

**Blue Sphere Corp. v York Renewable Energy
Partners, LLC**

2020 NY Slip Op 33527(U)

October 26, 2020

Supreme Court, New York County

Docket Number: 653650/2020

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 653650/2020
BLUE SPHERE CORPORATION, MOTION DATE 10/23/2020
Petitioner, MOTION SEQ. NO. 001

- v -

YORK RENEWABLE ENERGY PARTNERS, LLC, DECISION + ORDER ON MOTION
Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for PRELIMINARY INJUNCTION
ORDER

Upon the foregoing documents, it is hereby
ORDERED that the petition seeking a preliminary injunction pending the arbitration award between the parties is DENIED; and it is further

ORDERED that the Interim Order dated September 20, 2020 is vacated, and of no force and effect; and it is further

ORDERED that respondent's cross motion/counterclaim to compel arbitration of petitioner's application for a provisional remedy pending the arbitration award is granted, without costs and disbursements; and it is further

ORDERED that petitioner shall arbitrate its claims for provisional equitable relief against respondent in accordance with

the Amended and Restated Limited Liability Company Agreement of Concord Energy Partners, LLC, dated January 30, 2015 and the American Arbitration Association Commercial Rules and Mediation Procedures; and it is further

ADJUDGED that the parties shall proceed to arbitration of the application for provisional relief forthwith and respondent's counsel shall serve a copy of this judgment upon the arbitral tribunal.

DECISION

Section 12.04(b) of the Restated Operating Agreement (Operating Agreement) states, in pertinent part:

"The parties agree that notwithstanding the foregoing, prior to the appointment of the arbitrator, nothing herein shall prevent any party from seeking preliminary or temporary injunctive relief against any other party in the United States Federal or state courts of New York, County of New York. For the avoidance of doubt, any action for permanent relief or monetary damages shall be settled by arbitration."

It is undisputed that on August 6, 2020, in accordance with such provision, petitioner filed a show cause order, which commenced this proceeding, seeking a temporary restraining order. The court denied such interim relief on August 20, 2020 because petitioner did not demonstrate any immediacy. On September 21, 2020, the return date of the show cause order, by Interim Order

dated September 21, 2020, on consent of both parties¹, this court issued a preliminary injunction, which provided that, during the pendency of this proceeding, respondent was restrained

“from suffering to be done, directly or through any attorney, agent, servant, employee or other person under its supervision or control or otherwise, of any of the following acts: “marketing, selling or transferring its Membership Interest, or taking any steps or actions toward marketing, selling, or transferring its Membership Units in Concord and/or Rhode Island to anyone other than Petitioner”.

As issue had not yet been joined, the court adjourned argument on the petition, which sought a preliminary injunction in aid of arbitration, i.e., a preliminary injunction restraining respondent pending the arbitration award, until October 23, 2020, to allow service and filing of an answer and a reply to any counterclaims, and reserved decision on the requisite undertaking.

Though petitioner delivered a Demand for Arbitration dated July 29, 2020 (Demand) to respondent, it never filed the Demand with the American Arbitration Association (AAA) until September 10, 2020. Without such filing, no arbitrator could be appointed, which enabled petitioner to seek provisional relief in this court under Operating Agreement Section 12.04. It was not until the filing on September 9, 2020 of a demand for arbitration with the

¹Respondent argues that it never agreed to any restraint on its marketing or taking steps to market the Membership Units and points out that the ad damnum clause of the petition seeks no such relief.

AAA, by respondent, and not by petitioner, that an "emergency arbitrator" was appointed.

This court finds that petitioner's decision to move this court for temporary restraining and preliminary injunctive relief, rather than enable the appointment of an arbitrator, was a matter of strategy rather than necessity. On that basis, this court declines to exercise its discretion to grant to petitioner a preliminary injunction, pending resolution of the arbitration, without prejudice to petitioner seeking such relief from the appointed arbitrator.

As argued by respondent, and not denied by petitioner, the Operating Agreement and the AAA rules, incorporated by reference thereunder, empower the arbitrator to grant a preliminary injunction to petitioner, in the context of the arbitration of the parties' disputes about specific performance and injunctive relief under such agreement. This court concurs with respondent

that it would be inappropriate for this court to entangle itself in such disputes now pending before an arbitrator, the forum that the parties chose under the Operating Agreement. See Haulage Enterprises Corp. v Hempstead Resources Recovery Corp., 74 AD2d 863 (2d Dept. 1980) and Park City Associates v Total Energy Leasing Corp., 58 AD2d 786 (1st Dept. 1977).

10/26/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

APPLICATION:

SETTLE ORDER

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE