Scan

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 22**
BP AIR CONDITIONING CORP., BP MECHANICAL CORP., THE BPAC GROUP, INC., JOHN LOSEY and ROBERT BARBERA,	**NASSAU COUNTY**
	Index No: 016032-10
	Motion Seq. No: 1
Petitioners,	**Submission Date: 10/25/10**

For an Order pursuant to CPLR Article 75 Permanently Staying a Purported Arbitration Commenced by

DANIEL LASORSA,

Respondent.
----------x

The following papers have been read on this Order to Show Cause:

Order to Show Cause.....x
Petition and Exhibits.....x
Affirmation in Support.....x
Affidavit in Support.....x
Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x

This matter is before the Court for decision on the Order to Show Cause filed by Petitioners BP Air Conditioning, Corp., BP Mechanical Corp., The BPAC Group, Inc., John Losey and Robert Barbera ("Petitioners") on August 26, 2010 and submitted on October 25, 2010. For the reasons set forth below, the Court denies Petitioners' Order to Show Cause in its entirety.

BACKGROUND

A. Relief Sought

Petitioners move for an Order, pursuant to CPLR Article 75 dismissing or, in the alternative, permanently staying, the underlying arbitration brought by Respondent Daniel LaSorsa ("LaSorsa" or "Respondent") under the auspices of the American Arbitration Association ("AAA"), bearing AAA Number 13 166 01882 10 ("Arbitration").

B. The Parties' History

In their Petition filed August 20, 2010, Petitioners allege as follows:

BP Air Conditioning Corp. ("BP Air") and BP Mechanical Corp. ("BP Mechanical") are New York corporations that are qualified sub-chapter S subsidiaries of their parent company BPAC Group ("BPAC") which owns 100% of BP Air and BP Mechanical. Petitioner John Losey ("Losey") owns 63.03% of BPAC and is a director and officer of BP Air, BP Mechanical and BPAC. Petitioner Robert Barbera ("Barbera") owns 30.87% of BPAC and is a director and officer of BP Air, BP Mechanical and BPAC. Respondent LaSorsa owns 6.10% of BPAC.

Respondent began his relationship with BP Air in 1983 when BP Air was in the business of servicing, maintaining and repairing heating, ventilation and air conditioning ("HVAC") units for commercial properties. On or about April 15, 1999, Respondent entered into a Deferred Compensation Plan with BP Air ("1999 Plan") (Ex. A to Petition). Losey signed the 1999 Plan as Chief Executive Officer of BP Air, and Barbera signed the 1999 Plan in his capacity as "Witness." Article V of the 1999 Plan, titled "Agreements not to Compete or to Solicit," contains restrictive covenants with respect to Respondent's employment in the event that he terminated his employment with BP Air. Article VI of the 1999 Plan, titled "Proprietary Property, Confidentiality of Information and Duty of Nondisclosure," imposes limitations on Respondent's disclosure of certain information in the event that he terminated his employment with BP Air.

Section 10.12 of the 1999 Plan, titled "Controversy or Claim," provides as follows:

> (a) Except as provided in Section 10.12(b), any controversy or claim arising out of or relating to this Plan or the validity, interpretation, enforceability or breach thereof, or to [BP Air's] employment of [LaSorsa] which is not resolved by agreement between the parties, shall be resolved by arbitration in the County of New York, State of New York, in accordance with the Rules of the [AAA] at the time in effect, and judgment upon the award rendered in such arbitration [may] be entered in any court having jurisdiction. All expenses (including, without limitation, legal fees and

> expenses) incurred by the prevailing party in such arbitration in connection with, or in prosecuting or defending, any such claim or controversy shall be paid by the other party.
> (b) Anything in Section 10.12(a) to the contrary notwithstanding, in the event of a breach or threatened breach of any of the provisions of Articles V or VI hereof, [BP Air] may commence an action solely for such injunctive or equitable relief to which the Company may be entitled. Such an action may be brought in any competent Federal or state court located in the City of New York, and [LaSorsa] consents to the jurisdiction of such courts. The court shall issue all appropriate temporary restraining orders, preliminary injunctions and permanent injunctions and shall grant such other equitable relief as may be appropriate. However, all claims and counterclaims for money damages, including but not limited to [BP Air's] claims (if any) for money damages for any breach of the provisions of Articles V or VI hereof, shall not be decided by the court but shall instead be referred to arbitration pursuant to Section 10.12 (a).

In 2005, BP Air executed a Plan of Reorganization and Reorganization Agreement that formed and incorporated BPAC and BP Mechanical, and made BPAC the parent company of BP Air and BP Mechanical. Upon that reorganization, Respondent was employed by BP Mechanical and was no longer employed by BP Air. On July 13, 2005, BP Air and Respondent entered into an amendment of the 1999 plan ("2005 Amendment") (Ex. B to Petition). The 2005 Amendment 1) amended Section 10.6 of the 1999 Plan, titled "Change in Control;" 2) stated that Respondent's employment with BP Mechanical would not be considered a "termination of employment" under the 1999 Plan, including its application to the running of the applicable time periods for the restrictive covenants in Article V of the 1999 Plan; and 3) provided that the remaining terms and provisions remained in full force and effect.

The Petition further alleges that, in late 2009 and early 2010, Respondent began engaging in "questionable conduct" (Petition at ¶ 19), including 1) demonstrating an inability to work as a team member; 2) refusing to comply with directives from fellow partners; 3) being unable and/or refusing to cease using addictive substances; 4) failing to comply with BP Mechanical's request to upgrade his life insurance policy; and 5) refusing to return monies that BP Mechanical loaned to him, which were to be repaid by December 31, 2009. As a result of this alleged conduct, on March 4, 2010, BP Mechanical removed Respondent from his position as Managing Partner. BP Mechanical was willing to consider retaining Respondent as an employee, subject to certain conditions. Respondent refused to comply with those conditions and allegedly continued to engage in conduct that was detrimental to Petitioners' business and reputation.

In June of 2010, Petitioners requested that Respondent agree permanently to cease coming to Petitioners' premises, and take a leave of absence while continuing to draw a salary. Respondent refused this request and on July 1, 2010, BP Mechanical notified Respondent that it was terminating his employment. In an effort to resolve the dispute amicably, although not obligated to do, BP Mechanical offered to pay, and did pay, Respondent's salary and benefits through July 31, 2010.

On or about August 2, 2010, Petitioners received Respondent's Demand for Arbitration dated July 30, 2010 ("Demand") (Ex. C to Petition) via overnight mail. The Demand names Petitioners as the respondents in the Arbitration and describes the Nature of the Dispute as follows:

> Claimant seeks a declaration that he is not bound by restrictive covenants in a Deferred Compensation Plan and may compete against Respondents and solicit Respondents' clients. Claimant also seeks an amount to be determined, but believed to be between $500,000-$1,000,000 for Respondents' breach of contract and all expenses in connection with this arbitration, including attorneys' fees.

The underlying Statement of Claims (Ex. C to Petition) contains six claims. The first three seek declaratory judgments with respect to LaSorsa's right to solicit Petitioners' customers and compete with Petitioners and the enforceability of the restrictive covenants. On August 5, 2010, the AAA commenced the administration of the Arbitration. Petitioners have not responded to the Demand. By letter dated August 18, 2010, Petitioners advised the AAA that they were seeking judicial intervention to permanently stay or dismiss the Arbitration.

Petitioners submit that the Arbitration must be dismissed because it is jurisdictionally defective in light of LaSorsa's failure to serve the Demand in the manner prescribed by CPLR § 7503. Petitioners allege, specifically, that 1) the Demand did not advise Petitioners that they had twenty days to apply for a stay of arbitration or would be precluded from objecting that a valid agreement to arbitrate was not made; and 2) the Demand was served via overnight mail rather than pursuant to permissible methods including by registered or certified mail.

Petitioners contend, further, that the Arbitration must be permanently stayed and/or dismissed against BPAC, BP Mechanical, Losey and Barbera because they were not parties to the 1999 Plan and, therefore, cannot be forced to defend their claims in an arbitration proceeding. Petitioners also submit that the fourth, fifth and sixth claims for relief in the Statement of Claims, based on breach of contract, unjust enrichment and a request for an

accounting, should be permanently stayed or dismissed because they are not arbitrable. Finally, Petitioners argue that the first, second and third claims for relief in the Demand, seeking declaratory judgments, are specifically exempted from arbitration.

In his Affidavit in Support, Losey affirms as follows:

Losey is the Chief Executive Officer of BP Air, BP Mechanical and BPAC. Losey affirms the truth of the allegations in the Petition regarding, *inter alia*, Respondent's employment relationship with BP Air and BP Mechanical and the execution of the 1999 Plan and 2005 Amendment. Losey submits that the effect of the Amendment was that, "despite Respondent's employment with BP Mechanical, Respondent would be deemed to be employed with BP Air for purposes of the [1999] Plan." (Losey Aff. at ¶ 17).

Losey affirms that in 2009, the Petitioner companies began reviewing the insurance policies maintained for employees, including Respondent. Losey repeatedly asked Respondent to upgrade his insurance policy, which would have required Respondent to undergo a medical examination. Respondent did not comply with Losey's request. Losey also avers that, during the periods of time at issue, Respondent was acting abusively towards other employees and making poor business decisions for BP Mechanical. He also refused to repay the sum of $250,000 that BP Mechanical lent to him, which was to be repaid by December 31, 2009. Losey and Barbera believed Respondent's behavior was attributable to his misuse of addictive substances. Losey affirms the truth of the allegations in the Petition regarding the circumstances under which Respondent's employment was terminated and the filing of the Demand.

In his Affirmation in Opposition, counsel for Respondent disputes Petitioners' assertion that Respondent failed to engaged in good faith negotiations prior to filing his Demand. Respondent's counsel affirms that, for several months, he and other members of his firm attempted to contact Petitioners' counsel to discuss a settlement, but Petitioners would not propose any settlement terms or agree to discuss the matter further. In support, counsel provides a copy of a letter dated July 6, 2010 (Ex. D to Aff. in Opp.) that he sent to Petitioners' counsel in which he states, *inter alia,* that 1) despite Respondent's demands, Petitioners failed to articulate the specific conduct that led to Respondent's termination; 2) Respondent submitted to and passed a drug test, and disputes that his termination was for cause; 3) the two year restriction on solicitation, as contained in the 1999 Plan, is unenforceable; and 4) the restrictive covenants do not restrict Respondent from competing with or soliciting the customers of BP Mechanical or

BPAC, and were not modified by the 2005 Amendment. In a responsive letter dated July 8, 2010 (Ex. E to Aff. in Opp.), Petitioners' counsel, *inter alia*, 1) disputes Respondent's assertion as to the unenforceability of the restrictive covenants in the 1999 Plan; and 2) states that "BP Mechanical Corp. and its affiliates ("BP")" are "fully prepared to litigate the enforceability of [the restrictive covenant and confidentiality provisions] including their applicability to customers of BP."

C. The Parties' Positions

Petitioners submit, *inter alia*, that 1) as the 1999 Plan was entered into between Respondent and BP Air, Petitioners BP Mechanical, BPAC, Losey and Barbera were not parties to the arbitration agreement and cannot be required to arbitrate any issues or claims with LaSorsa; 2) pursuant to the arbitration provision in the 1999 Plan, BP Air has the right to litigate issues concerning the restrictive covenant, which are raised in Counts I, II and III of Respondent's Statement of Claims; and 3) the Arbitration Claims seeking declaratory relief are equitable in nature and therefore exempted from the arbitration agreement.

Respondent opposes Petitioners' motion. First, Respondent dispute Petitioners' disparaging allegations as to Respondent's character. Respondent contends, further, that these allegations are irrelevant to whether Petitioners are entitled to a stay of arbitration.

Respondent also argues that Petitioners, who are seeking to benefit directly from the restrictive covenants in the 1999 Plan, are estopped from denying the applicability of the arbitration agreement and cannot avoid arbitration of Respondent's claims, all of which relate to his employment. Respondent also disputes Petitioners' claim that the exception in the arbitration clause, to which they cite, prevents Respondent from seeking to arbitrate any claims. Rather, that exception provides BP Air with the option of adjudicating certain claims for injunctive and equitable claims in court, which it has not yet sought to do. Moreover, this exception applies only in the event that Respondent has breached, or threatened to breach, the restrictive covenants in the 1999 Plan, and Petitioners have made no such allegations.

RULING OF THE COURT

A. Arbitration

CPLR § 7501, titled "**Effect of arbitration agreement**" provides:

> A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character

> of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

CPLR §§ 7503(a) and (b) provide as follows:

> A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502 [addressing limitations of time], the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.
>
> Subject to the provisions of subdivision (c) [Notice of Intention to Arbitrate], a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.

Arbitration is favored in New York State as a means of resolving disputes, and courts should interfere as little as possible with agreements to arbitrate. *Shah v. Monpat Construction*, 65 A.D.3d 541, 543, 2009 NY Slip Op. 6132, 6134 (2d Dept. 2009). The Court must determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement. *Sisters of Saint John the Baptist v. Geraghty*, 67 N.Y.2d 997, 999 (1986). The Court's inquiry ends, however, when the requisite relationship is established between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate. *Id.*

Generally, it is for the courts to make the initial determination whether a particular dispute is arbitrable, *i.e.* whether the parties have agreed to arbitrate the particular dispute. *Nationwide General Insurance Company v. Investors Insurance Company of America*, 37 N.Y.2d 91, 95 (1975), quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570-71 (1960). The ultimate disposition of the merits, however, is reserved for the arbitrator and the courts are expressly prohibited from considering whether the claim regarding which arbitration is sought is

tenable, or otherwise passing on the merits of the dispute. *Nationwide General*, *supra*, at 75, citing CPLR § 7501.

With regard to the scope of an arbitration clause, a broad arbitration clause should be given the full effect of its wording in order to implement the intention of the parties. *Weinrott v. Carp*, 32 N.Y.2d 190 (1973). A court may exclude a substantive issue from issues that are submitted to an arbitrator only if the arbitration clause itself specifically enumerates the subjects intended to be put beyond the arbitrator's reach. *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299 (1984).

Where the court finds that the parties may have made a valid agreement to arbitrate, but the particular agreement that they made was of limited or restricted scope and the particular claim sought to be arbitrated is outside that scope, then arbitration of that claim will be stayed. *We're Associates Co. v. Chemical Bank*, 163 A.D.2d 393, 395 (2d Dept. 1990). The agreement to arbitrate must be express, direct and unequivocal as to the issue or disputes to be submitted to arbitration, and the law does not require the parties to arbitrate a claim which they did not intend to arbitrate. *Id.*

B. Estoppel

There are five theories for binding nonsignatories to arbitration agreements, one of which is estoppel. *MAG Portfolio v. Merlin Biomed Group*, 268 F.3d 58, 61 (2d Cir. 2001), quoting *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995). Under the estoppel theory, a company knowingly exploiting an agreement with an arbitration clause can be estopped from avoiding arbitration, despite having never signed the agreement. *Id.*, citing *Thomson-CSF* at 778. Where a company knowingly accepted the benefits of an agreement with an arbitration clause, the company may be bound by the arbitration clause even though it did not sign the agreement. *Id.*, quoting *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993) (internal quotation marks and citation omitted). The benefits must be direct, meaning that they flow directly from the agreement. *Id.*, citing *Thomson-CSF* at 779. *See also* HRH Construction LLC v. MTA, 33 A.D.3d 568, 569 (1st Dept. 2006) in which the First Department held that a nonsignatory to an agreement containing an arbitration clause who has knowingly received direct benefits under the agreement will be equitable estopped from avoiding the agreements's obligation to arbitrate, citing *MAG Portfolio*, *supra*.

C. Application of these Principles to the Instant Action

The Court holds that Petitioners BPAC, BP Mechanical, Losey and Barbera, by virtue of their efforts to benefit from the restrictive covenants in the 1999 Plan, which survived the 2005 Amendment, are bound by the arbitration agreement in the 1999 Plan, notwithstanding the fact that they are not signatories to that agreement.

The Court also concludes that the broad arbitration provision in the 1999 Plan, which states that "any controversy or claim arising out of or relating to this Plan or the validity, interpretation, enforceability or breach thereof, or to [BP Air's] employment of [LaSorsa] which is not resolved by agreement between the parties " shall be resolved by arbitration, subjects Respondent's employment disputes with Petitioners, which the Court has outlined herein, to arbitration. The Court also concludes that Petitioners have failed to allege a breach or threatened breach by Respondent of any of the provisions of Articles V or VI that would entitle BP Air, pursuant to the 1999 Plan, to commence an action in court for injunctive or equitable relief.

In light of the foregoing, the court denies Petitioners' Order to Show Cause in its entirety.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
October 27, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
NOV 04 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE