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SCANNED ON 1/4/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MOULTON **PART** 40-B
Justice

Index Number : ~~654291/2012~~ 102523-11
OZER, JOSEPH
vs.
GAZIT, EHUD
SEQUENCE NUMBER : ~~001~~ 003
COMPEL OR STAY ARBITRATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 003

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 and CNSS motion

are decided per attached Decision and order of the Court

FILED
JAN 04 2013
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
JAN - 3 2013
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 12/21/12

_____, J.S.C.
HON. PETER H. MOULTON

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: PART 40 B

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APPLICATION OF JOSEPH OZER,

Petitioner,

Index No. 102523/2011

For an Order Pursuant to Article 75
of the CPLR Staying the Arbitration
of a Claim Initiated by

EHUD GAZIT

Respondent.

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PETER H. MOULTON, J.S.C.

This motion and cross motion arise out of a tortured business dispute related to investments in a New York company, Sterling International Mercantile, Inc. ("Sterling").[1] By Decision and Order, dated January 10, 2012 (the "January Decision"), the court scheduled an evidentiary hearing to ascertain whether to stay an arbitration initiated under a Hebrew language document, dated April 8, 2005 (the "Hebrew Agreement"). Petitioner Joseph Ozer ("petitioner" or "Ozer") maintains that the Hebrew Agreement was intended to be held in escrow (and therefore, unenforceable), pursuant to a separate escrow agreement, dated April 8, 2005 (the "escrow agreement"). The escrow agreement contains certain conditions for release, but respondent Edud Gazit ("respondent" or "Gazit") has never argued that those conditions were met. Instead, Gazit has persistently maintained that the Hebrew Agreement was never intended to be held in escrow. The Hebrew Agreement refers to a purchase price of $2.0 million, payable in monthly installments over twenty years, with one percent interest, for a total amount of $2.2 million.

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[1]The litigious history of this case includes respondent's removal of this proceeding to federal court on the grounds of diversity. The case was remanded to this court by the federal court three months later.

In addition to the Hebrew Agreement, the parties (along with Eitan Arouh ("Arouh") and Sterling) signed an English language document, also dated April 8, 2005 (the "English Agreement") which refers to a purchase price of $313,450 for each of the two purchasers, payable in two hundred and forty equal payments of $2,000 (including interest) for a total of $626,900. It is unclear why the parties signed the Hebrew and English Agreements, on the same date, neither of which reference the other. Neither has it been explained why, according to the escrow agreement, unspecified "legal documents" were placed in "two sealed envelopes" on that date, to be held in escrow.

Prior to the court taking testimony in the evidentiary hearing, Gazit served a new arbitration notice (the "New Notice"), which unlike the one before the court, sought arbitration under the English Agreement, as well as under the Hebrew Agreement. The New Notice also sought arbitration against Sterling, which is a party to the English Agreement, but not the Hebrew Agreement. The New Notice also cured an alleged defect, the failure to add Arouh, who petitioner contended was a necessary party. The New Notice claims that under the Hebrew Agreement, petitioner owes respondent "$1,528,462 arising from Gazit's sale to Ozer of his interest in Sterling, with interest from the date of default" and that Ozer and Sterling also owe $852,075 in additional damages. The New Notice "will seek to have the arbitrator declare that the English Agreement is invalid" - - which Gazit maintains is the undisputed basis for arbitration of this dispute.

After serving the New Notice, respondent requested that petitioner consent to dismissal of this proceeding. When he refused, respondent filed the instant motion to dismiss this proceeding, maintaining that it is "moot" by virtue of filing the New Notice. The motion also seeks a "summary determination," but no basis is stated for such relief.

Petitioner also filed a related proceeding to stay arbitration under the New Notice and Gazit

cross petitioned to compel arbitration (*see Application of Joseph Ozer and Sterling International Mercantile, Inc., v. Ehud Gazit, and Eitah Arouh*, Index No 651291/12). The proceeding was referred to me as a related matter.[2] In this proceeding, Petitioner cross moves for a joint trial of the two proceedings.

