

Eliseo v Rolon
2025 NY Slip Op 35363(U)
February 6, 2025
Supreme Court, Bronx County
Docket Number: Index No. 810639/2024E
Judge: Fidel E. Gomez
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

VINCENT ELISEO,
-----X

Plaintiff,

Index No. 810639/2024E

- against -

Hon. FIDEL E. GOMEZ
Justice

LIZBETH ROLON,

Defendants.

-----X

The following papers numbered 1 to 1, read on this Motion noticed on 11/12/2024, and duly submitted as no. 1 on the Motion Calendar of 11/12/2024.

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion, Answering Affidavit, Replying Affidavit, etc.

Defendant's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 2/6/25

Hon. FIDEL E. GOMEZ, JSC

- 1. CHECK ONE
2. MOTION/CROSS-MOTION IS
3. CHECK IF APPROPRIATE.
CASE DISPOSED, GRANTED (MOTION), GRANTED IN PART, SETTLE ORDER, SUBMIT ORDER, DO NOT POST, NON-FINAL DISPOSITION, DENIED (MOTION), OTHER, FIDUCIARY APPOINTMENT, REFEREE APPOINTMENT, NEXT APPEARANCE DATE.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X

VINCENT ELISEO,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 810639/2024E

LIZBETH ROLON,

Defendant.

-----X

In the instant breach of contract action, defendant moves for an Order compelling plaintiff to arbitrate his claims against her, and dismiss this action pursuant to CPLR 3211(a)(1), (a)(5) and/or (a)(7).

For the reasons set forth hereinafter, defendant’s motion is granted, in part.

The complaint in this action alleges a single cause of action for breach of contract. Specifically, the complaint alleges as follows: Plaintiff and defendant entered into a “Membership Agreement of 2401 Westchester Ave LLC” (Membership Agreement), pursuant to which plaintiff holds a 30% interest in 2401 Westchester Ave LLC (the LLC) and defendant holds a 70% interest in the LLC. Pursuant to the Membership Agreement, plaintiff contributed \$150,000.00 and defendant contributed \$10.00 for their respective membership interests in the LLC. On September 25, 2023, plaintiff and defendant agreed that defendant would purchase plaintiff’s membership interest in the LLC and entered into a “Membership Interest Buyout Agreement” (Buyout Agreement), whereby defendant agreed to purchase plaintiff’s membership interest in the LLC for \$250,000.00 (Purchase Price). Pursuant to the Buyout Agreement, defendant agreed to pay the full Purchase Price by June 1, 2024, with monthly payments of \$1,500.00 commencing on September 1, 2023, and the remaining balance to be paid no later than June 1, 2024. As of June 1, 2024, defendant had made monthly payments totaling \$15,000.00 but failed to pay the full balance due. Defendant breached the Buyout Agreement by failing to

pay the balance of the Purchase Price on June 1, 2024, and by failing to close on the transaction on June 1, 2024. Plaintiff seeks damages in the amount of \$235,000.00.

In support of the motion, defendant contends that plaintiff waived his right to maintain an action against defendant in supreme court when he agreed to binding arbitration in the Membership Agreement, which serves as the basis for his breach of contract claim.

In support of the motion, defendant submits her affidavit and copies of the Membership Agreement and Buyout Agreement. In her affidavit, defendant states that she is the Managing Member of the LLC which owns, operates, leases and manages the building located at 2401 Westchester Avenue, Bronx, New York 10461 (the Building). The LLC leases space in the Building for commercial use. Currently, the LLC leases space to a pizza shop and a barber shop, both of which engage in daily business operations that involve and affect interstate commerce.

The Membership Agreement, dated September 2021, is between plaintiff and defendant and provides for the membership interests and operation of the LLC. The Membership Agreement states that the business of the LLC shall be, *inter alia*, the “[a]cquisition, ownership, management and sale of real property,” and that plaintiff has a 70% interest and defendant a 30% interest in the LLC. Pursuant to Section 14.11, “[a]ll claims and disputes arising under or relating to this Agreement are to be settled by binding arbitration in the State of New York or another location mutually agreeable to the parties.” Also, Section 14.1 states, *inter alia*, that “[t]his Agreement may not be amended nor may any rights hereunder be waived except by an instrument in writing signed by the party sought to be charged with such amendment or waiver, except as otherwise provided in this Agreement.” Section 14.2 provides that the Membership Agreement “be construed in accordance with and governed by the laws of the State of New York.”

The Buyout Agreement, effective September 25, 2023, is between plaintiff (Party A) and defendant (Party B) and provides, in pertinent part:

1. Purchase Price: Party B agrees to purchase Party A’s membership interest in [the LLC] for the total sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) (the “Purchase Price”).

2. Payment Terms: Party B shall pay the Purchase Price to Party A by June 1, 2024. The Purchase Price shall be paid as follows: a. A monthly payment of One Thousand Five Hundred [Dollars] shall be made starting September 1, 2023. b. The remaining balance shall be paid no later than June 1, 2024. . . .

3. Transfer of Membership Interest: Upon receipt of the full Purchase Price by Party A, Party A shall execute all necessary documents to affect the transfer and assignment of Party A's membership interest in [the LLC] to Party B. Party B shall assume all rights, responsibilities, and obligations associated with Party A's membership interest. . . .

5. Representations and Warranties: Both Parties represent and warrant that they have the authority to enter into this Agreement and that the execution and performance of this Agreement do not violate any applicable laws or agreements. . . .

6. Governing Law: This Agreement shall be governed by and construed in accordance with the laws of the state of New York, without regard to its conflicts of laws principles.

7. Entire Agreement: This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior discussions, negotiations, and agreements, whether oral or written.

In opposition to the motion, plaintiff contends that he should not be compelled to submit to arbitration because the parties never agreed to arbitration in the Buyout Agreement, and the arbitration provision in the Membership Agreement does not encompass claims arising out of the Buyout Agreement.

In support of his contentions, plaintiff submits his affidavit wherein he states, *inter alia*, as follows: There is no arbitration provision in the Buyout Agreement. He never agreed to arbitrate claims arising from or related to the Buyout Agreement. While the Membership Agreement has an arbitration provision, the parties clearly and knowingly omitted an arbitration provision in the Buyout Agreement. Nor does the LLC engage in interstate commerce. Defendant's assertion that the two tenants of the Building are engaged in daily business

operations that involve and affect interstate commerce is unsubstantiated and, upon information and belief, neither tenant engages in interstate commerce.

Plaintiff also submits the Buyout Agreement, discussed above. Plaintiff attached a copy of the Membership Agreement, also discussed above, to the complaint.

ARBITRATION

As an initial matter, the Court finds that the instant matter is not governed by the Federal Arbitration Act (FAA). Defendant contends that the FAA mandates enforcement of the arbitration provision in the Membership Agreement with respect to the instant breach of contract dispute because the LLC leases space in the Building to a pizza shop and a barber shop “whose daily business operations involve and affect interstate commerce.” Plaintiff argues that this contention is unsubstantiated.

The FAA provides that a written arbitration provision in “a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract” (9 USC § 2; *see Diamond Waterproofing Systems, Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 [2005]). The Supreme Court has interpreted the words “involving commerce” as the functional equivalent of the phrase “affecting commerce” (*Diamond Waterproofing Systems, Inc.* at 252 [“We conclude that the project here affected interstate commerce, triggering application of the FAA. Numerous out-of-state entities were involved in the transaction. The project manual and the engineer’s drawings were created in a joint effort with a structural engineering firm headquartered in Illinois. Diamond Systems’ largest supplier of materials for the project, MJM Studios, Inc., was a New Jersey company, and project meetings and visits were often scheduled at MJM’s offices. The largest supplier of equipment for the project, Dunlop Equipment, Inc., was a Massachusetts company. Further, various additional materials, equipment and services for the project were obtained from Oklahoma, Maryland and Kansas.”]). Thus, where a contract containing an arbitration provision “affects” interstate commerce, disputes arising thereunder are subject to the FAA (*id.*). Significantly, here, the only evidence submitted by defendant in support of the

applicability of the FAA standards to the instant matter is the conclusory statement of defendant, in her affidavit, that “[c]urrently, the LLC leases space to a pizza shop (Capri Pizza) and a barbershop, both of which engage in daily business operations that involve and affect interstate.” Indeed, defendant does not proffer any facts suggesting a nexus of any kind between the operations of either the pizza shop or the barber shop and interstate commerce. For this reason, defendant has not established that the FAA governs the instant matter.¹

Pursuant to CPLR § 7503(a), a party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. “If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration” (CPLR § 7503[a]).

The law is settled that whether a controversy is properly subject to arbitration is initially one for the courts to determine (*Matter of Nationwide Ins. Co. v Investors Ins. Co. of America*, 37 NY2d 91, 95 [1975][internal citations and quotation marks omitted]; *Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007]); *Denihan v Denihan*, 119 AD2d 144, 147-148 [1st Dept 1986]). Also, the proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute at issue (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.* at 583; *Gerling Global Reinsurance Corp. v Home Ins. Co.*, 302 AD2d 118, 123 [1st Dept 2002]). Further, an arbitration clause, as a component of a contractual agreement, must be enforced according to its terms; *Greenfield v Philles Records*, 98 NY2d 562, 569 [1st Dept 2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.* at 583). Arbitration is strongly favored under New York law (*Matter of Nationwide Ins. Co.* at 95; *State of New York v Philip Morris Inc.*, 30 AD3d 26, 31 [1st Dept

¹However, this is of no moment as the Court would reach the same conclusion under both the FAA and New York State law.

2006]), and any doubts as to whether an issue is arbitrable will be resolved in favor of arbitration (*BRG Sports, LLC v Zimmerman*, 127 AD3d 499, 499 [1st Dept 2015]; *State of New York* at 31).

Significantly, “it is settled that where parties have entered into an agreement containing a broad arbitration provision, the court’s inquiry is limited to whether or not the subject matter of the dispute is encompassed by its provisions; the question of whether the arbitration clause governs a particular aspect of the controversy, as well as the determination of the merits of the dispute, are matters within the exclusive province of the arbitrator” (*De Shazo v Hirschler*, 282 AD2d 257, 258 [1st Dept 2001])[court considered an arbitration provision including language that “[a]ny dispute, controversy or claim arising out of, relating to or in connection with” the parties’ purchase agreement was required to be submitted to arbitration a broad arbitration provision]; see *Remco Maintenance, LLC v CC Management & Consulting, Inc.*, 85 AD3d 477, 479-480 [1st Dept 2011] citing *Matter of Nationwide Ins. Co.* at 96 [“In cases where the parties have adopted a broad arbitration clause, the Court of Appeals has made clear: Once it appears that there is, or is not a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract, the court’s inquiry is ended.”]). The terms “arising out of,” and most particularly “relating to,” evince a broad arbitration clause (*State of New York* at 31; *Metalink Marine Corp. v NED Chartering and Trading, Inc.*, 207 AD2d 688, 689 [1st Dept 1994]). Here, the parties adopted a broad arbitration provision in the Membership Agreement which states, *inter alia*, that “[a]ll claims and disputes arising under or relating to this Agreement are to be settled by binding arbitration.” Clearly, the respective membership interests of the parties in the LLC are encompassed by the provisions of the Membership Agreement and, thus, there is a reasonable relationship between the parties’ agreement concerning a transfer of those interests and the subject matter of the Membership Agreement.

Additionally, inasmuch as the Buyout Agreement purports to modify the membership interests in the LLC, it effectively modifies substantive provisions of the Membership Agreement. This militates in favor of submitting this matter to an arbitrator. In this regard, the Court of Appeals has opined that “once the parties to a broad arbitration clause have made a valid choice of forum . . . all questions with respect to the validity and effect of

subsequent documents purporting to work a modification or termination of substantive provisions of their original agreement are to be resolved by the arbitrator” (*Inryco, Inc. v Parsons & Whittemore Contrs. Corp.*, 55 NY2d 666, 667 [1981][dispute concerning an oral agreement purporting to modify the terms of five written contracts, which contain arbitration provisions, to be resolved by the arbitrator]; see *Matter of Schlaifer v Sedlow*, 51 NY2d 181,185 [1980][whether a general release was obtained under duress to be resolved by arbitrator where underlying contract contained an arbitration provision and the release made no reference to the parties’ right to seek arbitration]).

Based on the foregoing authority, at a minimum, whether the arbitration provision in the Membership Agreement governs the instant dispute is an issue to be resolved by an arbitrator, not the Court.

Contrary to defendant’s assertion, the merger clause in the Buyout Agreement does not mandate a different result. As previously noted, the merger clause in the Buyout Agreement states that “[t]his Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior discussions, negotiations, and agreements, whether oral or written.” Significantly, the subject matter of the Buyout Agreement involves the parties’ membership interests in the LLC. The Buyout Agreement does not purport to modify any other substantive terms of the Membership Agreement. Indeed, Paragraph 3 of the Buyout Agreement provides that, upon the acquisition of plaintiff’s interest in the LLC, defendant “shall assume all rights, responsibilities and obligations associated with” plaintiff’s membership interest in the LLC. Those rights, responsibilities and obligations include the submission of any disputes arising from or related to the Membership Agreement to arbitration. And, as discussed above, the subject matter of the Buyout Agreement is reasonably related to the Membership Agreement.

DISMISSAL PURSUANT TO CPLR § 3211

Defendant contends that the Court should compel arbitration and dismiss the complaint, pursuant to CPLR § 3211 (a)(1), (5) and (7), or, alternatively, stay these proceedings pending the outcome of arbitration pursuant to CPLR § 7503(a), because plaintiff waived his right to seek arbitration.

The only legal argument advanced by defendant on this issue is that “[i]t is well settled in the First Department that when all of the issues raised in the Complaint must be submitted to arbitration, the Court may dismiss an action rather than stay proceedings.” In this regard, defendant cites two Supreme Court cases, which are not binding on this Court. Notably, defendant’s papers are bereft of any discussion regarding dismissal under any of the foregoing subsections of the CPLR.

In this Court’s view, the better practice is to stay this action instead of dismissing it so that the parties may make a motion in this action to confirm or vacate any eventual arbitral award instead of having to commence a new action (CPLR § 7503[a]; *see DS-Concept Trade Invest LLC v Wear First Sportswear, Inc.*, 128 AD3d 585, 586 [1st Dept 2015]).²

Accordingly, it is hereby

ORDERED that the parties submit the instant matter to an arbitrator in accordance with the Membership Agreement. It is further

ORDERED that this action be stayed pending arbitration. It is further

ORDERED that defendant shall serve a copy of this Decision and Order upon plaintiff, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: Bronx, New York
2/6/25

Hon. 

FIDEL E. GOMEZ, J.S.C.

²The Court also notes that it is possible, though not likely, that the arbitrator may determine that the arbitration provision does not govern the instant controversy.