

**Aggarwal v Kalbo**

2024 NY Slip Op 33103(U)

August 29, 2024

Supreme Court, New York County

Docket Number: Index No. 651815/2023

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M**

*Justice*

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RAJENDRA AGGARWAL, individually, and as a member of  
343 WEST 46 LLC,

Plaintiff,

- v -

MICHA KALBO, individually and as a member of 343 WEST  
46 LLC, MAURICE BERABI, individually and as a member of  
343 WEST 46 LLC, and 343 WEST 46 LLC,

Defendants.

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**INDEX NO.** 651815/2023

**MOTION DATE** 05/31/2023,  
05/24/2023

**MOTION SEQ. NO.** 002, 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 13, 14, 15, 16, 17,  
18, 19, 20, 21, and 23

were read on this motion to COMPEL ARBITRATION.

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 10, 11, 12, 22, 24,  
and 26

were read on this motion to APPOINT FIDUCIARY.

LOUIS L. NOCK, J.S.C.

In motion sequence 002, defendants seek to stay this action and compel arbitration (NYSCEF Doc No. 13, notice of motion). Plaintiff partially opposes the motion (NYSCEF Doc No. 19, counsel’s affirmation). In motion sequence 003, plaintiff seeks the appointment of a temporary receiver for 46 LLC (NYSCEF Doc No. 10, notice of motion). Defendants oppose the motion.

The motions are consolidated for disposition. For the reasons set forth below, motion sequence 002 is granted and motion sequence 003 is denied.

## Background

According to the complaint, defendant 343 West 46 LLC owns a building located at 343 West 46th Street in Manhattan and defendant Micha Kalbo is that company's manager (Complaint, NYSCEF Doc No. 16). Plaintiff alleges that he holds a 40% membership interest in 343 West 46 LLC and alleges, upon information and belief, that Kalbo and defendant Maurice Berabi hold 30% membership interests. Plaintiff further alleges, upon information and belief, that: (1) Kalbo and Berabi co-own "Don't Tell Mama," a nightclub that rents space from 343 West 46 LLC; (2) Kalbo refuses to provide an accounting and to pay him distributions; (3) Kalbo took distributions and/or is the reason that the nightclub defaulted on its rent; and (4) Kalbo diverted and continues to divert money, assets, and business from 343 West 46 LLC.<sup>1</sup> Based upon these allegations, plaintiff asserts nine causes of action sounding in breach of fiduciary duty and seeks an accounting, injunctive relief, damages, and fees.

In response, defendants served plaintiff with a notice of intention to arbitrate, as well as motion sequence 002 to stay this action and compel arbitration. In both, defendants refer to the Operating Agreement of 343 West 46 LLC (the "Operating Agreement") dated July 11, 2007, specifically, section 18 titled "Arbitration" (NYSCEF Doc No. 15, Operating Agreement). Section 18 expressly requires that "[a]ny dispute, controversy or claim arising out of or in connection with this Agreement or any breach or alleged breach...shall, upon the request of any party involved, be submitted to, and settled by, arbitration" (*id.* at 12-13). It also states that "[a]ny award rendered shall be final and conclusive upon the parties and a judgment thereon may be entered in a court of competent jurisdiction" (*id.* at 13).

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<sup>1</sup> The complaint contains no specific allegations of wrongful actions committed by Berabi.

## Discussion

Defendants contend that the court should stay this action and compel arbitration of plaintiff's claims pursuant to section 18 of the Operating Agreement and CPLR §§ 7503 (a), 2201 (NYSCEF Doc No. 18, mem of law). CPLR § 7503 (a) provides that “[a] party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration.” It further provides that “the court shall direct the parties to arbitrate” when “there is no substantial question whether a valid agreement [to arbitrate] was made” and its “order shall operate to stay [an] action, or so much of it as is referable to arbitration.” CPLR § 2201 provides the court with discretion to “grant a stay of proceedings in a proper case, upon such terms as may be just.”

New York public policy strongly supports arbitration (*American Intl. Specialty Lines Ins. Co. v Allied Capital Corp.*, 35 NY3d 64, 70 [2020]) and, therefore, “[a]ny doubts as to whether an issue is arbitrable will be resolved in favor of arbitration” (*State v Philip Morris Inc.*, 30 AD3d 26, 31 [1st Dept 2006], *affd* 8 NY3d 574 [2007]). When a contract contains “a broad arbitration clause, a court merely determines whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract” (*White Rock Ins. Co. PCC Ltd. v Lloyd's Syndicate 4242*, 202 AD3d 563, 565 [1st Dept 2022] [internal quotation marks and citations omitted]). Here, the Operating Agreement contains a broad arbitration clause as section 18 mandates arbitration when requested by a party concerning a dispute arising out of the Operating Agreement (*see Matter of Martin [Schneidman & Assoc.]*, 160 AD2d 316, 317 [1st Dept 1990] [noting that an arbitration clause is broad when it, among other things, covers “all disputes arising out of the contract”] [internal quotation marks and citations omitted]). Also, plaintiff's causes of action are within the subject matter of the

arbitration clause as they concern Kalbo's conduct as manager of 343 West 46 LLC. Thus, arbitration and a stay of this action are required.

Despite this, plaintiff argues that the court should stay arbitration to appoint a temporary receiver as arbitrators are not empowered to provide this remedy (NYSCEF Doc No. 19, counsel's affirmation). Plaintiff's position is that a temporary receiver is necessary to protect 343 West 46 LLC and himself from an irreparable loss as the receiver alone can determine the amount of money owed to them (NYSCEF Doc No. 11, plaintiff's aff). Plaintiff also asserts that 343 West 46 LLC may be unable to pay its expenses without a temporary receiver. According to plaintiff, the nightclub owes 343 West 46 LLC more than \$1,000,000 in rent through May 2023.

Defendants respond that it is for the arbitrator to decide "what remedies, if any, are available" to plaintiff as the subject arbitration provision does not contain any carved-out exceptions (NYSCEF Doc No. 23 at 4-5). "An arbitration clause, as a component of a contractual agreement, must be enforced according to its terms" (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007]). Thus, plaintiff's motion is denied. The result would be different if the Operating Agreement had contained express language permitting a party to seek judicial appointment of a temporary receiver irrespective of a party's arbitration election (*see HSBC Bank USA v National Equity Corp.*, 279 AD2d 251, 252, 254 [1st Dept 2001] [holding that HSBC was permitted "to seek judicial relief as to the provisional remedy while, simultaneously, seeking arbitration of the underlying dispute" as the parties' contract specified that "[n]o provision...shall limit the right of any party...to request and obtain from a court...before, during or after the pendency of any arbitration, provisional or ancillary remedies...including...the appointment of a receiver"]).

Even if the court were to reach the substance of the receiver issue, it would find that “[p]laintiff did not satisfy [his] burden of making a clear evidentiary showing that appointment of a [temporary] receiver was necessary to conserve the property and to protect plaintiff’s interests” (*Eastbank v Malneut Realty Corp.*, 180 AD2d 442, 442-443 [1st Dept 1992]). Instead, the only evidence plaintiff offers in support of his motion is his own affidavit (*see Vardaris Tech, Inc. v Paleros, Inc.*, 49 AD3d 631, 632 [2d Dept 2008] [reversing an order appointing a temporary receiver where the plaintiff’s evidence consisted of “unsupported allegations and accusations [that] fell far short of the required clear evidentiary showing”] [internal quotation marks and citations omitted]).

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

Accordingly, it is hereby

ORDERED that defendants’ motion for an order staying this action and compelling arbitration (Mot. Seq. No. 002) is granted; and it is further

ORDERED that plaintiff’s motion for an order directing the appointment of a temporary receiver (Mot. Seq. No. 003) is denied.

This constitutes the decision and order of the court.

ENTER:



<u>8/29/2024</u> DATE	<u>LOUIS L. NOCK, J.S.C.</u>		
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER
			<input type="checkbox"/> REFERENCE