

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

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ALTHEA NASTASI,

Plaintiff,

-against-

Index No. 22427/03
Motion Date: 12/17/03
Motion Cal. No. 35

THOMAS NASTASI III and ARTHUR JOHANSEN,
Jointly and Severally, and NASTASI & CO. LLC.,
Defendants.

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The following papers numbered 1 to 16 read on this motion by defendants Arthur Johansen and Nastasi & Co. LLC for an order pursuant to CPLR 7503(a), compelling arbitration of the disputes raised in the complaint; canceling the Notice of Pendency filed September 22, 2003; awarding costs and expenses occasioned by the filing and cancellation of the Notice of Pendency; or in the alternative for an order pursuant to CPLR 3211 (a) (7) dismissing the second, third, and fourth claims of the complaint, with prejudice and canceling the Notice of Pendency.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	1- 4
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Upon the foregoing papers it is ordered that this motion by defendants Arthur Johansen and Nastasi & Co. LLC for an order pursuant to CPLR 7503(a), compelling arbitration of the disputes raised in the complaint; canceling the Notice of Pendency filed September 22, 2003; awarding costs and expenses occasioned by the filing and cancellation of the Notice of Pendency; or in the alternative for an order pursuant to CPLR 3211 (a) (7) dismissing the second, third, and fourth claims of the complaint, with prejudice and canceling the Notice of Pendency is granted to the following extent:

This action involves a family dispute between plaintiff Althea Nastasi, the mother of defendant Thomas Nastasi, III and the mother-in-law of defendant Arthur Johansen. In June 1995, Ms. Nastasi and her husband, Thomas Nastasi, Jr., transferred their interests in the family business, Nastasi-White, Inc., to a trust for the benefit of Thomas and Arthur. Thomas Nastasi, Jr. Died in October 1995. In November 1995, the trusts were terminated and the

shares of Nastasi-White, Inc. were transferred to Thomas and Arthur outright. By further agreements dated February 5, 1997 and September 24, 1997, plaintiff and defendants amended the terms of the transfer. The last such agreement, entitled Agreement Regarding Confirmation of Private Annuity Agreement dated September 24, 1997, provides that plaintiff would receive an annuity in the amount of \$13,750 per month for the remainder of her life. Separately, in September 1997, plaintiff entered into an agreement with defendants to sell real property located at 129-09 26th Avenue in College Point, New York. Pursuant to the contract of sale, defendants assumed an existing mortgage on the property in the amount of \$2,743,534 and promised to pay plaintiff one half of any amount realized from an eventual sale of the property in excess of \$2,743,534.

Subsequently, plaintiff instituted the instant action, essentially alleging in the complaint that since defendants Thomas Nastasi III and Arthur Johansen have failed to make annuity payments provided for in the agreements governing the transfer of shares in Nastasi-White, Inc, she is entitled to a constructive trust over and/or reconveyance of the property. The first cause of action seeks money damages in the amount of \$1,086,250. The second cause of action seeks the imposition of a constructive trust over the property. The third cause of action claims that the defendants have failed to make any payments on the annuity and thereby have been unjustly enriched. She seeks money damages in the amount of \$5,115,000 or in the alternative, the reconveyance of the property to herself. The fourth cause of action claims fraud by defendants for falsely representing that they would pay the annuity and as a result of that fraud she was induced to convey the property to defendant Nastasi & Co.

Defendants Arthur Johansen and Nastasi & Co. LLC move for an order compelling plaintiff to arbitrate the claims in the complaint on the ground that they are subject to valid and enforceable arbitration agreements. Plaintiff opposes this branch of the motion by claiming that the agreements are not valid due to her having been induced to enter them as a result of fraud by defendants.

The court finds that the agreements involving the sale of the property and the transfer of shares in Nastasi-White, Inc. with the concomitant annuity obligations, contain broad arbitration clauses that indicate the parties clearly intended any disputes arising from any aspect of either transaction to be resolved in arbitration.

The arbitration clause in the transfer of the property contract, signed by the plaintiff, individually and in her capacity as executor of the Estate, reads as follows:

If any dispute arises with respect to this Agreement, the Parties will settle the matter by binding arbitration. All disputes between [Althea] and

[Thomas and Arthur] and their successors and assigns which either [Althea] or [Thomas and Arthur] deem worthy of arbitration as well as all other matters relating to this Agreement which any of the Parties to this Agreement or their successors and assigns deems worthy of arbitration and all disputes, causes of action, controversies, and claims of every nature which may exist or arise between the Parties or their successors and assigns of either party shall be settled by binding arbitration as follows. . . .

