GenCap Fin. Group LLC v Novak WV Prop Co 2020, LLC
2025 NY Slip Op 31325(U)
April 13, 2025
Supreme Court, New York County
Docket Number: Index No. 651396/2024
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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GENCAP FINANCIAL GROUP LLC, PETER GEORGIOPOULOS, and KATERINA KARVOUNAKI-HOBBIE,

Petitioners,

- v -

NOVAK WV PROP CO 2020, LLC,

Respondent.

INDEX NO. 651396/2024

MOTION DATE -

MOTION SEQ. NO. 001 003

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 16, 17, 18, 44, 48, 49, 50

were read on this motion to/for STAY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 45, 46, 47, 51, 52, 53, 54, 55, 56, 57, 58, 62

were read on this motion to/for COMPEL ARBITRATION.

In motion sequence number 001, petitioners GenCap Financial Group LLC (GenCap), Peter Georgiopoulos, and Katerina Karvounaki-Hobbie move, pursuant to CPLR 7503(b), to stay the arbitration commenced by respondent Novak WV Prop Co 2020, LLC (Novak) before the American Arbitration Association (AAA) - *Novak WV Prop Co 2020, LLC v Level5 Data Center Group, LLC*, AAA Case. No. 01-23-0003-6877 (Arbitration). In motion sequence number 003, Novak moves, pursuant to 7503(a), to compel the Arbitration before the AAA.

Background

On November 8, 2017, nonparties Silent Partner International, Inc. (Silent Partner), PVD Modular, LLC (PVD), and Stellar Armor, Inc. (Stellar) formed nonparty

Level5 Data Center Group, LLC (Level5).[1] (NYSCEF 34, Level5 Operating Agreement [1st Amendment] at 1.) Level5 was formed to "facilitate the contemplated transaction involving the financing of a governmental data center."[2] (*Id*.) Petitioner GenCap was allegedly formed on August 25, 2020 "to provide financing to Dale Hobbie, obtain financial return a financial return from the Project, and introduce financial parties interested in sponsoring the Project" as further detailed below. (NYSCEF 1, Petition ¶ 21.) GenCap is partly owned by petitioner Georgiopoulos. (*Id*. ¶ 22.)

On July 24, 2020, Novak, as lessor, and Level5, as lessee, entered into a lease agreement (Lease) in which it was agreed that Level5 would develop, construct, and operate a data center for use by the United States government (Project). (*Id*. ¶ 15; NYSCEF 28, Lease § 2.03 [Level5 and Novak "entered into this Lease with the understanding that Lessee intends to develop, construct and operate a multiple-phase, greenfield mission critical data center project with a division or affiliate of the United States Government as a tenant"].) Section 31.01 of the Lease contains the following arbitration provision:

> "[a]ny and all controversies, disputes, or claims arising out of or relating to this Lease, or the breach of any provision herein, between Lessor, and its members, partners, investors, affiliates, successors, and assigns and Lessee, and its members, partners, investors, affiliates, successors, and assigns, shall be resolved and settled by binding Arbitration administered by the American

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[1] Level5 was dissolved on August 18, 2023. (NYSCEF 30, Articles of Dissolution.) Nonparty Dale Hobbie was appointed to wind up the company's activities and affairs. (*Id*.)

[2] On March 25, 2022, Dale Hobbie, as managing member of Level5, Dale Hobbie, as managing member of Silent Partner, Nicholas Glinkowski, as president of PVD, Charles Asbury, II as president of Stellar, and Lee Stern, on behalf of Level5 Manager: L7MGR LLC (an entity to be formed) executed a First Amendment to the Level5 Operating Agreement (NYSCEF 34, Level5 Operating Agreement [1st Amendment] at 16.) Silent Partner, PVD, and Stellar are all listed as members of Level5. (*Id*.)

> Arbitration Association in accordance with its Commercial Arbitration Rules by an Arbitration of a panel of three (3) arbitrators, and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereto. By agreeing to binding Arbitration, the parties herein understand and agree that each is waiving its rights to maintain all other available resolution processes in order to resolve their disputed, such as a lawsuit and court action or administrative proceeding, and each are agreeing to settle all disputes by binding Arbitration." (NYSCEF 28, Lease at 52 [Arbitration Provision].)

On December 23, 2021, Novak sent Level5 a Notice of Default, informing Level5 that $7,022,550.61 was due under the Lease and providing a date of January 11, 2022 to cure. (NYSCEF 29, Second Amended Notice of Arbitration and Statement of Claim ¶ 80.) On January 19, 2022, Novak and Level5 entered into a Cure Date Extension Agreement. (NYSCEF 35, Cure Date Extension Agreement.) The parties' issues were not resolved, and on August 18, 2023, Novak filed its initial demand for arbitration that was amended on December 18, 2023. (NYSCEF 1, Petition ¶¶ 11,12.) On February 26, 2024,[3] Novak again amended its arbitration pleading to add GenCap, Georgiopoulos, and Karvounaki-Hobbie as respondents. (*Id*. ¶ 13; NYSCEF 29, Second Amended Notice of Arbitration and Statement of Claim.) In the Second Amended Notice of Arbitration and Statement of Claim, Novak alleges that petitioners, amongst others, breached the Lease and committed fraud, asserting liability on an alter ego theory. (*Id*. ¶ 24; NYSCEF 29, Second Amended Notice of Arbitration and Statement of Claim ¶¶ 166-183.)

On March 15, 2024, petitioners filed this proceeding to stay the Arbitration and move for such relief. Novak moves to compel arbitration.

[3] The court notes that the petition states that Novak's second amended notice of arbitration was filed on February 23, 2023. (NYSCEF 1, Petition ¶ 13.) However, the second amended notice of arbitration was filed on February 23, 2024. (NYSCEF 5, Second Amended Notice of Arbitration [Second Arbitration Notice] at 1.)

Discussion

"The standards governing motions for summary judgment are applicable to special proceedings generally." (*Brusco v Braun*, 199 AD2d 27, 31 [1st Dept 1993] [citation omitted], *affd* 84 NY2d 674 [1994].) This is also true for motions to stay or compel arbitration. (*See Hines v Overstock.com, Inc*., 380 F Appx 22, 24 [2d Cir 2010].)

Here, the issue is whether petitioners are bound by the Arbitration Provision even though they did not execute the Lease. This "is a threshold issue for the court, not the arbitrator, to decide." (*Matter of KPMG LLP v Kirschner*, 182 AD3d 484, 484-485 [1st Dept 2020] [internal quotation marks and citation omitted].)

Arbitration Provision Terms

It is undisputed that petitioners did not sign the Lease, and thus, they assert they are not subject to the Arbitration Provision. However, Novak argues that GenCap, as an affiliate and investor of Level5, and Georgiopoulos, and Karvounaki-Hobbie, as investors in Level5, are bound by the plain language of the Arbitration Provision.

GenCap

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] [citations omitted].) The Arbitration Provision covers "any and all controversies, disputes, or claims arising out of or relating to this Lease, or the breach of any provision herein, between [Novak], and its members, partners, investors, affiliates, successors, and assigns and [Level5], and its members, partners, investors, affiliates, successors, and assigns… ." (NYSCEF 6, Lease at 52 [emphasis added].) The plain text of this provision clearly provides that all disputes arising out of or relating

to the Lease between Novak and Level5 and their affiliates must be resolve in arbitration. Thus, any affiliate of Level5 is bound to arbitration, even though a non-signatory to the Lease. (*Citibank, N.A. v Franco*, 2011 US Dist LEXIS 150741, at *15 [SDNY Dec. 29, 2011].) However, "absent explicit language demonstrating the parties' intent to bind future affiliates of the contracting parties, the term "affiliate" includes only those affiliates in existence at the time that the contract was executed." (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 246 [2014] [citation omitted].) Petitioners allege that GenCap was formed on August 25, 2020 (NYSCEF 1, Petition ¶ 21), after the execution of the Lease. Novak does not dispute this formation date and no explicit language to bind it as a future affiliate. Thus, as GenCap did not exist at the time that the Lease was executed, it is not bound by the Arbitration Provision.

Novak also argues that GenCap is bound to arbitrate as an investor under the plain language of the Arbitration Provision. (*See* NYSCEF 6, Lease at 52 [emphasis added] ["any and all controversies, disputes, or claims arising out of or relating to this Lease, or the breach of any provision herein, between [Novak], and its members, partners, investors, affiliates, successors, and assigns and [Level5], and its members, partners, investors, affiliates, successors, and assigns… ."].) However, like the term "affiliate", the term "investor" in the Arbitration Provision only includes those investors at the time the Lease was executed. (*Ellington*, 24 NY3d at 246.)

Georgiopoulos and Karvounaki-Hobbie

Novak asserts that Georgiopoulos is an investor under the broad language of the Arbitration Provision as a part owner of GenCap and because he provided personal funds in connection with the Cure Date Extension Agreement on behalf of Level5. (*See*

NYSCEF 35, Cure Date Extension Agreement ¶ 3; NYSCEF 32, Wire Transfer Email.) Again, it is undisputed that GenCap's formation occurred after the execution of the Lease as did the payment in connection with the Cure Date Extension Agreement. Thus, Georgiopoulos was not an investor at the time the Lease was executed.

As to Karvounaki-Hobbie, Novak asserts that she is an investor under the terms of the Lease through her ownership in Silent Partner. "Barron's Dictionary of Business Terms … defines an 'investor' as a 'party who purchases an asset with the expectation of financial rewards.'" (*Lazard Freres & Co., LLC v W.*Group Props. LLC*, 22 AD3d 45, 51 [1st Dept 2005].) Novak presents no evidence that Karvounaki-Hobbie made any personal investment in Level5 and fails to argue how Silent Partner's (Karvounaki-Hobbie owns 25% of Silent Partner) investment in Level5 extends personally to Karvounaki-Hobbie.

Accordingly, petitioners are not bound by the language of the Arbitration Provision.

Bases for Binding Nonsignatories

Although "nonsignatories are generally not subject to arbitration agreements, … under limited circumstances nonsignatories may be compelled to arbitrate." (*Matter of Belzberg v Verus Invs. Holdings Inc*., 21 NY3d 626, 630 [2013] [internal quotation marks and citations omitted].) The "five theories for binding nonsignatories to arbitration agreements: [are] 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." (*Thomson-CSF, S.A. v Am. Arbitration Assn*., 64 F3d 773, 776 [2d Cir 1995].) Here, Novak argues estoppel and alter ego apply.

Estoppel

"A nonsignatory to an agreement containing an arbitration clause that has knowingly received direct benefits under the agreement will be equitably estopped from avoiding the agreement's obligation to arbitrate." (*HRH Constr. LLC v Metropolitan Transp. Auth.*, 33 AD3d 568, 569 [1st Dept 2006] [citation omitted].) Benefits are direct when they "flow[] directly from the agreement." (*Matter of Belzberg*, 21 NY3d at 631 [citation omitted].) "Courts have limited the application of the direct benefits doctrine to situations in which a non-signatory has obtained a real and tangible benefit from the relevant agreement by either taking affirmative steps to exploit a benefit from a contract by bringing an action of their own based upon the language of the contract or through the enjoyment of monetary benefits of a contract by taking over performance thereunder." (*Kramer Levin Naftalis & Frankel LLP v Cornell*, 2016 NY Slip Op 32863[U], *10, [Sup Ct 2016] [citations omitted], *affd* 148 AD3d 430 [1st Dept 2017].) "Where the benefits are merely 'indirect,' a nonsignatory cannot be compelled to arbitrate a claim. A benefit is indirect where the nonsignatory exploits the contractual relation of the parties, but not the agreement itself." (*Matter of Belzberg*, 21 NY3d at 631 [citation omitted].) "The guiding principle is whether the benefit gained by the nonsignatory is one that can be traced directly to the agreement containing the arbitration clause. The mere existence of an agreement with attendant circumstances that prove advantageous to the nonsignatory would not constitute the type of direct benefits justifying compelling arbitration by a nonparty to the underlying contract." (*Id.* at 633.)

To bind petitioners to arbitration on an estoppel principal, Novak must demonstrate that petitioners derived a direct benefit from the Lease. As to GenCap, Novak argues it admittedly received a direct benefit from the Lease as petitioners allege GenCap was formed to "provide financing to Dale Hobbie, obtain a financial return from the Project, and introduce financial parties interested in sponsoring the Project." (NYSCEF 1, Petition ¶ 21.) In turn, GenCap argues that the possibility that the Project could have been profitable is not a direct benefit of the Lease.

Under the Lease, Level5 was responsible for financing the Project and the sourcing of potential customers. (NYSCEF 28, Lease § 2.03.) GenCap was admittedly formed to aid Level5 in accomplishing this. (NYSCEF 1, Petition ¶ 21; NYSCEF 31, Side Letter [stating that GenCap provided "historic and ongoing financial support of [the] Project … via investment of operating capital, master financial advisory and legal representation services"].) This is different than a mere investor looking for a return on its money. Here, GenCap's creation was essentially born out of the Lease, meaning that GenCap's whole purpose was to aid the Project. Thus, any financial return is a direct benefit flowing from the Lease. Thus, GenCap is equitably estopped from avoiding arbitration.

As to Karvounaki-Hobbie, Novak argues that Karvounaki-Hobbie received a direct benefit from the Lease as a 25% owner in Silent Partner and because she revised documents related to the Project. (*See* NYSCEF 1, Petition ¶ 23; NYSCEF 38, Document with Edits made by KH.) The fact that Karvounaki-Hobbie is a minority owner Silent Partner, a member of Level 5, does "not constitute a direct benefit to

[Karvounaki-Hobbie] from the [Lease]." (*Gilat v Sutton*, 220 AD3d 569, 570 [1st Dept 2023].) Further, it is unclear how editing a document, if true, creates a direct benefit.

As to Georgiopoulos, Novak argues that Georgiopoulos received a direct benefit from the Lease because he paid Novak $25,000 pursuant to the Cure Date Extension Agreement, which incorporated the Lease by providing that "[i]n consideration of [Novak] agreeing to extend the Cure Date, [Level5] shall wire to [Novak] a payment in the amount of $50,000." (NYSCEF 35, Cure Date Extension Agreement §3; NYSCEF 32, Wire Transfer Email.) Novak asserts that, as a result of this payment, the Lease remained in effect, extending the time for Level5 to repay Novak and for Georgiopoulos to reap financial benefits. However, at most, any financial benefit Georgiopoulos allegedly received from the continuation of the Lease as a result of his consideration for the Cure Date Extension Agreement is an indirect benefit. (*Matter of Belzberg*, 21 NY3d at 631.) "[I]t is not enough that some benefit incidental to the performance of the contract may accrue to him." (*Bowery Presents LLC v Pires*, 2013 NY Slip Op 31361[U], *9 [Sup Ct, NY County 2013] [internal quotation marks and citations omitted].)

Alter Ego

A party seeking to compel arbitration pursuant to the alter ego exception bears a heavy burden to demonstrate that the corporation was dominated and such domination was the instrument of fraud or led to malfeasance. (*See Matter of Rural Media Group, Inc. v Yraola*, 137 AD3d 489, 490-491 [1st Dept 2016] [holding that "Respondent bears a heavy burden with respect to each of these theories, and [i]nterrelatedness, standing alone, is not enough to subject a nonsignatory to arbitration" (internal quotation marks and citation omitted)].) Novak fails to meet this burden as to Karvounaki-Hobbie and

Georgiopoulos.[4] Novak's conclusory assertion that Georgiopoulos exercised control over Level5 is insufficient. Further, the fact that, if true, Karvounaki-Hobbie made edits to one Level5 document is insufficient to show domination.

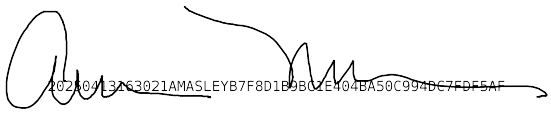
Accordingly, it is

ORDERED that motion sequence number 001 is granted, in part, and motion sequence number 003 is granted, in part; and it is further

ADJUDGED that the petition to stay the arbitration is granted, in part, as to petitioners Peter Georgiopoulos and Katerina Karvounaki-Hobbie and the arbitration is stayed as to them, and denied, in part, as to petitioner GenCap Financial Group LLC; and it is further

ADJUDGED that GenCap Financial Group LLC shall proceed to arbitration forthwith and respondent's counsel shall serve a copy of this judgment upon the arbitral tribunal; and it is further

ORDERED that this action is disposed.



4/13/2025
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**

[4] The court will not address GenCap under this theory as it is subject to arbitration under the theory of estoppel.