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Boz Export & Import, Inc. v Karakus
2011 NY Slip Op 51685(U) [32 Misc 3d 1242(A)]
Decided on September 15, 2011
Supreme Court, Kings County
Demarest, J.
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Decided on September 15, 2011

Supreme Court, Kings County

Boz Export & Import, Inc. d/b/a MASAL CAFÉ, MUSTAFA BOZ, and AMMER MUSLU, Plaintiffs,

against

Selahattin Karakus, Defendant.

8738/11

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Carolyn E. Demarest, J.

The following papers numbered 1 to 8 read on this motion:Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed*1, 2, 5*

Opposing Affidavits (Affirmations)*3, 7*

Reply Affidavits (Affirmations)*6*

Other Papers (Memoranda of Law)*4, 8*

Defendant moves, pursuant to CPLR 7502 (c), to stay the action pending arbitration, and, in the alternative, pursuant to CPLR 3211 (a) (5), to dismiss the action. Plaintiffs cross-move, pursuant to CPLR 7502 (a) (i), to stay the arbitration sought by defendant.

BACKGROUND

[*2]

This action arises out of a shareholder dispute between plaintiffs Mustafa Boz ("Boz") and Ammer Muslu ("Muslu") and defendant Selahattin Karakus ("Selahattin"), who claims he was improperly ousted as president from plaintiff corporation Boz Export & Import, Inc. ("Boz Inc."), doing business as Masal Café, by the individual plaintiffs.

On April 23, 2010, Boz, Muslu, Selahattin and Selahattin's cousin, non-party Tahsin Karakus ("Tahsin"), entered into a Shareholders Agreement to govern their interests in Boz Inc, operating as Turkish restaurant, Masal Cafe. Under the Shareholders Agreement, 200 shares of stock were issued, 72 of which were issued to Selahattin, 72 to Tahsin, 36 to Boz

and 20 to Muslu. Subsequently, Tahsin left the country and transferred his shares. Both Selhattin and Muslu have asserted claims to Tahsin's shares and contend that the other's claim is fraudulent. Plaintiffs allege that Tahsin's shares were sold to Muslu on March 1, 2011. Selahattin alleges that Tahsin's shares were sold to him through a Stock Purchase, Sale & Transfer Agreement, dated December 13, 2010, which has been challenged as fraudulent, as indicated in the affidavit of Cinar Nejdet, the witness to the document, who attests in his affidavit sworn April 12, 2011, at the American Consulate in Berlin, Germany, that, at Selahattin's request, and in exchange for a promise of $50,000 (only $10,000 of which was paid), he signed both Tahsin's and his own name to the December 13, 2010 document. This representation is, however, contradicted in a statement, subscribed before a notary in Kings County on March 30, 2011, indicating that "[o]n December 16, 2010, at the request of Tahsin Karakus [he] witnessed Tahsin Karakus sign the . . . Stock Purchase, Sale & Transfer Agreement'."

On March 14, 2011, plaintiffs Boz and Muslu called a special meeting and voted their purportedly majority shares to remove Selahattin from the board of directors and install a non-shareholder, Cetin Guzel (apparently a cousin of Muslu), as president. Selahattin, who had been president of Boz Inc., alleges that he never received notice of such meeting. Finding defendant's claim meritorious, on April 28, 2011, this court declared such meeting and vote illegal and void and restored Selahattin as president.

Plaintiffs commenced this action on April 15, 2011 alleging, *inter alia*, breach of fiduciary duty, conversion, unjust enrichment and violations of the BCL in addition to requesting an accounting, and simultaneously, by order to show cause, sought a preliminary injunction and a temporary restraining order ("TRO"), enjoining defendant from terminating the sublease between Boz Inc. and its landlord and from managing, operating or entering Masal Café. In my absence, Justice Kathy King signed the order to show cause and granted the temporary restraining order. On April 18, 2011, defendant commenced an arbitration proceeding with the International Centre for Dispute Resolution, a division of the American Arbitration Association. On April 28, 2011, defendant cross-moved to stay the instant action, pursuant to CPLR 7502 (c), and to defer the resolution of all issues to the arbitrator, who has already been chosen, or, in the alternative, to dismiss the action pursuant to CPLR 3211 (a) (5). Following a hearing on April 27 and April 28, 2011, this court modified the TRO to enjoin defendant only from terminating the sublease, and the parties entered into a

stipulation in open court[FN1] resolving plaintiffs' request for a preliminary injunction and providing for the payment of Boz, Muslu and Selahattin's salaries, as well as the payment of attorneys' fees, during the pendency of this action. With the agreement of counsel for [*3]all parties, this court ordered a framed issue hearing for the limited purpose of determining the parties' share ownership.

On June 1, 2011, plaintiffs filed a cross-motion, pursuant to CPLR 7502, to stay the arbitration. On June 8, 21 and 23, 2011, in aid of determining the extent of the agreement to arbitrate contained in the Shareholders Agreement, as well as the intention of Tahsin Karakus as reflected in various conflicting communications regarding his transfer of shares, this court heard testimony from Nusrat Haker, Esq., the drafter of the Shareholders Agreement. The hearing was adjourned to September 26, 2011, pending the deposition of Tahsin Karakus to be held in Berlin, Germany or Istanbul, Turkey, pursuant to a Commission issued by this court on June 8, 2011. However, this court reserved decision on the limited issues of the interpretation of the arbitration clause in the Shareholders Agreement and whether the question of the ownership of the shares previously owned by Tahsin should be determined judicially or in arbitration.

DISCUSSION

Defendant has moved to stay this action pending the disposition of the arbitration proceeding pursuant to CPLR 7502 (c). Plaintiffs have cross-moved to stay the arbitration pursuant to CPLR 7502 (a). However, although neither party has moved pursuant to CPLR 7503, that statute, not CPLR 7502, governs whether arbitration should be compelled or stayed. CPLR 7503 (a) provides:

"A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. 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 (b) provides:

"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.

Arbitration agreements are enforceable "without regard to the justiciable character of the controversy," thus precluding this court from considering "whether the claim with respect to which arbitration is sought is tenable or otherwise pass[ing] upon the merits of the dispute" (CPLR 7501). The Court of Appeals has set forth three threshold questions requiring judicial determination when evaluating a motion to stay or compel: "whether the parties made a valid agreement to arbitrate, whether if such an agreement was made it has been complied with, and whether the claim sought to be arbitrated would be barred by limitation of time had it been asserted in a court of the State"(*Rockland County v Primiano Const. Co., Inc.*, 51 NY2d 1, 6-7 [1980] (internal quotations and citations omitted); CPLR 7503 (a) and 7502; *see generally*, [*4]Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7501:1-8). "If the court determines that the parties had not made an agreement to arbitrate, that concludes the matter and a stay of arbitration will be granted or the application to compel arbitration will be denied "(*Rockland*, 51 NY2d at 7).

New York's public policy strongly favors arbitration (*In re Miller*, 40 AD3d 861, 861 [2d Dept 2007]; *Union Free Dist. No. 15, Town of Hempstead v Lawrence Teachers Assn.*, 33 AD3d 808, 808 [2d Dept 2006]). However, "a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes'" (*Waldron v Goddess*, 61 NY2d 181, 183 [1984] quoting *Schubtex, Inc. v Allen Snyder, Inc.*, 49 NY2d 1, 6 [1979]).

Defendant claims that Section 9.8 (b) of the Shareholders Agreement, dated April 23, 2010, unambiguously requires the shareholders to resolve all disputes exclusively by arbitration. Section 9.8 (b) provides that "[a]ny controversy relating to [the Shareholders Agreement] shall be resolved exclusively by arbitration to be conducted in New York, NY, under the auspices of the American Arbitration Association, and the parties shall bear the costs, legal fees excepted, of any such arbitration." Plaintiffs claim that the clause is not enforceable because it conflicts with and is directly contradicted by Section 7.1 of the Shareholders Agreement which provides:

"The parties hereto agree that the shares of Stock are unique, that failure to perform the obligations provided by the Agreement shall result in irreparable damage, and that:

> a - a declaratory judgment of the parties' rights hereunder may be obtained by suit at law; and
>
> b - that specific performance of the obligations hereof, may be obtained by suit in equity."

It is because of this apparent conflict in the language of the Shareholders Agreement that this court found it necessary to examine the drafter of the Agreement, Nusrat Haker, Esq.

Mr. Haker testified that he had explained the Agreement, and the arbitration provision contained in Section 9.8 (b), to all of the parties in Turkish, as that is their first language. Each party executed the Agreement, initialling each page. Both in his testimony and in his affirmation in support of defendant's cross-motion, Mr. Haker explained that Section 7.1 did not conflict with Section 9.8 (b), but had been inserted into the Agreement as an aid to arbitration pursuant to CPLR 7502 (c) "considering the commercial significance of any delay in obtaining such relief in arbitration." He further testified that Section 7.1 was intended to be a "catch-all type of clause, in the event that the parties needed assistance by [the] court system" (Tr. p. 26, Line 22-23), but that reference to the declaratory judgment was included to resolve disputes outside the scope of arbitration, including judicial intervention necessary to determine the share ownership of the stock, given that certain shareholders were foreign nationals.

There is no question that all parties to this suit agreed to arbitrate "any controversy relating to this Agreement" and that Section 9.8 (b) is binding and enforceable. In fact, the issue of stock ownership is covered in the Agreement and would be resolvable by an arbitrator, notwithstanding Mr. Haker's suggestion that share ownership could be determined only by a court, and therefore fell outside the scope of the arbitration provision. Certainly all issues and claims raised in the plaintiffs' complaint, relating to defendant's performance of his duties as [*5]president and his alleged breaches of duty to plaintiffs, are within the parameters of the broad arbitration clause of the Agreement (*see Ehrlich v Stein*, 143 AD2d 908, 909 [2d Dept 1988] (enforcing a broad arbitration clause in spite of the shareholder

agreement's allowance "for judicial remedies should controversy arise concerning the right or obligation to purchase or sell shares"); *cf. Levkoff-Sennet Partnership v Levkoff*, 154 AD2d 352, 353 [2d Dept 1989] (noting that an arbitration clause may have been enforceable "notwithstanding the apparent conflict between the broad arbitration clause and the provision for judicial remedies" but for both parties' waiver of their right to arbitration by proceeding with litigation)). Given Mr. Haker's testimony, there does not appear to be a conflict between Sections 7.1 and 9.8 (b) of the Agreement with respect to the substance of the claims raised in the complaint.

Having determined the first threshold question in the affirmative, the court need not address the second threshold question, whether the agreement was complied with, as neither side has alleged any conditions precedent to be fulfilled prior to the commencement of arbitration. Whether the claim is barred by the statute of limitations also need not be addressed as neither side contests the timeliness of any of the claims asserted.

Plaintiffs, however, claim that the entire action should remain before this court because the relief requested in the complaint is primarily equitable in nature and thus nonarbitrable. "Whether a dispute is arbitrable is generally an issue for the court to decide unless the parties clearly and unmistakably provide otherwise" (*Zachariou v Manios*, 68 AD3d 539, 539 [1st Dept 2009]). Here, the arbitration clause is broad and generally covers "any controversy" relating to the Shareholders Agreement. In *Zachariou*, the Appellate Division, First Department enforced a narrow arbitration clause even though the relief requested in the arbitration included specific performance and an accounting, quoting *Matter of Silverman [Benmor Coats, Inc.]*, 61 NY2d 299, 309 [1984], in which it was held that "[a]n application for a stay will not be granted . . . even though the relief sought is broader than the arbitrator can grant, if the fashioning of some relief on the issue sought to be arbitrated remains within the arbitrator's power." In *Silverman*, the Court of Appeals recognized the broad authority exercised by arbitrators when issuing awards, noting that "absent provision in the arbitration clause itself, an arbitrator is not bound by principles of substantive law or by rules of evidence . . . He may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement, even though the award exceeds the remedy requested by the parties." (*id.* at 308 [internal citations omitted]). Plaintiffs have failed to provide any reason the arbitrator would lack the authority to resolve the claims asserted in the complaint, including breach of

fiduciary duty, conversion, unjust enrichment and violations of the BCL, in addition to requesting an accounting, all of which stem from the Shareholders Agreement. Moreover, having failed to move to stay the arbitration within the requisite 20 days of service of defendants' Demand for Arbitration on April 15, 2011, as required by CPLR 7503 (c), plaintiffs are precluded from staying the arbitration (*see Matter of Standard Fire Ins. Co. v Mouchette*, 47 AD3d 636 [2d Dept 2008]). Thus, arbitration based upon the allegations of the complaint shall proceed.

Defendant seeks to have all issues, including the dispute over shareholdings, referred to arbitration. As this court has noted, the ownership of shares would be arbitrable under the Shareholders Agreement where, as here, the dispute is exclusively among signatories to the [*6]Agreement, but for the testimony of Mr. Haker to the effect that the Agreement provides, under Section 7.1, for adjudication of ownership interests by the court. The issue, in any case, is collateral to those claims interposed in plaintiffs' complaint. Tahsin, the seller of the shares, was also a signatory to the Agreement, but his interest has been terminated by the transfer. Although his testimony is critical to the resolution of the issue of ownership, he is unavailable to give direct testimony because he will not be permitted to enter the United States. This court has signed a Commission to take his deposition outside the country which would aid in arbitration, but problems have already arisen regarding the implementation of the Commission and applications have been made to the court to resolve these problems. Thus, this court will continue to be involved in litigation even were the question of share ownership referred to arbitration.

Moreover, as heretofore noted, when the question of the disputed ownership was first raised, no objection was made to a framed issue hearing to determine such ownership. In fact, defense counsel stated that he favored such hearing by the court. Thus was commenced a hearing that remains pending before the court. Two witnesses have testified, and written communications have been received, addressed to the court, directly from Tahsin Karakus which will undoubtedly become evidence at trial. In light of these circumstances, this court finds it inappropriate, and a waste of judicial resources, in addition to creating additional costs to the litigants in duplicating before an arbitrator the efforts already made in litigation pending before this court, to refer the share ownership dispute to arbitration at this time.

CONCLUSION

Accordingly, as all of the issues raised in plaintiffs' complaint and recited in defendant's Demand for Arbitration relate to the rights and obligations of the parties under the Shareholders Agreement, defendant's cross-motion to stay the action is granted with respect to the allegations of the complaint. The parties are directed to proceed forthwith in compliance with the directions of the arbitrator.

Defendant's motion to dismiss the action pursuant to CPLR 3211 (a) (5) is denied. Dismissal under this statute is only available to the defendant after arbitration has concluded and an award has been issued (*see Prince of Peace Lutheran Church v Hibner*, 44 AD2d 830, 830 [2d Dept 1974]; *Langemyr v Campbell*, 23 AD2d 371, 373 [2d Dept 1965]). This case will remain open until an arbitration award has been made and is confirmed or vacated upon motion by the parties. CPLR 7510-7511.

Plaintiffs' motion to stay arbitration, while untimely, is granted in this court's discretion only to the extent of retaining the collateral issue of the ownership of Tahsin's shares for determination by this court, in the interests of justice and judicial economy. It is noted that there is no question that Tahsin's shares were transferred and he is not a necessary party to either the arbitration or the litigation. Nor is the determination of share ownership a prerequisite to arbitration of the issues raised in the complaint. Accordingly, the parties are directed to forthwith proceed with the pending arbitration. The hearing heretofore commenced relating to share ownership is adjourned to September 26, 2011.

EN T E R,

_____ [*7]

Carolyn E. Demarest

J. S. C.

Footnotes

Footnote 1: The transcript of the stipulation was so-ordered by this court on May 25, 2011.

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