Board of Mgrs. of the 262 Mott St. Condominium v Jocar Realty Co., Inc.
2016 NY Slip Op 32267(U)
November 2, 2016
Supreme Court, New York County
Docket Number: 157382/15
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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THE BOARD OF MANAGERS OF THE 262 MOTT STREET CONDOMINIUM, on behalf of itself and Owners of Residential Units of the 262 Mott Street Condominium,

Plaintiff,

-against-

JOCAR REALTY CO., INC., NOLITA MINI STORAGE, INC., JOSEPH CHINNICI, and RUSS CHINNICI,

Defendants,

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Index no. 157382/15

Motion seq. no. 002

DECISION AND ORDER

BARBARA JAFFE, JSC:

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By notice of motion, defendants move pursuant to CPLR 7503(a) for an order compelling arbitration and staying this action, or alternatively, compelling arbitration and dismissing this action. Plaintiff opposes.

I. PERTINENT FACTS

Plaintiff condominium board brings this action against defendants, sponsor of the condominium, its principal, and owners of unsold units therein, based on defendants' alleged misappropriation of portions of the condominium's common elements and their incorporation into defendants' unsold units in violation of the condominium's declaration, its bylaws, and the Condominium Act. (NYSCEF 13).

Article two, section 2.4(A) of the condominium bylaws sets forth plaintiff's powers and duties. In section 2.4(A)(xxvii), plaintiff is given the duty of allocating expenses and apportioning the commercial units' common charges resulting from a change in use or a change in circumstances. It also provides that any dispute arising between plaintiff and the owners of the commercial units must be "resolved by arbitration." (NYSCEF 25).

Article six, section 6.1 of the bylaws governs the determination of common expenses and fixing of common charges. Pursuant to section 6.1(A)(iii), plaintiff must allocate and assess common charges among unit owners, pro rata, according to their respective common interests. And section 6.1(D) includes as income of the unit owners "the excess of all rents, profits and revenue derived from rental or use of any space forming a part of, or included in, any Common Element remaining after deduction of all of expenses incurred in connection with generating the same . . ." It also requires that plaintiff collect such excess on behalf of the unit owners, and apply it against common expenses for the year in which they are collected. (*Id.*).

In section 9.2(A), it is agreed that should a unit owner violate or breach any provision of the condominium documents, plaintiff may enjoin, abate, or remedy such violation or breach by "appropriate proceeding brought either in law or in equity." (*Id.*).

Plaintiff advances causes of action for: (1) breach of contract, based on defendants' wrongful appropriation of portions of the common elements and failure to disgorge rents corresponding with those portions in violation of the declaration and bylaws; (2) a declaration that defendants' amendments to the declaration and tax lot floor plans of the units are void and unenforceable, and that defendants do not own and cannot use appropriated common elements which remain indivisible; (3) an injunction directing defendants to sever the appropriated

common elements from their units and return them to the condominium; (4) an injunction directing defendants to withdraw their amendment to the declaration and tax lot floor plans; and (5) unjust enrichment, resulting from defendants failure to disgorge rents corresponding to the appropriated common elements. (NYSCEF 7).

II. DISCUSSION

A. Contentions

In support of their motion and in recognition of the state policy in favor of arbitrating disputes, defendants assert that section 2.4(A)(xxvii), which requires the arbitration of "[a]ny disputes between the Commercial Unit Owners and [plaintiff]," is so broad as to encompass all of plaintiff's claims, absent any limitation set forth therein. Even if the allegations set forth in the complaint are beyond the scope of the matters set forth in section 2.4(A)(xxvii), defendants argue, they bear a reasonable relationship to them, as the gravamen of this action concerns the allocation of expenses and common charges for the misappropriation of common elements. They also ask that in addition to compelling arbitration, the instant action be dismissed, rather than stayed. (NYSCEF 23).

Plaintiff denies seeking an adjudication of common charges or expenses, and maintaining that it seeks declaratory and injunctive relief with respect to defendants' conduct in wrongfully taking common elements and recording fraudulent amendments to the declaration and floor plans, and the disgorgement of improperly collected rents. It thus denies that the arbitration clause encompasses the issues here, noting that the bylaws authorize plaintiff to commence court proceedings in the event of a breach of the bylaws, and observes that nothing in the arbitration provision directs the arbitration of equitable relief, thereby precluding arbitration. To the extent

that defendants seek dismissal, it contends, a stay of the proceedings is more appropriate as there may later be a need for judicial confirmation of an arbitration award. (NYSCEF 33).

In reply, defendants argue that as it is undisputed that the improper enlargement of the units is an issue in this action, and that the size of units dictates the allocation of expenses and common charges, the arbitration provision is applicable. They add that as the rent attributable to the alleged encroachment on the common elements would be applied to common charges, the arbitration provision applies, and that plaintiff attempts to conflate the merits of their claims with their arbitrability. They dispute plaintiff's argument that the arbitration of equitable claims are prohibited, as the bylaws provide for arbitration according to the rules of the American Arbitration Association, which permits the arbitration of equitable claims. (NYSCEF 34).

B. Analysis

An agreement to arbitrate is a contract and, when clear, is to be enforced according to its terms. Thus, parties who clearly and expressly agree to arbitrate must to do so. (*Matter of Exercycle Corp. [Maratta]*, 9 NY2d 329, 334 [1961]; *Gomez v Brill Sec., Inc.*, 95 AD3d 32, 37 [1st Dept 2012]). Absent a "clear, explicit and unequivocal" agreement to submit claims for arbitration, a party will not be so compelled. (*Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 132-133 [1st Dept 2014]). Thus, on a motion pursuant to CPLR 7503(a) to compel arbitration, the court must determine whether a valid arbitration agreement exists between the parties, and if so, whether the matter for which arbitration is sought falls within the scope of the agreement. (*VR Capital Group Ltd. v Broadridge Fin. Solutions, Inc.*, 142 AD3d 912, 912-913 [1st Dept 2016]; *Edgewater Growth Capital Partners, L.P. v Greenstar N. Am. Holdings, Inc.*, 69 AD3d 439, 439 [1st Dept 2010]).

Where the arbitration clause at issue is broad, the test is whether there is "a reasonable relationship between the subject matter of the dispute and the general subject matter of the [underlying agreement]." (*Matter of Bd. of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 143 [1999]; *DS-Concept Trade Inv. LLC v Wear First Sportswear, Inc.*, 128 AD3d 585, 585 [1st Dept 2015]). The inclusion of incidental matters in a broad provision does not preclude arbitration. (*Matter of Poly-Pak Indus., Inc. v Collegiate Stores Corp.*, 269 AD2d 130, 131 [1st Dept 2000]). However, where an arbitration clause is narrow, it must be determined whether the subject matter of the dispute is on its face within the scope of the provision or is collateral to the main agreement. (*Zachariou v Manios*, 68 AD3d 539, 539-540 [1st Dept 2009]; *Gerling Global Reins. Corp. v Home Ins. Co.*, 302 AD2d 118, 126 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]).

The sole issue here is whether the dispute sought to be submitted to arbitration falls within the scope of the arbitration provision, and as the provision is contained solely within section 2.4(A)(xxvii) of 28 subdivisions, it is reasonably inferred that the parties intended to restrict arbitration to the subject matter of that subdivision, no matter how broadly the provision itself is drafted. (*See Fendley v Power Battery Co.*, 167 AD2d 260, 262 [1st Dept 1990] [limitation of liabilities clause's placement under rider dealing with warranties evidenced that parties intended to limit remedies grounded in contract, not tort]). Consequently, the provision is narrow in its scope, confined as it is to the subject matter of section 2.4(A)(xxvii). It must then be determined whether the subject matter of plaintiff's complaint on its face is within the scope of the section 2.4(A)(xxvii) or is collateral to it.

As the subject matter of the complaint is defendants' enlargement of their units, encroachment on the common elements, and amendments of condominium documents, on its

face, it is not within the scope of section 2.4(A)(xxvii), but is collateral to it. That the disposition of plaintiff's claims will affect subsequent expenses and/or its common charge determinations is also collateral. (*See Gerling Global Reinsurance Corp.*, 302 AD2d at 123-124 [as arbitration provision narrow, limited to differences in interpretation of reinsurance policies, dispute not arbitrable as it turned solely on method of loss allocation which was "at best, connected to the main agreement that contains the arbitration clause"] [internal quotation marks omitted]).

Thus, defendants fail to demonstrate that the instant dispute comes within the scope of the arbitration provision. As there is no basis to compel arbitration, I need not reach defendants' other arguments.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for an order compelling arbitration is denied.

ENTER:

Barbara Jaffe, JSC

DATED: November 2, 2016
New York, New York