SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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LAMORNA INVESTMENTS LIMITED S.A.,

Plaintiff,

- v -

MG CAPITAL MANAGEMENT RESIDENTIAL FUND III L.P., MG CAPITAL MANAGEMENT, L.P., ECAM III, LLC, MG GP III, L.P., ERIC MALLEY

Defendant.

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INDEX NO. 652836/2019

MOTION DATE 10/29/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 36, 37
were read on this motion to/for COMPEL ARBITRATION.

In this action, plaintiff Lamorna Investments Limited S.A. ("Lamorna") alleges that defendants MG Capital Management Residential Fund III L.P. (Fund or Fund III), MG Capital Management, L.P. (MG Capital), ECAM III, LLC (ECAM), MG GP III, L.P. (MG GP) and Eric Malley "made fraudulent representations in Offering Materials in order to induce Plaintiff to acquire a limited partnership interest" in defendant Fund III. (Compl., ¶¶ 57, 55–66 [NYSCEF Doc. No. 1]. Two agreements are at issue: the Second Amended and Restated Agreement of Limited Partnership Agreement governing the Fund (Aff. of David Wrobel [Defs.' Atty] in Supp. [Wrobel Aff.], Ex. C [NYSCEF Doc. No. 23] [Limited Partnership Agreement]); and a Subscription Agreement, pursuant to which Lamorna applied to purchase a limited partner interest in Fund III. (Wrobel Aff., Ex. D [NYSCEF Doc. No. 24].) Defendants move to compel arbitration pursuant to CPLR 7503 and the Federal Arbitration Act, 9 USC § 1 et seq. In the alternative, defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). (Notice of Motion [NYSCEF Doc. No. 28].) Defendants also move to seal certain documents.

Defendants move to compel arbitration based on section 11.18, the Dispute Resolution provision of the Limited Partnership Agreement to which the Fund, MG GP as general partner, and various limited partners, including plaintiff, are parties. In particular, section 11.18 (a) provides:

> "Any dispute, controversy, or claim arising out of or relating to this Agreement, including any question regarding its formation, applicability, enforceability, existence, validity or termination (a 'Dispute') shall, subject to Section 11.18(b), be referred to and finally settled under the Rules of Arbitration (the 'Rules') of the International Chamber of Commerce (the 'ICC')."

In opposing the motion to compel, plaintiff contends that "the Subscription Agreement alone [] governs Lamorna's acquisition of a limited partnership interest in Fund III"; that "[i]t is the Subscription Agreement alone that Lamorna seeks to rescind as the remedy for its fraud claim"; and that the Limited Partnership Agreement arbitration provision therefore does not apply. (Pl.'s Memo. in Opp., at 1-2 [NYSCEF Doc. No. 34].) Plaintiff further contends that it is not required to arbitrate, as the Subscription Agreement does not contain an arbitration provision. (Id.)

As a threshold matter, the court holds that the arbitrator, rather than the court, must decide whether plaintiff's claims are arbitrable. The parties have not directly addressed the issue of whether the FAA or state law governs the determination as to whether the court or the arbitrator should decide the substantive arbitrability of the underlying dispute. Plaintiff and defendants cite both federal and New York law, and plaintiff also cites Delaware law. The court need not, and does not, determine the choice of law question, as neither party points to, and the court's own research has not revealed, any material difference on the issue between federal law decided under the FAA and New York or Delaware law.

The New York courts have held that "[g]enerally, 'whether there is a clear, unequivocal and extant agreement to arbitrate the claims[] is for the court and not the arbitrator to determine.'" (Matter of Fiveco, Inc. [v Haber], 11 NY3d 140, 144 [2008], rearg denied 11 NY3d 801 quoting Primex Intl. Corp. v Wal-Mart Stores, Inc., 89 NY2d 594, 598 [1997].) Courts applying New York law will, however, enforce an arbitration agreement that "clearly and unmistakably" provides that the arbitrator will decide the arbitrability of a dispute. (Matter of Smith Barney Shearson Inc. [v Sacharow], 91 NY2d 39, 46 [1997] [internal citation omitted].) Under the FAA, similarly, "courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." (Henry Schein, Inc. v Archer and White Sales, Inc., 139 S.Ct. 524, 531 [2019] [internal quotation marks and citation omitted].) The Supreme Court has, however, "consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." (Id., at 530 [internal citation omitted].) When the parties' agreement both specifically incorporates by reference the rules of an arbitration organization that permit the arbitrator to decide the scope of the arbitration agreement and "employs language referring all disputes to arbitration," courts applying the FAA will "leave the issue of arbitrability to the arbitrators." (Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's, 66 AD3d 495, 496 [1st Dept 2009] [internal quotation marks and citation omitted], affd 14 NY3d 850 [2010], rearg denied 15 NY3d 769 [2010], cert denied 562 U.S. 962 [2010].) Similarly, in holding that the issue of arbitrability is for the arbitrator to decide, the New York courts and the Delaware courts require not only that the arbitration clause incorporate rules of an arbitral forum that empower the arbitrator to decide issues of arbitrability but also that the arbitration clause provide broadly for submission of disputes to the arbitrator. (Vectra Capital,

LLC v Cosgrove, 656751/2016, 2017 WL 2900482, * 3 [Sup Ct, NY County 2017] [this court's decision collecting New York authorities, including Matter of Smith Barney Shearson Inc., 91 NY2d at 46-47 [applying New York choice of law provision]].) Delaware law is to the same effect. (Vectra Capital, LLC, 2017 WL 2900482, at * 3 [discussing James & Jackson, LLC v Willie Gary, LLC, 906 A2d 76 [Del 2006]].)

Here, the court holds that the parties' agreements evidence a clear and unmistakable intent to delegate arbitrability questions to the arbitrator. As noted above, the Limited Partnership Agreement provides that "[a]ny dispute, controversy, or claim arising out of or relating to this Agreement" shall be resolved by arbitration under the Rules of the International Chamber of Commerce. (Limited Partnership Agreement, § 11.18 [a].) The ICC rules provide:

> ". . . [I]f any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court[1] for its decision pursuant to Article 6(4)."

(Rules of Arbitration of the International Chamber of Commerce, Art. 6(3) [https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf].)[2]

The Limited Partnership Agreement also provides that the arbitral tribunal appointed under that Agreement "may exercise jurisdiction with respect to both this Agreement and the Related Agreements," which are defined to include "any Subscription Agreement and/or side letter pertaining to the Partnership between the General Partner and/or the Partnership on the

[1] "Court" is defined as the International Court of Arbitration of the International Chamber of Commerce. (Rules of Arbitration of the International Chamber of Commerce, Art. 1(1).)
[2] Plaintiffs make no claim that the ICC Rules do not delegate the issue of arbitrability to the arbitrator. Indeed, neither party discusses the impact of these Rules.

one-hand, and a Limited Partner on the other hand. . . ." (Limited Partnership Agreement, § 11.18 [h].) The Subscription Agreement expressly provides that it is made by and among the Fund, MG GP as general partner, and the investor (as relevant here, Lamorna), "who is hereby applying to become a limited partner of the Partnership. . . , on the terms and conditions set forth in this Subscription Agreement and in the Amended and Restated Agreement of Limited Partnership of the partnership. . . ." (Subscription Agreement, Opening Paragraph [NYSCEF Doc. No. 24].)

Based on the terms of the Subscription Agreement and the Limited Partnership Agreement, the court cannot find as a matter of law that plaintiff's claims in this action arise solely under the Subscription Agreement or that the two Agreements are entirely unrelated. Rather, it is for the arbitrator to decide the applicability of the Limited Partnership Agreement, including the arbitration provision of that Agreement or, put another way, whether plaintiff's claims fall within the scope of that provision.

Plaintiff also argues that the defendants that are not parties to the Limited Partnership Agreement "lack standing to make a motion to compel arbitration thereunder." (Pl.'s Memo. In Opp., at 4, n 4.) Plaintiff does not cite any authority in support of this contention. Nor does plaintiff address authority that, while nonsignatories are generally not subject to arbitration agreements, a nonsignatory may be bound by an arbitration clause where it knowingly exploits the benefits of the agreement containing the arbitration clause (see Matter of Belzberg [v Verus Invs. Holdings Inc.], 21 NY3d 626, 630-31 [2013] [applying New York law]) or where, for example, the signatory and nonsignatory acted in concert. (Gabriel Capital, L.P. v CAIB Investmentbank AG., 28 AD3d 376, 378 [1st Dept 2006] lv dismissed 7 NY3d 922 rearg denied 8 NY3d 955 [2007]; see All Metro Health Care Servs., Inc. v Edwards, 25 Misc 3d 863, 867-68

[Sup Ct, NY County 2009] [this court's decision collecting FAA cases where nonsignatories have been held bound by arbitration agreements].) Here, although ECAM, MG Capital, and Malley were nonsignatories to the Limited Partnership and Subscription Agreements, MG GP, general partner of Fund III, signed both Agreements by ECAM, its general partner, and ECAM in turn signed by Eric Malley, its Managing Member. As alleged in the complaint, MG Capital is the investment manager for all of the MG Capital funds, including Fund III. (Compl., ¶ 7.) Under these circumstances, plaintiff's bare assertion that these nonsignatories lack standing to move to compel arbitration is unpersuasive.

Defendants' motion to compel arbitration will accordingly be granted. In view of this holding, the court does not reach the branch of defendants' motion to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (7).

Defendants also move to seal those portions of exhibits C (Limited Partnership Agreement [NYSCEF Doc. No. 23]), D (Subscription Agreement [NYSCEF Doc. No. 24]), E (Private Placement Memorandum [NYSCEF Doc. No. 25]), and F (Investor Presentation [NYSCEF Doc. No. 26]). Defendants claim that these documents contain "Plaintiff's private financial information" (Wrobel Aff., ¶ 19 [NYSCEF Doc. No. 20]) as well as "trade secrets, investment strategies, and proprietary analytics which do not implicate matters of public interest." (Id., ¶ 20.) The unredacted exhibits were filed under temporary seal, pending determination of this motion. Defendants initially sought wholesale sealing of the documents. At the court's direction, they provided more narrowly tailored redactions.

The court finds that defendants have demonstrated good cause for sealing, pursuant to 22 NYCRR § 216.1. The requested redactions concern the investor's private personal and financial

information. They also concern proprietary and confidential business information, including but not limited to investment strategies, distributions, fees, and capital commitments.

It accordingly hereby ORDERED that the branch of defendants' motion to compel arbitration and to stay this action is granted to the following extent:

It is ORDERED that this action is stayed pending determination by the International Chamber of Commerce of whether, or to what extent, plaintiff's causes of action are arbitrable; and it is further

ORDERED that in the event the International Chamber of Commerce orders arbitration of some or all of plaintiff's causes of action, this action is further stayed pending hearing and determination of such causes of action, provided that: Either plaintiff or defendants may move to vacate or modify this stay upon the final determination of the arbitration; and it is further

ORDERED that the branch of defendants' motion to dismiss the complaint is denied as moot and without prejudice to defendants' right, if so advised, to restore such branch in the event the International Chamber of Commerce does not order arbitration of some or all of plaintiff's causes of action; and it is further

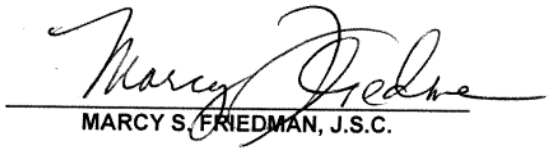
ORDERED that NYSCEF Doc. Nos. 23, 24, 25, and 26 shall remain filed in unredacted form under seal and, until further order of the court, the County Clerk shall deny access to the sealed documents to anyone, other than the staff of the County Clerk or the court, counsel of record for any party to this case, and any party; and it is further

ORDERED that defendants shall publicly file redacted versions of NYSCEF Doc. Nos. 23, 24, 25, and 26 identical to the proposed redacted versions provided to the court; and it is further

ORDERED that future submissions containing or referencing the confidential information specified in this decision shall be redacted prior to public filing in NYSCEF; and it is further

ORDERED that this order may not be used to seal or redact any documents or evidence to be offered at trial, if any.

This constitutes the decision and order of the court.



9/25/2020
DATE

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE