SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2
----------X
Isaac Broyn and Victor Baranes,

DECISION AND ORDER

Plaintiffs,

Index Number:

-against-

160874/2015

Melvin Caro, Matthew Mazzella and Blue Chip Ventures LLC,

Mot. Seq. 002

Defendants.
----------X

Pursuant to CPLR 2219 (a), the following papers were considered by the court in deciding the motions:

Order to Show Cause and Annexed Affidavits	1-2 (Exs. 1-11)
Affirmation in Opposition	3 (Exs. A-H)
Reply Affirmation	4 (Exs. 1-3)
Memorandum of Law in Reply	5

Kathryn Freed, J.:

Defendants move, pursuant to CPLR 7503 (a), to compel plaintiffs to proceed to arbitration, to discharge a notice of pendency and to disqualify plaintiffs' counsel.

Underlying Allegations and Procedural Background

Plaintiffs allege that they agreed with defendants Mazzella and Caro (the Individual Defendants) to form a joint venture, 203-207 Cabrini LLC (Cabrini LLC) (complaint, ¶ 9). Plaintiffs allege that the Individual Defendants owned real property known as 207 Cabrini Boulevard, New York, New York (207 Cabrini) and

that defendant Blue Chip Ventures LLC (Blue Chip) owned real property known as 203 Cabrini Boulevard (203 Cabrini) and 205 Cabrini Boulevard, New York, New York (205 Cabrini, collectively, the Cabrini Properties) (*id.*, §§ 6-7). On May 20, 2015, plaintiffs and defendants executed a joint venture agreement (the Agreement) (*id.*, § 10). Under the Agreement, defendants would transfer the Cabrini Properties into Cabrini LLC, and plaintiffs would pay certain sums and manage the construction of new townhouses on the Cabrini Properties (*id.*, §§ 9-16).

Section Ten of the Agreement contains a provision for arbitration of disputes (the Arbitration Clause) and states that "[a]ny matter in dispute, and which is not provided for in this [A]greement, shall be decided pursuant to the laws of the State of New York and submitted to arbitration under either the American Arbitration Association or JAMS."

Plaintiffs contend that defendants did not transfer title to the Cabrini Properties into Cabrini LLC, thereby breaching their obligations under the Agreement (*id.*, §§ 18-23, 26-30, 33-36, 39-42).

On October 22, 2015, plaintiffs commenced this action seeking monetary damages for fraud, breach of contact, unjust enrichment, an accounting and injunctive relief, all relating to defendants' alleged breach of the Agreement. On October 22, 2015, plaintiffs filed a notice of pendency on the Cabrini

Properties. On March 7, 2016, defendants brought this application, seeking to compel plaintiffs to proceed to arbitration in accordance with the Arbitration Clause of the Agreement and staying all further proceedings in this action (Caro affidavit §§ 19, 21; Mazzella affidavit, §§ 18, 21), to discharge the notice of pendency based upon allegedly inadequate service of the summons, complaint and notice of pendency (*id.*, §§ 23-30; Caro affidavit, §§ 23-31) and to disqualify plaintiffs' counsel since he served as a referee to compute on the foreclosure actions involving 203 and 205 Cabrini.

Arbitration

Initially, whether a controversy is subject to arbitration is a matter for the court to determine and the proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007]). There must be "an express, unequivocal agreement" to arbitration (*Matter of Marlene Indus. Corp. [Carnac Textiles]*, 45 NY2d 327, 333 [1978]). Without such a clear and explicit agreement to arbitrate, a party cannot be compelled to submit to arbitration (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc. LLP*, 6 NY3d 371, 374 [2006]).

Discussion

Here, plaintiffs have stated that they "do not object" to arbitration in accordance with the Arbitration Clause and that they are willing to proceed to arbitration (Klass affirmation, § 39). Since both plaintiffs and defendants agree that the Arbitration Clause applies to their dispute, "'the appropriate remedy is [an order directing the parties to proceed to arbitration and] a stay of the judicial proceeding [pending resolution of the arbitration]'" (*Nastasi v Nastasi*, 26 AD3d 32, 41 [2d Dept 2005], quoting *Allied Bldg. Inspectors Intl. Union of Operating Engrs., Local Union No. 211, AFL-CIO v Office of Labor Relations of City of N.Y.*, 45 NY2d 735, 738 [1978]).

There is a factual conflict as to the adequacy of service of the summons, complaint and notice of pendency, which would generally be resolved by a traverse hearing at an early stage in the case (*see e.g. LeFevre v Cole*, 83 AD2d 992, 992 [4th Dept 1981]; *Howard v Spitalnik*, 68 AD2d 803, 803 [1st Dept 1979]. However, in this matter, a hearing at this time is not appropriate, since the judicial proceeding has been stayed pending arbitration. "[O]nce the arbitration proceeds and the arbitrator renders an award, either party may then move in the previously stayed judicial action to confirm, vacate, or modify the award" (*Nastasi*, 26 AD3d at 41).

Defendants' argument that plaintiffs' counsel, Richard A.

Klass, Esq., should be disqualified from representing plaintiffs herein is without merit. Mr. Klass does not dispute defendants' contention that, in 2010, a foreclosure of a note and mortgage as against Mazzella and Caro secured by the Cabrini Property was commenced by the lender. In that matter, Mr. Klass was appointed by the court as a referee to compute. However, Mr. Klass denies, and defendants have not established, that Mr. Klass was retained as counsel for any party in the foreclosure matter.

"A party seeking disqualification of its adversary's counsel based on counsel's purported prior representation of that party must establish 1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, 2) that the matters involved in both representations are substantially related, and 3) that the interests of the present client and former client are materially adverse." *Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 (1996).

Since there was no attorney-client relationship between Mr. Klass and Mazzella and/or Caro in the foreclosure matter, and since the issues in this case and in the foreclosure matter are not substantially related, other than involving the same property, this Court, in its discretion, finds that there is no ground for the disqualification of Mr. Klass herein. *See Gjoni v Swan Club, Inc.*, 134 AD3d 896, 897 (2d Dept 2015).

In light of the foregoing, it is therefore:

ORDERED that the portion of defendants' motion to compel arbitration and to stay this action is granted; and it is further

ORDERED that plaintiffs shall arbitrate their claims against defendants in accordance with the Joint Venture Agreement dated May 20, 2015; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration, and it is further

ORDERED that the branch of defendants' motion seeking to disqualify plaintiffs' counsel is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: September 8, 2016 ENTER:

KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT