle for an investor (Nicole Chow) to make investments and

loans in a real estate development project in Brooklyn. Palm Cove insists that Frankel arranged for Palm Cove to loan \$500,000 in the project and a corresponding promissory note was executed. Palm Cove argues that the promissory note required that there be interest payments made each quarter and that these payments were not made. It further alleges that Mr. Frankel arranged for Palm Cove to invest \$3 million in another project.

Palm Cove argues that it filed the New Jersey suit because Mr. Frankel (after he was terminated as manager of Palm Cove) agreed to a revised payment schedule for the balance of the various monies owed to Palm Cove without any authority to enter into such an agreement.

In June 2023, Palm Cove successfully moved to amend its complaint and this second amended complaint forms the basis of the instant proceeding. They observe that the new claims in the second amended complaint seek to enforce Palm Cove's rights as a purported third-party beneficiary of a Limited Liability Company Interest Purchase and Sale Agreement ("PSA") from March 2020 between petitioner FPG CH Amity/Henry Member LLC ("Amity") and respondent Cobble Hill Acquisitions, LLC ("Cobble Hill") concerning Amity's acquisition of Cobble Hill's interest in Amity.

Petitioners observe that the PSA contains a mandatory arbitration clause that requires disputes to be handled at JAMS. They point out that this forum is appropriate because, under the terms of the contract, the arbitration provision is to be enforced in New York Supreme Court if there is no diversity jurisdiction. Petitioners explain that Palm Cove's sole member is a Singapore corporation and so it cannot bring the case in federal court in New York as such an action would lack diversity jurisdiction.

Petitioners argue that arbitration is appropriate because the new claims asserted in the New Jersey action make direct reference to the PSA and that Palm Cove (although a non-

signatory to the PSA) is relying on the PSA in support of its new claims. Petitioners also seek an injunction as to the proceedings in New Jersey relating to these new claims.

In opposition Palm Cove observes that this application should have been brought in New Jersey and, in any event, it voluntarily dismissed Count V which it claims is the only possible basis to compel arbitration. Palm Cove claims that the remaining new claims (Counts VI and VII) are not subject to arbitration as they do not seek recovery flowing from the PSA. Instead, they allege tortious interference with different contracts and civil conspiracy as a result of petitioners entering the PSA and another contract. Palm Cove argues that although these claims acknowledge the existence of the PSA, they do not rely upon a third-party beneficiary theory of recovery. It stresses that the PSA itself contains a clause stating that it does not confer any benefits on third parties.

In reply, petitioners argue that the mandatory arbitration provision in the PSA requires that enforcement actions be brought in New York. They insist that the strategic dismissal of Count V does not compel the Court to dismiss this petition because Counts VI and VII all derive from common factual allegations about the PSA.

Proper Forum

The first issue for the Court to explore is whether this application should have been brought in New Jersey. CPLR 7503(a) provides, in part, that “If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, *the application shall be made by motion in that action*. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration” (emphasis added).

The lengthy arbitration clause in the PSA provides that:

“5.15 Arbitration of Disputes.

(a) Any and all existing or future claims, demands or disputes among, out of or relating to this Agreement shall be resolved and determined exclusively under the provisions of this Section 5.15, which shall be the sole and exclusive procedure for the resolution of any such disputes.

(b) The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by good faith negotiation between parties who have authority to settle the controversy. Any party may give the other party written notice of any dispute not resolved in the normal course of business. Within fifteen (15) days after delivery of the disputing party's notice, the parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one party to the other will be honored. All negotiations pursuant to this Section 5.15(b) are confidential.

(c) If the parties are unable to reach a satisfactory solution to any dispute within thirty (30) days after the delivery of the notice described in Section 5.15(b) hereof, then such dispute between the parties arising under, out of, or in connection with this Agreement, or the breach, termination or validity hereof, will be submitted to final and binding arbitration in New York, New York, administered by JAMS in accordance with JAMS Streamlined Arbitration Rules and Procedures in effect at that time or, if JAMS is no longer in existence, then administered by National Arbitration and Mediation ("NAM"), in accordance with NAM's Comprehensive Dispute Resolution Rules and Procedures; and if NAM is no longer in existence, then administered by the American Arbitration Association under the Expedited Procedures of its Commercial Arbitration Rules in effect at that time; and if none of the preceding remains in existence, by the expedited arbitration procedures of any succeeding or substantially similar dispute resolution organization). A single arbitrator will be selected pursuant to such rules and procedures (the "JAMS Arbitrator"). The parties agree that:

(i) the speedy resolution of any disputes or claims between them pursuant to this arbitration clause is a mutual and material inducement to enter into this Agreement;

(ii) the unsuccessful parties in such arbitration will pay the successful parties all costs and expenses reasonably incurred by the successful parties, including reasonable attorneys fees and disbursements, and will pay any fees and disbursements due to JAMS and the JAMS Arbitrator and, to the extent the "successful" parties cannot be clearly identified, each party will bear its own costs and expenses and the parties will pay their equal share of any fees and disbursements due to JAMS and the JAMS Arbitrator; and

(iii) arbitration pursuant to this arbitration clause is intended to be the sole and exclusive dispute resolution mechanism of the parties concerning this Agreement, and in no event

will a party have the right to bring any action at law or in equity or otherwise seeking damages or any other relief with respect to any such dispute or claim; and

(iv) this arbitration clause and all awards hereunder are to be enforced in the United States District Court for the Southern District of New York or, if (but only if) such Court does not have jurisdiction, then in New York Supreme Court, New York County. The JAMS Arbitrator will be bound by the provisions of this Agreement and will not have the power to add to, subtract from or otherwise modify such provisions, and will have the authority to, and may, order specific performance to remedy any breach of the terms of this Agreement. The JAMS Arbitrator will consider only the specific issues submitted to him/her for resolution, and will be directed to make a determination as to the "successful party or a specific determination that there is no prevailing party. Each party covenants not to institute any action or litigation in any court, or commence any other proceeding, with respect to any matter under this Agreement" (NYSCEF Doc. No. 5, ¶ 5.15).

The central issue, therefore, is if the language in section (iv) concerning enforcement of the arbitration clause requires the dispute to be heard in New York in spite of the provisions of CPLR 7503. The Court finds that it was proper for petitioners to bring this proceeding in New York. "The starting point of our analysis is the long-settled principle that a party seeking to enforce a valid agreement to arbitrate in New York under CPLR 7503(a) is entitled, as a matter of course, to injunctive relief against further prosecution of proceedings in tribunals of other jurisdictions concerning matters within the scope of the arbitration agreement" (*Curtis, Mallet-Prevost, Colt & Mosle, LLP v Garza-Morales*, 308 AD2d 261, 263, 762 NYS2d 607 [1st Dept 2003]).

Clearly, the arbitration clause here provides that it shall be enforced in New York. That is precisely what petitioners seek to do here: enforce the provision via the forum selected in the agreement. "[I]f the relevant contract calls for arbitration in New York, the aggrieved party may seek an injunction from the New York court enjoining the other party from proceeding with the out-of-state action" (Vincent C. Alexander, *Prac Commentaries, McKinney's Cons Laws of NY, CPLR C7503:1*).

The Allegations in the Second Amended Complaint

Palm Cove observes that it withdrew the fifth cause of action, which it acknowledged directly implicated the PSA. The question for this Court is whether causes of action VI and VII require arbitration.

Count VI certainly mentions the PSA (*see* NYSCEF Doc. No. 14, ¶ 56), but the central theory of recovery here is tortious interference with Palm Cove's contracts. "As a result of FPG Cobble Hill, FPG CH Amity/Henry, and Lakestar's intentional interference, Frankel, MF River Park, LLC, and MF Cobble Hill Manager, LLC have breached their agreements with Plaintiff depriving Plaintiff of the monies owed to it" (*id.* ¶ 60). Of course, Palm Cove is not a party to the PSA and so the Court finds that this allegation does not implicate the arbitration clause. Palm Cove is seeking recovery based on interference with its contracts, not as a third-party beneficiary under the PSA.

Count VII concerns a conspiracy claim. Palm Cove alleges that "defendants, FPG CH Holding, FPG Cobble Hill, FPG CH Amity /Henry, Cobble Hill Acquisitions, and Lakestar (collectively "Conspiracy Defendants") conspired and acted in concert to commit unlawful acts. Each of the Conspiracy Defendants shared the same conspiratorial objective, which was to prevent Plaintiff from receiving the payments owed to it, with the intent of harming plaintiff and profiting from that harm. Each of the Conspiracy Defendants understood the objectives of the scheme, accepted them, and was an active and knowing participant in the scheme" (*id.* ¶ 52). While these allegations reference the PSA, the overall request for relief does not rely upon the PSA nor does Palm Cove seek recovery under it. Critically, this cause of action relates to efforts to prevent Palm Cove from receiving payments owed to it—Palm Cove is not a party to the PSA and so it was not entitled to payments under the PSA at least with respect to this claim.

And, as Palm Cove points out, the PSA itself provides that “No Obligation to Third Parties. The execution and delivery of this Agreement shall not be deemed to confer any rights upon, nor obligate either of the parties hereto, to any person or entity other than each other” (NYSCEF Doc. No. 5, ¶ 5.9). This provision emphasizes Palm Cove’s argument that it is not seeking relief under the PSA itself.

Summary


There is no doubt that the PSA is relevant in the New Jersey action. But in this Court’s view, that agreement is not directly implicated by counts VI or VII. The scope of Palm Cove’s causes of action encompasses more than just the two parties that entered into the PSA and so the Court sees little reason to compel arbitration of some portion of the New Jersey action, especially where Palm Cove is not seeking recovery under a third-party beneficiary theory.

The key distinction is that Palm Cove’s remaining “new” causes of action rely on the existence of the PSA (and other agreements) as evidence that other entities attempted to avoid paying Palm Cove what it is owed. The mere existence of the PSA does not constitute a dispute arising out of, or relating to, the PSA itself. In other words, Palm Cove does not allege that it is entitled to recover because of a breach of the PSA; rather it says that the execution of this agreement constitutes actions that show others took extraordinary steps to ensure Palm Cove did not get paid.

Accordingly, it is hereby

ADJUDGED that the petition is denied, this proceeding is dismissed and respondents are entitled to recover costs and disbursements upon presentation of proper papers to the County Clerk; and it is further

ORDERED that all injunctive relief issued in this proceeding (*see* NYSCEF Doc. No. 35) is hereby vacated.

<u>12/20/2023</u> DATE					 ARLENE P. BLUTH, J.S.C.		
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART	<input 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"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE