

Slifka v Slifka

2024 NY Slip Op 30753(U)

March 8, 2024

Supreme Court, New York County

Docket Number: Index No. 656184/2023

Judge: Melissa A. Crane

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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. MELISSA A. CRANE **PART** **60M**

Justice

-----X

BARBARA SLIFKA,

Plaintiff,

- v -

RANDOLPH W. SLIFKA, DAVID DOVE

Defendant.

-----X

INDEX NO. 656184/2023

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 19, 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 STAY.

Petitioner Barbara Slifka, through Robert Fagenson as Temporary Guardian for Barbara Slifka (“Petitioner” or “Barbara”) has filed a verified petition to stay permanently the arbitration that Respondents Randolph Slifka (“Randy”) and David Dove (“Dove”) (collectively, “Respondents”) have commenced before the American Arbitration Association (“AAA”) under Case No. 01-23-003-9416, purportedly in Randy’s capacity as contingent beneficiary of a 1949 trust for the benefit of Barbara and in his capacity as a beneficiary of a 1949 trust for the benefit of Alan Slifka (“Alan”). For the following reasons, the court denies the verified petition to stay arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

This action is one amongst a number of actions related to the events preceding and following a June 2019 sale of a commercial office building located at 477 Madison Avenue (“Property”) (Verified Petition, NYSCEF Doc. No. 1, ¶¶ 8, 24). Joseph Slifka (“Joseph”), the father of Petitioner and grandfather of Randy, constructed the Property in the 1950s and subsequently divided the Property into a Fee interest for the land and building and a Leasehold

interest tied to the ground lease (*id.*, ¶ 8). Joseph divided these interests into trusts for his children, Alan and Barbara, and then Alan apportioned his trust's interest between trusts for his own children, Randy, David and Michael (*id.*, ¶¶ 10-15).

477 Madave Associates is the partnership that owned the Fee interest (*id.*, ¶ 17). Pursuant to the November 5, 1984 partnership agreement between Joseph, Sylvia, Barbara, and Alan Slifka ("Madave Partnership Agreement"), the purpose of the partnership is "[m]anaging, improving, financing, mortgaging, refinancing, leasing, subleasing, and otherwise exercising complete control over the Property," specifically with respect to the Fee interest (Madave Partnership Agreement, NYSCEF Doc. No. 25, art. 4.1). Further, under the Madave Partnership Agreement, the "Managing Partner is authorized to execute on behalf of the Partnership all notes, mortgages, deeds, contracts and other instruments to effectuate all of the foregoing purposes" (*id.*, art. 4.2). Additionally, under article 19.1 of the Madave Partnership Agreement:

In the event of any dispute or controversy between the parties hereto with respect to this Agreement, the parties agree to submit such dispute to binding arbitration, pursuant to the rules of the American Arbitration Association before three (3) arbitrators experienced in such matters, whose decision shall be final and binding upon the parties hereto with the same force and effect as a judgment entered by a court of competent jurisdiction. The parties agree that judgment may be entered on any award or decision rendered by the arbitrators in any court having jurisdiction over either the Partnership, its property or any of the parties hereto.

(*id.*, art. 19.1)

After Joseph and Alan died, Barbara became the sole managing partner of 477 Madave Associates, the partnership that owned the Fee interest (Verified Petition, ¶ 17). Barbara determined that she would sell both the Fee and Leasehold interests together and retained the law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP to assist with the sale (*id.*, ¶ 21). Despite Randy's opposition, Barbara consummated the sale in June 2019 for \$258,250,000 (*id.*, ¶ 24).

After the sale, Randy and his co-trustee, Dove, initiated arbitration proceedings against Barbara on behalf of Randy's trust on August 10, 2020 (*id.*, ¶ 25).

Claimants' first demand for arbitration claimed that Barbara "improperly allocated the Sales Proceeds as being 39.57% attributable to the Fee interest, and 60.43% attributable to the Leasehold interest," when the proper allocation should have been "predominantly attributable to the Fee interest" (Demand for Arbitration, NYSCEF Doc. No. 8, p. 2). The arbitration panel ruled in favor of the claimants, issuing a partial final award on September 9, 2022, in which it declared that Barbara breached her fiduciary duties to claimants and breached the implied covenant of good faith and fair dealing under the Madave Partnership Agreement through misallocating sale proceeds and failing to allocate to claimants their share of the sale proceeds based on Randy's 16.67% beneficial interest in the Fee (Partial Final Award, NYSCEF Doc. No. 6, pp. 59-60). Pursuant to the partial final award, the panel ordered Barbara to pay to claimants, for the benefit of Randy, compensatory damages in the amount of \$16,012,358.83, with interest (*id.*, p. 60).

Respondents made the second demand for arbitration on September 6, 2023 (Second Demand for Arbitration, NYSCEF Doc. No. 5). While this demand for arbitration is also related to the 2019 sale of the Property, it purportedly asserts a different theory of liability than what the Respondents asserted in the first arbitration. According to the second demand for arbitration, the first award was for Randy's "personal trust's interest in Madave Associates and for his one-third share of the 1949 Alan Trust's interest in Madave Associates" (Second Demand for Arbitration, ¶ 8). The second demand for arbitration asserts derivative claims (1) on behalf of **Barbara's** trust on the theory that Randy is a contingent beneficiary of the Barbara trust and (2) as a beneficiary of **Alan's** trust (*id.*, pp. 38-40). The second demand for arbitration alleges that, around the time of the first arbitration's partial final award, Barbara breached her fiduciary duties to the 1949 trusts

through engaging in self-dealing, particularly through waiving claims of the 1949 trusts against herself and her representatives (*id.*, ¶ 223). Barbara allegedly entered into “at least three settlement agreements purporting to release millions in claims held by the 1949 Trusts in exchange for personal benefits for herself and no consideration for the Trusts,” including settlements with Shorenstein Properties LLC (“Shorenstein”) and Randy’s brothers, David and Michael (*id.*, ¶¶ 158, 162, 170, 180). The second demand for arbitration also alleges that Barbara breached the covenant of good faith and fair dealing under the Madave Partnership Agreement through wrongfully depriving the 1949 trusts of their share of the sale proceeds (*id.*, ¶ 228).

According to the second demand for arbitration, this action falls under the Madave Partnership Agreement’s arbitration clause in article 19.1 because the derivative action “concerns [Barbara’s] actions under color of authority under the Partnership Agreement, including the misallocation of distributions from the sale of the Partnership’s sole asset and [Barbara’s] failure as Managing Partner to restore proceeds to the 1949 Trusts following the Award” (*id.*, ¶¶ 13-15). Therefore, the action “arises ‘with respect’ to the Partnership Agreement” (*id.*, ¶ 15).

Barbara then filed the verified petition on December 11, 2023, seeking a stay of the second arbitration pursuant to CPLR 7502 and 7503. For the following reasons, the court denies the verified petition in its entirety.

DISCUSSION

Barbara’s principal argument in favor of a stay of arbitration is that Randy lacks standing to bring a derivative proceeding on behalf of Alan’s trust, because he is “not free from animus and hostility towards Barbara,” or on behalf of Barbara’s trust, because he has “failed to plead that he is a beneficiary of Barbara’s trust” (Verified Petition, ¶¶ 49-50). However, the court does not determine whether standing exists in this matter because lack of standing is not a basis for a motion

to stay arbitration pursuant to CPLR 7502 and 7503. Under CPLR 7503(b), 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.” Conversely, under CPLR 7502(b), if, “at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration.”

Therefore, the sections of the CPLR under which Petitioner seeks a stay of arbitration generally limit the bases for a stay to (1) that the parties did not enter into or comply with a valid agreement to arbitrate or (2) that the substantive claims are barred by an applicable statute of limitations (*American Independent Ins. Co. v Art of Healing Medicine, P.C.*, 104 AD3d 761, 761-762 [2d Dept 2013]; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Benjamin*, 1 AD3d 39, 43 [1st Dept 2003]; *Turner Const. Co. v J & A Concrete Corp.*, 44 Misc.3d 217, 220 [Sup Ct, NY County 2014]). Additionally, while not “specifically enumerated in the statute,” the court may determine “whether public policy precludes arbitration of the subject matter of a particular dispute” (*Merrill Lynch*, 1 AD3d at 43; *American Independent Ins. Co.*, 104 AD3d at 762).¹ Generally, it is for the courts to make an “initial determination as to whether the dispute is arbitrable,” while leaving the “ultimate disposition of the merits” to the arbitrators (*In re Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 [1975]; *Alam v Ahmad*, 190 AD3d 471, 472 [1st Dept 2021] [finding that because the arbitration provisions at issue “do not clearly and unequivocally provide that questions about the scope of the arbitration provisions are for the arbitration panel to

¹ The court notes, however, that Petitioner does not raise violation of public policy as a basis for a stay of arbitration, so the court does not consider this basis.

determine, the threshold question, whether the dispute is encompassed within an agreement to arbitrate, is a question for the courts”]; *White Rock Insurance Company PCC Limited v Lloyd’s Syndicate 4242*, 202 AD3d 563, 565 [1st Dept 2022]; *Matter of Living Real Estate Group, LLC v Douglas Elliman, LLC*, 220 AD3d 573, 573-574 [1st Dept 2023] [denying a petition for a stay of arbitration where the respondent established “that the parties had agreed to submit their [] dispute to arbitration and that the dispute generally came within the scope of the agreement”]).

Thus, Barbara’s arguments that Randy lacks standing to pursue these derivative claims or that other members of his family previously released the claims are to be determined by the arbitrator, not the court. The cases that Barbara cites in opposing this argument are distinguishable. In *Factory Mut. Liab. Ins. Co. of Am. v Comfort* (37 AD2d 416 [2d Dept 1971]), respondents served a demand for arbitration related to a car accident under an insurance policy’s uninsured motorist provisions, and the insurance company sought a stay of arbitration (*id.* at 416-417). The court stayed the arbitration, finding that the issue of whether the automobile involved in the accident was an “uninsured automobile” under the insurance policy had to be resolved as a condition precedent to arbitration (*id.* at 417). This is distinguishable because in *Factory Mut.*, the court had to determine the issue of whether the automobile was “uninsured” to determine whether the provision of the policy allowing for arbitration applied in the first place. Thus, the issue the trial court had to decide was tied directly to the contours of the agreement to arbitrate, which is a proper area for trial court evaluation under CPLR 7503. Here, on the contrary, no one can plausibly dispute that the parties agreed to arbitrate disputes related to the Property under the Madave Partnership Agreement.

The case *Ciao Europa v Silver Autumn Hotel (N.Y.) Corp.* (290 AD2d 216 [1st Dept 2002]), that Barbara cites in favor of her argument that Respondents have waived arbitration, is also

distinguishable. There, the court found that the lower court had properly granted a defendant's motion to dismiss where the plaintiff had made two prior attempts to litigate the claim, reflecting a "preference clearly inconsistent with its present claim that the parties are obligated to arbitrate such claim" (*id.*). Here, the situation is precisely the opposite. The parties have displayed a prior preference **in favor** of arbitration by engaging in the first arbitration pursuant to the Madave Partnership Agreement. Similarly, in *Sherrill v Grayco Bldrs.* (64 NY2d 261 [1985]), the Court of Appeals affirmed an order permanently staying arbitration, finding that the party seeking arbitration had waived their right to arbitrate by previously electing to litigate (*id.* at 274 ["Once the right to arbitrate a particular dispute has been lost by an election to litigate it cannot be recaptured."]). Barbara has failed to present any argument that suggests that Respondents have lost their right to arbitrate this dispute by electing to litigate previously.

However, while standing is for the arbitrator to determine, the court is deeply skeptical of Respondents' theory of contingent beneficiary status as a basis for derivative liability on behalf of Barbara's trust. The court is particularly doubtful of this argument considering Robert Fagenson's March 6, 2024 filing in the arbitration, in which he affirmed that Barbara "has exercised her power of appointment under Barbara's Trust to identify the beneficiaries of Barbara's Trust" and that "neither Randolph W. Slifka nor the trust created under Article Eleventh of the Will of Alan B. Slifka for the benefit of Randolph W. Slifka ('Randy's Trust') are identified as beneficiaries of Barbara's Trust" (Aff. of Robert Fagenson, NYSCEF Doc. No. 45). Therefore, as Justice Ostrager already held in a related action, it appears that "Randy is not a beneficiary of Barbara Slifka's Trust, and there is no evidence that Randy will ever be named a beneficiary" (November 1 Hecht Decision, NYSCEF Doc. No. 12, p. 2).

The court also rejects the argument that the statute of limitations bars the breach of fiduciary duty cause of action. The statute of limitations that applies to a breach of fiduciary duty claim depends on the relief that the plaintiff is seeking. While a three-year statute of limitations generally applies for breach of fiduciary duty claims seeking “purely monetary relief,” a six-year statute of limitations applies where the plaintiff is seeking “equitable relief for which an award of monetary damages would not be adequate” (*VA Management, LP v Estate of Valvani*, 192 AD3d 615, 615 [1st Dept 2021]). The six-year statute of limitations applies to a derivative action seeking both monetary damages and equitable relief (*Homapour v Harounian*, 182 AD3d 426, 428 [1st Dept 2020]). However, the court need not decide which statute of limitations applies because, under either statute of limitations, the breach of fiduciary duty cause of action is timely.

While the second demand for arbitration is clearly related to the June 2019 sale of the Property, to the extent the breach of fiduciary duty cause of action focuses on Barbara’s alleged self-dealing in **2022**, it is timely. The second demand for arbitration alleges that Barbara failed to “seek to recover the money clearly due to the 1949 Trusts **under the [September 9, 2022] Award**,” and instead “engaged in self-dealing . . . by purporting to waive the 1949 Trusts’ claims against herself and her representatives” (Second Demand for Arbitration, ¶¶ 158, 223). Barbara allegedly entered into the Shoreinstein settlement agreement “without securing any payment for the 1949 Trusts” on October 6, 2022 (*id.*, ¶¶ 170-171) and executed the settlement agreement with Michael in November 2022 (Michael Settlement Agreement, NYSCEF Doc. No. 30). While Barbara settled with David in June 2022, before the arbitration panel issued its partial final award (David Settlement Agreement, NYSCEF Doc. No. 29), even a claim based on that would be timely under a three-year statute of limitations, because Respondents issued the second demand for

arbitration on September 6, 2023. Thus, the claims based on Barbara’s alleged self-dealing in breach of her fiduciary duties are timely.

The court has considered the parties’ remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that Petitioner’s motion to stay arbitration that Respondents have commenced with AAA under Case No. 01-23-003-9416 is denied in its entirety; and it is further

ORDERED that the Clerk of the Court mark this matter as disposed.

03/08/2024
DATE


MELISSA A. CRANE, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
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<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:
CHECK IF APPROPRIATE: