Xiangyang Luo v Tessler
2021 NY Slip Op 30899(U)
March 19, 2021
Supreme Court, New York County
Docket Number: 654707/2020
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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XIANGYANG LUO, CHUNXI ZHANG, GE WU, QIAOMEI LI, GANG ZHAO, JINFEI PAN, TIANZHI CUI, JUN TIAN, YANSHU NIU, XIAOWEI MEI, GUORONG GONG

Plaintiff,

- v -

YITZCHAK TESSLER, BIG APPLE CAPITAL MANAGEMENT, LLC,NEW YORK PROTON REGIONAL CENTER, LLC,NCM USA BRONX LLC,NCM USA MANAGEMENT, LLC,NCM USA SERVICE BRONX, LLC,JOHN DOES, BIG APPLE CAPITAL LENDERS LLC,

Defendant.

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INDEX NO. 654707/2020

MOTION DATE 03/17/2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36, 37, 43, 44, 45, 46

were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 47, 48

were read on this motion to/for STAY.

Motion Sequence Numbers 001 and 002 are consolidated for disposition. The motion (MS001) by plaintiffs for a default judgment is denied. The motion (MS002) by defendants to compel arbitration is granted.

Background

Plaintiffs contend that they are twelve members of Big Apple Capital Lenders, LLC ("Big Apple") and that defendant Tessler has caused Big Apple to violate the terms of a loan agreement. Plaintiffs seek repayment of loans made to defendants, loans that were allegedly made pursuant to the EB-5 program offered by U.S. Customs and Immigration Service. Under this program, projects can secure investment from foreign investors. Plaintiffs contend that the

borrowers, all entities controlled by defendant Tessler, received $6 million and none of the principal or interest has been repaid. According to plaintiffs, the borrowers sought funds to set up proton therapy centers.

MS002

Defendants contend that the operating and loan agreements require that any disputes arising out of the agreement must be resolved in arbitration and specifically, an arbitration before the American Arbitration Association. They point to section 20.3 of the Lender Operating Agreement and 10.14 of the loan agreement which contain clear arbitration provisions.

In opposition, plaintiffs contend that the arbitration clause is not a meritorious defense. They characterize the arbitration clause as "an alternative forum selection provision." Plaintiffs emphasize that the provision is not mandatory and that defendants did not make a timely demand for arbitration. Plaintiffs insist that the only cause of action at issue here is defendants' failure to pay the loan and the only relevant agreement is the loan agreement, not the operating agreement.

In reply, defendants emphasize that the loan agreement clearly provides for arbitration to resolve disputes about the loan agreement. They contend that plaintiffs are attempting to circumvent a clear arbitration provision by imposing additional requirements on defendants.

Section 10.14 of the loan agreement (the agreement plaintiffs are suing under) provides that "Upon demand of either Borrower or Lender, whether made before or after institution of any judicial proceeding, any claim or controversy arising out of or relating to this Agreement or any other Loan Document . . . shall be resolved by binding arbitration conducted under and governed by the Commercial Financial Disputes Arbitration Rules . . . of the American Arbitration Association . . . and the Federal Arbitration Act" (NYSCEF Doc. No. 10, ¶ 10.14).

"It 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" (*Waldron v Goddess*, 61 NY2d 181, 183-84, 473 NYS2d 136 [1984]).

Despite plaintiffs' efforts to obfuscate the meaning of the arbitration provision in the loan agreement, the Court finds that this case must be stayed pending arbitration and grants defendants' motion (MS002). The loan agreement makes absolutely clear that this dispute must be resolved in arbitration. Plaintiffs' first cause of action seeks to "enforce [the] loan agreement and redress Defendants' breach of the loan agreement" (NYSCEF Doc. No. 2, ¶ 73).

Plaintiffs' claim that defendants had to demand that there be an arbitration makes no sense; plaintiffs initiated this litigation, meaning that they should have commenced an arbitration in the first instance. It was not defendants' obligation to make a demand for arbitration for plaintiffs' affirmative claims.

MS001

Having found that the case should go to arbitration, the Court denies plaintiffs' motion (MS001) for a default judgment. Defendants established a reasonable excuse for failing to timely answer by pointing to an in-person meeting that purportedly took place between the parties on November 12, 2020. According to defendant Tessler, the parties discussed the instant dispute, potential settlement options and provided plaintiffs' counsel with the accounting records for his company (NYSCEF Doc. No. 35, ¶ 19). Tessler insists that he thought the case would not go forward while the parties attempted to settle (*id*. ¶ 20).

While defendants should not have assumed, without procuring an agreement in writing, that the case would not proceed while the parties discussed settlement, the fact is that plaintiffs do not deny that there were settlement discussions. This is not a case where defendants ignored a case. Rather it appears that defendants made a mistake in failing to file a timely answer in a case they were trying to settle. This Court prefers that cases be resolved on the merits.

Moreover, there is no prejudice to plaintiffs as this case just began—it was commenced on September 24, 2020 and defendants were not served until October 30, 2020. And, of course, plaintiffs should never have filed and should have commenced an arbitration based on the loan agreement. Contrary to plaintiffs' argument, a valid arbitration provision can serve to as a basis to vacate a default (*Natl. Agr. Commodities, Inc. v Intl. Commodities Export Co.*, 108 AD2d 735, 737, 484 NYS2d 902 [2d Dept 1985]). And any delay in resolving this case is totally plaintiffs' fault – had they commenced an arbitration, it might have been done by now.

Accordingly, it is hereby

ORDERED that the motion by plaintiffs (MS001) for a default judgment is denied; and it is further

ORDERED that defendants' motion (MS002) to compel arbitration and to stay this action is granted; and it is further

ORDERED that plaintiffs shall arbitrate its claims against defendants in accordance with the applicable contract at issue; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration.

Next Conference (Control Date): September 30, 2021. If the arbitration has not been completed, then the parties may request an adjournment.

3/19/2021
DATE

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