Village of Ossining v Village of Ossining Policemans Benevolent Assn., Inc.
2023 NY Slip Op 34694(U)
May 26, 2023
Sup Ct, Westchester County
Docket Number: Index No. 69659/2022
Judge: Gretchen Walsh

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

Present: HON. GRETCHEN WALSH, J.S.C.
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Application of

VILLAGE OF OSSINING and THE BOARD OF TRUSTEES OF THE VILLAGE OF OSSINING,

Petitioners,

For an Order Pursuant to Article 75 of the CPLR Staying Arbitration of a certain controversy

-against-

VILLAGE OF OSSINING POLICEMANS BENEVOLENT ASSOCIATION, INC. and ANDREW PAVONE,

Respondents,

AMERICAN ARBITRATION ASSOCIATION,

Interested Party.

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Index No.: 69659/2022
Mot. Seq. Nos. 1 and 2
Mot. Date: 2/24/2023

DECISION & ORDER

WALSH, J.

The following e-filed documents, listed in NYSCEF by document numbers 1-9, 12-34, 37-41 were read on this: (1) petition ("Petition") by Petitioner Village of Ossining ("Village") and Petitioner The Board of Trustees of the Village of Ossining ("Board") (together "Petitioners") for an order permanently staying and enjoining an arbitration demand from Respondent Village of Ossining Policemans Benevolent Association ("PBA") and Respondent Andrew Pavone ("Pavone") (together "Respondents") pursuant to CPLR 7503(b); and (2) cross-motion by Nonparty American Arbitration Association ("AAA") for an order dismissing the Petition pursuant to CPLR 403, 404, 3211(a)(1) and 3211(a)(7). Respondents oppose the Petition and Petitioners oppose the AAA's cross-motion.

Upon the foregoing papers and for the reasons set forth herein, Petitioners' Petition shall be denied and the AAA's motion shall be denied as moot.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioners commenced this proceeding on December 23, 2022 by filing their Petition (NYSCEF Doc No. 1).

According to the Petition, Respondents purportedly "demand arbitration of a grievance under the terms of a certain Collective Bargaining Agreement ["CBA"] between the Village and PBA covering the period of January 1, 2014 through December 31, 2019 . . . which remains in effect through the present" (NYSCEF Doc No. 1 at ¶ 2). The Petition states that the PBA "filed a grievance on or about August 10, 2022, on behalf of Mr. Pavone . . . alleging that the Village violated Article XI (Transfer Credits), Article XIII (Welfare Benefits), Article XIV (Retirement Benefits), Article XXXlV (Disputes), and such other related provisions and practices of the [CBA] when the Village's Personnel Director, Marisa Rokuson . . . notified Mr. Pavone that the Village would not provide him with retiree health insurance" (NYSCEF Doc No. 1 at ¶ 3). The Petition states that the grievance "was denied by the Village and, ultimately, Respondents filed a Demand for Arbitration with AAA, dated September 9, 2022" (NYSCEF Doc No. 1 at ¶ 4). According to the Petition, "the parties did not agree to arbitrate any claims under the [CBA] as they relate to Mr. Pavone . . . Indeed, on March 18, 2021, Petitioners and Respondents duly entered into a settlement agreement in connection with certain disciplinary charges preferred against Mr. Pavone by the Chief of Police of the Ossining Police Department, Kevin Sylvester . . . ." (NYSCEF Doc No. 1 at ¶¶ 5-6). The Petition states that "[t]he instant Demand for Arbitration is an attempt on the part of Respondents to circumvent the validly negotiated Settlement Agreement between Petitioners and Respondents and deprive Petitioners of the benefits thereunder" (NYSCEF Doc No. 1 at ¶ 7). The Petition alleges that "Mr. Pavone was employed by the Village Board as a police officer with the Ossining Police Department from September 28, 2015 through August 30, 2022 and, as such, was a member of PBA" (NYSCEF Doc No. 1 at ¶ 13). According to the Petition, "[o]n February 10, 2021, Chief Sylvester preferred disciplinary charges against Mr. Pavone pursuant to the Westchester County Police Act, Section 5711-q of the Unconsolidated Laws of New York" (NYSCEF Doc No. 1 at ¶ 14) and that "[o]n March 18, 2021, Mr. Pavone, the Village, Chief Sylvester, and the PBA, entered into the Settlement Agreement, for the purpose of fully resolving the disciplinary charges short of a disciplinary hearing" (NYSCEF Doc No. 1 at ¶ 15).

According to the Petition:

> The Settlement Agreement provided that Mr. Pavone would be suspended without pay, that Mr. Pavone would remain on disciplinary evaluation for the remainder of his employment with the Village and that Mr. Pavone was required to retire from the Village on the anniversary date of the twentieth (20th) year of his service credit with the New York State Police and Fire Retirement System. More importantly, the Settlement Agreement contained an express waiver of Mr. Pavone's right to assert claims arising from, inter alia, the [CBA]. As consideration for such waiver, the Village relinquished its right to seek immediate termination of Mr. Pavone's employment based upon the disciplinary charges. Thereafter, in accordance with

the Settlement Agreement, Mr. Pavone retired effective August 30, 2022" (NYSCEF Doc No. 1 at ¶¶ 16-19).

The Petition further states that "[t]he Village and PBA are parties to the [CBA], covering the period of January 1, 2014 through December 31, 2019. On or about August 3, 2022, Mr. Pavone notified Ms. Rokuson of his impending retirement from the Ossining Police Department, effective August 30, 2022 and requested retiree health insurance under the [CBA]. On or about August 10, 2022, Ms. Rokuson notified Mr. Pavone that the Village would not provide him with retiree health insurance" (NYSCEF Doc No. 1 at ¶¶ 20-22).

The Petition continues that "[o]n or about August 10, 2022, the PBA filed the Grievance on Mr. Pavone's behalf alleging that the Village violated Article XI (Transfer Credits), Article XIII (Welfare Benefits), Article XIV (Retirement Benefits), Article XXXIV (Disputes), and such other related provisions and practices of the CBA when Ms. Rokuson notified him that the Village would not provide him with retiree health insurance" (NYSCEF Doc No. 1 at ¶ 24). Moreover, the Petition states that "[t]he Village denied the Grievance on or about August 15, 2022, which denial was appealed by Mr. Pavone on August 19, 2022 and again denied by the Village on September 8, 2022" (NYSCEF Doc No. 1 at ¶ 25). "Thereafter, despite the waiver contained in the Settlement Agreement, Respondents filed a Demand to Arbitrate, dated September 9, 2022, with AAA seeking to arbitrate Mr. Pavone's claim for retiree health insurance under the CBA" (NYSCEF Doc No. 1 at ¶ 26).