The Parties' Arguments

Respondent maintains that because the New Notice seeks to arbitrate under the English Agreement, in addition to the Hebrew Agreement, the court should no longer decide whether the Hebrew Agreement is subject to arbitration. To support his claim that this proceeding is now moot, respondent cites *Matter of Schneider* (*Newman*) (88 AD2d 876 [1st Dept 1982]) [service of an amended demand clarifying the nature of the dispute rendered the original demand academic for purposes of the appeal]). For the first time, Gazit maintains that it is within the province of the arbitrator to decide whether the English Agreement was terminated or superceded, citing the Hebrew Agreement's cryptic reference to an "additional agreement, which is merely cosmetic." To support his new argument, respondent cites *Matter of Weinrott* (*Carp*), 32 NY2d 190 [1973] ["questions regarding the validity of the overall agreement, i.e., whether it has been superceded, terminated or is otherwise invalid, are the express province of the arbitrator"]). Thus, he maintains that the court

[2]The court has considered the following submissions in connection with the motion to dismiss and the cross motion: (1) respondent's notice of motion, dated April 10, 2012, including affirmation and exhibits; (2) respondent's memorandum of law in support, dated April 10, 2012; (3) petitioner's cross motion for joint trial dated May 4, 2012; (4) petitioner's memorandum of law in opposition and in support of cross motion, dated May 4, 2012; and (4) respondent's reply memorandum of law, dated May 21, 2012.

should not decide which agreement governs, because that would be invading the province of the arbitrator.

Petitioner counters that the motion to dismiss is untimely under CPLR 404 (a), because it was made more than six months after the time allowed for respondent to answer. Petitioner further argues that the motion to dismiss should be denied because respondent appeared for the hearing, waiving his arguments. Moreover, petitioner asserts that respondent has admitted, by his conduct, that the English Agreement governs because respondent's 2005 tax returns reflect a sale price of $613,952, which correlates to the $626,000 purchase price in the English Agreement. Petitioner also points to the arbitration clause in the English Agreement providing for arbitration of "any dispute which involves the validity, construction, meaning, performance, termination or effect of *this Agreement* or the rights and liabilities of the parties" (emphasis added). He further points to the merger clause which provides that the writing "constitutes the entire agreement." Accordingly, the English Agreement provides for arbitration of disputes related to that agreement only, which cannot encompass disputes under the Hebrew Agreement.

In reply, respondent states that there is no time limit for his motion. Pointing to the language in the English Agreement covering "any" disputes involving the "validity" and "effect" of that agreement, or, the "rights and liabilities of the parties" Gazit maintains that the arbitration clause is broad enough to cover everything that he seeks to arbitrate. Respondent further contends that petitioner's citation to the merger clause is of no import because contract interpretation is for the arbitrator, and not the court. Gazit cites *L & R Exploration Venture v Grynberg* (22 AD3d 221 [1st Dept 2005]); *Matter of Riccardi* (*Modern Silver Linen Supply Co.*) (45 AD2d 191 [1st Dept 1974]), and *31 W. 47th St. Co. v Bevona* (215 AD2d 152 [1st Dept 1995]) for the proposition that issues

involving whether one agreement supercedes or terminates another, is for the arbitrator to decide.

Gazit asserts yet another argument which was not made in connection with his prior cross motion to compel arbitration, and is raised for the first time in his reply. He argues that whether there was an agreement to hold a document in escrow, and the conditions for its release, concerns the issue of whether a condition precedent exits, and is a matter for the arbitrator. In support of this new argument, Gazit cites *Pearl St. Dev. Corp. v Conduit & Found. Corp.* (41 NY2d 167 [1976]) and *United Nations Dev. Corp. v Norking Plumbing Co.* (45 NY2d 358 [1978]).

