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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS **PART** 58
Justice

CENTRAL EIGHT REALTY,

Petitioner,

-v-

RANDY PALUMBO and PLANT CONSTRUCTION, LLC,
Respondents.

INDEX NO. 108063/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

The following papers, numbered 1 to 7 were read on this motion for .

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1-5
Answering Affidavits– Exhibits	6-7
Replying Affidavits	

CROSS-MOTION: ✓ YES ____ NO

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 10/6/11

DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58

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Application of CENTRAL EIGHT REALTY

Petitioner,

For an Order Pursuant to Article 75

of the CPLR Compelling Arbitration
of Certain Controversy

-against-

RANDY POLUMBO and PLANT CONSTRUCTION, LLC,

Respondents.

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Index No.
108063/11
DECISION AND JUDGMENT

HON. DONNA MILLS J .:

Petitioner, Central Eight Realty LLC, (Central Eight), has brought a proceeding under CPLR 7503 to compel respondents Plant Construction LLC (Plant), and Randy Polumbo (Polumbo), who are allegedly "alter egos" of 3-D Laboratory Inc.,(3-D), to join an arbitration currently pending between Central Eight and 3-D, as a result of a dispute under a construction agreement (Contract) to which respondents were not signatories. In order to prove its entitlement to the relief sought, petitioner now moves by order

to show cause dated July 15, 2011, claiming it requires expedited depositions pursuant to CPLR 408 from: (I) Polumbo; (ii) Plant; (iii) four employees of both 3-D /Plant: Pauline Kow, Edit Nagey, Jenner La Bassiere, Marina Faelli; (iv) three named clients of 3-D /Plant: Roy Tisch, Gordon Sumner (aka Sting) and Joshua Rechnitz and (v) architect Lee Mindel.

Respondents vehemently oppose the application, cross move to dismiss the petition and seek sanctions, costs and attorneys fees pursuant to Uniform Rule, 22 NYCRR §130-1.1, for frivolous conduct in causing significant delay in the underlying arbitration. For the reasons set forth below, the respondents' cross motion to dismiss is granted and petitioner's application is denied.

Background

Central Eight is an entity owned by Mortimer Sackler (Sackler) that owns a high end townhouse (the Townhouse) located at 8 East 75th Street. In December 2006, Central Eight entered to the Contract with construction company 3-D, owned by Polumbo, to perform renovations and administrative services on the Townhouse, which is the private home of Sackler, in one year for the sum of $5.7 million. (Contract, Petitioner's Ex A). Both Sackler and Polumbo signed the Contract in their capacities as

president of their respective corporations.

In April 2008 the Contract was modified whereby Central Eight agreed to pay 3-D an additional $478,000 in exchange for 3-D's promise to substantially complete all work by January 2009 (Amendment, Petitioner's Ex A-1).

Communication broke down and on November 5, 2009, 3-D served Central Eight with a demand to arbitrate seeking $344,000 in damages for unpaid work which was substantially complete, and for punitive damages, later amended in August 2010 to $803,000 in damages. On November 11, 2009, Central Eight officially terminated the Contract.

In December 2009 Central Eight answered the demand and asserted a $1,000,000 counterclaim, now estimated by Central Eight to be over $2,000,000. In February 2010 Plant was created by Polumbo. The parties state that they unsuccessfully attempted to mediate in early 2010. The Panel set the hearing date for June 2011, a year and a half after the arbitration was commenced in order to allow for appropriate discovery.

In July 2011 Central Eight commenced this proceeding claiming that Plant and Polumbo are "alter egos" of 3-D and that it is entitled to "pierce the corporate veil" of Plant because Plant dominated 3-D and used the domination to commit a wrong

which resulted in petitioner's injury (Verified Petition dated July 12, 2011, ¶¶ 1, 11-15). It is petitioner's position that it 3-D's termination of some of its existing contracts and its transferring those contracts to Plant during the arbitration proceedings is sufficient proof of domination to warrant compelling respondents to arbitrate in the underlying arbitration (Verified Petition 52-56). Petitioner claims that it has been injured as a result of the domination because it can potentially win a judgment in the arbitration and 3-D can potentially not have sufficient funds to pay the judgment. The arbitration has been stayed, pending determination of this proceeding (Stipulation of parties dated July 29, 2011).

The Arbitration Procedures

The Contract between Central Eight and 3-D establishes detailed procedures for resolving any disputes that arise between the parties including the procedure for joinder of parties. Specifically, the Contract requires submission of any dispute "arising out of or relating to this Contract" to the architect and then, if it is not resolved, it is subject to mediation as a condition precedent to submission to arbitration. It states that the parties shall endeavor to resolve their dispute by mediation (Contract, § 9.10.1- 9.10.4 annexed as Ex A to Petitioner's Order

to Show Cause). It thereafter states:

> Claims ... relating to the Contract that are not resolved by mediation ... shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect... [which award shall be final]. ... no arbitration arising out of ... the Contract Documents shall include, by consolidation, joinder or in any other manner, any person or entity not a party to the Agreement ... unless it is shown at the time the demand is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, (3) the interest or responsibility of such person or entity in the matter is not insubstantial... [t]he agreement herein shall be specifically enforceable under applicable law in any court having jurisdiction.

The Arbitration

The three member panel was convened in August 2010. In March 2011, after many months of discovery, Central Eight notified the Panel that it expects to seek a ruling on whether it is entitled to discovery of Plant, which it considers to be 3-D's successor corporation, created after the arbitration was commenced, assertedly to avoid paying a potential judgment on Central Eight's counterclaims. In the Panel's March 29, 2011 ruling, it stated that:

> From the information provided to date-and only based on that scant information-Respondent should be aware of the Panel's initial view that documents regarding the formation of another company that is not

> a party to this proceeding and apparently was not involved in any of the matters at issue in this dispute, would not appear to be discoverable at this stage of the proceedings. Respondent is encouraged to provide the Panel with additional information and legal authority that would bolster its arguments (Notice of Cross Motion Ex F, annexed to Affidavit of Randy Polumbo dated July 22, 2011).

On April 6, 2011, petitioner filed its motion in the arbitration proceedings to compel production of Plant documents (Cross Motion, Ex H), in order to support its future application to join Plant in the arbitration, in order to avoid to the "prospect of a second litigation to enforce a [potential] award against Plant" (Respondent's Ex G, H). In support, Central Eight referenced three 3-D construction projects that have now become Plant projects.

In an April 20, 2011 Order the Panel denied Central Eight's motion for discovery from Plant stating that it "has not been presented with any information to suggest that Plant Construction was involved in any way, shape or form with any issues presented to the Panel" (Panel's April 20, 2011 Ruling, Respondent's Ex J).

After many months of discovery, the parties' June 2011 hearing date was once again postponed to September 2011, "primarily due to [Central Eight]'s failure to adhere to two prior scheduling orders regarding discovery" (Panel's April 13

Ruling, Respondent's Ex K). Thereafter, this proceeding was commenced.

Discussion

After a full and thorough review of all of the relevant papers at issue, the Court finds that the portion of the application which seeks permission to obtain disclosure pursuant to CPLR 408, is denied in the broad discretion of this court (*Matter of Shore*, 109 AD2d 842 [2nd Dept 1985]; McLaughlin, Practice Commentaries, Mckinney's Cons Laws of NY, Book 7B, CPLR C408:1). Given the strong public policy of this state favoring arbitration, and the importance of conservation of the court's limited resources, especially during theses difficult economic times, courts are cautioned against permitting the parties from "using the courts as a vehicle to protract litigation" which would "only serve to frustrate ... the initial intent of the parties" (*Matter of Nationwide Gen Ins Co v Investors Ins Co*, 37 NY2d 91, 95 [ ]). Petitioner herein has failed to demonstrate "ample need" for the discovery sought from this court (*Grossman v McMahon*, 261 AD2d 54 [3rd Dept 1999]), which can be applied for within the context of the arbitration (Contract, Petition, Ex A), and thus, the requested discovery is denied.

In addition, that portion of the cross motion which seeks to

dismiss the petition to "pierce the corporate veil" of 3-D and compel respondents to arbitrate, is granted for the following reasons:

"Those seeking to pierce the corporate veil ... bear 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... [e]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance" (internal citations omitted) (*TNS Holdings, Inc., v MKI Securities Corp.*, 92 NY2d 335 [1998]).

Applying the "alter ego" test here, petitioner has failed to meet its heavy burden of demonstrating that 3-D was dominated as to the transaction attacked since importantly, that domination and alleged wrongful conduct did not occur within "the transaction attacked" (id.). Rather, petitioner has conceded that it is relying on events occurring after the Contract was terminated, and after the arbitration was commenced, and thus, the application to dismiss the petition is granted.

That portion of the cross motion that seeks to impose sanctions is denied in the discretion of the court.

Accordingly, it is hereby

ADJUDGED that the petition is denied and it is further

ADJUDGED that the proceeding, including the motion for discovery, is dismissed and finally, that the stay of the arbitration is vacated.

10/6/11

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).