Levy v Donel Corp.
2018 NY Slip Op 30070(U)
January 11, 2018
Supreme Court, Kings County
Docket Number: 521036/16
Judge: Lawrence S. Knipel

At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of January, 2018.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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MENACHEM MENDEL LEVY, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF DONEL CORPORATION,

Plaintiff,

- against -

Index No. 521036/16

DONEL CORPORATION, DON YOEL LEVY, AND COMMITTEE FOR THE ADVANCEMENT OF TORAH,

Defendants.

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The following papers numbered 1 to 10 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-6
Opposing Affidavits (Affirmations)	7-8
Reply Affidavits (Affirmations)	9-10

Upon the foregoing papers, plaintiff Menachem Mendel Levy (Menachem), individually and on behalf of Donel Corporation moves for an order 1) pursuant to CPLR 7503, staying arbitration commenced by defendants Donel Corporation (Donel), Don Yoel Levy (Don Yoel) and Committee for the Advancement of Torah (CAT) and 2) setting this matter down for a preliminary conference. Defendants cross-move for an order (a)

pursuant to CPLR 7503, compelling arbitration of causes of action 1 through 4 as set forth in the verified complaint and (b) staying the litigation of causes of action 5 through 10 as set forth in the verified complaint.

This action involves a dispute between the shareholders of Donel, a domestic corporation whose sole asset is the "Circle K" trademark utilized to designate certain products as kosher. According to a Stock Option Agreement dated May 1999, Menachem was designated as holder of 1% of the issued and outstanding shares of Donel while Don Yoel was named holder of 99% of the issued and outstanding shares. Under the Stock Option Agreement, Don Yoel granted Menachem an option to purchase up to 48% of Don Yoel's shares so that Menachem may hold 49% of all of the issued and outstanding shares of Donel. The Stock Option Agreement provided that unless the parties otherwise agree, the price of the option shares shall be equal to the fair market value of such shares on the date the option is exercised "as determined by an appraiser acceptable to Menachem and Don Yoel." The parties agreed that "[i]n the event Menachem and Don Yoel are unable to agree upon an appraiser to establish the Option Price for applicable Option Share(s), then each of [sic] Menachem and Don Yoel shall select an appraiser, which appraisers shall select an appraiser who shall establish the Option Price." Section 6 of the Stock Option Agreement states as follows:

> "6. Entire Agreement. This Agreement and the Shareholders' Agreement represent the entire understanding between the parties with respect to its subject matter, and

> supercede all prior understandings or agreements, oral or written between the parties with respect to the subject matter of this Agreement."

In addition to the Stock Option Agreement, Menachem and Don Yoel entered into a Shareholders' Agreement dated June 1999. Section 22.2 of the Shareholders' Agreement states that "[t]his Agreement, along with the Stock Option Agreement, is the entire understanding and agreement of the parties with regard to Common Stock and shall not be changed, amended or terminated, except by written agreement of the parties." Among the other provisions of the Shareholders' Agreement is section 16, which provides that "[d]isputes relating to this Agreement will be governed by Rabbinic law before a *Beit Din* having proper jurisdiction over such disputes."

According to the complaint, Menachem exercised his option under the Stock Option Agreement by sending written notice to Don Yoel on July 9, 2014. The notice stated that Menachem nominated Ian Ratner as an appraiser to determine the fair market value of the shares. Following several exchanges of correspondence between the parties regarding the valuation of the shares and the qualifications of Ratner as an appraiser, Menachem advised Don Yoel by letter dated September 18, 2014 that Menachem intended to use Ratner as his appraiser and that unless Don Yoel designates his appraiser by September 24, 2014 Menachem will consider this a waiver by Don Yoel of his right to participate in the valuation process. After failing to receive any notification of Don Yoel's designation of an appraiser, Menachem advised Don Yoel on September 30, 2014

that Menachem considered Don Yoel's failure to designate an appraiser a waiver of his rights under the Stock Option Agreement.

By letters from his counsel dated November 5, 2014 and November 11, 2014, Don Yoel claimed that the Stock Option Agreement and Shareholders' Agreement are invalid as Don Yoel never signed the documents and there was therefore no reason to proceed with any appraisal process. In the meantime, Don Yoel, on behalf of Donel, executed a trademark licence agreement with CAT which gave CAT an exclusive fifty-year license for the use of the Circle K trademark in consideration of an annual fee of $5,000.00. Menachem alleges that this licence agreement, executed without his knowledge or consent, "effectively gave away Donel's sole and valuable asset virtually for free." The instant action was commenced on September 2, 2016. In his complaint, Menachem sets forth four causes of action (1-4) relating to Don Yoel's refusal to abide by the Stock Option Agreement and six causes of action (5-10) relating to Don Yoel's execution of the licence agreement with CAT. In November 2016, defendants commenced an arbitration proceeding in a rabbinical court, Hisachdus Harabbonim. A summons and "Bais Din Warning" was thereafter sent to Menachem.

In his motion to stay the arbitration commenced by defendants, Menachem argues that the Stock Option Agreement under which his first four causes of action arise does not contain an arbitration provision and that the six causes of action relating to the trademark licencing agreement are not predicated on the Shareholders' Agreement and thus are not

subject to the arbitration provision contained therein. Menachem further maintains that to the extent he agreed to arbitrate disputes before a Bais Din, Menachem did not agree to arbitrate before Hisachdus Harabbonim and that while the trademark licensing agreement contains an arbitration clause, Menachem did not enter into said agreement and is not bound thereby. In their cross motion to compel arbitration, defendants contend that the Stock Option Agreement and the Shareholders' Agreement together both constitute a singular contract, as set forth by section 6 of the Stock Option Agreement and section 22.2 of the Shareholders' Agreement and therefore any claims arising out of the Stock Option Agreement are subject to arbitration before a Bias Din as provided for in the Shareholders' Agreement.

Pursuant to CPLR 7503 (a), "[w]here there is no substantial question whether a valid agreement was made or complied with ... the court shall direct the parties to arbitrate" (CPLR 7503[a]). Arbitration is a favored method of dispute resolution in New York (*see Board of Educ. of Bloomfield Cent. School Dist. v Christa Constr.*, 80 NY2d 1031 [1992]; *Matter of Weinrott [Carp]*, 32 NY2d 190, 199 [1973]). The threshold issue of whether there is a valid agreement to arbitrate is for the courts (*see Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 598 [1997]; *Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 6-8 [1980]). 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.*

[Presidential Towers Residence], 40 NY2d 897 [1976]; *Matter of Prinze [Jonas]*, 38 NY2d 570, 577 [1976]; *Brown v Bussey*, 245 AD2d 255 [2d Dept 1997]). However, "[i]t is settled that a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. The agreement must be clear, explicit and unequivocal and must not depend upon implication or subtlety" (*Matter of Waldron v Goddess*, 61 NY2d 181, 183-184 [1984] [citations and internal quotation marks omitted]; *see also God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006]; *Matter of Estate of Arthur Miller*, 40 AD3d 862, 861-862 [2d Dept 2007]). The movant has the burden to show a "clear and unequivocal" agreement to arbitrate the claim *(Gerling Global Reins. Corp. v The Home Ins. Co.*, 302 AD2d 118, 123 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]; *see also Allstate Ins. Co. v Roseboro*, 247 AD2d 379 [2d Dept 1998]).

Here there is a clear, unequivocal agreement to arbitrate contained in the Shareholders' Agreement. However, a similar clause is not contained in the Stock Option Agreement, and defendants have not established that the parties intended the Stock Option Agreement and the Shareholders' Agreement to form a single unified contract. The Stock Option Agreement expressly states that the parties intended same to "supplement" the Shareholders' Agreement. While it is the general rule that written contracts executed simultaneously and for the same purpose must be read and interpreted together (*Nau v*

Vulcan Rail & Constr. Co., 286 NY 188, 197 [1941]; *Manufacturers & Traders Trust Co. v Erie County Indus. Dev. Agency*, 269 AD2d 871, 872 [4th Dept 2000]), this rule

> "does not require that the two separate instruments must be deemed consolidated and one for all purposes or that a separate and independent provision of one, such as a jurisdictional paragraph, which has no bearing on the construction to be placed on the two instruments is to be . . . incorporated in the other" (*Kent v Universal Film Mfg. Co.*, 200 App Div 539, 550 [1st Dept 1922]).

Section 1.1 of the Shareholders Agreement restricts the sale, transfer, assignment, hypothecation or encumbering of shares "[e]xcept as provided in this Agreement *and* in the Stock Option Agreement" (emphasis added). The parties thus plainly recognized a distinction between "this Agreement" (the Shareholders' Agreement) and the Stock Option Agreement. The plain language of section 16 of the Shareholders' Agreement requires rabbinical arbitration of any dispute relating to "this Agreement." Insofar as no mention of the Stock Option Agreement appears in section 16 of the Shareholders' Agreement, that section cannot be interpreted, absent any additional terms in either agreement, to apply to disputes related to the Stock Option Agreement. The Stock Option Agreement, executed separately, relates to Menachem's right to purchase a set amount of shares and provides the mechanism for setting the purchase price. A conflict regarding Menachem's right to purchase a specified amount of shares and the valuation of the shares is not a conflict arising from the terms of the Shareholders' Agreement which governs, inter alia, general restrictions on the alienation or encumbering of shares, general offers

to purchase and/or sell shares between shareholders and transfer of shares resulting from the death of a shareholder.

When an agreement between parties is clear and unambiguous on its face, it will be enforced according to its terms and without resort to extrinsic evidence (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990]). Accordingly, a court "should not, under the guise of contract interpretation, 'imply a term which the parties themselves failed to insert' or otherwise rewrite the contract" (*Lui v Park Ridge at Terryville Assn.*, 196 AD2d 579, 581 [2d Dept 1993], quoting *Mitchell v Mitchell*, 82 AD2d 849 [2d Dept 1981]). Given the absence of an arbitration clause in the Stock Option Agreement or any unequivocal language incorporating the Stock Option Agreement into the arbitration clause of the Shareholders' Agreement, the court cannot compel Menachem to submit his claims relating to the Stock Option Agreement to arbitration (*see Glauber v G & G Quality Clothing, Inc.*, 134 AD3d 898, 898-899 [2d Dept 2015]). Defendants do not contend that Menachem's remaining causes of action (fifth through tenth) are subject to arbitration.

While defendants argue that section 22.2 of the Shareholders' Agreement and section 6 of the Stock Option Agreement state that each agreement, together with the other, "constitute the entire understanding" of the parties, defendants have not demonstrated that such clauses are intended as anything other than common merger clauses simply evincing that no other agreements exist between the parties other than the

Shareholders' Agreement and Stock Option Agreement with respect to the subject matter contained therein.

Accordingly, Menachem's motion to stay arbitration and for a preliminary conference is granted. Defendants' cross motion to compel arbitration and stay the litigation of the fifth through tenth causes of action is denied. The parties are directed to appear for a preliminary conference on February 2, 2018.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL