

Matter of Kurbatsky v Harmony Funeral Home, Inc.

2018 NY Slip Op 30434(U)

March 13, 2018

Supreme Court, Kings County

Docket Number: 5937/16

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

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 13th day of March, 2018.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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IN THE MATTER OF THE APPLICATION OF
BORIS KURBATSKY AND FELIX NEMIROVSKY,

PETITIONERS,

- AGAINST -

Index No. 5937/16

FOR AN ORDER DISSOLVING THE CORPORATION KNOWN
AS HARMONY FUNERAL HOME, INC., PURSUANT
TO BCL §§ 1104 AND 1104-A

RESPONDENT.

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The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	_____1-2_____
Opposing Affidavits (Affirmations)_____	_____3_____
Reply Affidavits (Affirmations)_____	_____4_____
_____Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, petitioners Boris Kurbatsky and Felix Nemirovsky¹ move to renew an order of this court, dated July 17, 2017, which dismissed the instant petition for dissolution.

¹The court disregards the ostensible error in the caption which repeats the name of Felix Nemirovsky as an additional petitioner (CPLR 2001).

Petitioners, along with Aleksandr Brailovsky (Aleksandr) and Dmitriy Brailovsky (Dmitriy), are shareholders in Harmony Funeral Home Inc. (Harmony). The shareholders' agreement contains the following arbitration clause:

Any dispute or controversy arising among the parties hereto regarding any term, covenant or condition of this Agreement or the breach thereof shall, upon written demand of any party hereto, be submitted to and determined by arbitration before the American Arbitration Association, in Kings County, in the State of New York by a panel of three arbitrators, in accordance with the rules of the Association then in effect. Any award or decision rendered shall be made by means of a written opinion explaining the arbitrators' reasons for the award or decision, and the award or decision shall be final and binding upon the parties hereto. The arbitrators may not amend or vary any provision of this Agreement. Judgment upon the award or decision rendered by the arbitrators may be entered in any court of competent jurisdiction.

In a related derivative action brought by petitioners against Aleksandr and Dmitriy seeking damages for breach of fiduciary and an accounting (*Nemirovsky, et ano. v Brailovsky, et al.*, Kings County index No. 515145/15), petitioners moved, by way of order to show cause, for various items of interlocutory relief including a stay of arbitration proceedings brought by Aleksandr and Dmitriy pursuant to the relevant shareholders' agreement. By order dated December 16, 2016, this court determined that the parties shall proceed to arbitration as per the shareholders' agreement and that the prior orders issued in this action by Justice Martin Solomon shall remain in full force and effect.² In this court's July 17, 2017 order dismissing the petition, the court stated that "it is the law of the case that

²These orders provided, in essence, that all parties shall be free to have access to and operate the subject funeral home owned by Harmony, as well as access to corporate books and banking records.

the subject matter is to be decided in arbitration as per [the December 16, 2016] order of this court.” At the time this court issued the July 17, 2017 order, an arbitration proceeding, pursuant to a demand for arbitration served by Aleksandr and Dmitry upon petitioners, was pending.

“A motion for leave to renew is addressed to the sound discretion of the court” (*Matheus v Weiss*, 20 AD3d 454, 454-455 [2d Dept 2005]). A motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination” (CPLR 2221 [e] [2]; *see Hodzic v M. Cary, Inc.*, 151 AD3d 1034 [2d Dept 2017]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820, 822 [2d Dept 2007]). Petitioners base their motion on the withdrawal of Aleksandr and Dmitriy from the arbitration proceeding following the issuance of the order. Aleksandr and Dmitriy state in their opposition papers that petitioners refused to pay an invoice from the American Arbitration Association for their share of the hearing fees which, presumably, was the reason for the withdrawal.

Even if this court were to deem the withdrawal of the arbitration proceeding as “new facts” or otherwise reconsider the prior motion without giving import to the December 16, 2016 order, such would not change the court’s ultimate determination that petitioners’ claims must be submitted to arbitration. 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]).

There is no dispute that the relevant shareholders' agreement contains a valid arbitration cause. In their petition for dissolution, petitioners allege that Aleksandr and Dmitriy have failed to provide financial information concerning the corporation to them, refused to give them access to corporate bank accounts, denied petitioners the right to act as authorized co-signers on the bank accounts, failed to provide them with financial information for tax purposes, failed to communicate with petitioners regarding corporate affairs, converted corporate profits and failed to pay petitioners their share of the profits.

The broad arbitration clause in the shareholders' agreement clearly covers the subject matter of the dispute, which essentially concerns claimed breaches of those parts of the agreement relating to the management of the corporation and a breach of fiduciary duties. The claims in the petition must therefore be submitted to arbitration in accordance with the shareholders' agreement (*see Matter of Ehrlich v Stein*, 143 AD2d 908, 910 [2d Dept 1988];

Matter of Levy, 79 AD2d 684 [2d Dept 1980]). While petitioners contend that the withdrawal of the arbitration proceeding by Aleksandr and Dmitriy resulted in this court being the only forum to hear the dispute, petitioners have not shown that they are precluded from filing their own demand for arbitration.

Accordingly, petitioners' motion for renewal is denied.

The forgoing constitutes the decision and order of the court.

E N T E R,

A handwritten signature in black ink, appearing to be 'L. Knipel', written over the text 'J. S. C.'.

J. S. C.

HON. LAWRENCE KNIPEL