Fein v Berger
2020 NY Slip Op 34148(U)
December 11, 2020
Supreme Court, New York County
Docket Number: 656540/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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ARIEL FEIN, SARA FEIN, IRVING LANGER, MIRIAM LANGER, ALLEGIANT HOLDING, LLC (AZ), ALLEGIANT HOLDINGS, LLC (NY), ALLEGIANT HOLDING C, LLC,ALLEGIANT REALTY, LLC,ALLEGIANT HEALTHCARE OF PHOENIX, LLC,ASMSY, LLC

Plaintiff,

- v -

ELIOT BERGER, ALLEGIANT HOLDING B, LLC,

Defendant.

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INDEX NO. 656540/2020

MOTION DATE 11/25/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 30, 31, 32

were read on this motion to/for COMPEL ARBITRATION.

Upon the foregoing documents and as set forth on the record (12-11-2020), the petitioners' motion to (i) enjoin respondents from continuing to prosecute a lawsuit initiated by them against petitioner in the Superior Court of the State of Arizona, County of Maricopa, captioned *Berger v Fein* and bearing the Case No. CV2020-011496 (the **Arizona Action**) and (ii) compelling respondents to arbitrate the Arizona Action is granted to the extent set forth below.

RELEVANT FACTUAL BACKGROUND

Eliot Berger is a former employee of and a minority stakeholder in a group of nursing homes in Arizona. He was terminated for allegedly engaging in certain misconduct, including wiring money from the entities' bank accounts to his brother-in-law. Mr. Berger filed the Arizona Action asserting eighteen claims based primarily on alleged violations of the operating

agreements of two entities that governed the nursing home entities: (i) Allegiant Realty, LLC (**Allegiant Realty**) and (ii) Allegiant Holdings C, LLC (**Allegiant Holdings**). Allegiant Realty owns the real estate for the nursing homes, and Allegiant Holdings is the holding company for entities that lease the nursing homes from Allegiant Realty and operate the homes.

The Operating Agreement of Allegiant Realty (the **Original Realty Agreement**), dated September 22, 2016, as amended by an Amendment to Operating Agreement (the **Amendment**, the Original Realty Agreement together with the Amendment, collectively, hereinafter, the **Realty Agreement**; NYSCEF Doc. No. 5), dated as of March 28, 2017, each, by and among Irving Langer and Ariel Fein, as Managers, and Allegiant Holding, LLC and Allegiant Holding B, LLC, as Members, contains the following Dispute Resolution provision:

> 10.4 Dispute Resolution. The parties hereto agree that with respect ***to all disputes, problems or claims arising out of or in connection with this Agreement and all other agreements or other instruments executed in connection herewith*** (the "Dispute"), the parties hereto shall, in good faith, use their reasonable best efforts to resolve the Dispute. If after such efforts the parties hereto are unable to agree upon a resolution within ten (10) days of the arising of the Dispute***, either party may submit to final and binding arbitration before Rabbi Eytan Feiner of Congregation Kneseth Israel in Rockaway, New York (the "Beth Din"). Either party may commence the arbitration process called for in this Lease by filing a written demand for judgment with the Beth Din.*** The provisions of this Section 10.4 with respect to judgment before the Beth Din may be enforced by any court of competent jurisdiction, and the parties seeking attorneys' enforcement shall be entitled to an award of all costs, fees and expenses, including fees, to be paid by the parties against whom enforcement is ordered. The fees and expenses of such proceeding shall be borne by the non-prevailing party, as determined by such proceeding. ***Upon the mutual agreement of the parties involved in the Dispute, the parties may submit to final and binding arbitration before any other recognized alternative dispute resolution company or organization. The parties hereto agree that this paragraph shall be grounds for dismissal of any court action commenced by any party with respect to a dispute arising out of such matters***

(the **Arbitration Provision;** NYSCEF Doc. No. 5, ¶ 10.4 [emphasis added]).

Section 10.5 of the Realty Agreement provides that Arizona law shall govern the "interpretation, enforcement and performance" of the Realty Agreement, and Section 10.6 governs Jurisdiction and Venue and provides as follows:

> 10.6 Jurisdiction; Venue. ***EXCEPT AS PROVIDED OTHERWISE IN THIS AGREEMENT***, IN THE EVENT ANY DISPUTE BETWEEN THE PARTIES HERETO RESULTS IN LITIGATION, OR TO THE EXTENT A PARTY MUST GO TO A COURT OF LAW TO ENFORCE A JUDGMENT ARRIVED AT THROUGH ARBITRATION PURSUANT TO SECTION 10.4 OF THIS AGREEMENT, ALL SUCH ACTIONS AND PROCEEDINGS IN ANY WAY, MANNER OR RESPECT ARISING OUT OF OR FROM OR RELATED TO THIS AGREEMENT, THE OTHER DOCUMENTS OR THE TRANSACTIONS CONTEMPLATED HEREIN SHALL BE LITIGATED IN COURTS HAVING SITUS IN THE CITY OF PHOENIX, STATE OF ARIZONA. … THE PARTIES HERETO HEREBY WAIVE ANY RIGHT THEY MAY HAVE TO TRANSFER OR CHANGE THE VENUE OF ANY LITIGATION BROUGHT AGAINST SUCH PARTY IN ACCORDANCE WITH THIS SECTION

(the **Jurisdiction Provision**; NYSCEF Doc. No. 5, ¶ 10.6 [emphasis added]).

The Allegiant Holdings C, LLC Limited Liability Company Agreement (the **2017 Holdings Agreement;** NYSCEF Doc. No. 6) by and among Jake Weintraub, Eliot Berger, Ariel Fein, and Irving Langer, dated March 21, 2017, provides that:

> Each Member hereby irrevocably submits in any suit, action or proceeding out of or relating to this Agreement or any Member's performance hereof or rights or obligations hereunder to the jurisdiction of the federal and state courts sitting ***in New York*** and waived any and all objections to the jurisdiction of, or venue in, such courts that such Member may have under applicable laws

(NYSCEF Doc. No. 6, ¶11.3 [emphasis added]).

The 2017 Holdings Agreement contains an integration clause, which provides:

> Section 11.5 Entire Agreement
>
> This Agreement and the Schedules and Exhibits hereto, if any, together with all other contracts and agreements which either are referred to herein or bear

> even date herewith, contain all the understandings and agreements of whatsoever kind and nature existing between the Members with respect to the subject matter hereof and thereof and supersede all prior agreements and undertakings with respect thereto. This Agreement constitutes the entire agreement between the parties hereto and wholly cancels, terminates and supersedes all previous negotiations, agreements and commitments, whether formal or informal, oral or written, with respect to the subject matter hereof, existing now and in the future unless this Agreement is specifically mentioned as amended and restated and a copy of which is attached to any new or purported superseding agreement.

(NYSCEF Doc. No. 6, ¶11.5).

There is no mention of arbitration in the 2017 Holdings Agreement. The 2017 Holdings Agreement is signed by Ariel Fien as managing member of Allegiant Holdings and by Mr. Fein, Mr. Berger, and Mr. Weintraub, individually, as members. The 2017 Holdings Agreement submitted to the court is not, however, signed by Mr. Langer. However, pursuant to the Operating Agreement of Allegiant Holdings C, LLC (the **2016 Holdings Agreement;** NYSCEF Doc. No. 17), dated September 22, 2016, by and among Eliot Berger and Jake Weintraub as managers of the company, and Eliot Berger, Ariel Fein, Irving Langer and Jake Weintraub as members, the members agreed that the "[a]greement may be amended, altered or modified [] by the affirmative vote of the Majority-in-Interest of the Members" (NYSCEF Doc. No. 17, ¶ 10.14). The 2016 Holdings Agreement contains an identical arbitration provision to the Realty Agreement (NYSCEF Doc. No. 17, ¶¶ 10.4-10.6). The 2016 Holdings Agreement provides that Messrs. Berger, Fein, Langer, Weintraub and Langer each are 25% members of Allegiant Holdings (NYSCEF Doc. No. 17). Therefore, when Messrs. Berger (who contests the effectiveness of the 2017 Holdings Agreement and, instead, argues that the 2016 Holdings Agreement governs, notwithstanding the fact that he himself signed the 2017 Holdings

Agreement), Fein, and Weintraub signed the 2017 Holdings Agreement, "the Majority-in-Interest of the Member," i.e.,75%, adopted the 2017 Holdings Agreement.

The petitioners have represented that they have previously requested, and have provided email exchanges with counsel to the respondent requesting, that Mr. Berger participate in the "Beth Din" but to date, Mr. Berger has refused (NYSCEF Doc. Nos. 27, 30-31). To address certain form objections as to the manner in which the petitioners demanded the Beth Din pursuant to the Arbitration Provision of the Realty Agreement, by letter dated December 9, 2020 (NYSCEF Doc. No. 32), the petitioners wrote to Rabbi Feiner to expressly demand Beth Din arbitration.

DISCUSSION

To obtain a preliminary injunction, the movant must demonstrate: (1) a likelihood of success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balance of the equities in its favor (*Invesco Institutional (N.A.), Inc. v Deutsche Inv. Mgmt. Ams., Inc.,* 74 AD3d 696, 697 [1st Dept 2010]). In support of their motion, the petitioners argue that an injunction is required here because the Arbitration Provision requires the parties to arbitrate their disputes and permitting the Arizona Action would violate that agreement.

The parties dispute whether arbitration of disputes before the Beth Din is mandatory or merely permissive. The respondents argue that because the word "may" is used, the arbitration provision is permissive only and that they are, therefore, not required to participate in the Beth Din. The argument fails.

The Arbitration Provision in the Realty Agreement clearly states that the parties "shall**,** in good faith, use their reasonable best efforts to resolve" any dispute (NYSCEF Doc. No. 5, ¶ 10.4). In the event that such "best efforts" are unsuccessful after 10 days, "either party may submit to final and binding arbitration before Rabbi Eytan Feiner of Congregation Kneseth Israel in Rockaway, New York (the 'Beth Din')" (*id.*). The respondents are correct that this language is permissive. However, it is permissive in that ***either*** party may demand the Beth Din without further consent of the other party – i.e., no further agreement is required. Once demanded by ***either*** party, arbitration is mandatory. This is in stark contrast to the language set forth in the balance of the provision as it relates to other kinds of arbitration, which indicates that the parties may upon "mutual agreement … submit to final and binding arbitration before any other recognized alternative dispute resolution company or organization." (*id.*). Stated differently, the provision provides that the parties must first meet and confer as to any dispute, and then either party may demand a Beth Din with Rabbi Feiner, or both parties may agree to an alternative forum for arbitration. Critically, as it relates to this dispute, the parties agreed that once arbitration is demanded or agreed upon, the arbitration is grounds for dismissal of any court action:

> this paragraph ***shall*** be grounds for dismissal of any court action commenced by any party with respect to a dispute arising out of such matters"

(*id.*).

For the avoidance of doubt, the Jurisdiction Provision, which provides for venue in Maricopa County, Arizona, is not inconsistent with this result because (i) the Jurisdiction Provision provides for venue in Arizona "EXCEPT AS PROVIDED OTHERWISE IN THIS AGREEMENT" (i.e., in the event of arbitration under the Arbitration Provision set forth in Paragraph 10.4), (ii) because, in the absence of a demand for the Beth Din or an agreement to

arbitrate with another alternative dispute resolution company, litigation is permitted, and (iii) because the Arbitration Provision, itself, expressly provides that,

> The provisions of this Section 10.4 with respect to judgment before the Beth Din ***may be enforced by <u>any</u> court of competent jurisdiction,*** and the parties seeking enforcement shall be entitled to an award of all costs, fees and expenses, including fees, to be paid by the parties against whom enforcement is ordered

(NYSCEF Doc. No. 5, ¶¶ 10.6, 10.4 [emphasis added]).

In other words, whereas the Jurisdiction Provision requires litigation of disputes between the parties to be held in Phoenix, Arizona, the Arbitration Provision carves out an exception with respect to enforcement of the Arbitration Provision itself, permitting that Arbitration Provision to be "enforced by ***any court*** of competent jurisdiction" (NYSCEF Doc. No. 5, ¶10.4). Because the petitioners have clearly demanded Beth Din arbitration (and, indisputably, by their letter to Rabbi Feiner dated December 9, 2020), this court finds that they have demonstrated a likelihood of success on the merits as to their entitlement to compel arbitration with respect to "all disputes, problems or claims arising out of or in connection with" the Realty Agreement and "all other agreements or other instruments in connection" therewith. For the avoidance of doubt, it is of no moment that the demand for the Beth Din may have occurred after the Arizona Action was filed as this is clearly contemplated by the Realty Agreement.

Having to litigate the Arizona Action, if the parties agreed to arbitration, clearly demonstrates an irreparable injury and runs the risk of inconsistent rulings, which could impact the Beth Din. Finally, the balance of the equities also favors the petitioners here as having to proceed with the Arizona Action while their Petition to compel arbitration is decided would alter the status quo whereas an injunction would merely preserve it.

With respect to Allegiant Holdings, the 2017 Holdings Agreement appears to be the effective agreement with respect to that entity, notwithstanding the fact that Mr. Langer appears not to have signed the 2017 Holdings Agreement as the 2016 Holdings Agreement permits amendment by agreement of the majority of the members in interest, and, in any event, here, enforcement is sought against Mr. Berger, who indisputably signed the agreement sought to be enforced.

The 2017 Holdings Agreement expressly permits jurisdiction in New York pursuant to Section 11.3 (NYSCEF Doc. No. 6, ¶ 11.3). However, that Section does not provide that New York is the exclusive forum. Rather, it merely provides that the parties agree that jurisdiction is proper in New York and that the parties consent to it. Inasmuch as the 2017 Holdings Agreement is not executed in connection with the Realty Agreement, the only basis for issuing an injunction as to the 2017 Holdings Agreement would be a finding that the dispute under the 2017 Holdings Agreement arises out of or in connection with the Realty Agreement and all other agreements or other instruments executed in connection therewith. This is not something this court can do on the record before it and, in any event, is something that should be decided by Rabbi Feiner in connection with the Beth Din.

However, to the extent that the respondents argue that the 2016 Holdings Agreement is the operative agreement with respect to Allegiant Holdings because the 2017 Holdings Agreement was not signed by all parties, they cannot then object to the submission of the dispute to the Beth Din as the 2016 Holdings Agreement requires submission of all disputes to the Beth Din once

demanded by either party, which has clearly been done here. Simply put, they cannot have their cake and eat it, too.

Finally, on the record before the court, as with Allegiant Holdings (based on the 2017 Holdings Agreement), to the extent that the Arizona Action involves other parties that are not signatories of the Realty Agreement, the court cannot determine whether the dispute as it relates to those entities arises out of or in connection with the Realty Agreement "and all other agreements or other instruments executed in connection" therewith, or whether any such entities are necessary parties to the Beth Din. This, too, is properly left to Rabbi Feiner.

Based on the foregoing, the court grants the motion to enjoin the respondents from litigating "all disputes, problems or claims arising out of or in connection with" the Realty Agreement and "all other agreements or other instruments in connection" therewith during the pendency of this special proceeding.

Accordingly, it appearing to this Court that a cause of action exists in favor of the petitioners and against the respondents and that the petitioners are entitled to a preliminary injunction on the ground that the respondents threaten or are about to do, or are doing or procuring or suffering to be done, an act in violation of the petitioners' rights respecting the subject of this special proceeding and tending to render the judgment ineffectual, as set forth in the aforesaid decision, it is now

ORDERED that the undertaking is fixed in the sum of $25,000, conditioned that the petitioners, if it is finally determined that they was not entitled to an injunction, will pay to the respondents all damages and costs which may be sustained by reason of this injunction; and it is further

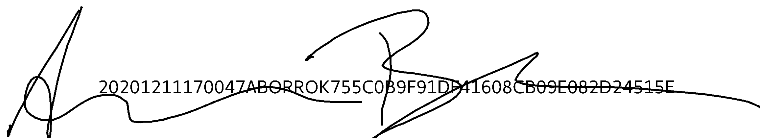
ORDERED that respondents, their agents, servants, employees, entities and all other persons acting under the jurisdiction, supervision and/or direction of the respondents, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee, entity or other person under the supervision or control of defendant or otherwise, any of the following acts:

> Litigating all disputes, problems or claims arising out of or in connection with the Realty Agreement and all other agreements or other instruments in connection therewith pending the determination of this Special Proceeding, as set forth above;

and it is further

ORDERED that the respondents are directed to file a response to the petition within 20 days of this decision and order; and it is further

ORDERED that counsel are directed to appear for a remote status conference in Part 53 on January 11, 2021, at 10:30 AM.



12/11/2020
DATE

ANDREW BORROK, 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