Matter of Feldman v United Scenic Artists, Local 829, IATSE
2014 NY Slip Op 30571(U)
March 6, 2014
Sup Ct, NY County
Docket Number: 653898/13
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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Application of ABIGAIL FELDMAN,

Index No.: 653898/13

Petitioner,

For an Order Pursuant to Article 75 of the CPLR to
Stay the Arbitration of a Certain Controversy

-against-

UNITED SCENIC ARTISTS, LOCAL 829, IATSE,

Respondent.

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Hon. Anil C. Singh, J.:

In this special proceeding arising out of an abandoned production of a musical revival, petitioner Abigail Feldman moves, pursuant to CPLR 7503 (b), to permanently stay or enjoin the arbitration as against her entitled *In Re Local 829, United Scenic Artists and Pump Boys Broadway Revival*, AAA No. 13 576 01098 13 (the Arbitration).[1] Petitioner asserts that the claims asserted against her are not arbitratable, because petitioner is not a proper party to the Arbitration under New York law, where she neither contracted with respondent United Scenic Artists, Local 829, IATSE (Local 829) or its members, nor did she otherwise agree to arbitrate any of the claims asserted by Local 829 in the arbitration demand. The Arbitration, which was originally scheduled for November 13, 2013, has been held in abeyance by the arbitrator pending resolution of the instant petition.

BACKGROUND

Petitioner, once an aspiring theatrical producer, is an actress who lives in New York City.

[1] Petitioner also operates under the pseudonym, Abby Lee.

In 2011, Feldman took producing classes at New York's Commercial Theatre Institute. In March of 2012, petitioner founded Numero Uno Productions, LLC (Numero Uno), in order to produce theatrical productions. On October 29, 2012, Numero Uno organized Pump Boys Broadway Revival, LLC (PBBR), with the sole purpose of mounting the six-character musical play, "Pump Boys and Dinettes" (the Production). Petitioner is the principal of Numero Uno, and Numero Uno is the principal and managing member of PBBR.

Thereafter, Numero Uno hired veteran Broadway producer, Thomas Viertel, to serve as an executive producer and consultant to the Production. On Viertel's advice, Numero Uno hired Frankel Green Theatrical Manager (Frankel) to serve as the general manager of the Production. Laura Green, a principal of Frankel, performed the general manager duties for the Production.

Between September 1, 2012, and October 23, 2012, on behalf of PBBR, as producer, Green signed form Local 829 designer contracts and rider agreements with set designer, David Gallo, lighting designer, Mike Baldassari, and costume designer, Ann Hould-Ward (the Designer Contracts). Between November 5, 2012, and January 20, 2013, on behalf of PBBR, Green signed form Local 829 assistant designer contracts with assistant set designer, Steven Kemp, and assistant costume designers Kristina Kloss and Christopher Vergara (the Assistant Designer Contracts). In addition, on October 1, 2012, on behalf of PBBR, Green signed an agreement with Dan Moses Schreier, whereby Schreier would serve as sound designer on the Production (the Sound Designer Agreement) (collectively, the Contracts).

Pursuant to their terms, the Contracts incorporated a collective bargaining agreement between Local 829 and the Broadway League, for the time period January 1, 2012, through December 31, 2015 (the CBA). Specifically, arbitration provisions, contained in the Sound

Designer Agreement and in riders to the Designer and Assistant Designer Contracts, make reference to the arbitration procedures set forth in the CBA.

It should be noted that the Broadway League is a national trade association for the Broadway theater industry. Its members are made up of individuals; theater owners and operators, producers, presenters and general managers, rather than corporations, partnerships or other entities. The individual producers/members of the Broadway League serve as bargaining representatives for the Broadway League's membership. Various corporations, partnerships and limited liability companies are bound by the collective bargaining agreements, because a Broadway League member has a controlling ownership interest in said entities. Petitioner is not a member of the Broadway League.

Rehearsals for the Production were to begin on February 4, 2013, previews were to begin on March 19, 2013, and opening night was scheduled for April 8, 2013. However, on February 8, 2013, when the Production was allegedly fully designed and pre-production was underway, Numero Uno and Frankel were forced to announce that the Production would be postponed indefinitely due to trouble that PBBR was having in raising the $4 million dollars it needed for full capitalization.

On February 25, 2013, Frankel sent PBBR a letter advising that Frankel was terminating its general management of the Production in 10 days. On March 15, 2013, in a letter, Green notified Local 829 that Frankel was no longer providing general management services to PBBR, advising that all further correspondence between Local 829 and PBBR be sent to PBBR's production counsel.

On May 16, 2013, Local 829 sent a demand for arbritration (the Arbitration Demand) to

the America Arbitration Association (the AAA) concerning various advance payments allegedly still due to the designers under the Contracts. The Arbitration Demand named petitioner and PBBR as respondents, but not Numero Uno.

In response to the Arbitration Demand, on May 24, 2013, via facsimile, AAA sent a Notice of Arbitration to PBBR's production counsel. The notice of arbitration listed Local 829 and PBBR as parties to the Arbitration, but not petitioner or Numero Uno. PBBR's production counsel and Local 829's counsel then selected Arbitrator Randall M. Kelly to hear the dispute at a hearing to be held on November 13, 2013. On September 19, 2013, the Production was officially abandoned.

DISCUSSION

Whether Petitioner is a Proper Party to the Arbitration

Petitioner filed this petition to permanently stay the Arbitration as against her, on the ground that she is not a proper party to the Arbitration. Petitioner argues that, since there is no contract between petitioner and Local 829 or its members, petitioner could not have agreed to arbitrate any of the claims asserted by Local 829 against her in the Arbitration Demand (*see Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 382 [1st Dept 2006] [where the petitioner did not sign the agreement, which contained an arbitration provision, he could not "be compelled to arbitrate the respondent's claim"]).

"[I]t is a judicial responsibility, and not the arbitrator's, to decide the threshold question of whether the parties are bound by a valid agreement to arbitrate" (*M.I.F. Sec. Co. v R.C. Stamm & Co.*, 94 AD2d 211, 213 [1st Dept], *affd* 60 NY2d 936 [1983]; *Primavera Labs. v Avon Prods.*, 297 AD2d 505, 505 [1st Dept 2002]). "Under New York law, an enforceable contract requires

mutual assent to its essential terms and conditions" (*Edelman v Poster*, 72 AD3d 182, 184 [1st Dept 2010]). "'[A] court will not order a party to submit to arbitration absent evidence of that party's unequivocal intent to arbitrate the relevant dispute and unless the dispute falls clearly within that class of claims which the parties agreed to refer to arbitration'" (*id.* quoting *Primavera Lab. v Avon Prods.*, 297 AD2d at 505 [internal quotation marks and citation omitted]; *Matter of Wonder Works Constr. Corp. v R.C. Dolner, Inc.*, 73 AD3d 511, 513 [1st Dept 2010]; *JMT Bros. Realty, LLC v First Realty Bldrs., Inc.*, 51 AD3d 453, 455 [1st Dept 2008] [the lower court erred when it denied the petitioner's "cross motion to stay arbitration of the claims against him individually since he signed the arbitration agreement in his capacity as president of JRF Construction, and a party will not be compelled to arbitrate absent evidence that affirmatively establishes an express agreement to do so"]; *Matter of Metamorphosis Constr. Corp. v Glekel*, 247 AD2d 231, 231 [1st Dept 1998] [Court held that the lower court "properly stayed arbitration of the counterclaim against petitioner's president since he did not contract with respondent or agree to arbitration in his individual capacity"]).

The evidence in this case does not establish that petitioner possessed an "unequivocal intent to arbitrate the relevant dispute" (*Edelman v Poster*, 72 AD3d at 184). The Contracts were between Local 829 members and PBBR, as producer of the Production. Petitioner was not a party to the Contracts. In addition, Frankel's Green signed the Contracts on PBBR's behalf. Further, none of the terms in the Contracts contemplate arbitration against petitioner in any fashion. Therefore, petitioner is not a proper party to the Arbitration.

In its opposition, Local 829 argues that section XXI of the CBA binds petitioner, even as a nonparty to the CBA. However, in fact, section XXI of the CBA, which binds "Related

Employers," by its terms, only concerns the defined "Employer" and "any Principal of the Employer" (petitioner's notice of motion, exhibit G, the CBA at 26). As argued by petitioner, applying this language to the corporate structure at hand, the employer of the Production is PBBR, and the principal of PBBR is Numero Uno. Therefore, petitioner is not bound to the CBA and its arbitration provisions on this ground.

Local 829 also puts forth a May 19, 2009 sideletter to the CBA (the CBA Sideletter), in which the Broadway League and Local 829 make it clear that general managers who execute individual agreements between producers and designers bind the "corporation, partnership or company that is producing the production," and also any "individual League Member(s) who are general partners, managing members, or other principals of the producing entity" (petitioner's petition, exhibit G, the CBA at 31).

