SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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In the Matter of the Application of

DR. ELAZAR RABBANI AND BARRY WEINER,

Petitioners,

Index No.
108997/09

-against-

SHAHRAM RABBANI,

Respondent.

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Hon. Richard B. Lower, III:

Petitioners Dr. Elazar Rabbani (E. Rabbani) and Barry Weiner (Weiner) move for an order, pursuant to CPLR 7503 (b), staying arbitration as against them on the ground that there is no agreement to arbitrate disputes between the parties, and granting them their costs and disbursements.

Background

E. Rabbani is the chairman of Enzo Biochem, Inc. (Enzo) and of its Board of Directors. Weiner is Enzo's president and a member of its Board of Directors.

The underlying dispute arises out of the termination of respondent Shahram Rabbani (S. Rabbani) from his employment as president of the clinical lab division of Enzo. Respondent, who is E. Rabbani's brother and Weiner's brother-in-law, is a member of Enzo's Board of Directors and owns approximately 1.5 million shares of stock in Enzo.

Petitioners state that Enzo terminated respondent's employment for cause on March 5, 2009. Respondent contends, however, that in January 2009, petitioners and Enzo began to take unjustified and unlawful adverse employment actions against him, ultimately resulting in his

termination and the denial of millions of dollars allegedly owed to him under the December 4, 2008 Amended and Restated Employment Agreement between respondent and Enzo (the Agreement).

By an April 27, 2009 letter, respondent submitted a demand for arbitration and statement of claim to the American Arbitration Association, Inc. (AAA), in which he alleges: 1) breach of contract against Enzo; 2) unlawful retaliation under Sarbanes-Oxley against Enzo and petitioners; and 3) tortious interference with contract against petitioners. Respondent seeks monetary damages of more than $10,000,000.

Petitioners maintain that, because they are not parties to any arbitration agreement with respondent, the court should issue an order, pursuant to CPLR 7503, staying the arbitration as against them. Enzo does not seek to stay the arbitration proceeding as against it, because it is a party to the Agreement. The Agreement, which replaced a 1994 employment agreement between respondent and Enzo, contains a clause at paragraph 15 that states, in part, that "[a]ny dispute or controversy arising under or in connection with this Agreement shall be settled exclusively by arbitration ..."

In opposition to the petition, respondent states that the claims in the arbitration against petitioners are inextricably interwoven with the claims against Enzo. Respondent contends that all of the claims arise out of, or are related to, the Agreement and fall within the broad arbitration clause contained therein. According to respondent, although interrelatedness is not by itself enough to compel a non-signatory to participate in arbitration proceedings, it is a factor that courts consider in making such a determination.

Respondent also argues that, under the doctrine of estoppel, a non-signatory to an arbitration clause can be compelled to arbitrate if the non-signatory derived direct benefits from

the agreement containing the clause. He asserts that petitioners, who are the two highest ranking officers of Enzo, members of its Board of Directors and very large shareholders, benefitted from the Agreement. Among other things, respondent contends that petitioners benefitted from what is described in the Agreement as respondent's substantial contributions to Enzo's growth and success.

Respondent argues that not only the Agreement, but also the petitioners' employment agreements with Enzo, contain broad arbitration clauses. He asserts, therefore, that petitioners should have expected that they would be subject to an arbitration of any disputes arising between them and respondent in connection with employment-related matters.

Respondent maintains that non-signatories may also be required to arbitrate under principles of agency and veil piercing, both of which, according to him, apply here. He asserts that petitioners improperly caused Enzo to breach the Agreement and that they have misused Enzo to retaliate against respondent for his whistle-blowing activities.

Respondent further argues that petitioners have participated in the arbitration since its inception. He points out that, after he filed and served his April 27, 2009 demand for arbitration and statement of claim, petitioners did not move before this court to stay the arbitration until they filed the instant petition. Respondent states that, in a May 6, 2009 letter, petitioners' counsel agreed to accept service of the demand for arbitration and statement of claim not only on behalf of Enzo, but also on behalf of petitioners.

On May 15, 2009, petitioners faxed a letter to respondent requesting that the claims against them be withdrawn because they were not parties to any arbitration agreement with respondent. Respondent rejected the request. On May 15, 2009, Enzo and petitioners filed their answer to the statement of claim, as well as their purported defenses. In the answer, petitioners

reserved the right to contest the arbitral forum's jurisdiction over them. Respondent states that petitioners continued to participate, including discussing the qualifications and selection of arbitrators.

Respondent also explains that, regardless of the outcome of the instant petition, petitioners will participate extensively in the arbitration. He states that the allegations in the arbitration primarily concern petitioners' misconduct in improperly causing Enzo to breach the Agreement, and their misuse of Enzo to retaliate against respondent for his whistle-blowing activities. Thus, according to respondent, petitioners will be significant witnesses in the arbitration.

Petitioners argue that respondent's "incorporation by reference" theory has no basis. Petitioners acknowledge that their employment agreements with Enzo also contain arbitration clauses, but they point out that their agreements do not incorporate the Agreement by reference.

Petitioners also argue that they cannot be compelled to arbitrate even if respondent's claims against them are inextricably interwoven with his claims against Enzo. They further maintain that there is no basis to pierce Enzo's corporate veil to compel petitioners to participate in the arbitration because they are not "owners" of Enzo, as that term is used within the context of a corporate disregard analysis, and do not control Enzo. Petitioners explain that Enzo is a public company listed on the New York Stock Exchange with over 37 million shares outstanding.

Petitioners contend that they have not participated in the arbitration. There have been no discussions with the arbitrators, no discovery, no motions and no issues of any kind presented. Moreover, petitioners assert that they have expressly and continually reserved their rights to contest the arbitration.

Discussion

Generally, it is well settled that parties cannot be forced to arbitrate in the absence of an express agreement to do so (*Matter of Waldron [Goddess]*, 61 NY2d 181, 183 [1984]). While in has been held that "[i]n certain limited circumstances the need to impute the intent to arbitrate to a nonsignatory" is . . . appropriate (*TNS Holdings, Inc. v. MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]), those limited circumstances are not present in the instant case.

In addressing the concept of "'inextricably interwoven'" agreements, the Court of Appeals has held that "interrelatedness, standing alone, is not enough to subject a nonsignatory to arbitration" (*id.* at 340). In applying this principle, the First Department has held that it does not compel arbitration of nonarbitrable claims that are inextricably interwoven with arbitrable claims (*Mionis v Bank Julius Baer & Co.*, 301 AD2d 104, 111 [1st Dept 2002]; *see also All Metro Health Care Servs., Inc. v Edwards*, 25 Misc 3d 863, 869 [Sup Ct, NY County 2009] [stating that the First Department "has cast doubt on whether a court may compel arbitration of nonarbitrable claims even where they are 'inextricably interwoven' with arbitrable claims"]).

Under the doctrine of estoppel, a non-signatory to an arbitration provision who knowingly received direct benefits from the agreement containing the arbitration clause can be estopped from seeking to avoid the obligation to arbitrate (*Matter of SSL Intl., PLC v Zook*, 44 AD3d 429, 430 [1st Dept 2007]; *HRH Constr. LLC v Metropolitan Transp. Auth.*, 33 AD3d 568, 569 [1st Dept 2006]). Any benefits petitioners received from the Agreement, however, were indirect. To the extent that there were such benefits, they flowed to Enzo directly, and thereafter indirectly benefitted petitioners as well as other employees, officers and stockholders of Enzo. Thus, petitioners are not estopped from avoiding the arbitration clause in the Agreement.

Respondent points out that the Agreement contains the same arbitration agreement as is found in petitioners' employment agreements with Enzo. He offers no legal support, however, for his argument that he should therefore be entitled to arbitrate his claims against petitioners. "While an agreement to arbitrate can be incorporated by reference, any such reference must clearly show such an intent to arbitrate" (*Matter of Aerotech World Trade v Excalibur Sys.*, 236 AD2d 609, 611 [2d Dept 1997]). No such intent is shown here in the employment agreements entered into between petitioners and Enzo.

Regarding petitioners' level of participation in the arbitration, they noted throughout that they were reserving their right to contest the arbitrability of the claims against them. They requested that respondent allow them to withdraw from the arbitration, which request was denied. Petitioners' attorney, on behalf of petitioners and Enzo, engaged in some discussion about who might be appropriate arbitrators. That alone is not enough to indicate a level of participation by petitioners such that they cannot now move for a stay. Enzo will proceed with the arbitration as against it, and the arbitration has not yet begun, such that petitioners have not participated in any hearings before the arbitrators.

Finally, respondent cannot apply the "alter ego" theory or pierce the corporate veil so as to bind the non-signatory petitioners under the arbitration provision in the Agreement. A party seeking to do so "bear[s] a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences" (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d at 339). In the instant case, Enzo is a public company that was formed for legal purposes and is engaged in legitimate business (*see id.*) Thus, respondent cannot apply the arbitration provision

to petitioners.

In its discretion, the court denies that part of the motion seeking costs and disbursements is denied.

Conclusion

Accordingly, it is

ORDERED that the petition is granted to the extent of staying the arbitration as against the petitioners.

Dated: March 9, 2010

ENTER:

HON. RICHARD B. LOWE, III
J.S.C.