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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Martin Bregman

- v -

Challenger III, LLC et al

INDEX NO. 109641/2011

MOTION DATE 10/6/11

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 001 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the cross motion is granted to the extent that, pursuant to CPLR 408, respondents may obtain limited discovery with regard to the question of whether Bregman Productions is Martin Bregman's alter ego corporate entity and whether the corporate veil of Bregman Productions, Inc. should be pierced; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this Court on the issue as to whether Bregman Productions, Inc. is an alter ego of petitioner Martin Bregman; and it is further

Dated: _____ _____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of the Court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (which can be accessed at the References" link on the Court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320 (a)) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this Court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in this decision shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this Court thereon.

Dated 12/1/14 **ENTER:** _____, **J.S.C.**

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35
----------X

MARTIN BREGMAN,

Petitioner,

Index No. 109641/11

-against-

CHALLENGER III, LLC, JACOB ARABOV, and ANGELA ARABOV,

Respondents.

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CAROL EDMEAD, J.:

Petitioner Martin Bregman (Bregman) moves, by order to show cause, for an order striking respondents' demand for arbitration, dated July 18, 2011, as against him, on the ground that he is not a party to any agreement to arbitrate any matter involving respondents. Respondents cross-move, pursuant to CPLR 404 (a) and 7503 (a), for an order dismissing the petition and to compel arbitration, or, alternatively, to allow discovery and conduct a hearing as to whether the corporate veil should be pierced.

FACTS

Respondents Jacob Arabov and Angela Arabov (together, the Arabovs) are the principals of respondent Challenger III, LLC (Challenger) (all respondents collectively, Respondents). Respondents commenced an arbitration against Bregman Productions, Inc. (BP) and Bregman individually, pursuant to a demand for arbitration dated July 18, 2011. Thereafter, Bregman commenced

this proceeding challenging the demand for arbitration.

Bregman provides a copy of an agreement between his company, BP, and an unnamed entity. The agreement is signed by Bregman as President, and by someone from the other entity; however, that signature is not legible, and there is no name identifying the party. Nonetheless, both Bregman and Respondents agree that the second party is Respondents. The agreement is undated, but the parties agree that it was entered into in February of 2008.

The agreement is in the form of a confirmation of the agreement between the parties. It provides that Respondents would pay BP $200,000.00. BP was "planning to try to set up and/or produce" various projects to which it did not yet have rights. The agreement further provides:

> "With regard to all projects developed by BP during the term: you shall receive an amount equal to ten percent (10%) of: (i) all Martin Bregman's producer fees after the first Two Hundred and Fifty Thousand Dollars ($250,000) per project, and (ii) participations paid to BP for its own account, regardless of when received, whether during or after the term except that with respect to proceeds received by BP after the term, your participation shall be reduced to six and a quarter percent (6.25%); and you or your designee shall receive an executive producer screen credit thereon, which credit will be shared with all other executive producers on such projects."

Order to Show Cause, Ex. B. The term of the agreement is five years. Respondents were given the right to audit and inspect the financial records of BP relating to said projects. Finally, the agreement stated that:

> "In the event of any dispute under or relating to this agreement, the same must be submitted to arbitration to the American Arbitration Association in New York City, New York, in accordance with the rules promulgated by the said Association and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof."

Id.

Bregman contends that since he signed the agreement only as president of BP, not in his individual capacity, he cannot be forced to arbitrate in his individual capacity.

Respondents maintain that the Arabovs were encouraged to invest in BP by Kenneth I. Starr (Starr), an investment advisor who pled guilty to charges that he diverted tens of millions of dollars of his clients' money to support his extravagant lifestyle. Respondents produce the government's complaint against Starr, in portions of which the agreement at issue is discussed. Respondents contend that they never received any return on their investment with BP, and never received any portion of the principal back. Further, BP and Bregman have refused to provide any information about the disposition of their investment.

In further support of their cross motion, Respondents produce an affidavit of Elizabeth Bregman, Bregman's former wife. The affidavit was submitted in an action in New York County, entitled *Matter of Bregman v NBC Universal, Inc.*, index number 111953/08. In her affidavit, Elizabeth Bregman states that

during their marriage, many personal expenses were paid for by various corporations that Bregman owned, including each of their cars, their youngest son's car, Bregman's chauffeur, bartenders, nannies and housekeepers at their residence. The corporations also paid their credit card bills, and all of Bregman's travel expenses, whether for business or personal reasons, including hotel costs.

Bregman seeks to strike the demand for arbitration as against him based on the fact that he signed the agreement as president of BP, not in his individual capacity. He asserts that if Respondents believe that they have any personal claim against him, they should commence a plenary action.

Respondents raise two bases for compelling arbitration. First, they claim that Bregman derived direct benefit from the agreement, as a result of which he is bound by the arbitration provision it contains. Second, Respondents maintain that Bregman is the alter ego of BP and has abused his domination over that entity to deprive the Arabovs of the benefits of the agreement. Therefore, the corporate veil should be pierced, and Bregman should be bound by the arbitration agreement.

DISCUSSION

It is well settled that in order to be required to arbitrate a dispute, a party must have agreed to arbitrate. *God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP,*

6 NY3d 371, 374 (2006). However, that does not mean that a party must have personally signed the written arbitration provision in order to be bound by it. A nonsignatory can be bound to an arbitration agreement based upon ordinary principles of contract and agency. *Thomson-CSF, S.A. v American Arbitration Assn.*, 64 F3d 773, 776 (2d Cir 1995). Among the grounds for binding a nonsignatory to an arbitration agreement are estoppel and veil piercing. *Id.*

Estoppel

Nonsignatories can be estopped from avoiding arbitration where they have derived a direct benefit from the agreement that contains the arbitration provision. *Mark Ross & Co., Inc. v XE Capital Mgt., LLC*, 46 AD3d 296, 297 (1st Dept 2007).

Respondents argue that the agreement at issue here entitles the Arabovs to a percentage of "Martin Bregman's producer fees" - not merely to monies earned by BP. Since Bregman signed the agreement, he knew that the agreement obligated him to make reasonable efforts to earn such fees, because otherwise any agreement would be illusory. Restatement (Second) of Contracts, § 76, Comment *d* (1981). He was also aware of the fact that the agreement contained an arbitration provision that would cover disputes arising out of his failure to make such efforts. Respondents maintain that Bregman derived a direct benefit from the agreement because he would be using the Arabovs' $200,000

investment in order to develop projects in conjunction with BP, from which he would obtain producers' fees. Respondents conclude that Bregman should not be permitted to reap the benefits of the agreement while avoiding the obligations thereunder.

Bregman contends that under Respondents' theory, any compensated employee or officer of a corporation would be subjected to the arbitration agreements of that entity. He claims that he stood to benefit from the agreement only indirectly, in the form of producer fees paid by the motion picture studio to him, had a film project come to fruition.

While it is true that Bregman benefitted from the agreement, in that his company had money invested in it which could be used to produce films, that benefit was not direct to him, but indirect. *Cf. HRH Constr. LLC v Metropolitan Transp. Auth.*, 33 AD3d 568, 569 (1st Dept 2006). The agreement did not provide for Bregman to receive any payments as a result of Respondents' investment, but only to give up a portion of his fees if the project came to fruition. To the extent that Bregman may have made use of the investment money personally, as implied by Respondents, that would be a question of whether Bregman is the company's alter ego, and whether the corporate veil should be pierced. It does not, however, establish that the agreement provided a direct benefit to Bregman.

Discovery to Establish Alter Ego Liability or to Pierce the

Corporate Veil

Alternatively, Respondents seek to obtain discovery to establish that Bregman dominated BP to commit fraud or other wrongs. Respondents maintain that discovery is permitted in a special proceeding in order to address the issues before the court, in this case, whether the arbitration agreement is binding on Bregman as a result of his being the alter ego of BP. *Matter of Welton Becket Assoc. v LLJV Dev. Corp.*, 193 AD2d 478 (1st Dept 1993).

Respondents maintain that this court must apply Delaware law in order to determine whether BP is the corporate alter ego of Bregman. If they can demonstrate such alter ego status under Delaware law, then Bregman can be compelled to arbitrate under New York law. *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 (1998); *Matter of Welton Becket Assoc. v LLJV Dev. Corp.*, 193 AD2d at 478.

In order to support their request for discovery, Respondents assert that BP does not and has not adhered to corporate formalities, and that Bregman has not separated his personal business from BP. They further claim that Bregman exercises complete domination over BP, and is virtually indistinguishable from BP. This is evidenced by the fact that the Arabovs were encouraged to invest in BP by Kenneth Starr, who had a relationship with Bregman and whose wife was reported as

producing one of the projects listed in the agreement. Starr induced the Arabovs to fund other questionable investments with benefits to Starr's wife, associates and friends, and Respondents conclude that this was another such investment. Respondents also point to the fact that Bregman and BP have refused to provide an accounting of their investment, and that there is no evidence that the funds were used for their intended purpose. Additionally, Respondents contend that Bregman has serious personal financial problems. Finally, the Arabovs aver that they are aware of at least one other Article 75 proceeding involving a nearly identical agreement to the one at issue, in which Bregman was also named in his individual capacity on the ground that BP is his alter ego. Respondents contend that these facts sufficiently establish good cause to justify permitting disclosure to enable Respondents to demonstrate that Bregman is the alter ego of BP, and that the corporate veil should be pierced.

In a supplemental affirmation, Respondents submit the affidavit of Elizabeth Bregman, discussed above, in which she attests to Bregman's use of BP as his personal financial property.

Bregman avers that discovery is unnecessary, and that, should Respondents be successful at arbitration, they can litigate the question of piercing the corporate veil after

liability is established and they seek to collect any judgment. Bregman disputes any claim that Starr's wrongful conduct is in any way relevant to the issues involved here, and asserts that Respondents have not produced any evidence of any connection. Bregman distinguishes the *Welton Becket* case, pointing out that it involved a successor in interest or assignee, not an attempt to pierce the corporate veil. Bregman contends that Respondents are engaging in a fishing expedition, and maintains that the proposed discovery demands are complex rather than indicative of an expedited matter. Bregman asserts that there would be prejudice in allowing discovery, in the form of cost and inconvenience. He concludes that Respondents can pursue their alter ego claims in the arbitration or supplementary proceeding.

Where there is a question of whether a party may be bound by an arbitration agreement due to an alter ego relationship, and the court cannot determine that issues on the papers presented, it is appropriate for the court to allow discovery and to conduct a hearing on the question of who is bound by the arbitration provision. *Matter of Welton Becket Assoc. v LLJV Dev. Corp.*, 193 AD2d at 478. Thus, the question presented is whether Respondents have alleged sufficient facts to warrant discovery and a hearing on the issue of whether Bregman should be bound personally by the arbitration clause.

Delaware law, which controls this matter because BP is a

Delaware company, allows for piercing the corporate veil where there is fraud, or where the corporation is "a mere instrumentality or alter ego of its owner." *Geyer v Ingersoll Publs. Co.*, 621 A2d 784, 793 (Del Ch 1992). Under the alter ego theory, there is no requirement to show fraud, only that the two entities operated as a single economic entity, and that there is an element of unfairness or injustice. *Fletcher v Atex, Inc.*, 68 F3d 1451, 1457 (2d Cir 1995).

Here, Respondents allege that Bregman essentially used BP as his own property, using it to pay his personal expenses, and that BP did not carry on the business in which it was purportedly involved. Such use of a company, if proven, is sufficient to warrant piercing the corporate veil if, as Respondents allege, it causes unfairness, such as failure to repay an investment according to an agreement. *See e.g. International Credit Brokerage Co. v Agapov*, 249 AD2d 77, 78 (1st Dept 1998); *Matter of Sbarro Holding (Shiaw Tien Yuan)*, 91 AD2d 613, 614 (2d Dept 1982). Bregman does not refute Respondents' allegations, but relies on the paucity of evidence to dismiss their demand to arbitrate. However, the affidavit of Elizabeth Bregman, while submitted in another action, provides evidentiary facts from a person with personal knowledge which support Respondents' assertions. Therefore, the record contains ample basis for this court to conclude that discovery is warranted, as is a hearing on

the question of whether BP was Bregman's alter ego, thereby subjecting Bregman to arbitration under the Agreement.

While Bregman complains that the proposed discovery is overly broad, Respondents are entitled to obtain discovery that would indicate whether BP has observed corporate formalities, whether it dispersed funds appropriately, to whom it dispersed funds, and who was involved in running the company and making decisions. The proposed discovery addresses these issues. Bregman has not specified any particular question that he finds objectionable, and it is not the Court's responsibility to go through each discovery question to ascertain whether it is appropriate where no specific objection has been made.

CONCLUSION

Accordingly, it is hereby

ORDERED that the cross motion is granted to the extent that, pursuant to CPLR 408, respondents may obtain limited discovery with regard to the question of whether Bregman Productions is Martin Bregman's alter ego corporate entity and whether the corporate veil of Bregman Productions, Inc. should be pierced; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this Court on the issue as to whether Bregman Productions, Inc. is an alter ego of petitioner Martin Bregman; and it is further

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ORDERED that, unless otherwise directed by this Court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in this decision shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this Court thereon.

Dated: December 1, 2011

ENTER:

J.S.C.

HON. CAROL EDMEAD