Arguments in the Related Proceeding

In the related proceeding, Ozer and Sterling seek to stay arbitration under the New Notice on the basis that the Hebrew Agreement was intended to be held in escrow and is therefore, unenforceable. Noting that the New Notice does not allege any defaults under the English Agreement, they assert that Gazit is improperly seeking to use the arbitration clause under the English Agreement to obtain arbitration under the Hebrew Agreement. They further seek a stay of arbitration on the basis that Sterling cannot be compelled to arbitrate under the Hebrew Agreement, as a non-party to that agreement, citing *Matter of Travelers Prop. Cas. Corp.* (*Hershman*) (287 AD2d 412 [1st Dept 2001). Although Gazit maintains that Ozer is Sterling's "alter ego" and therefore can be compelled to arbitrate on that basis, Ozer and Sterling assert that no facts are alleged to establish that Ozer dominated and controlled Sterling. Ozer and Sterling also maintain that the Hebrew Agreement does not contain an unequivocal agreement to arbitrate, an issue raised, but not

decided, by the court in footnote 3 of the January Decision.[3]

In his cross petition to compel arbitration, Gazit reiterates all of the arguments made in connection with this motion. In addition, he contends that the Hebrew Agreement contains an unequivocal agreement to arbitrate because "the arbitrator option shall be used in the event of a disagreement" among the parties based on "the wish" of one of those parties. Even if the Hebrew Agreement required that the selection of the arbitrator was subject to the parties' consent, arbitration could be triggered by one party. Further, although he concedes that no monetary defaults exist under the English Agreement, the arbitration clause in the English Agreement is not limited to monetary disputes and encompasses issues such as the "validity" and "effect" of the agreement, which Gazit maintains is at issue. Gazit cites cases holding that any issues which are logically connected to, or touch on, a dispute which is subject to a broad arbitration clause, must be arbitrated. He also contends that non-signatory Sterling can be compelled to arbitrate under the Hebrew Agreement as the alter ego of Ozer and a "direct third-party beneficiary" of below market interest rates "estopped" from denying arbitration. Respondent, who seems to never be at a loss for arguments, never addresses petitioner's contention that Gazit's tax returns suggest that Gazit himself believed that the

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[3]The Hebrew Agreement purportedly contains an arbitration clause providing:
An arbitrator shall be appointed by Udi [Ehud Gazit], Yossi [Joseph Ozer] and Eitan, under the consent of each of the parties. The arbitrator is not required to be a professional arbitrator but rather may be any person acceptable to all parties.

A. The ruling of the arbitrator binds all the parties and is final.
B. The arbitrator option shall be used in the event of a disagreement between Yossi, Eitan and Udi, and the wish of one of the parties is sufficient.

C. The arbitrator shall aspire to make a decision by a quick proceeding and shall indeed aspire to conclude the process within 30 days.

English Agreement was the operative document.[4]

In reply, in addition to reiterating the arguments raised in connection with the motion to dismiss, Ozer and Sterling assert that the fact that Sterling was a signatory to the English Agreement, but not the Hebrew Agreement, is proof that the parties never intended that Sterling arbitrate under the Hebrew Agreement. Furthermore, they assert that Gazit erroneously maintains that the court no longer should decide whether the Hebrew Agreement was intended to be held in escrow. Ozer and Sterling point to respondent's acknowledgment the court must decide whether a valid agreement to arbitrate exists, prior to submitting a dispute to arbitration. They cite to *Mizuna v Crosslands Fed. Sav. Bank*, 90 F3d 650, 659 [2d Cir 1995] ["[p]lacing a contract in escrow is a way of creating a condition precedent to its validity"] and *Town of Ogden v Manitou Sand & Gravel Co.*, 252 AD2d 964, 966 [4th Dept 1998] [an agreement which provided that it would not be introduced in court, absent compliance with all of its provisions, is not a valid and enforceable contract]). Ozer and Sterling maintain that Gazit conflates the question of whether a valid arbitration agreement exists with the interpretation of the underlying legal agreement. Ozer and Sterling further maintain that the arbitration language in the English Agreement cannot operate to draw in the Hebrew Agreement, and the "rights and liabilities" language of the English Agreement is limited those related to "this [English] Agreement."

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[4]Respondent further rehashes arguments considered and rejected by the court in the January Decision. Although respondent maintains that the evidence demonstrates that, as a matter of law, the Hebrew Agreement was never intended to be held in escrow, an evidentiary hearing was scheduled to resolve this issue of fact.

Discussion

Respondent's motion is denied in its entirety. The matter is not moot. The court must still decide whether there is a valid agreement to arbitrate under the Hebrew Agreement. Although there is no question that arbitration must be compelled under the English Agreement, Gazit seeks to arbitrate under both agreements. It is the court's role to decide which documents are subject to a valid agreement to arbitrate, regardless of the arbitrator's role in determining the issues which are logically connected to that agreement, or in determining whether that agreement is superceded.[5]

The January Decision has already established that the court, not the arbitrator, must make that determination, which is now law of the case (*see e.g., Levitz v Robbins Music Corp.*, 17 AD2d 801, 801 [1st Dept 1962] ["The denial of the original motion for summary judgment established the law of the case and required the denial of the subsequent motion"]). Gazit has not reargued or appealed the January Decision. Even if he had made a motion to reargue, however, it would be denied.

Neither party, nor the court, has uncovered a case directly on point. However, prior to submitting a dispute to arbitration, the court must determine the existence of "a valid agreement to arbitrate" (*Matter of Weinrott*, 32 NY2d at 198, *supra*). Validity does not refer solely to the existence of the agreement, but also refers to its enforceability (*see Durst v. Abrash*, 22 AD2d 39 [1st Dept 1964] [prior to 1962, CPLR § 7503 did not expressly refer to the "validity" of the agreement

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[5]It is for the arbitrator to decide whether the merger clause in the English Agreement precludes consideration of any issues outside of that agreement, which are not logically connected or touch on that agreement. "[I]ssues of contract interpretation are precisely the type of dispute to be left to arbitration . . . If the issue involved was solely one of construction or interpretation, it would, without a doubt, be for the arbitrators to decide" (*Pearl St. Dev. Corp.*, 41 NY2d 167, *supra* [internal citations and quotations omitted]). Nor is it the court's role to determine whether the English Agreement was terminated or superceded in some manner (*see e.g., Sisters of St. John the Baptist, Providence Rest Convent v Geraghty Constructor*, 67 NY2d 997 [1986]).

but only to "the existence of the agreement"], *aff'd* 17 NY2d 445 [1965]). If the Hebrew Agreement was intended to be held in escrow, then the arbitration provision is not valid until the conditions for the agreement's release are met (*see Mizuna*, 90 F3d at 659, *supra* ["Placing a contract in escrow is a way of creating a condition precedent to its validity"]).[6] Moreover, "arbitration is essentially a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit" (*Matter of Howard & Co. v. Daley*, 27 NY2d 285, 289 [1970] [internal citations omitted]). If the Hebrew Agreement was intended to be held in escrow, absent compliance with the escrow agreement's provisions, then the Hebrew Agreement is not a valid and enforceable contract, and cannot be arbitrated (*see Town of Ogden v Manitou Sand & Gravel Co.*, 252 AD2d 964, *supra* [an agreement providing that it would not be introduced in court absent compliance with all of its provisions is not a valid and enforceable contract]).

None of the cases cited by Gazit compel a different result. *United Nations Dev. Corp. v Norking Plumbing Co.* (45 NY2d 358, *supra*) does not support sending the escrow issue to the arbitrator. As explained in *Matter of County of Rockland* (*Primiano Constr. Co.*) (51 NY2d 1 [1980]), there is difference between conditions precedent to arbitration (which is a matter for the court) and conditions precedent involving procedural stipulations (which is a matter for the arbitrator). The latter includes limitations of time within which a demand for arbitration must be

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[6]An 'escrow' has been defined as a written instrument which by its terms imports a legal obligation and which is deposited by the grantor, promisor, or obligor, or agent thereof, with a stranger or third party to be kept by the depositary until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee, promisee, or obligee (55 NY Jur Escrows § 1).

made, which was the issue in *United Nations Dev. Corp.* (*id.* at 8).

As explained in *County of Rockland*:

> Whether the particular requirement falls within the jurisdiction of the courts or of the arbitrators depends on its substance and the function it is properly perceived as playing -- whether it is in essence a prerequisite to entry into the arbitration process or a procedural prescription for the management of that process. Under the first heading will come provisions which in point of time are intended to be preliminary to the institution of any arbitration proceeding and in a precise sense are unrelated to it, e.g., a requirement that before any demand for arbitration can be made the dispute between the parties be referred to the architect or to the partnership -- "conditions precedent" in the literal meaning of that term. Under the second heading will come provisions relating to the conduct of the arbitration proceeding itself, i.e., requirements or conditions in arbitration, e.g., that the demand be made within a specified time, or be served in a specified manner or on specified persons.

Id. at 9.

The determination of the escrow issue "is in essence a prerequisite to entry into the arbitration process" which is a matter for the court. As explained above, if the Hebrew Agreement is intended to be held in escrow, and no conditions for its release have been met, then none of its provisions are effective, including the agreement to arbitrate.

Pearl St. Dev. Corp. v Conduit & Found Corp. (41 NY2d 167, *supra*) is also inapposite. There the dispute was a matter for the arbitrator because the applicability of the condition precedent was dependant upon interpretation of the underlying contracts which contained the arbitration clauses. In this dispute, resolution of the escrow issue is not dependant upon interpretation of the Hebrew or English Agreements (*see Teletech Europe B.V. v Eassar Servs. Mauritius*, 83 AD3d 511 [1st Dept 2011] [dispute was not subject to arbitration because the escrow agreement controlled over a separate document which contained an arbitration provision]).

Respondent's citation to *L & R Exploration Venture v Grynberg* (22 AD3d 221 [1st Dept 2005]); *Matter of Riccardi* (*Modern Silver Linen Supply Co.*) (45 AD2d 191 [1st Dept 1974]), and

31 W. 47th St. Co. v Bevona (215 AD2d 152 [1st Dept 1995]) does not support respondent's argument that the matter is now moot. As held in those cases, it is in the province of the arbitrator to decide whether the parties' subsequent conduct terminates, modifies, renews or supercedes an agreement which subject to arbitration. However, this principle does not obviate a court's role in determining whether there is a valid agreement to arbitrate in the first instance.

Furthermore, *Matter of Weinrott*, 32 NY2d 190, *supra* does not support respondent's claim that the matter is moot because it is within the arbitrator's jurisdiction to determine whether the Hebrew Agreement supercedes the English Agreement. In *Matter of Weinrott*, the issue of whether the contract was invalid, because it was induced by fraud, was an issue for the arbitrator. The court found that the arbitration provision was separable from other portions of the contract, in the absence of any assertion that arbitration provision was also induced by fraud. The court noted, however, that "[o]f course, if the alleged fraud was part of a grand scheme that permeated the entire contract, including the arbitration provision, the arbitration provision should fall with the rest of the contract" (*id.* at 197 [internal citations omitted]). Here, the arbitration provision in the Hebrew Agreement must fall with the rest of the contract, and is not separable. If the Hebrew Agreement was intended to be held in escrow, and no conditions for its release have been met, then none of the document's provisions are currently enforceable.

It is hereby

ORDERED that respondent's motion to dismiss is denied in its entirety; and it is further

ORDERED that petitioner's cross motion for a joint trial is granted; and it is further

ORDERED that the evidentiary hearing will be held on January 23, 2013 at 2:15 pm in Room

1127 B at 111 Centre Street, New York.

This Constitutes the Interim Decision and Order of the Court.

Dated: December 21, 2012

ENTER:

J.S.C.