CITATION: 12823543 Canada Ltd. v. Mizrahi Commercial (The One) GP Inc., 2022 ONSC 6206
COURT FILE NO.: CV-22-00685567-00CL
DATE: 20221107

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: 12823543 CANADA LTD, Applicant

AND:

MIZRAHI COMMERCIAL (THE ONE) GP INC., MIZRAHI COMMERCIAL (THE ONE) LP, SAM M INC. and SAM MIZRAHI, Respondents

BEFORE: Penny, J.

COUNSEL: *Nina Perfetto*, *David W. Levangie*, and *Samantha M. Green* for the Applicant (responding on the motion)

Scott Hutchison and *David Postel* for the Respondents (moving parties)

HEARD: November 1, 2022

ENDORSEMENT

Overview

[1] The parties to this application are involved in a large real estate development project at Yonge and Bloor in Toronto (the Project).

[2] The applicant has issued a notice of application seeking, among other things, declarations and other relief under s. 248 of the Ontario *Business Corporations Act* (the oppression remedy). The principle focus of attack is on a resolution passed by the general partner of this Project which purports to confer sole decision-making power over the Project on only one of its owners, Sam M Inc.

[3] The respondents have brought a motion for a stay of the application on the basis that the issues raised are subject to comprehensive arbitration clauses contained in the constating documents which bind the parties.

[4] For reasons explained below, I find that the moving parties have raised an arguable case as to the application of the arbitration clauses in the unique circumstances of this case. On the basis of the *competence competence* principle in arbitration law, therefore, I grant the stay and refer the matter to the appropriate arbitral tribunal.

Background

[5] The full history of this matter is long and complex. For purposes of this motion, I will outline only the following key contextual facts.

[6] Mizrahi Commercial (The One) LP is a limited partnership and the beneficial owner of the Project. Mizrahi Commercial (The One) GP Inc. is the General Partner. The General Partner is owned in equal portion by Sam M Inc. (Sam Holdco) and the applicant, 12823543 Canada Ltd. (128). Sam Mizrahi owns Sam Holdco. Jenny Coco and other members of the Coco family own 128.

[7] The Project is governed by a number of agreements between the parties. There are three agreements of particular relevance to these proceedings. They are:

(1) a 2014 unanimous shareholders' agreement (USA), containing a broad arbitration clause;

(2) a 2014 partnership agreement, also containing a broad arbitration clause; and,

(3) a 2021 Control Agreement, which expired by its terms on August 30, 2022.

[8] The parties have been in material disputes since at least 2019. Arbitration proceedings began in 2019 under the USA and Partnership Agreements. Additional arbitration proceedings were initiated in 2020. Certain agreements and arbitration awards were made during the arbitration proceedings. In June 2020, the parties entered into an agreement whereby Mizrahi-owned entities would buy out the Coco family interests in the Project. This did not, however, end the disputes because, although the purchase agreement was extended several times, Mizrahi could not the close due to lack of adequate financing.

[9] In 2021, as part of the attempts to close the purchase agreement, the parties entered into the Control Agreement. This agreement was premised on the expectation that Mizrahi would buy out Coco and become sole beneficial owner and manager of the Project. Under the terms of the Control Agreement, Sam Holdco had sole control and management of all aspects of Project. When it became apparent that the purchase agreement could not be closed, in July 2022 Mizrahi sought an extension of the Control Agreement. Coco refused. Using the purported powers under the Control Agreement, Mizrahi unilaterally caused the General Partner to pass a resolution (the Resolution) granting Sam Holdco sole control and management of all aspects of project and appointing Mizrahi as the managing director, with sole power and authority to manage all of the business and affairs of the General Partner. As noted, the Control Agreement expired by its terms on August 30, 2022 and is no longer of any force or effect.

[10] The applicant commenced these proceedings by notice of application on the Commercial List on August 16, 2022 seeking, among other things, a revocation of the Resolution under the oppression remedy in the OBCA. The application has since been amended in material respects which are incorporated into the analysis below.

[11] The present motion brought by the respondents is for a stay of the court application on the basis that the grounds of dispute fall within the terms of the arbitration agreements contained in the USA and the Partnership Agreement.

The Law

[12] There is no dispute about the applicable legal principles. The parties' dispute is over the application of these principles to the unique circumstances of this case.

[13] The law favours giving effect to arbitration agreements. This is evident in both legislation and in jurisprudence. Section 7(1) of the *Arbitration Act*, provides:

> If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

[14] In general, in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. This is known as the "*competence-competence* principle": *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at para. 84.

[15] It is well-established in Ontario that the court should grant a stay where it is "arguable" that the dispute falls within the terms of an arbitration agreement. It is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement. Those are matters which are generally within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement should the court reach any final determination in respect of such matters on an application for a stay of proceedings: *Dancap Productions Inc. v. Key Brand Entertainment, Inc.*, 2009 ONCA 135, 246 O.A.C. 226, at paras. 32-33

[16] Where it is arguable that the dispute falls within the terms of the arbitration agreement, the stay should be granted and those matters left to be determined by the arbitral tribunal. A "deferential approach" allowing the arbitrator to decide whether the dispute is arbitrable, absent a clear case to the contrary, is consistent both with the wording of the legislation and the intention of the parties to refer their disputes to arbitration.

[17] The analytical framework is laid out by the Court of Appeal for Ontario in *Haas v. Gunasekaram*, 2016 ONCA 744, at para. 17. This framework breaks the judge's task of considering a stay under s. 7 into a number of sub-issues:

(1) Is there an arbitration agreement?

(2) What is the subject matter of the dispute?

(3) What is the scope of the arbitration agreement?

(4) Does the dispute arguably fall within the scope of the arbitration agreement?

(5) Are there grounds on which the court should refuse to stay the action?

I will deal with each of these in turn.

Analysis

(1) Is there an arbitration agreement?

[18] There is a major dispute over this question. This is because the USA and the Partnership Agreement both contain broad arbitration clauses whereas the Control Agreement contains no arbitration clause. This is important because, as will be discussed in more detail below, 128 takes the position that the subject matter of the dispute is the Resolution which relies, for its authority and validity, entirely upon the Control Agreement and does not engage USA or the Partnership Agreement at all.

[19] The USA contains an arbitration clause at Section 7.4 that requires arbitration in two circumstances: 1) any dispute concerning the interpretation of the USA; or, 2) where the shareholders are unable to pass a resolution or make a decision which is, in the view of at least one of the parties, of fundamental importance to the to the Project. Section 7.4 provides:

> If (i) any dispute or question (the "Dispute") shall arise between the Parties concerning the interpretation of this Agreement or (ii) the Shareholders are unable to adopt a resolution or make a decision which any of the Shareholders considers (in its sole judgment) to be of fundamental importance to the Corporation or the Partnership with respect to which no resolution can be achieved and that precludes the Partnership or the Corporation, on its own behalf and in its capacity as general partner of the Partnership, from achieving their business purpose, the Parties shall attempt in good faith to resolve such Dispute. If the Parties have not agreed to settlement of the Dispute within 30 days from the date on which the Dispute first became known to the Parties, then the Parties agree that the Dispute shall be submitted to arbitration pursuant to the *Arbitrations Act, 1991* (Ontario). Such Dispute shall not be made the subject matter of an action in any court by either or any of such parties unless the dispute has first been submitted to arbitration and finally determined in accordance with the provisions of Schedule "A" hereof. Any such action commenced thereafter shall only be for the purpose of enforcing the decision of the arbitrators and the costs incidental to the action. In any such action the decision of the arbitrator shall be conclusively deemed to determine the rights and liabilities as between the parties to the arbitration in respect of the Dispute

[20] The Partnership Agreement arbitration clause, at para. 11.11, also requires arbitration regarding any question or dispute about the interpretation of the Partnership Agreement. It provides:

> If any dispute or question (the "Dispute") shall arise, during the term of this Agreement or at any time thereafter, between the General Partner and one or more Limited Partners concerning the interpretation of this Agreement or any part thereof, such parties shall attempt in good faith to resolve such Dispute. If such parties have not agreed to a settlement of the Dispute within 30 days from the date on which the Dispute first became known to both such parties, then such parties agree that the Dispute shall be submitted to arbitration and finally determined in accordance with the provisions of Schedule "C". Any such action commenced thereafter shall only be for the purpose of enforcing the decision of the arbitrators and the costs incidental to the action. In any such action the decision of the arbitrator shall be conclusively deemed to determine the rights and liabilities as between the parties to the arbitration in respect of the Dispute

[21] There is, therefore, undoubtedly *an* arbitration agreement. The issue, to be discussed below, is whether there is a dispute concerning the interpretation of the USA or the Partnership Agreement, or a dispute, under the USA, whereby the shareholders of the General Partner are unable to pass a resolution or make a decision of fundamental importance.

(2) What is the subject matter of the dispute?

128's Notice of Application

[22] In summary terms, 128's amended notice of application seeks the following relief:

(a) enforcement of an arbitral award dated October 21, 2020 including an order that 128 receive documentary disclosures which it claims are specified in the arbitral award;

(b) a declaration that the business and affairs of the General Partner have been conducted in a manner that is oppressive, unfairly prejudicial to or unfairly disregards the interests of 128;

(c) an order restraining the oppressive conduct and, specifically, an order that the Resolution dated August 6, 2022 is invalid, unlawful and of no force or effect;

(d) an order granting 128 unobstructed access to the books and records of the General Partner and Mizrahi Commercial (The One) LP and other related access to documentary records; and,

(e) an order appointing an investigator under s. 161 of the OBCA.

[23] The grounds for the relief sought are extremely long and detailed but culminate in the following three paragraphs which capture the essence of the applicant's allegations of

oppression. It is claimed that immediately following Mizrahi's failure to close the purchase agreement and the Coco family's refusal to extend the Control Agreement beyond August 30, 2022, the following acts of oppressive conduct occurred:

(ss) On August 5, 2022, Sam delivered a signed resolution of Mizrahi GP. The resolution, dated August 6, 2022, purports to appoint San managing director of Mizrahi GP and grant him the indefinite "sole power and authority to manage all of the business and affairs of the Corporation to the fullest extent permitted by the OBCA, and to execute on behalf of the Corporation all documents and to perform all such acts as may be necessary or desirable" (the "Resolution").

(tt) The Resolution purports to indefinitely grant Sam the powers which he no longer has under the terminated Purchase Agreement and Control Agreement.

(uu) In other words, Sam purported to use the expiring rights that were given to him under the Control Agreement pending a buyout of the Coco family, to grant himself those same rights and powers indefinitely, notwithstanding the fact the Coco family will not be bought out and will remain a 50% investor and significant lender in the Project.

The Control Agreement

[24] In order to understand the Resolution in context, it is necessary to consider the Control Agreement.

[25] In May 2021, the parties executed all of the documents necessary to close the purchase agreement in escrow. At the same time, the parties executed the Control Agreement. It was a term of the Control Agreement that, if the escrow release conditions were not satisfied (that is, if the purchase agreement did not close) by August 30, 2022, the purchase agreement and the Control Agreement would terminate.

[26] The Control Agreement provided that "notwithstanding anything to the contrary in the USA or the Partnership Agreement" Sam Holdco has "the sole control and management of all aspects of the Project" and is "solely entitled to direct" the General Partner regarding "all matters related to the business, control and management of" the Project. This includes sole authority to execute any documents on behalf of the General Partner and sole authority to "take such measures as are necessary or appropriate for the business and affairs of" the General Partner and the Project.

[27] Pending the closing of the purchase agreement, in effect, Mizrahi was entitled to run the Project as if he was the sole shareholder and director of the General Partner.

[28] As noted, the Control Agreement contains no arbitration clause.

The Resolution

[29] The Resolution lies at the heart of the applicant's oppression application.

[30] The Preamble to the Resolution recites the fact that Sam Holdco has the sole control and management of all aspects of the Project and is solely entitled to direct the General Partner regarding all matters related to the business, control and management of the Project. It asserts that the Control Agreement is a unanimous shareholders agreement under s. 108(2) of the OBCA. And, it states that Sam Holdco has all the rights, powers, duties and liabilities of 128's nominee director, because the Control Agreement restricts the discretion or powers of 128's nominee director to manage or supervise the management of the business and affairs of the Project, such that Sam Holdco has the sole authority to manage the business and affairs of the General Partner. The Resolution then goes on to bestow upon Sam Mizrahi personally "the sole power and authority to manage all of the business and affairs of the Corporation to the fullest extent permitted by the OBCA, and to execute on behalf of the Corporation all documents and to perform all such acts as may be necessary or desirable."

[31] The subject matter of the dispute raised in 128's application, both the oppression portion and the enforcement of the prior arbitral award portion, is the validity of the Resolution. The claim is that the purported use of powers under the about-to-expire Control Agreement in order to confer complete control on Mizrahi/Sam Holdco permanently, was a misuse of the Control Agreement powers. The oppression application attacks this alleged misuse. The enforcement application is effectively the same because, under the Control Agreement, the arbitration proceedings, including enforcement of same, were suspended. Now that the Control Agreement has expired, 128 wants the benefits of the prior arbitral award; the respondents say the prior arbitral award is no longer relevant – that is has been superceded by the powers conferred in the Resolution.

[32] In both cases, the subject matter of the real dispute is the validity of the Resolution.

(3) What is the scope of the arbitration agreement?

[33] This and the next component of the test are at the heart of the dispute between the parties on this motion.

[34] Mizrahi submits that the USA and the Partnership Agreement require arbitration of disputes concerning "interpretation" of those agreements. The USA also requires arbitration where there is an impasse between the parties concerning the adoption of a resolution or making of a decision that one party views as critically important to the Project. That is the situation here. The 128/Coco remedy to the passage of the Resolution, now that the Control Agreement has expired, is to seek to pass another resolution of the General Partner revoking the Resolution. The respondents concedes that because of the deadlock between the shareholders, a revoking resolution could not be passed. Thus, the parties are unable to make a resolution or resolve a decision which at least one party (Coco) considers fundamentally important to the Project. This triggers the arbitration clause under the USA. More broadly, the applicant's allegations concerning the Resolution require an interpretation of the "protocols" in the USA and Partnership Agreement to determine if the Resolution breaches those protocols, including sections 2.1(c), 3.2, 3.3, 3.5, and 3.7 of the USA and sections 3.1, 3.2, 3.4, and 3.6 of the Partnership Agreement. Further, oppression

depends on the reasonable expectations of the parties. Shareholder agreements are a *prima facie* indication of the reasonable expectations of the shareholders. Interlocking agreements must be read together. As such, adjudication of the oppression claims will require interpretation of the USA and Partnership Agreement as well as the Control Agreement.

[35] 128 submits that the USA and Partnership Agreements have nothing to do with its complaint. 128's complaint turns solely on the meaning and effect of the Control Agreement and whether it can reasonably be interpreted to permit the respondents to pass the Resolution in a context where the purchase agreement was clearly not going to close and the Control Agreement was about to expire. Because there is no arbitration clause in the Control Agreement, there is no jurisdiction for a referral to arbitration under the USA and the Partnership Agreement.

(4) Does the dispute arguably fall within the scope of the arbitration agreement?

[36] An "arguable" case is clearly something less than the standard of "correctness" or even "likely to succeed". It is more like "a reasonable prospect of success" or "not obviously doomed to fail". I am forced to conclude that both arguments set out above have merit – there is, therefore, an arguable case for referral to arbitration.

[37] The law of *competence competence* from the Supreme Court and the Court of Appeal requires me to exercise restraint; in other words, not to role up my sleeves and decide the issue on the merits. Rather, the law requires me to determine whether the case for arbitration is "arguable" and, if it is, to defer to the agreement between the parties and refer the matter to an arbitral tribunal for a determination of its jurisdiction.

[38] That is the case here. Subject to the final consideration below, I find that there is an arguable case that the application raises issues that fall within the scope of the arbitration clauses in the USA and the Partnership Agreement.

(5) Are there grounds on which the court should refuse to stay the action?

[39] Section 7(1) of the *Arbitration Act* provides that the Court has the discretion to refuse to grant a stay if the motion was made with undue delay. Further, a party may attorn to or accede or submit to the jurisdiction of the Court even where there is an arbitration clause, and thereby give up their rights. Once a party attorns to the jurisdiction of the Court they cannot later take exception to that forum.

[40] The applicant argues that Mizrahi is guilty of undue delay and has attorned to the jurisdiction of the court.

[41] The basis for this position is that, in a scheduling conference before Osborne J. Mizrahi's counsel consented to the scheduling of the application on December 5, 2022. At that point, there was only a notice of application, the application record had not been served. It was only several days later that the respondents raised the issue of possible arbitration and their intent to bring a motion for a stay. The application record was only served after the respondents raised the issue of arbitration. In his October 12, 2022 scheduling endorsement

for this motion, Justice Osborne noted that the application was previously scheduled, on consent, to be heard in December. He nevertheless went on to schedule this motion for a stay on a timely basis.

[42] I am unable to conclude, on these facts, that respondents were guilty of undue delay or that they waived the right to rely on the USA and Partnership Agreements. To do so would involve a radical (and in my view unwarranted) extension of the circumstances in which a motion for a stay based on an arbitration clause could be prohibited. The delay was a matter of days. The consent to schedule the application reflects little more than compliance with the "three Cs" of the Commercial List. Once counsel for the respondents had the opportunity to consider the matter, they acted promptly. There was absolutely no prejudice to the applicants arising out of this brief delay. Sam Mizrahi is not personally a party to the USA or the Partnership Agreement. He has, however, through counsel, agreed to be a party to and bound by any arbitral award that is made.

[43] I cannot agree that the respondents waived their arbitration rights under the USA and Partnership Agreements or that they were guilty of undue delay sufficient to warrant deprival of those rights.

Conclusion

[44] The request for submission to arbitration, although not obviously the only possible answer, raises an "arguable" case. I am therefore required, by the law of *competence competence* jurisdiction laid down in *Dell*, *Dancap* and *Haas,* to grant a stay and direct the applicants to refer the complaints raised in their application to an arbitral tribunal. This is without prejudice to the applicant's argument (should they be so advised) that the arbitral tribunal does not have jurisdiction in the circumstances of this case.

Costs

[45] The parties agreed that costs should be fixed in the all-inclusive amount of $50,000 to the successful party. It is so ordered.

Penny J.

Date: November 7, 2022