In their First Cause of Action in the Petition, Petitioners request that the arbitration demand should be permanently stayed and enjoined because: (1) "the subject of the demanded arbitration [*i.e.*, that the Village violated Articles XI, XIII, XIV, XXXIV, and other provisions of the CBA when the Village denied Pavone retiree health insurance] is beyond the scope of those subjects the parties agreed to arbitrate;" and (2) according to the Settlement Agreement between Petitioners and Respondents, Petitioners "agreed to waive Mr. Pavone's rights to make any claims pursuant to, *inter alia*, the CBA . . . including, but not limited to, the right to arbitrate Mr. Pavone's claims for retiree health insurance" (NYSCEF Doc No. 1 at ¶¶ 28-32).

On February 6, 2023, Respondents filed their opposition to the Petition (NYSCEF Doc No. 12). This opposition included an answer, which asserted two affirmative defenses and two objections in point of law (NYSCEF Doc No. 14). In their First Affirmative Defense, Respondents contend that Petitioners were untimely in applying to stay the arbitration because they failed to follow CPLR 7503's 20-day requirement (*i.e.*, Petitioners received the arbitration demand on September 13, 2022 and did not file the Petition to stay arbitration until December 23, 2022, which was served on December 27, 2022) (NYSCEF Doc No. 14 at ¶¶ 34-36). In their Second Affirmative Defense, Respondents assert that Petitioners waived their right to seek arbitration under CPLR 7502(b) because they actively participated in the arbitration process before they sought to stay the arbitration (NYSCEF Doc No. 14 at ¶¶ 37, 42-43). Specifically, Respondents contend that in September 2022, Petitioners communicated with and notified AAA as to its choice of an arbitrator to hear the arbitration, in response to AAA sending out a list of potential arbitrators" (NYSCEF Doc No. 14 at ¶ 38). Respondents also contend that between September 2022 and November 17, 2022, Petitioners "communicated with and notified AAA of [their] availability for dates in response to the dates offered by the assigned arbitrator to schedule the arbitration"

(NYSCEF Doc No. 14 at ¶ 39). Respondents also point out that in November 2022 Petitioners agreed to or did not object to an arbitration hearing date of February 8, 2023 (NYSCEF Doc No. 14 at ¶ 40). According to Respondents, "Petitioners' counsel accepted information demands sent by Respondents' counsel for information necessary for Respondents to prepare for the arbitration and Petitioners' counsel responded on December 22, 2022, that it was working on obtaining responses" (NYSCEF Doc No. 14 at ¶ 41). As to objections in point of law, Respondents contend that: (1) the Petition raises no grounds to stay arbitration under CPLR 7503; and (2) the Petition states no cause of action for relief (NYSCEF Doc No. 14 at ¶¶ 44-45).

On February 7, 2023, AAA filed a cross-motion to dismiss the Petition (NYSCEF Doc No. 26).

THE PARTIES' CONTENTIONS ON THE PETITION TO STAY

A. Petitioners' Contentions in Support of Their Petition

In support of the Petition, Petitioners submit: (1) a Verified Petition, which attaches (a) a copy of a CBA between the Village and PBA, (b) a copy of a grievance from Pavone, (c) a copy of the arbitration demand from Respondents, (d) a copy of a Settlement Agreement between the Village, PBA, and Pavone; and (2) a memorandum of law.

In their memorandum of law, Petitioners contend that the arbitration demand should be permanently stayed because "Respondents' express waiver of any and all of Mr. Pavone's claims under the [CBA] unequivocally demonstrates that the parties have not agreed to arbitrate" and to find otherwise would nullify the Settlement Agreement (NYSCEF Doc No. 7 at 4).

Petitioners also contend that the Petition is timely because: (1) where the parties do not agree to arbitrate, such a petition may be made outside the 20-day period that CPLR 7503(c) requires; and (2) no "valid agreement to arbitrate the claims asserted" in the arbitration demand exists (NYSCEF Doc No. 7 at 4-5).

According to Petitioners, the Village did not agree under the Settlement Agreement "to arbitrate any rights under the CBA as they relate to Mr. Pavone" because: (1) the intent of parties to a public employment collective bargaining agreement to arbitrate must be express rather than implied (NYSCEF Doc No. 7 at 5, *citing Matter of Board of Educ. of Valhalla Union Free Sch. Dist. v Valhalla Teachers Assn.*, 112 AD3d 620, 621 [2d Dept 2013]; *Matter of Acting Supt. of Schs. of Liverpool Cent. Sch. Dist. v United Liverpool Faculty Assn.*, 42 NY2d 509, 512 [1977]; (2) "the express waiver of Mr. Pavone's right to assert claims pursuant to the CBA [in the Settlement Agreement] unequivocally evidences the parties' intent to override the remedial provisions of the CBA (i.e., the dispute/grievance/arbitration procedure) as they relate to Mr. Pavone" (NYSCEF Doc No. 7 at 5); (3) otherwise, the Settlement Agreement would be nullified, "as the waiver of such remedy [*i.e.*, arbitration] was a material inducement for the Village's forfeiture of its right to prosecute the disciplinary charges preferred against Mr. Pavone, which sought immediate termination of his employment" (NYSCEF Doc No. 7 at 6); (4) once waived, the right to arbitrate cannot return (NYSCEF Doc No. 7 at 6, *citing Ryan v Kellogg Partners Inst. Servs.*, 58 AD3d 481, 481-482 [1st Dept 2009]; (5) although the Village and the PBA generally

have a valid agreement to arbitrate under the collective bargaining agreement, the PBA and Pavone "waived their rights and, in effect, terminated such agreement to arbitrate with respect to claims made by Mr. Pavone when Respondents delivered to Petitioners a release, discharging and barring all of Mr. Pavone's claims, asserted and unasserted, under the CBA" (NYSCEF Doc No. 7 at 7, *citing Matter of Minkin v Halperin*, 279 App Div 226 [2d Dept 1951], *affd* 304 NY 617 [1952]); and (6) this case did not involve the Village "bypass[ing] the union and engag[ing] in any direct dealing with Mr. Pavone, a PBA member" (NYSCEF Doc No. 7 at 8, *citing Matter of Buffalo Council of Supervisors & Admrs. [Buffalo City Sch. Dist.]*, 50 PERB ¶ 4547 [2017]).

Petitioners also contend that the Settlement Agreement is supported by consideration and not unconscionable based on: (1) the decision of *Winkler v Kingston Hous. Auth.*, 259 AD2d 819, 820-821 [3d Dept 1999]; (2) "Respondents knowingly and voluntarily enter[ing] into the Settlement Agreement"; and (3) "Respondents [being] represented throughout the settlement negotiations by the PBA's attorneys" (NYSCEF Doc No. 7 at 7-8).

B. Respondents' Contentions in Opposition

In opposition to the Petition, Respondents submit: (1) a Verified Answer, which attaches (a) a copy of Board meeting minutes, (b) a certified mail return receipt, (c) a copy of a letter from AAA representative Jeffrey Kriegsman directed to Christine Maggiore, Esq., counsel for Respondents, and Stuart E. Kahan, Esq., counsel for the Village, dated September 14, 2022, (d) a copy of a letter from AAA representative Kriegsman directed to Maggiore and Jaclyn G. Goldberg, Esq., counsel for Petitioners, dated October 31, 2022, (e) a copy of a letter from AAA representative Kriegsman directed to Maggiore and Goldberg, dated November 11, 2022, (f) a copy of a notice of hearing from AAA representative Kriegsman directed to Maggiore and Goldberg, dated November 17, 2022, and (g) copies of two emails dated December 19, 2022 and December 22, 2022 between Maggiore's representative and Goldberg; (2) an affirmation in opposition of Maggiore, dated February 6, 2023, which attaches (a) a copy of an affidavit of John Michael Grant, Esq., sworn to on February 3, 2023, and (b) a copy of an affidavit of Pavone, sworn to on February 2, 2023; and (3) a memorandum of law in opposition (NYSCEF Doc Nos. 12-25).

In their Verified Answer, Respondents raise two affirmative defenses: (1) Petitioners were untimely in filing the petition because contrary to CPLR 7503(c), they filed it more than 20 days after receiving the arbitration demand; and (2) CPLR 7502(b) prevents Petitioners from seeking a stay because Petitioners actively participated in the arbitration by sharing to AAA their preferred arbitrator and availability for arbitration, by agreeing or not objecting to a February 8, 2023 date for the arbitration hearing, and by accepting Respondents' demands for information needed for Respondents to prepare for the arbitration (which Petitioners through their counsel responded that they were working on) (NYSCEF Doc No. 14 at ¶¶ 34-43)

The Verified Answer also states that the "Petition fails to state a cause of action for relief" because "[t]he allegations in the Petition do not constitute grounds to stay arbitration under [CPLR 7503]" (NYSCEF Doc No. 14 at ¶¶ 44-45).

In their memorandum of law, Respondents contend that the Petition is untimely because: (1) contrary to CPLR 7503(c), which must be enforced strictly, the Petition was made more than

20 days after Petitioners received the arbitration demand (NYSCEF Doc No. 25 at 3, *citing Matter of Silverman v Benmor Coats, Inc.*, 61 NY2d 299 [1984]; *Matter of Gold Mills, Inc. v Pleasure Sports, Inc.*, 85 AD2d 527 [1st Dept 1981]; *Matter of Lane v Abel-Bey*, 50 NY2d 864 [1980]); and (2) *Matter of Matarasso v Continental Cas. Co.* (56 NY2d 264, 266 [1982]) which Petitioners cite for the proposition that no agreement to arbitrate exists, is distinguishable because unlike in that case, Respondents are a party to the CBA and the Settlement Agreement should not be interpreted to completely waive grievances and arbitration of CBA violations (NYSCEF Doc No. 25 at 4). As to timing, Respondents contend that the arbitration demand was made on September 9, 2022; that Petitioners obtained that demand on September 13, 2022 as evidenced by a signed certified mail return receipt; and that Petitioners filed this application on December 23, 2022 (NYSCEF Doc No. 25 at 3-4, *citing Matter of Fodor v MBNA Am. Bank, N.A.*, 34 AD3d 473 [2d Dept 2006]; *Matter of State Farm Mut. Auto. Ins. Co. v Kankam*, 3 AD3d 418 [1st Dept 2004]).

Respondents also contend that Petitioners waived their right to file this application for a stay because Petitioners participated in the arbitration process under CPLR 7503(b) by selecting an arbitrator, not objecting to a scheduled arbitration for early February 2023, responding to an information demand by acknowledging that it had been forwarded to the personnel department, and requesting a one-week extension to the information demand to provide requested materials (NYSCEF Doc No. 25 at 4-6, *citing Matter of National Cash Register Co. v Wilson*, 8 NY2d 377 [1960]; *Matter of Trafelet v Cipolla & Co.*, 62 Misc 3d 1205[A], 2019 NY Slip Op 50006[U] [Sup Ct, NY County 2019], *affd* 190 AD3d 573 [1st Dept 2021]).

Respondents next contend that the Settlement Agreement does not prevent the arbitration demand for a few reasons. First, Respondents contend that the arbitrator should decide to interpret how the Settlement Agreement affects arbitration because the arbitration demand was filed under the CBA rather than the Settlement Agreement (NYSCEF Doc No. 25 at 6). Second, Respondents contend that the Settlement Agreement cannot be interpreted as a total bar to the PBA from grieving and arbitrating Pavone's claims because of the Grant affidavit and Pavone affidavit (NYSCEF Doc No. 25 at 6-7). Third, Respondents argue that a case, which Petitioners cite for the proposition that the court decides whether an agreement to arbitrate exists when that is the only threshold issue, states that "'the issue here is not contract interpretation which would be a matter for the arbitrator,'" and that Petitioners here are asking the court "to make an inquiry that requires contract interpretation" (NYSCEF Doc No. 25 at 7, *quoting Matter of County of Suffolk v Novo*, 96 AD2d 902, 903 [2d Dept 1983]; *see also Matter of Rapid Armored Truck Corp. v Local 807 Armored Car Div. Pension Fund*, 88 AD2d 434 [1982], *lv denied* 58 NY2d 602 [1982]). Fourth, Respondents argue that although Pavone is the named grievant, the PBA filed the grievance "on behalf of Pavone and all other similarly situated members" and that the Settlement Agreement includes no other PBA members (NYSCEF Doc No. 25 at 7). Fifth, Respondents argue that the Settlement Agreement, "which only addresses settlement of disciplinary charges, manifests no intent to exclude every and any claim the PBA may choose to grieve on behalf of Pavone, unrelated to the terms of the discipline" (NYSCEF Doc No. 25 at 7-8, *citing Matter of County of Albany v AFSCME, Council 82, Local 775*, 114 AD2d 732, 733 [3d Dept 1985]; *Matter of Long Is. Lbr. Co. v Martin*, 15 NY2d 380 [1965]; *Matter of State of N.Y. [Dept. of Correctional Servs.] v Council 82, AFSCME*, 176 AD2d 1009, 1010-1011 [3d Dept 1991], *lv denied* 79 NY2d 756 [1992]). Sixth, Respondents contend that a waiver to arbitrate requires the agreement to "clearly manifest an intent to exclude the subject matter of the dispute from the provisions of the CBA relating to grievances

and arbitration" and that "[w]here such agreements have been found to constitute a waiver, the language constituting the waiver has been specific," but that in this case, the Settlement Agreement only removed the grievance and arbitration provision under the CBA "pertaining to [Pavone's] discipline and its resolution" rather than "every possible subject matter from the grievance and arbitration provision for the remainder of [Pavone's] employment" (NYSCEF Doc No. 25 at 8-9, *citing Matter of Campbell v State of N.Y.*, 37 AD3d 993, 994 [3d Dept 2007]; *Matter of Bd. of Educ. of Thousand Is. Cent. Sch. Dist. v Thousand Is. Educ. Assn.*, 106 AD3d 1530 [4th Dept 2013]; *Matter of Juul v Board of Educ. of Hempstead Sch. Dist. No. 1, Hempstead*, 76 AD2d 837 [2d Dept 1980], *affd* 55 NY2d 648 [1981]; *see also Matter of Schaefer*, 18 NY2d 314 [1966]; *Cahill v Regan*, 5 NY2d 292 [1959]). Seventh, Respondents contend that a case that Petitioners cite for the proposition that the right to arbitration is waived forever is inapplicable because Respondents did not actively participate in litigation "for almost three years through the completion of extensive disclosure proceedings . . . ." (NYSCEF Doc No. 25 at 9, *citing Ryan*, 58 AD3d 481). Eighth, Respondents assert that Petitioners' contention that Respondents waived arbitration is based on a broad interpretation of the Settlement Agreement that the language of that agreement and the history of negotiations do not support (NYSCEF Doc No. 25 at 9-10).

Respondents contend that the dispute can be arbitrated (NYSCEF Doc No. 25 at 10). After summarizing the relevant law, Respondents offer three reasons to support the arbitrability of this dispute (NYSCEF Doc No. 25 at 10-11). First, Respondents contend that under New York law, the arbitration agreement is so broad that the Court need only decide "whether the dispute bears a reasonable relationship to the arbitration agreement and whether arbitration of the dispute violates public policy" (NYSCEF Doc No. 25 at 11). Second, Respondents argue that Petitioners raise no argument that public policy prevents this grievance from proceeding to arbitration, that public policy supports arbitration of labor and employment disputes, and that courts have recognized only limited instances where arbitration is prohibited on public policy grounds alone (NYSCEF Doc No. 25 at 12). Third, Respondents contend that a reasonable relationship exists between the grievance and the CBA because Petitioners concede that the PBA and the Village generally have an arbitration agreement within the CBA, the grievance was filed on behalf of Pavone and those similarly situated, and the grievance concerns Petitioners' failure to follow CBA articles (NYSCEF Doc No. 25 at 13-14).

C. Petitioners' Contentions in Further Support of Their Petition

In further support of their Petition, Petitioners submit a reply memorandum of law. In it, Petitioners contend that the application to stay arbitration is timely for a few reasons (NYSCEF Doc No. 41 at 2). First, according to Petitioners, CPLR 7503 and case law include relevant exceptions to the 20-day requirement, which apply to this case (NYSCEF Doc No. 41 at 2-4, *citing Matter of Steck v State Farm Ins. Co.*, 89 NY2d 1082 [1996]; *Matter of Matarasso*, 56 NY2d 264; *Matter of American Centennial Ins. Co. v Williams*, 233 AD2d 320 [2d Dept 1996]; *Matter of Crawford v Feldman*, 199 AD2d 265 [2d Dept 1993]). Second, Petitioners contend that the court rather than the arbitrator must decide whether an agreement to arbitrate exists (NYSCEF Doc No. 41 at 2-3, *citing Matter of Primex Intl. Corp. v Wal-Mart Stores, Inc.*, 89 NY2d 594, 598 [1997]; *Matter of County of Rockland v Primiano Constr. Co.*, 51 NY2d 1, 6 [1980]; *Matter of O'Donnell v Arrow Elecs.*, 294 AD2d 581 [2d Dept 2002]). Third, Petitioners contend that the only issue is whether "Respondents' express waiver of Pavone's right to make any claims under the CBA

contained in the Settlement Agreement" terminated the arbitration provision (NYSCEF Doc No. 41 at 3, *citing Matter of Schenkers Intl. Forwarders, Inc. v Meyer*, 164 AD2d 541 [1st Dept 1991], *lv denied* 78 NY2d 852 [1991]; *Matter of Jennings v Saint Elizabeth Hosp.*, 54 AD2d 607 [4th Dept 1976], *lv denied* 40 NY2d 809 [1977]; *Proctor & Gamble Ind. Union of Port Ivory, N.Y. v Proctor & Gamble Mfg. Co.*, 312 F2d 181 [2d Cir 1962], *cert denied* 374 US 830 [1963]; *M.K. & O. Tr. Lines, Inc. v Division No. 892, Amalgamated Assn. of St., Elec. Ry. & Motor Coach Empls. of Am.*, 319 F2d 488 [10th Cir 1963], *cert denied* 375 US 944 [1963]; *Matter of Minkin*, 279 App Div 226]). Fourth, Petitioners contend that even if the Petition were untimely, Respondents failed to comply with CPLR 7503(c) "by omitting the 20-day preclusion language," which in turn allows a motion for a stay at any time before arbitration (NYSCEF Doc No. 41 at 4, *citing Matter of Government Empls. Ins. Co. v Kozlowski*, 62 AD2d 1056 [2d Dept 1978]; *Matter of Cooper v Bruckner*, 21 AD3d 758, 759-760 [1st Dept 2005]; *Matter of Filippazzo v Garden State Brickface Co.*, 120 AD2d 663, 664-665 [2d Dept 1986]; *Matter of City of Cortland v Cortland Police Benevolent Assn.*, 2 Misc 3d 1008[A], 2004 NY Slip Op 50196[U] [Sup Ct, Cortland County 2004]).

Next, Petitioners contend that they did not sufficiently participate in the arbitration because case law shows that selecting an arbitrator, selecting a hearing date, and requesting more time to respond to discovery demands are insufficient participation to find that Petitioners waived their right to seek a stay (NYSCEF Doc No. 41 at 4-5, *citing Matter of City of Cortland*, 2004 NY Slip Op 50196[U]; *Matter of IMG Publ. v Viesti*, 170 AD2d 268 [1st Dept 1991]; *Matter of Trafelet*, 2019 NY Slip Op 50006[U]).

Petitioners argue that the arbitration demand must be stayed because Respondents' waiver of rights prevents arbitration (NYSCEF Doc No. 41 at 6). First, Petitioners contend that the parties did not agree to arbitrate because Respondents under the Settlement Agreement waived without qualification Pavone's claims under the CBA (NYSCEF Doc No. 41 at 6, *citing Matter of Matco-Norca, Inc. v Matz*, 22 AD3d 495 [2d Dept 2005] [stating that the intent of the parties to a contract must be found within the four corners of the contract where its terms are clear]).

Second, Petitioners contend that Respondents conceded that the parties did not discuss limiting the waiver to specific claims or provisions of the CBA (NYSCEF Doc No. 41 at 6-7; NYSCEF Doc Nos. 23-24).

Third, Petitioners contend that Respondents' interpretation that Settlement Agreement paragraph nine concerns only Pavone's "'discipline and its resolution'" renders paragraph two duplicative and thus paragraph nine meaningless, and that the express waiver shows that the parties intended "to override the remedial provisions of the [CBA] as they relate to Pavone" (NYSCEF Doc No. 41 at 7-8; *citing Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]; *Engel v Deutsche Bank Natl. Trust Co.*, 116 AD3d 915 [2d Dept 2014]; *LeMay v H. W. Keeney, Inc.*, 124 AD2d 1026 [4th Dept 1986], *lv denied* 69 NY2d 607 [1987]; *Matter of Sherrill v Grayco Bldrs., Inc.*, 64 NY2d 261 [1985]; *Matter of Minkin*, 279 App Div 226; *Matter of Zimmerman v Cohen*, 236 NY 15 [1923]).

Fourth, Petitioners contend that Settlement Agreement paragraph eleven shows that paragraph nine is not limited to discipline (NYSCEF Doc No. 41 at 9).

Fifth, Petitioners contend that the case on which Respondents rely (*Matter of Schaefer*, 18 NY2d 314) is distinguishable because the word "'claim'" in the Settlement Agreement is modified by the words "'pursuant to the Act, Civil Service Law, or the CBA'" (NYSCEF Doc No. 41 at 9-10).

Sixth, Petitioners contend that another case on which Respondents rely (*Cahill*, 5 NY2d 292) is also distinguishable because a grievance arising under the CBA was foreseeable, given that the Settlement Agreement "provided for Pavone's continued employment with the Village over 17 months" (which the CBA accounted for) and Respondents knew that the CBA included provisions on grievances, disputes, and other matters (NYSCEF Doc No. 41 at 10-11).

Seventh, Petitioners argue that Article XXX of the CBA "has been null and void since 2006" and that the parties could not have intended paragraph nine of the Settlement Agreement "to waive a void CBA provision" because the Westchester County Police Act "governs all police discipline in Westchester County" and voids "any provision in a collective bargaining agreement concerning police officer discipline, even though Respondents argue that Article XXX was waived because Pavone agreed to a 30-day suspension without pay without a hearing" (NYSCEF Doc No. 41 at 11-12, *citing Matter of Town of Harrison Police Benevolent Assn., Inc. v Town of Harrison Police Dept.*, 69 AD3d 639 [2d Dept 2010]; *Matter of Patrolmen's Benevolent Assn. of City of N.Y. v New York State Pub. Empl. Relations Bd.*, 6 NY3d 563 [2006]; *Matter of Village of Ossining v Village of Ossining Policemans Benevolent Assn., Inc.*, Index No. 58220/2021 [Sup Ct, Westchester County 2021]).

Eighth, Petitioners contend that Respondents misinterpreted *County of Suffolk* (96 AD2d 902) and *Rapid Armored Truck Corp.* (88 AD2d 434) when they argued that the arbitrator rather than the court interprets the Settlement Agreement. According to Petitioners, in *Rapid Armored Truck Corp.* the Court held that the arbitrator interprets the contract "when [the disputes as to contract interpretation] concern the merits of the grievance, or underlying claim" and in *County of Suffolk*, the Court held the threshold question of arbitrability was for the Court to decide (NYSCEF Doc No. 41 at 11-12). Petitioners also argue that this action concerns the interpretation of the Settlement Agreement, which is unlike the interpretation of the CBA (NYSCEF Doc No. 41 at 12).

Ninth, Petitioners contend that Respondents' contention that the grievance was filed by the PBA on behalf of Pavone and similarly situated individuals, and that no other PBA members were included in the Settlement Agreement such that "the waiver of rights has no effect on their ability to arbitrate" is wrong because the PBA was itself a party to the Settlement Agreement (NYSCEF Doc No. 41 at 13).

Tenth, Petitioners contend that the PBA cannot submit an arbitration demand that includes "'similarly situated members'" because: (1) Article XXXIV of the CBA states that the PBA "may only submit to arbitration a dispute brought by a specific police officer or officers" and that "such dispute must first proceed through the prescribed grievance procedure;" and (2) here, "no other specific police officers have filed grievances regarding the dispute that Respondents seek to submit to arbitration" (NYSCEF Doc No. 41 at 13). Moreover, Petitioners contend that the PBA "is

limited in its Demand for Arbitration to the original grievance, which was solely brought by Pavone as the grievant and sets forth facts specifically related to Pavone" because of Article XXXIV of the CBA (NYSCEF Doc No. 41 at 13).

Eleventh, Petitioners argue that if the Court decides that the PBA can bring its arbitration demand on behalf of similarly situated individuals according to the waiver of rights included in the Settlement Agreement, the arbitration demand should be stayed as against Pavone because Pavone "waived his right to even bring the grievance in the first instance" (NYSCEF Doc No. 41 at 13).

Petitioners assert that the arbitration demand must be stayed because the grievance cannot be arbitrated (NYSCEF Doc No. 41 at 14). Specifically, Petitioners contend that the grievance was premature insofar as it could not be filed while Pavone was still a police officer because: (1) Article XXXIV of the CBA applies to "'police officer(s)'"; (2) Pavone's denial of retiree health insurance on August 10, 2022 when he was an active police officer was not an actual denial given that the retirement was not effective until August 30, 2022; and (3) case law supports same (NYSCEF Doc No. 41 at 14-15, *citing Matter of Board of Educ. of Oneonta City Sch. Dist. v Moore*, 229 AD2d 888 [3d Dept 1996]; *Matter of City of Niagara Falls v Niagara Falls Police Club, Inc.*, 52 AD3d 1327 [4th Dept 2008]; *Matter of DeRosa v Dyster*, 90 AD3d 1470 [4th Dept 2011]; *Buff v Village of Manlius*, 115 AD3d 1156 [4th Dept 2014]).

THE PARTIES' CONTENTIONS ON THE CROSS-MOTION TO DISMISS

A. AAA's Contentions in Support of Its Cross-Motion to Dismiss

In support of its cross-motion to dismiss, AAA submits: (1) an affirmation of Theodore L. Hecht, Esq., counsel for AAA, which attaches: (a) a copy of a decision in *Matter of Trojan v American Arbitration Assn.*, Index No. 101972/2016 (Sup Ct, NY County 2017); (b) a copy of a decision in *Matter of Everlast World's Boxing Headquarters Corp.*, Index No. 103796/2003 (Sup Ct, NY County 2003); (c) a copy of AAA's rules on labor arbitration; (d) a Request for Judicial Intervention; (e) a copy of a letter from Hecht to Goldberg, dated January 23, 2023.

In his affirmation, Hecht states that he represents AAA, who is "named in the caption as an 'Interested Party'" (NYSCEF Doc No. 27 at ¶ 1). According to Hecht, the cross-motion to dismiss should be granted because AAA is not a necessary or proper party to this special proceeding and AAA is entitled to arbitral immunity (NYSCEF Doc No. 27 at ¶ 2). Hecht states that despite Petitioners' label, AAA "is *not* an interested party" (NYSCEF Doc No. 27 at ¶ 2). Hecht cites case law to support the proposition that arbitration sponsoring organizations and arbitrators, all of whom lack a legal interest in the outcome of the dispute, are not proper or necessary parties (NYSCEF Doc No. 27 at ¶ 3). Hecht asserts that Petitioners or Respondents can obtain any relief without AAA as a party to the action (NYSCEF Doc No. 27 at ¶ 4, *citing Intl. Med. Group v American Arbitration Assn., Inc.*, 312 F3d 833, 843 [7th Cir 2002], *cert denied* 540 US 822 [2003]). Hecht also contends that AAA rules "expressly allow petitioners to seek judicial relief without having to name AAA as a party" because of Rule 42(a) of AAA's Labor Arbitration

Rules, and that case law shows that such rules have been enforced (NYSCEF Doc No. 27 at ¶¶ 5-6).

According to Hecht, case law also shows that arbitral immunity prevents AAA from appearing as a necessary party (NYSCEF Doc No. 27 at ¶ 7). Hecht also contends that Petitioners "acknowledged that AAA is not a proper party when they filed their Request for Judicial Intervention in this case and failed to even list AAA as a party" (NYSCEF Doc No. 27 at ¶ 8). Hecht concludes by stating that he only filed this cross-motion after he requested that Petitioners file a notice of discontinuance as against AAA pursuant to CPLR 3217(a)(1), but Petitioners declined to do so (NYSCEF Doc No. 27 at ¶ 9).

B. Petitioners' Contentions in Opposition to AAA's Cross-Motion to Dismiss

In opposition to AAA's cross-motion to dismiss, Petitioners submit: (1) an affirmation in opposition of Goldberg, dated February 17, 2023, which attaches: (a) a copy of a decision in *Matter of Village of Ossining v Village of Ossining Policeman's Benevolent Assn., Inc.*, Index No. 58220/2021 (Sup Ct, Westchester County 2021); (b) a copy of a decision in *Matter of Town of New Castle v Police Assn. of New Castle*, Index No. 58249/2020 (Sup Ct, Westchester County 2020) and (c) a copy of a decision in *Matter of Town of North Castle*, Index No. 60334/2015 (Sup Ct, Westchester County 2015).

In her affirmation, Goldberg states that AAA's cross-motion to dismiss "should be denied on both procedural and substantive grounds" (NYSCEF Doc No. 37 at ¶ 3). According to Goldberg, the cross-motion should be denied because AAA failed to attach a copy of the Verified Petition, which she contends is "a procedural defect requiring denial" under case law (NYSCEF Doc No. 37 at ¶¶ 4-5). Goldberg also contends that the cross-motion should be denied because AAA is an interested party (NYSCEF Doc No. 37 at ¶ 6). Specifically, Goldberg contends that "AAA has not been named as a party to this proceeding and Petitioners seek no relief as against AAA," and that the verified petition and request for judicial intervention show that AAA is not a named respondent (NYSCEF Doc No. 37 at ¶¶ 7-8). Goldberg distinguishes the cases on which AAA relies because in those cases, AAA was "listed as actual defendants/respondents" (NYSCEF Doc No. 37 at ¶¶ 9-10). Goldberg restates that Petitioners did not sue AAA, but rather that AAA was "merely listed" as an interested party because this proceeding "will affect AAA's jurisdiction over the underlying, and currently pending, grievance arbitration filed by Respondents" (NYSCEF Doc No. 37 at ¶¶ 11-13). Goldberg contends that the foregoing complies with Rule 42(a) of AAA's Labor Arbitration Rules and that numerous cases in which an arbitration stay was requested still maintained AAA or another arbitration sponsoring organization as an interested party (NYSCEF Doc No. 37 at ¶¶ 14-15).

DISCUSSION

New York has a "'long and strong public policy'" favoring the enforcement of arbitration agreements (*American Intl. Specialty Lines Ins. Co. v Allied Capital Corp.*, 35 NY3d 64, 70 [2020], *quoting Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007]; *see also Maross Constr., Inc. v Central N.Y. Regional Transp. Auth.*, 66 NY2d 341, 345 [1985] [stating that arbitration "is now well recognized as an effective and expeditious means of resolving disputes between willing parties desirous of avoiding the expense and delay frequently attendant to the judicial process"]; *Wilson v PBM, LLC*, 193 AD3d 22, 25 [2d Dept 2021] [citations omitted] [citing New York's "'longstanding public policy favoring the arbitration of disputes, particularly with respect to broad arbitration clauses . . . .'"]; *Matter of New Brunswick Theol. Seminary v Van Dyke*, 184 AD3d 176, 178 [2d Dept 2020] *lv dismissed* 36 NY3d 937 [2020], *lv denied* 36 NY3d 912 [2021] [stating that arbitration "'is a creature of contract'" and "'is a favored method of dispute resolution in New York'"]; *Ferrarella v Godt*, 131 AD3d 563, 565 [2d Dept 2015], *lv denied* 26 NY3d 913 [2015] [noting that the "'announced policy of this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties'"]). However, a party who has not agreed to arbitrate a dispute cannot be forced to arbitrate and may seek to stay such a proceeding pursuant to the provisions of CPLR Article 75.

CPLR 7501 states:

> A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute (CPLR 7501).

CPLR 7503 states in relevant part:

> Application to stay arbitration. Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration **on the ground that a valid agreement was not made** or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502 (CPLR 7503[b] [emphasis added]).

"The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay'" (*Matter of Northeast & Central Contrs., Inc. v Quanto Capital, LLC*, 203 AD3d 925, 928 [2d Dept 2022], *quoting Matter of Travelers Personal Ins. Co. v Hanophy-Ryan*, 200 AD3d 695, 696 [2d Dept 2021]). "'Thereafter, the burden shifts to the party opposing the stay to rebut the prima facie showing'" (*Matter of Northeast & Central Contrs., Inc.*, 203 AD3d at 928, *quoting Matter of Travelers Personal Ins. Co.*, 200 AD3d at 696). "'Where a triable issue of fact is raised, the Supreme Court, not the arbitrator, must determine it in a framed-issue hearing, and the appropriate

procedure under such circumstances is to temporarily stay arbitration pending a determination of the issue'" (*Matter of Northeast & Central Contrs., Inc.*, 203 AD3d at 928, *quoting Matter of Government Empls. Ins. Co. v Tucci*, 157 AD3d 679, 680 [2d Dept 2018]).

As set forth in CPLR 7503, a stay of arbitration may only be brought by "a party who has not participated in the arbitration" (CPLR 7503[b]). Conversely, a party that participates in arbitration cannot seek a stay (*Matter of Sherrill*, 64 NY2d at 273 n 3 ["[A] party seeking to stay arbitration, in favor of litigation, cannot participate in the arbitration on the merits"]). Participation includes selecting arbitrators, as well as adjourning an arbitration hearing without a reservation of rights (*Matter of Allstate Ins. Co. v Khait*, 227 AD2d 551 [2d Dept 1996]; *Matter of National Cash Register Co.*, 8 NY2d 377; *Matter of Binghamton Civ. Serv. Forum v City of Binghamton*, 44 NY2d 23, 29 n [1978] ["By its active participation in the selection of an arbitrator, the city waived any objection it may have had on the ground that there was no contract to arbitrate the issue of severity of the penalty"]); failing to object to an arbitration and expressly consenting to be a named party to an arbitration proceeding (*Matter of Simon-Equity Jefferson Val. Partnership v AJC Contrs., Inc.*, 124 AD2d 579 [2d Dept 1986]); and "filing a notice of appearance and participating in the selection of an arbitrator and the scheduling of the arbitration hearing" (*Matter of Home Mut. Ins. Co. v Springer*, 130 AD2d 493, 493 [2d Dept 1987]; *see also Greenwald v Greenwald*, 304 AD2d 790 [2d Dept 2003] [finding active participation where plaintiff "answered the demand for arbitration and counterclaimed," plaintiff "paid a $3,250 fee to the American Arbitration Association," and the parties "discussed the selection of arbitrators several times with the AAA"]).

On the other hand, participation does not include stipulating "to extend the time to answer" (*Matter of De Sapio v Kohlmeyer*, 35 NY2d 402, 405 [1974]; *see also Matter of De Laurentiis v Cinematografica De Las Americas, S.A.*, 9 NY2d 503 [1961] [finding no active participation where petitioner's representative, after petitioner received the arbitration demand, sent to respondents' representatives numerous letters, which were written when no party did anything to select arbitrators, requesting time extensions so petitioner could decide whether to participate in arbitrator selection and proceedings or else move to stay arbitration]; *Matter of Dana Realty Corp. v Consolidated Elec. Constr. Co.*, 21 AD2d 769 [1st Dept 1964] [finding no active participation where petitioner requested a time extension to select arbitrators while simultaneously "protesting the arbitration of the dispute" and having "notified the American Arbitration Association that it was moving for an order staying arbitration"]; *Matter of Hull Dye & Print Works, Inc. v Riegel Textile Corp.*, 37 AD2d 946 [1st Dept 1971], *overruled on other grounds Sablosky v Edward S. Gordon Co.*, 73 NY2d 133 [1989] [finding no active participation where petitioner did not submit a list of arbitrators, did not interpose an answer to the claim, and moved to stay arbitration before the list of proposed arbitrators was submitted or a time extension to make selection was granted]; *Matter of Trafelet*, 2019 NY Slip Op 50006[U] [finding no active participation because petitioner contacted the American Arbitration Association to adjourn so she could obtain counsel and her counsel requested to adjourn the date "on which a list of arbitrators must be exchanged"]; *Matter of IMG Publ.*, 170 AD2d 268 [finding no active participation where counsel for petitioner, who was not a party or signatory to the contract between a company and its employee, selected arbitrators or hearing dates on behalf of the company rather than the petitioner]; *Matter of Mix*

Centre v Butler, 221 AD2d 182, 182 [1st Dept 1995] [finding no active participation where respondent's attorney appeared "and did nothing more than request an adjournment"]).[1]

Based on the record before the Court, Petitioners participated in the arbitration processs, and failed to object to the arbitration and reserve their right to seek a stay of the arbitration. Petitioners were served with the arbitration demand on September 13, 2022 (NYSCEF Doc No. 16). Petitioners and Respondents were advised by AAA letter dated September 14, 2022 that they needed to return the List for Selection of Arbitrator on or before September 26, 2022 and that the failure to return the List would mean that they deemed all of the names acceptable (NYSCEF Doc No. 17). However, the parties could seek additional time to identify a mutually acceptable arbitrator (*id.*). According to Respondents (which contention has not been refuted by Petitioners), Petitioners participated in the selection of the arbitrator (NYSCEF Doc No. 22 at ¶ 17), which selection was confirmed in a letter from the AAA dated October 31, 2022 (NYSCEF Doc No. 18). In this same letter, the AAA proposed a hearing date of January 17, 2023 and set November 7, 2022 as the due date to respond to whether the proposed date was acceptable (*id.*). Apparently, the January 17, 2023 proposed date was not acceptable and, therefore, by letter dated November 11, 2022, the AAA proposed a new hearing date of February 8, 2023 and a due date to respond of November 18, 2022 (NYSCEF Doc No. 19). The mutually acceptable hearing date of February 8, 2023 was confirmed by AAA letter dated November 17, 2022 (NYSCEF Doc No. 20). Respondents' counsel asserts that on December 19, 2022, she sent an informational demand to Petitioners' counsel and Petitioners' counsel responded by asking for a week extension to respond to the informational demand (NYSCEF Doc No. 22 at ¶¶ 20-21). On December 23, 2022, Petitioners filed this Petition (NYSCEF Doc No. 1). Based on the foregoing participation without objection, Petitioners waived their right to seek a stay of the arbitration (*see, e.g.*, *Matter of Home Mut. Ins. Co.*, 130 AD2d 493; *see also Stone v Noble Constr. Mgmt., Inc.*, 116 AD3d 838 [2d Dept 2014]; *Matter of Mechtronics Corp. v Kirchhoff-Consigli Constr. Mgmt., LLC*, 144 AD3d 688 [2d Dept 2016]; *Matter of Standard Steel Section, Inc. v Royal Guard Fence Co.*, 62 AD2d 1040 [2d Dept 1978], *lv denied* 45 NY2d 707 [1978]; *Matter of Boston Old Colony Ins. Co. v Martin*, 34 AD2d 776 [1st Dept 1970]). Indeed, this approximate four month delay in seeking the stay during which Petitioners actively participated without objection in the arbitration proceeding is similar to the facts found by the Second Department in *Matter of Carbone/Orrino Agency, Inc. v Carbone*, (210 AD2d 221 [2d Dept 1994]) to constitute sufficient participation such that the petitioner waived the right to seek a stay.

Finally, even if the Court were not finding that Petitioner waived its right to stay arbitration because of its participation for four months in the arbitration process before seeking the stay, the

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[1] In opposition to Respondents' claim of participation, Petitioner relies on *Matter of Trafelet* and *Matter of IMG Publ.* However, as set forth above, those cases are readily distinguishable. In addition, Petitioner relies on *Matter of City of Cortland*, 2004 NY Slip Op 50196[U]). However, in that case, the petitioner objected to proceeding in the arbitration setting forth its position that the matter was not arbitrable while simultaneously returning the form for the selection of the arbitrator and requesting an adjournment. Here, the Court has not been presented with any proof that Petitioner objected to the arbitration and set forth its position that the matter was not arbitrable while it proceeded to submit the required responses to arbitrator selection and arbitration dates over the four-month period before bringing this Petition to stay the arbitration.

Court would nevertheless deny the Petition because the issue over arbitrability should be decided by the AAA arbitrator.

> The CBA sates in relevant part:
>
> Any dispute concerning the interpretation or application of the terms of this contract or the rights claimed to exist there under shall be processed in accordance with the following procedures:
>
> (A) Such dispute by a police officer(s) shall be presented to his/her Association representative within thirty (30) days of the incident that gives rise to the grievance.
>
> (B) In the event that such dispute is not resolved by the Association representative, it shall be presented by the Association to the Chief of Police or his/her designee within five (5) working days of the Association's receipt of the grievance.
>
> (C) In the event that such dispute is not then satisfactorily resolved or adjusted at the preceding step of the procedure, then the Association may present the same to the Village Board or its designee, for settlement within twenty (20) working days.
>
> (D) In the event that such dispute is not disposed of within thirty (30) days, it may then be referred by either party to the American Arbitration Association (AAA) for arbitration under its procedures (NYSCEF Doc No. 2 at Article XXXIV [D]).

"'Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit'" (*Matter of Monarch Consulting, Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, 26 NY3d 659 [2016] [citations omitted]; *see also Matter of County of Rockland*, 51 NY2d at 9 ["[T]he entire arbitration process is a creature of contract, the parties by explicit provision of their agreement have the ability to place any particular requirement in one category or the other, to make it a condition precedent to arbitration or to make it a condition in arbitration"]). As the Court of Appeals stated in *Matter of Monarch*:

> The [United States] Supreme Court has also held that arbitration agreements must be enforced according to their terms, and that "parties can agree to arbitrate 'gateway' questions of 'arbitrability'" . . . Such "delegation clauses" are enforceable where "there is 'clea[r] and unmistakabl[e]' evidence" that the parties intended to arbitrate arbitrability issues . . . "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts" (*Matter of Monarch Consulting, Inc.*, 26 NY3d at 675 [citations omitted]).

In short, whether a dispute is arbitrable is generally an issue for the court to decide unless the parties clearly and unmistakably provide otherwise (*id.*; *Matter of Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39 [1997]). Where the terms of the parties' agreements incorporate rules of an alternative dispute resolution tribunal, "the issue of whether the dispute is arbitrable should be

resolved by the arbitrator" (*Garthon Bus. Inc. v Stein*, 30 NY3d 943, 944 [2017] [agreements incorporating rules of the London Court of International Arbitration]).

In the context of contracts incorporating the AAA's procedures, New York courts will "leave the question of arbitrability to the arbitrators" (*Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 496 [1st Dept 2009], *affd* 14 NY3d 850 [2010], *cert denied* 562 US 962 [2010] ["Although the question of arbitrability is generally an issue for judicial determination, when the parties' agreement specifically incorporates by reference the AAA rules, which provide that '[t]he tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement,' and employs language referring 'all disputes' to arbitration, courts will 'leave the question of arbitrability to the arbitrators'"]); *see also Lake Harbor Advisors, LLC v Settlement Servs. Arbitration & Mediation, Inc.*, 175 AD3d 479 [2d Dept 2019] [same]; *Matter of WN Partner, LLC v Baltimore Orioles Ltd. Partnership*, 179 AD3d 14 [1st Dept 2019] [same]; *Matter of Flintlock Const. Serv., LLC. v Weiss*, 122 AD3d 51 [1st Dept 2014], *lv dismissed* 24 NY3d 1209 [2015] [same]; *Matter of Schindler v Cellco Partnership*, 200 AD3d 505 [1st Dept 2021] [finding that the parties clearly and unmistakably agreed to arbitrate arbitrability because "the AAA rules were incorporated into the parties' arbitration provision"]; *Matter of Anima Group, LLC v Emerald Expositions, LLC*, 191 AD3d 572 [1st Dept 2021]; *Matter of Revis v Schwartz*, 192 AD3d 127 [2d Dept 2020], *affd* 38 NY3d 939 [2022]; *Flowcon, Inc. v Andiva LLC*, 200 AD3d 411 [1st Dept 2021]).

Here, the parties agreed that any dispute not resolved within thirty days would be referred to the American Arbitration Association under its procedures (NYSCEF Doc No. 2 at Article XXXIV [D]). The AAA's procedures include giving the arbitrator the power to determine his or her jurisdiction, including issues relating to the existence of an arbitration agreement (NYSCEF Doc No. 30 at ¶ 3[a] [AAA Labor Arbitration Rules]).

For all the foregoing reasons, Petitioner's Petition shall be denied and this action shall be dismissed. And in light of the dismissal of this proceeding, the AAA's cross-motion to dismiss the Petition shall be denied without prejudice as moot (*2004 Parker Family LP v BDO USA LLP*, 67 Misc 3d 1222[A], 2020 NY Slip Op 50614[U] at *1 [Sup Ct, NY County 2020] ["And because the claims against [two defendants] will be determined at arbitration, the moving defendants agree that their separately filed motions to dismiss . . . are moot"]).

CONCLUSION

Based on the foregoing papers and for the reasons stated, it is hereby

ORDERED that the Petition to stay arbitration by Petitioners Village of Ossining and the Board of Trustees of the Village of Ossining is denied and this action is dismissed; and it is further

ORDERED that in light of the dismissal of this proceeding, the cross-motion to dismiss by the American Arbitration Association is denied as moot.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
May 26, 2023

ENTER:

Hon. Gretchen Walsh
Justice of the Supreme Court

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