Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES **PART 17**
Justice

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CHRYSOSTOMOS GIANNIKOUROS,
Plaintiff,

-against-

Index No. 11812/11
Motion Date: 10/12/11
Motion Cal.: No. 24

NICOS CONSTANTINOU and EMEL SOAN CORPORATION,
Defendants.

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The following papers numbered 1 to 11 read on this motion by defendants Nicos Constantinou and Emel Soan Corporation (collectively, "defendants") for an order pursuant to CPLR 7503 compelling plaintiff to arbitrate his claims in this case, or in the alternative, for an Order pursuant to 3211(a)(1) and (7), and 3016(b) dismissing the causes of action in the complaint.

	PAPERS NUMBERED
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Upon the foregoing papers it is ordered that the motion by defendants for an order pursuant to CPLR 7503 compelling plaintiff to arbitrate his claims in this case, or in the alternative, for an Order pursuant to 3211(a)(1) and (7), and 3016(b) dismissing the causes of action in the complaint, is decided as follows:

Based on the complaint and the submitted documents, on or about April 1, 2009 plaintiff and defendants executed a series of instruments pursuant to which, among other things, plaintiff purchased Emel common stock from Constantinou for five hundred fifty thousand dollars. Plaintiff paid defendant Constantinou three hundred thousand dollars in cash and executed a $200,000 Promissory Note payable to Constantinou, a Pledge Agreement by which he pledged his newly acquired shares to Constantinou to secure his debt under the note, and a Shareholders Agreement detailing the parties' relationships to each other and the Company. Pursuant to the Stock Purchase Agreement, plaintiff also signed the Pledge and Shareholders Agreement. Constantinou made a number of express "representations" in the Stock Purchase Agreement - concerning, for example, that he owned one hundred percent of the shares of Emel. his authority, freedom to execute the SPA, Pledge and Shareholders Agreements and the absence of any undisclosed, extraordinary Company liabilities. The Stock

Purchase Agreement also contained a provision that Both Giannikouros and Constantinou disclaimed any reliance on any other, prior representations that either may have made.

In the Note, plaintiff is required to pay Constantinou 84 monthly installments of principal and interest, each in the amount of $2,826.78. Under the Pledge, plaintiff's 49 shares of Emel stock are held by Constantinou to secure payment of the Note indebtedness, and may be sold by Constantinou upon a default under the Note. The Shareholders Agreement provided, among other things, the following arbitration clause: Any disputes or controversies arising under or relating to this Agreement (except for disputes referred to in Section 6.3(d) above [relating to valuation of shares during a restricted transfer procedure]) shall be settled by arbitration to be held in New York, New York in accordance with the applicable rules of the American Arbitration Association or any successor thereto.

A few months after plaintiff bought his Emel stock from Constantinou, on or about January 1, 2010, Constantinou sold more of his Emel shares to another existing employee, Mr. Quituizaca. As required by the terms of the Shareholders Agreement signed in connection with plaintiff's purchase, this sale was approved by plaintiff, and a new Shareholders Agreement was signed by all three shareholders (Constantinou, Giannikouros and Quituizaca). The two Shareholders Agreements that have been signed by plaintiff contain an arbitration clause, requiring all disputes among shareholders to be decided by arbitration administered by the American Arbitration Association's New York City office. In or about June 2010, Constantinou exercised his responsibilities under the Shareholders Agreement by relieving plaintiff of his duties at the Athens Café for reasons of managerial incompetence.

Thereafter, plaintiff commenced the instant action, which contains five causes of action. The first sounds in fraud and claims defendants made fraudulent representations to plaintiff prior to and at the time of execution of the Stock Purchase Agreement. The second claims defendants have breached the material provisions of the Stock Purchase Agreement, including refusing to give plaintiff access to the books and records of the Athens Café and failing to perform renovations of the Café. Plaintiff demands rescission of the Stock Purchase Agreement and the promissory note as well as an accounting from defendants. The third cause of action claims defendants have been unjustly enriched due to their retention of the money plaintiff gave them for the stock purchase. The fourth cause of action sounds in fraud and claims defendants misrepresented the value of the shares of EMEL and seeks rescission of the Stock Purchase Agreement and other things. The fifth cause of action also sounds in fraud and claims various misrepresentations were made regarding the ownership of the shares of EMEL in the Stock Purchase Agreement and plaintiff seeks damages in the amount of five hundred fifty thousand dollars**.**

Defendants now move for the instant relief based upon plaintiff's claims being subject to arbitration pursuant to the language contained in Section 7.9 of the Shareholders Agreement,

which provides, in pertinent part, as follows:

"Any disputes or controversies arising under or relating to this Agreement … shall be settled by arbitration to be held in New York, New York in accordance with the applicable rules of the American Arbitration Association or any successor thereto."

Defendants claim that this language is a "broad arbitration provision" that covers the issues raised by Plaintiff, all of which "arise under or relate to" the provisions of the Shareholders Agreement. According to defendants', as the Complaint states, "the primary purpose of defendant, EMEL, is the operation of a restaurant d/b/a the Athens Café." and plaintiff executed the Shareholders Agreement in order to participate in the business run by Emel, as the Complaint repeatedly points out. Furthermore, defendants claim that several of the plaintiff's causes of action refer specifically to provisions of the Shareholders Agreement, for example, that "defendants have denied plaintiff access to the books and records of defendant, EMEL, d/b/a the Athens Café." refers to Section 5.2 of the Shareholders Agreement as there is no reference of any kind to "books and records" in the Stock Purchase Agreement. As such, defendants claim that all of Plaintiff's claims are subject to the Shareholder Agreement's broad arbitration provision - whether sounding in contract or tort - and should be stayed pending arbitration.

Plaintiff opposes the branch of the motion seeking to compel arbitration by claiming that his Complaint is based upon specific allegations of fraud and seeks rescission of a certain Stock Purchase Agreement and also seeks rescission based upon failure of consideration, monetary damages and punitive damages. Since defendant's base their claim for arbitration on a separate and distinct Shareholders Agreement and there is no arbitration clause in the Stock Purchase Agreement, there is no basis to compel arbitration. Plaintiff claims that there is no basis to find, as defendants contend, that because claims are arbitrable under the Shareholders Agreement, then by extension claims under the Stock Purchase Agreement are also arbitrable because overlapping facts exist. Plaintiff also claims that the broad arbitration clause found in the Stock Purchase Agreement is inapplicable to his causes of action because the issues of fraud concerning the ownership of shares of EMEL are not intertwined and connected with the disputes subject to the arbitration clause in the Shareholders' Agreement.

It is well settled that on a motion to compel or stay arbitration, the court must determine, whether the parties made a valid agreement to arbitrate, whether the agreement has been complied with, whether the dispute at issue falls within the agreement to arbitrate, and whether the claim is time-barred. Matter of Smith Barney, Harris Upham & Co. v Luckie, 85 NY2d 193, (1995.) *See also*, Levkoff-Sennet Partnership v Levkoff, 154 AD2d 352 (2d Dept 1998.) Once it is determined that the parties have agreed to arbitrate the subject matter in dispute, the court's role has ended and it may not address the merits of the particular claims. *See*, Matter of Praetorian Realty Corp, 40 NY2d 897(1976.) In fact, this Court's concern is

limited to whether the parties made a valid agreement to arbitrate and not whether the contract as a whole was unenforceable. Wagner Acquisition Corp. v. Giove, 250 A.D.2d 857 (2d Dept 1998) In fact, Courts have recognized a strong federal and state policy favoring arbitration as an alternative means of dispute resolution. Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 76 (2d Cir1998.) As such, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); *see also* League of American Theatres & Producers, Inc. v. Cohen, 270 A.D.2d 43 (1st Dept 2000.) In addition, CPLR 7503(a) directs that "where there is no substantial question whether a valid agreement was made or complied with . . . the court shall direct the parties to arbitrate." *Id*. Here, applying these factors and reviewing the arguments presented in opposition to the motion, it is clear that plaintiff's claims are subject to arbitration.