The arbitration clause in the Joint and Survivor Private Annuity Agreement, signed by plaintiff individually, which governs the transfer of Nastasi-White shares and the associated annuity obligation, reads as follows:

All disputes including any disputes regarding price, value, etc., between the Transferors and the Transferees and their successors in interest and assigns which either party deems worthy of arbitration as well as all other matters relating to this Joint and Survivor Private Annuity Agreement which any of the parties to this Agreement or their successors in interest and assigns deem worthy of arbitration, and all disputes, causes of action, controversies, and claims of every nature which may exist or arise between the parties, their successors in interest and assigns or either with respect to this Agreement shall be settled by binding arbitration as follows. . . .

It is well settled that on a motion to compel or stay arbitration, the court must determine, whether the parties made a valid agreement to arbitrate, whether the agreement has been complied with, whether the dispute at issue falls within the agreement to arbitrate, and whether the claim is time-barred. Matter of Smith Barney, Harris Upham & Co. v Luckie, 85 NY2d 193, (1995.) *See also*, Levkoff-Sennet Partnership v Levkoff, 154 AD2d 352 (2d Dept 1998.) 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, 40 NY2d 897(1976.)

In the instant case, plaintiff's challenge to the validity of the arbitration clause fails. She claims that the agreements were signed as a result of defendant's fraud. Her claim is supported by her statement that the defendants had no intention ever to pay her the annuity or for the sale of the property. This claim is contradicted by her claims seeking damages for breach of these agreements. Moreover, her allegations of fraud fail to set forth facts from

which a fraud may be inferred. Her allegations lack the requisite particularity and are nothing more than conclusory assertions. *See, Credit Alliance v Arthur Andersen & Co.* 65 NY2d 536. Finally, even if the fraudulent inducement was properly alleged, the arbitration clause requires submission of the issue of whether there was fraudulent inducement to the arbitrator. Accordingly, the parties are directed to proceed to arbitration, pursuant to the agreements and in accordance with the CPLR.

The branch of the motion seeking cancellation of the Notice of Pendency, filed September 22, 2003, is denied. CPLR 6501 permits a party to effectively retard the alienability of real property without any prior judicial review. CPLR 6514 provides for the limited circumstances where cancellation of a notice of pendency is available. Under (a), the court must cancel a notice of pendency, “if service of a summons has not been completed within the time limited by section 6512; or if the action has been settled, discontinued or abated.” Under (b), the court may cancel a notice of pendency, “if the plaintiff has not commenced or prosecuted the action in good faith.” Under either section, the court's scope of review is circumscribed. *5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313 (1984.) “One of the important factors in this regard is that the likelihood of success on the merits is irrelevant to determining the validity of the notice of pendency.” *Id.* at 320. There is little a court may do to provide relief to the property owner if the procedures prescribed in article 65 have been followed or if the action has been commenced or prosecuted in good faith.

In the instant matter, defendants have not alleged facts that suggest either mandatory or discretionary cancellation is required. They do not claim that the notice of pendency has been filed in violation of any procedural rules or that the action was filed without good faith. Rather, they argue that a notice of pendency is not among the provisional remedies that the Court may permit in connection with an arbitrable controversy. Contrary to defendants’ argument, CPLR 7502 (c) does not indicate that a notice of pendency cannot remain in effect during an arbitrable controversy. This section deals with applications that a court may entertain when an arbitration is pending. It limits such to orders of attachment or for a preliminary injunction. However, there is nothing to suggest that an existing Notice of Pendency must be canceled while the arbitration is pending. The court notes that, given the ability to file a Notice of Pendency without court permission, it is likely that a Notice of Pendency may be filed after the commencement of the arbitration, as well. In any event, the branch of the motion seeking cancellation of the Notice of Pendency is denied.

Based upon the above, the branch of the motion seeking an award for costs and expenses occasioned by the filing and cancellation of the Notice of Pendency is denied. The

branch of the motion seeking alternative relief of an order pursuant to CPLR 3211 (a) (7) dismissing the second, third, and fourth claims of the complaint, with prejudice and canceling the Notice of Pendency need not be addressed since the court has compelled arbitration.

Dated: December 18, 2003

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ORIN R. KITZES, J.S.C.

Dated: June 18, 2002

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ORIN R. KITZES, J.S.C.