SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2
Justice

Index Number : 115404/2010
GRUBIN, SHARON E.
VS.
GOTHAM CONDOMINIUM
SEQUENCE NUMBER : 003
COMPEL OR STAY ARBITRATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

JUL 24 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/13/12

Luy, J.S.C.
LOUIS B. YORK J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

----------x

SHARON E. GRUBIN and DEBORAH E. LANS,

Plaintiffs,

Index No. 115404/2010

-against-

THE GOTHAM CONDOMINIUM, JEANNE BAK, MICHAEL BRUCK, THOMAS BURKE, ANDREW W HAHN, BERNARD KURY, JAMES PALADINO, ALEXANDER RUBIN, MICHAEL SCHWEITZER, JUSTIN WELLEN and RICHARD YIEN, individually and as members of the Residential Board of Managers of The Gotham Condominium, COOPER SQUARE REALTY, Inc. John/Jane Does 1 through 4,

Defendants.

----------x

LOUIS B. YORK, J.:

In this action, plaintiffs, the owners of an apartment in a condominium building located at 170 East 87th Street in Manhattan, allege that they have suffered abhorrent living conditions as a result of defendants' conduct. They claim that defendants, the condominium board and managing agent of the building and the individual members of the board, managed various construction projects in the building in an inexcusable manner, such as with fraudulent representations as to the status of those projects. Plaintiffs included eight causes of action in their November 24, 2010 complaint: fraud, negligence, breach of contract, breach of fiduciary duty, trespass, nuisance, breach of the

covenant of good faith and fair dealing, and overcharge of electricity and abuse of process. In lieu of an answer, defendants moved to dismiss on January 6, 2011. In response to defendants' pre-answer motion to dismiss, this Court's December 12, 2011 order dismissed individual claims against all but two members of the board. Defendants answered and asserted counterclaims following this decision on January 26, 2012. Defendants listed their right to arbitration among the affirmative defenses in the answer. Defendants also gave notices to take depositions and moved to compel arbitration on January 26, 2012. On March 16, 2012, plaintiffs filed a cross-motion seeking priority in discovery. Both parties have submitted memos in support of their arguments for compelling arbitration and priority.

Plaintiffs allege that defendants overcharged them for electricity and subjected them to abuse of process. Defendants allege that the condominium by-laws, to which all parties undisputedly agreed, mandate arbitration. Plaintiffs counter that defendants waived their arbitration right through litigating this action and thereby accepted the judicial forum instead of an arbitral one. In their cross-motion, plaintiffs argue for priority in discovery. They contend that because the alleged breach of a fiduciary relationship between the parties involved a central claim with information known only by defendants, plaintiffs have the right to discover that information before defendants can depose them. For the reasons below, this Court grants defendants' motion to compel arbitration and denies plaintiffs' motion for priority in discovery.

First, the Court addresses defendants' motion. According to defendants, arbitration of the outstanding electricity bill is mandatory under the condominium by-laws, which state in pertinent part:

> A Unit Owner who has a complaint about his submetered electricity bill shall first attempt to resolve any dispute regarding electrical service or charges with the Managing Agent... If the Condominium Board is unable to provide a satisfactory resolution to the Unit Owner within 30 days after the Condominium Board receives the complaint, then the complainant will be provided written notice of the grievance procedure rules summarized below and the complaint shall be conducted in accordance with the rules of the American Arbitration Association... The American Arbitration Association shall be asked to appoint the arbitrator. Exhibit D, Notice of Motion to Compel Arbitration Pursuant to CPLR 7503(a), January 26, 2012, Index No. 115404/10.

Defendants state that since this provision in the by-laws mandates the procedure for disputes over electricity, the eighth cause of action, which involves electricity bills, should be arbitrated. According to plaintiffs, despite the by-laws, arbitration is not required. Instead, a judicial forum is appropriate because defendants waived their right to arbitration by participating in this lawsuit. Plaintiffs concede that both parties mutually agreed to the by-laws and do not argue that the instant motion is untimely. The sole argument for staying arbitration is waiver.

New York favors arbitration as a matter of policy in part because it provides an expeditious means of resolution. Stark v. Molod Spitz, 9 N.Y.3d 59, 66, 845 N.Y.S.2d 217, 222 (2007). Courts do not interfere with the "freedom of consenting parties to submit disputes to arbitration." Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's, 66 A.D.3d 495, 496, 888 N.Y.S.2d 458, 459 (1st Dep't 2009), aff'd, 14 N.Y.3d 850, 901 N.Y.S.2d 133 (2010). Mutually agreed arbitration is not an absolute right though. Instead, "[l]ike contract rights generally, a right to arbitration may be modified, waived, or abandoned." Sherrill v. Grayco Bldrs., 64 N.Y.2d 261, 272, 486 N.Y.S.2d 159, 162 (1985). Non-moving parties that display a preference for resolution within a courthouse can terminate their arbitration rights, for example. See id. at 274, 486 N.Y.S.2d at 164. Plaintiffs argue that because defendants elected to litigate plaintiffs'

claims in court they have demonstrated this preference and therefore are barred from reasserting their arbitration right.

An assessment of the scope of the defendants' judicial actions determine whether arbitration has been waived:

> In the absence of unreasonable delay, so long as the defendant's actions are consistent with an assertion of the right to arbitrate, there is no waiver. However, where the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer in the particular case, his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory. De Sapio v. Kohlmeyer, 35 N.Y.2d 402, 405, 362 N.Y.S.2d 843, 846 (1974).

In addition, courts consider whether defendants raised arbitration as an affirmative defense, litigated after a court denied a motion to compel arbitration, or litigated the case for an extended period of time. See LaRosa v. Arbusman, 74 A.D.3d 601, 604, 903 N.Y.S.2d 371, 374 (1st Dep't 2010).

In light of these factors, the Court finds that defendants did not waive arbitration. Plaintiffs' suggestion that defendants took fourteen months before asserting their arbitration rights is spurious. While the answer may have been served fourteen months after the complaint was filed, defendants served their answer, cross-claim, deposition orders, and motion to compel arbitration in January 2011, about a month after the Court's decision denying their motion to dismiss. Defendants' response was therefore timely and at no point indicated a preference for litigating before a judge rather than mediating before an arbitrator.

Grounds for waiver of arbitration often arise when the non-moving party first raises its right after engaging in litigation for some time. For example, Courts have found that delays of over a year, Nishio v. E.F. Hutton & Co., Inc., 168 A.D.2d 224, 224, 562

N.Y.S.2d 112, 112 (1st Dep't 1990), three years, Sherill 64 N.Y.2d at 269-271, 486 N.Y.S.2d at 160-162, and sixteen months, Flores 4 N.Y.3d at 371-372, 795 N.Y.S.2d at 497, were sufficient to constitute waiver. However, a delay of four months did not of itself create a waiver. Byrnes v. Castaldi, 72 A.D.3d 718, 720, 898 N.Y.S.2d 640, 642 (2d Dep't 2010). As defendants note, their answer and their motion were timely. Therefore, they retained their arbitration right.

In addition, defendants have the right to arbitrate for other reasons. First, as they point out, they raised arbitration as an affirmative defense in their answer. See, e.g., Ruttera & Sons Contr. Co. v. J. Petrocelli Contr., 257 A.D.2d 614, 615, 684 N.Y.S.2d 286, 286 (2d Dep't 1999); Les Construction Beauce-Atlas v. Tocci Bldg. Corp. of N.Y., 294 A.D.2d 409, 410, 742 N.Y.S.2d 356, 357-358 (2d Dep't 2002). Plaintiffs argue that through ordering depositions, obtaining adjournments, and asserting counterclaims, defendants pursued discovery and waived arbitration. Conducting depositions with the stated goal of completing discovery may waive arbitration; however, "[n]ot every foray into the courthouse effects a waiver of the right to arbitrate." Sherrill, 4 N.Y.2d at 273, 486 N.Y.S.2d at 163 (1985). Because defendants ordered depositions but never conducted them, their demand for discovery, without more, was insufficient to waive arbitration. See Byrnes 72 A.D.3d at 720, 898 N.Y.S.2d at 642 (2010).

Second, defendants argue that because they engaged in litigation only out of necessity their actions do not waive their arbitration rights. See, e.g., MCC Dev. Corp. v. Perla, 81 A.D.3d 474, 475, 916 N.Y.S.2d 102, 103 (1st Dep't), leave denied, 17 N.Y.3d 715, 934 N.Y.S.2d 373 (2011) (answer and counterclaims did not waive arbitration because measures were necessary). Defendants were entitled to take immediate and

protective measures, such as ordering depositions, in order to maintain the status quo of the case. Non-moving parties may take pressing actions without waiving arbitration rights. See, e.g., Preiss/Breismeister Architects v. Westin Hotel, 56 N.Y.2d 787, 788, 452 N.Y.S.2d 397, 397 (1982) (filing for injunctive relief was protective act that did not waive arbitration); Flynn v. Labor Ready, 6 A.D.3d 492, 493, 775 N.Y.S.2d 357, 359 (2d Dep't 2004) (pre-answer motion to dismiss did not constitute waiver because defendant was entitled to test adequacy of complaint before seeking arbitration). The Court of Appeals applied this reasoning in Stark v. Molod Spitz. 9 N.Y.3d at 67-68, 845 N.Y.S.2d at 909 (2007). In Stark, defendant's participation in a special hearing proceeding and two plenary actions did not waive arbitration because those proceedings addressed pressing needs. Id. at 67-68, 845 N.Y.S.2d at 909. Plaintiffs argue that these cases are distinguishable because they involve commercial ventures. The Court finds this distinction insignificant because the natures of the disputes were not critical factors in these cases.

In sum, because the agreed to by-laws covered the type of dispute at issue, defendants asserted their right to arbitration in a timely answer, and defendants did not waive this right, arbitration can be compelled. See, Castellone v. JP Morgan Chase Bank, N.A., 60 A.D.3d 621, 623, 875 N.Y.S.2d 130, 132 (2d Dep't 2009). Defendants have not initiated a sufficient amount of discovery with respect to the arbitrable claim to constitute a selection of the judicial forum. Moreover, they appeared by court order at the preliminary conference. These facts combined with the State's predisposition for arbitration leads to the conclusion that arbitration should be compelled.

It is relevant that the eighth cause of action is also the only one where arbitration is an issue, making any decision over the motion to compel arbitration minor within the complete landscape of this lawsuit. The resolution of this motion then, will have little impact on the progress of this action. Furthermore, because the seven outstanding causes of action do not deal with arbitration, it will be virtually impossible for defendants to refrain from participating in discovery. For example, defendants would have likely invited negative juridical responses had they elected not to attend recent preliminary and compliance conferences.

The Court next addresses plaintiffs' cross-motion for priority of discovery. Under CPLR 3106(a), defendants normally have priority. Bucci v. Lydon, 116 A.D.2d 520, 521, 497 N.Y.S.2d 669, 671 (1st Dep't 1986). Plaintiffs argue that a reversal of priority is appropriate because: (1) there was a fiduciary relationship between plaintiffs and defendants, (2) defendants' breach was central to relevant claims, and (3) defendants possess exclusive knowledge of information essential to the charges. Defendants respond that plaintiffs fail to articulate a specific breach of fiduciary duty or other specific circumstances sufficient to waive priority. Defendants also reject the argument that they possess sole knowledge of vital information.

Defendants' arguments are persuasive. Because they seek a variation from a procedural rule, plaintiffs must show that there are "special circumstances substantiating" their claim for priority. Bennett v. Riverbay Corp., 40 A.D.3d 319, 320, 833 N.Y.S.2d 896, 896 (1st Dep't 2007). Unless plaintiffs show special circumstances, priority goes to defendants or the party who served a notice of examination first, because "the defendant is blameless until the plaintiff proves otherwise." Serio v. Rhulen, 29 A.D.3d 1195, 1197,

815 N.Y.S.2d 320, 323 (3rd Dep't 2006). Courts have broad discretion to determine whether special circumstances exist. See Halitzer v. Ginsberg, 80 A.D.2d 771, 772, 436 N.Y.S.2d 738, 739 (1st Dep't 1981); Preferred Elec. & Wire Corp. v. Price, 68 Misc.2d 423, 424-425, 326 N.Y.S.2d 614, 616 (Sup. Ct., N.Y. Cnty. 1971).

Under this standard, the Court concludes special circumstances do not exist here. Defendants served the first deposition notices and so are entitled to priority on both grounds. Moreover, plaintiffs do not argue let alone show extenuating or special circumstances. Accordingly, they are not entitled to priority.

Another exception to the rule arises when the parties were engaged in a shared business enterprise that creates a fiduciary duty between them, and the party without priority has exclusive knowledge of vital facts. Bel Geddes v. Zeiderman, 228 A.D.2d 393, 393, 644 N.Y.S.2d 729, 729 (1st Dep't 1996). However, "the mere allegation of a breach of fiduciary duty is not sufficient to upset a defendant's right to priority." Schindler v. Niche Media Holdings, 1 Misc.3d 713, 721, 772 N.Y.S.2d 781, 788 (Sup. Ct., N.Y. Cnty. 2003). In addition, a plaintiff must show that use of the usual procedures would result in prejudice. NOPA Realty Corp. v. Central Caterers, 91 A.D.2d 991, 457 N.Y.S.2d 851 (2d Dep't, 1983) (priority denied to plaintiff when both parties lacked knowledge of some facts). Plaintiffs' arguments on this point are insufficient to justify reversing the normal rules for priority. Plaintiffs assert that defendants' breach of fiduciary duty is a central part of the litigation for this case and therefore unless plaintiffs get priority, plaintiffs' claims will be prejudiced. However, plaintiffs neither clarify the breach nor explain the prejudice. Defendants argue in their memo that plaintiffs do not explain why this breach of fiduciary duty is central to litigation; furthermore, even if it

were central, plaintiffs fail to cite a case that justifies a change in priority. Defendants similarly do not cite any case law on this point. Since neither side advocates this matter thoroughly or persuasively, the Court shall not address it. However, as plaintiffs bear the burden of proof, defendants prevail.

The parties also dispute whether defendants' have exclusive knowledge of some of the facts. If this were the case, the plaintiffs might be entitled to examination priority. See McKenzie Mgmt. & Research Co. v. Lee Natl. Corp., 36 A.D.2d 602, 602, 318 N.Y.S.2d 355, 355 (1st Dep't 1971); Wunner v. Maguire, 66 A.D.2d 797, 410 N.Y.S.2d 897 (2d Dep't 1978). It is plaintiffs' burden to meet this high standard and show that "the pertinent facts were wholly within the knowledge of the defendants, to entitle them" to priority in discovery. Preferred Equities Corp. v. Zeligman, 155 A.D.2d 424, 424, 547 N.Y.S.2d 355, 355 (2d Dep't 1989). While plaintiffs correctly assert that defendants control some records pertaining to the construction work and fraudulent representations in question, defendants note that plaintiffs must have information of some facts based on their allegations in the complaint. Defendants also point out that they cannot wholly know the disputed facts since this lawsuit revolves around the condition and maintenance of plaintiffs' real property. As residents of the real property, plaintiffs have presumed knowledge of its condition. Thus, plaintiffs have not satisfied their burden here as well.

This Court also notes that members of both parties are seasoned attorneys, and that their extensive motion practice and accusatory language borders increasingly on frivolousness. The Court admonishes all parties to conduct themselves more professionally in all future court proceedings.

Based on the above, therefore, it is

ORDERED that the motion to compel arbitration herein is granted; and it is further

ORDERED that the cross-motion to grant plaintiff priority of discovery is denied.

Dated: 7/13/12

ENTER:

LOUIS B. YORK, J.S.C.

LOUIS B. YORK J.S.C.

FILED

JUL 24 2012

NEW YORK
COUNTY CLERK'S OFFICE