Initially, there is no dispute that a valid agreement to arbitrate exists in the two Shareholders Agreements signed by the parties. Consequently, the issue for this Court to resolve is whether the clauses in those agreements cover the instant dispute. First, contrary to plaintiff's claims, several allegations in his Complaint do relate to the Shareholders Agreements. For example, his claim regarding the accounting and access to books. Moreover, plaintiff's claims regarding Constantinou not permitting him to be EMEL's manager is a subject not in the Stock Purchase Agreement, but rather, that topic is covered by the Shareholders Agreements. Furthermore, there is a clear relationship between the subject matter of the causes of action and the subject matter of the Shareholders Agreements. M.H. Kane Constr. Corp. v. URS Corp. Group Consultants, 42 A.D.3d 512 (2d Dep't 2007)

Additionally, the Arbitration Clauses are "broad" in scope and they require arbitration of not only disputes "arising under" the Shareholders Agreements, but also disputes merely "relating to" the Shareholders Agreements. As such, there is a presumption of arbitrability - meaning that, so long as there is a reasonable relationship between the subject matter of the claims and the general subject matter of the contract containing the broad arbitration clause, courts will compel arbitration, and leave it to the arbitrators to perform a more "penetrating definitive analysis of the scope" of the clause. Matter of Nationwide Gen. Ins. Co. v. Investors Ins. Co. of Am., 37 N.Y.2d 91, 96 (1975). Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299 (N.Y. 1984) Here, there is such a "reasonable relationship" between the subject matter of plaintiff's claims of Constantinou's stock ownership, the sharing of profits, the management of Emel and Athens Café, shareholder access to books and records, and the subject matter of the Shareholders Agreements.

Furthermore, the Shareholders Agreements that the parties signed are inextricably interrelated with the Stock Purchase Agreement and disputes relating to any of the interrelated contracts must be arbitrated. *See*, Pepsi-Cola Metropolitan Bottling Co. v. Columbia-Oxford Beverages, Inc., 100 A.D.2d 868 (2d Dep't 1984) See, also, Bayly, Martin & Fay, Inc. v. Glaser, 92 A.D.2d 850 (1st Dep't), aff'd, 60 N.Y.2d 577 (1983.) Here, the Stock Purchase

Agreement and initial Shareholders Agreement are two of four interrelated agreements, executed simultaneously, all of which were necessary to complete the subject transaction. The Stock Purchase Agreement not only refers to the Shareholders Agreement, but annexes it as an exhibit, and it expressly conditioned the entire transaction on plaintiff's execution and delivery to defendants of the Shareholders Agreement. The successive Shareholders Agreements are also governing agreements of the Company and are interrelated with the Stock Purchase Agreement. Furthermore, the Shareholders Agreements refer to the Stock Purchase Agreement. As such, given the broad arbitration clause contained in the Shareholders Agreements, disputes relating to the interrelated Stock Purchase Agreement must be arbitrated. Finally, since the arbitration clause is broad and does not specifically exclude fraud in the inducement from the issues to be determined by arbitration, plaintiff's claims of fraud and any other tort claims relating to the contract are arbitrable. Anderson St. Realty Corp. v. New Rochelle Revitalization, LLC, 78 A.D.3d 972 (2d Dep't 2010)

Based on the above, the branch of the motion seeking to compel arbitration is granted. The action is stayed and the parties are directed to proceed to arbitration, pursuant to the Shareholders Agreements as set forth above. As such, the parties shall proceed in accordance with the rules of the American Arbitration Association, at its offices located at 1633 Broadway, 10th Floor, New York, New York 10019 and in accordance with the CPLR. An arbitrator shall be designated by the American Arbitration Association whom shall act in accordance with this order. CPLR 7504. Accordingly, the parties are directed to proceed to arbitration, pursuant to the contract. The Court finds it would be inappropriate to dismiss the action at this time and the branch of the motion seeking dismissal is denied.

A copy of this decision is being sent to the parties by means of facsimile transmission on October 18, 2011.

Dated: October 18, 2011 .....

ORIN R. KITZES, J.S.C.