However, petitioner is not bound by the CBA Sideletter, because, not only is PBBR the producer of the Production, and not petitioner, but petitioner is not a member of the Broadway League. In any event, even if petitioner were a Broadway League member, petitioner is not a general partner or managing member of PBBR, the producing entity. Rather, Numero Uno is the managing member of PBBR.

Finally, Local 829 puts forth a collective bargaining agreement between the Broadway League and Local 829, entered into in July of 2012, which applies solely to sound designers and their assistant sound designers (the Sound Designer CBA). Local 829 argues that the Sound Designer CBA is actually the collective bargaining agreement referred to in the Sound Designer Agreement, and that, unlike the CBA, the Sound Designer CBA includes language which does bind petitioner as a principal of the principal (Numero Uno) of the employer (PBBR).

Here, it is clear that it is the CBA, and not the Sound Designer CBA, which has been incorporated into the Sound Designer Agreement. "Incorporation by reference . . . is appropriate only where the document to be incorporated is referred to and described in the instrument as issued so as to identify the referenced document 'beyond all reasonable doubt'" (*Shark Infor. Servs. Corp. v Crum & Forster Commerical Ins.*, 222 AD2d 251, 252 [1st Dept 1995], quoting *Matter of Board of Commrs.*, 52 NY 131, 134 [1873]; *Movado Group, Inc. v Mozaffarian*, 92 AD3d 431, 431-432 [1st Dept 2012] [the plaintiff "proved by a preponderance of the evidence that the terms and conditions of the extrinsic document were incorporated into the credit agreement, and that defendants' acknowledged receipt and agreed to be bound by the same" (citations omitted)]).

Notably, in a cover letter from Local 829's counsel to the AAA, Local 829's counsel attached a copy of the CBA, referring to it as "the collective bargaining agreement (CBA) governing this dispute" (Local 829's opposition, Arbitration Demand, exhibit G at 1, 3-5). In addition, while the Arbitration Demand makes mention of the CBA, it makes no mention of the Sound Design CBA.[2]

Further, the Sound Designer Agreement itself states that "[a]ny controversy or claim arising out of or relating to this Agreement shall be settled per the arbitration procedure set forth in the [Local 829]/[Broadway] League Agreement" (petitioner's notice of motion, exhibit F,

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[2] The Arbitration Demand states that the "Collective Bargaining Agreement dated 1/1/12 . . . provides for arbitration under the Labor Arbitration Rules of the American Arbitration Association" (petitioner's notice of motion, exhibit J, Arbitration Demand). While the CBA was not dated January 1, 2012, it did commence on January 1, 2012. As the Sound Designer CBA was not entered into until mid-July of 2012, and as it was effective as of July 1, 2012, it is clear that the Arbitration Demand refers to the CBA, and not the Sound Designer CBA.

Sound Designer Agreement at 8). As evidence that the Sound Designer Agreement was referring to the CBA, and not the Sound Designer CBA, it should be noted that the cover page of the CBA is entitled "Agreement Between [Local 829] and The Broadway League" (petitioner's notice of motion, CBA, exhibit G at 1). However, the Sound Designer CBA reverses the order of the parties to the collective bargaining agreement, identifying itself as an agreement between "The Broadway League . . . and [Local 829]" (Local 829's opposition, exhibit B, Sound Design CBA at 1).

"[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*id.*). Thus, Local 829's argument that petitioner is a proper party to the Arbitration on this ground fails, as well.

Finally, as there is no agreement to arbitrate between petitioner and Local 829, petitioner's alleged "failure to move in a timely fashion to stay arbitration in accordance with CPLR 7503 (c) is of no moment" (*Matter of Wonder Works Constr. Corp. v R.C. Dolner, Inc.*, 73 AD3d at 514, citing *Matter of Matarasso [Continental Cas. Co.]*, 56 NY2d 264, 268 [1982]).

Thus, as there is no legal basis upon which to compel petitioner to arbitrate the claims asserted by Local 829 in the Arbitration Demand, petitioner is entitled to a permanent stay of the Arbitration against her.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED and ADJUDGED that the petition to permanently stay arbitration as to petitioner Abigail Feldman, entitled *In Re Local 829, United Scenic Artists and Pump Boys Broadway Revival*, AAA No. 13 576 01098 13, is granted.

DATED: MARCH 6, 2014

ENTER:

J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE