

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART 55

Index Number : 652536/2015
BORRICO, MICHAEL
vs
TRIMASA RESTAURANT PARTNERS,
Sequence Number : 001
COMPEL OD STAY ARBITRATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/9/15

CYNTHIA S. KERN
J.S.C.
CK

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
In the Matter of the Application of

MICHAEL BORRICO,

Petitioner,

Index No. 652536/15

-against-

DECISION/ORDER

TRIMASA RESTAURANT PARTNERS, LLC

Respondent.

-----X
HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affidavits in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Michael Borrigo brings the instant petition for an Order pursuant to CPLR § 7503(b) permanently staying the arbitration proceeding (the “Arbitration”) demanded by respondent TriMasa Restaurant partners, LLC (“TriMasa”) before the American Arbitration Association (“AAA”) on June 29, 2015 as against petitioner. For the reason set forth below, the petition is granted.

The relevant facts are as follows. On or about May 23, 2013, TriMasa entered into an agreement (the “Contract”) with CNY Construction Management, Inc. (“CNY”) pursuant to which TriMasa was to pay CNY for certain construction work in connection with the building of a Japanese restaurant at 78 Leonard Street, New York, New York (the “restaurant”). Petitioner is the President of CNY and executed the Contract on behalf of CNY as its President. Pursuant to Article 6 of the Contract, the parties to the Contract are required to resolve any claims between them that could not be

resolved in mediation by binding arbitration before the AAA.

During the course of construction on the restaurant, certain disputes arose between TriMasa and CNY. Thereafter, on or about June 29, 2015, TriMasa commenced the Arbitration against both CNY and petitioner and has asserted eight claims against them seeking both compensatory and punitive damages. Petitioner now moves for an Order pursuant to CPLR § 7503 permanently staying the Arbitration as against him on the ground that there is no agreement between TriMasa and petitioner to arbitrate.

CPLR § 7503(b) provides, in relevant part, that a party may move to stay an arbitration “on the ground that a valid agreement was not made or has not been complied with.” “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.’” *Waldron v. Goddess*, 61 N.Y.2d 181, 183 (1984)(citing *Schubtex, Inc. v. Allen Snyder Inc.*, 49 N.Y.2d 1, 6 (1979)).

In the instant action, this court finds that the petition to permanently stay the Arbitration as against petitioner is granted on the ground that there is no agreement between petitioner and respondent to arbitrate their disputes. The Contract, which contains the arbitration provision at issue, provides that it is an “Agreement...Between the Owner (TriMasa...) and the Contractor (CNY...)....” Further, it is undisputed that petitioner signed the contract on behalf of CNY only in his capacity as the President of CNY. Indeed, page 7 of the Contract and an Addendum to the Contract dated June 11, 2013 expressly state that petitioner is signing the Contract as President of CNY. Nowhere in the Contract can it be construed that petitioner was signing the Contract in his individual capacity. As the evidence establishes that there is no agreement between petitioner and respondent to arbitrate, petitioner’s petition to permanently stay the Arbitration as against him is granted.

Respondent's assertion that the petition to stay the Arbitration as against petitioner must be denied on the ground that petitioner is CNY's alter ego and thus, may be compelled to arbitrate pursuant to the Contract, is without merit. In certain circumstances, courts will pierce the veil of a corporation in order to bind a nonsignatory to an arbitration agreement. See *TNS Holdings v. MKI Sec. Corp.*, 92 N.Y.2d 335 (1998); see also *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995). However, "[v]eil piercing determinations are fact specific and 'differ[] with the circumstances of each case.'" *Thomson-CSF, S.A.*, 64 F.3d at 777(citing *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988)). Indeed, "[t]hose seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." *TNS Holdings*, 92 N.Y.2d at 339. However, "[e]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance." *Id.*

Here, petitioner may not be compelled to arbitrate on the basis that he is CNY's alter ego as respondent has failed to present any evidence sufficient to pierce the corporate veil. In opposition to the petition, respondent merely affirms, through the affirmation of its attorney, that petitioner is CNY's alter ego on the grounds that: "Borrigo personally affixed his own signature to the Contract"; Borrigo "exercised dominant control over the signatory, CNY"; Borrigo is CNY's President and sole owner; Borrigo resides in the same property at which CNY's offices are located; and "Borrigo repeatedly represented to Trimasa that both he and CNY were undercapitalized, and unable to cover the costs of indemnifying Trimasa, pursuant to their Contract obligations, for the damage and delays caused by the Petitioner's own negligence." However, such allegations are insufficient to establish that Borrigo is CNY's alter ego as they fail to show that Borrigo exercised the requisite degree of control over CNY necessary to justify piercing the corporate veil, especially in light of the fact that they are asserted by

respondent's counsel and no affidavit of a representative of respondent has been provided.

Further, respondent's assertion that the petition to stay the Arbitration as against petitioner must be denied on the ground that petitioner is estopped from avoiding arbitration as he has derived a direct benefit from the Contract is without merit. "A nonsignatory to an agreement containing an arbitration clause that has knowingly received direct benefits under the agreement will be equitably estopped from avoiding the agreement's obligation to arbitrate." *HRH Constr. LLC v. Metropolitan Transp. Auth.*, 33 A.D.3d 568, 569 (1st Dept 2006). Specifically, the Court of Appeals has held that the nonsignatory must "'knowingly exploit[]' the benefits of an agreement containing an arbitration clause, and receive[] benefits flowing directly from the agreement" in order to be compelled to arbitrate. *Belzberg v. Verus Investments Holdings Inc.*, 21 N.Y.3d 626, 631 (2013). However, "[w]here the benefits are merely 'indirect,' a nonsignatory cannot be compelled to arbitrate a claim. A benefit is indirect where the nonsignatory exploits the contractual relation of the parties, but not the agreement itself." *Id.* "The guiding principle is whether the benefit gained by the nonsignatory is one that can be traced directly to the agreement containing the arbitration clause. The mere existence of an agreement with attendant circumstances that prove advantageous to the nonsignatory would not constitute the type of direct benefits justifying compelling arbitration by a nonparty to the underlying contract." *Id.* at 633.

Here, petitioner may not be compelled to arbitrate on the basis of estoppel as respondent has not established that petitioner has "knowingly exploited" the benefits of the Contract or that petitioner has derived any "direct" benefits from the Contract. Respondent asserts that petitioner should be estopped from avoiding arbitration on the basis that he received both financial gain from the Contract and notoriety in that respondent's principal is a high-profile client. However, such allegations do not establish that petitioner has "knowingly exploited" the benefits of the Contract nor do they demonstrate that petitioner received benefits flowing directly from the Contract. Indeed, it may be true that

petitioner has received and will receive benefits indirectly from the Contract due to being a shareholder of CNY. However, none of these benefits flow directly from the Contract itself. All monies paid under the Contract were paid directly to CNY and not to petitioner and any funds paid to petitioner from the Project came to him indirectly from CNY. Moreover, the benefit of having a high-profile client was not a benefit flowing directly from the Contract as respondent was a client of CNY and not Borrico.

Finally, respondent's assertion that the petition to stay the Arbitration as against petitioner must be denied on the basis of public policy is without merit. "[N]otwithstanding the public policy favoring arbitration, nonsignatories are generally not subject to arbitration agreements" and will only be subject to same in very limited circumstances. *Belzberg*, 21 N.Y.3d at 630.

Accordingly, the petition to permanently stay the Arbitration as against petitioner is granted. This constitutes the decision and order of the court.

Dated:

10/9/15

Enter: _____

CJK

J.S.C.

CYNTHIA S. KERN
J.S.C.