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Narravula v Perosphere Tech., Inc.
2021 NY Slip Op 50510(U)
Decided on May 27, 2021
Supreme Court, Albany County
Platkin, J.
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Decided on May 27, 2021

Supreme Court, Albany County

Tharunidhar Narravula and Arun Savkur, Individually and as Representatives of the Nominee, Petitioners,

against

Perosphere Technologies, Inc. and Dr. Sasha H. Bakru, as Seller Representative of the Sellers of Perosphere Technologies, Inc., Respondents.

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Richard M. Platkin, J.

Petitioners Tharunidhar Narravula and Arun Savkur bring this proceeding pursuant to CPLR 7503, seeking to permanently stay the arbitration of any claims asserted against them in their individual and/or representative capacities arising out of, or related to, a July 1, 2020 Share [*2]Purchase Agreement. Respondents Perosphere Technologies, Inc. and Dr. Sasha H. Bakhru [FN1] cross-move for an order compelling arbitration pursuant to CPLR 7503 and dismissing the petition (*see* NYSCEF Doc No. 1 ["Petition"]) under CPLR 3211 (a) (1), (5) and (7).

BACKGROUND

A. The Share Purchase Agreement

This proceeding arises from a Share Purchase Agreement dated July 1, 2020 (*see* Petition, ¶¶ 1-2; *see also* NYSCEF Doc No. 4 ["SPA"]). The SPA begins with a recitation of the parties to the transaction. The company to be acquired, respondent Perosphere Technologies, Inc., is referred to as "the Company," and respondent Dr. Sasha H. Bakhru, in his capacity as the representative of the Company's shareholders, option holders and warrant holders ("Sellers"), is deemed the "Seller Representative" (SPA, p. 1, first sentence).

The SPA further recites that petitioners Tharunidhar Narravula and Arun Savkur "represent[ ] an investor group referred to . . . as the 'Nominee' for the Buyer," which "will be replaced by an acquisition company called Perosphere Tech (Delaware) LLC . . . after it is incorporated" (*id*.). The term "Buyer" is defined in the SPA as "a Delaware limited liability company, yet to be registered, called Perosphere Tech (Delaware), LLC," which "the Nominee shall (or cause to) form" (*id*., third Whereas clause).

At the closing of the purchase/sale transaction, which initially was scheduled to occur within sixty (60) days from execution of the SPA (*see id*., § 5.1), the newly-formed Buyer would pay to the Sellers a specified purchase price (*see id*., art IV) for all of the Sellers' interest in Perosphere Technologies (the "Company") (*see id*., art II).

Section 9.4 of the SPA, entitled "Dispute Resolution," provides that "[a]ny dispute arising out of or related to [the SPA] shall be exclusively resolved by arbitration conducted in accordance with New York Arbitration Rules."

The SPA was signed by petitioners in a representative capacity with a signature block that reads as follows:

BUYER:

PEROSPHERE TECH (DELAWARE) LLC.

Arun Savkur and Tharunidhar Narravula

As Nominees

Represented by

By:/s/

Arun Savkur

By:/s/

Tharunidhar Narravula

On July 14, 2020, the parties executed a First Amendment to the SPA (*see* NYSCEF Doc No. 5 ["First Amendment"]), which allowed the Buyer to be formed as a Delaware business corporation called "Perosphere Corporation," rather than a limited liability company called

"Perosphere Tech (Delaware) LLC" (*id*., § 1). The First Amendment was signed with the same signature block as the SPA (*see id*., p. 2).

Despite several extensions of the closing date via letter agreements (*see* NYSCEF Doc No. 6), petitioners were unable to secure investors to fund the acquisition, and the closing never [*3]occurred (*see* Petition, ¶ 4). These letter agreements were signed by petitioners as representatives of the Nominee, and Narravula signed for "Buyer: Perosphere Corporation" in his capacity as the corporation's president (NYSCEF Doc No. 6).

B. The Sellers' Intention to Arbitrate

Respondents served petitioners with a draft Demand for Arbitration on December 17, 2020 (*see* Petition, ¶ 5; *see also* NYSCEF Doc No. 2 ["Draft Demand"]). The Draft Demand names petitioners as respondents in the contemplated arbitration, both individually and as representatives of the Nominee, and seeks to hold them liable, along with Perosphere Corp., for breaching the SPA by failing to close on the share purchase transaction (*see* Draft Demand, ¶¶ 1, 9-10, 32).

On December 29, 2020, respondents served petitioners with a Notice of Intention to Arbitrate (*see* NYSCEF Doc No. 3 ["Notice"]). The Notice, which refers to the Draft Demand, asserted that petitioners "are in breach of the parties' July 1, 2020 [SPA] for having failed to consummate the contemplated transaction" (*id*.). The Notice further stated that petitioners would be precluded from objecting to arbitration under CPLR 7503 (c) unless they timely applied for a judicial stay of arbitration (*see id*.).

C. This Proceeding

Petitioners commenced this special proceeding on January 19, 2021 through the filing of the Petition, which was noticed for hearing on February 19, 2021 (*see* NYSCEF Doc No. 8).

Respondents served an answer on February 11, 2021 (*see* NYSCEF Doc No. 27) that denied the pertinent allegations of the Petition and raised eight affirmative defenses. At least four of these defenses go to the issue of whether petitioners are bound to arbitrate under the SPA's arbitration clause.

Respondents allege, among other things, that: (1) petitioners knowingly exploited the benefits of the SPA and, therefore, are estopped from denying that they are bound by the SPA's arbitration clause; (2) Perosphere Corp. is nothing more than the alter ego of petitioners, and its corporate veil should be pierced to hold petitioners personally liable for the corporation's obligations, including the obligation to arbitrate any dispute concerning the SPA; (3) the SPA is valid and binding upon petitioners in their individual capacities by virtue of their role as promoters of an unincorporated entity; and (4) the SPA is valid and binding on petitioners in their individual capacities due to their failure to disclose the identity of their principal (*see id*., Affirmative Defenses, ¶¶ 2-3, 6-7).

Oral argument was held remotely on May 14, 2021 via Microsoft Teams, a copy of the transcript was filed on May 26, 2021, and this Decision, Order & Judgment follows.

ANALYSIS

"On a motion to stay or compel arbitration, [the court's] inquiry is limited to ascertaining (1) whether there was a valid agreement to arbitrate, (2) if so, whether the parties complied with the agreement, and (3) whether the underlying claim is timely" (*Matter of Conifer Realty LLC [Envirotech Servs., Inc.]*, 106 AD3d 1251, 1252 [3d Dept 2013]). "Where there is no substantial question whether a valid agreement was made or complied with . . . the court *shall* direct the parties to arbitrate" (CPLR 7503 [a] [emphasis added]).

"Arbitration is a matter of contract, grounded in agreement of the parties" (*Matter of Belzberg v Verus Invs. Holdings Inc.*, 21 NY3d 626, 630 [2013] [internal quotation marks and citations omitted]). "As a consequence, notwithstanding the public policy favoring arbitration, nonsignatories are generally not subject to arbitration agreements" (*id*. [citations omitted]).

"However, under limited circumstances nonsignatories may be compelled to arbitrate" (*id*., citing *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). "[A] nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency" (*Thomson-CSF, S.A. v American Arbitration Assn.*, 64 F3d 773, 776 [2d Cir 1995]).

A. Individual Capacity

Respondents offer four theories by which petitioners may be bound to the SPA's arbitration clause in their individual capacity. The Court will consider each theory in turn.

1. Direct Benefits Estoppel

Respondents first contend that petitioners should be estopped from denying their obligation to arbitrate under the SPA because they directly benefited from the SPA.

Under the direct-benefits theory of estoppel, "a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement" (*Matter of Belzberg*, 21 NY3d at 631 [internal quotation marks and citation omitted]). "The benefits must be direct, and the party seeking to compel arbitration must demonstrate that the party seeking to avoid arbitration relies on the terms of the agreement containing the arbitration provision in pursuing its claim" (*Oxbow Calcining USA Inc. v American Indus. Partners*, 96 AD3d 646, 649-650 [1st Dept 2012]). "Where the benefits are merely indirect, a nonsignatory cannot be compelled to arbitrate a claim" (*Matter of Belzberg*, 21 NY3d at 631 [internal quotation marks omitted]).

Respondents argue that petitioners "stood to benefit directly from the SPA because the SPA expressly permitted each of them to receive a broker's fee in connection with the transaction" (NYSCEF Doc No. 33 ["Opp Mem"], pp. 11-12). In this connection, respondents cite provisions of the SPA that prohibit any person acting on behalf of the Sellers or the Buyer to receive a finders' fee or commission, except for petitioners (*see* SPA, §§ 6.1 [k]; 6.2 [d]). Respondents therefore argue that petitioners "signed the SPA and enjoyed a right to compensation flowing from it" (Opp Mem, p. 12).

The Court is unconvinced by respondents' argument and concludes that any benefits that petitioners may have stood to derive from the SPA are indirect and, therefore, do not work an estoppel. As petitioners observe, the SPA does not create any entitlement to a finders' fee or commission; it merely carves petitioners out of a provision that would otherwise prevent them from receiving a fee or commission in connection with the SPA. But that fee or commission necessarily would be based on a contract or other relationship extrinsic to the SPA.

The Court therefore concludes that petitioners did not knowingly exploit a benefit directly traceable to the SPA (*see Matter of Belzberg*, 21 NY3d at 634 ["a connection based on mere extended causality is beyond the intended scope of the direct benefits estoppel theory"]; *Alam v Ahmad*, 190 AD3d 471, 473 [1st Dept 2021] ["any benefits plaintiffs may receive as a result of the execution of the share sale agreements will come pursuant to the partnership agreement"]; *IQVIA RDS Inc. v Eisai Co. Ltd*, 2018 NY Slip Op 32923[U], *3-4 [Sup Ct, NY County 2018] [benefits are indirect where permissive language of an agreement allowed for an "advantageous opportunity" to be derived from a different agreement]; *cf. Wu v Pearson Educ., Inc.*, 2010 WL 3791676, *3, 2010 US Dist LEXIS 103488, *8 [SD NY 2010] ["Wu concedes that when Pearson signs a licensing agreement with the photo bureaus, he receives a portion of the licensing fee. He thus receives a direct benefit from the contract."]).

2. Veil Piercing/Alter Ego

Respondents next contend that the corporate form of the acquiring company, Perosphere Corp., should be disregarded on the ground that it merely served "as a shell for the Petitioners in their individual capacities" (Opp Mem, p. 13). Respondents argue that Perosphere Corp. was formed solely for the purpose of executing the business transaction described in the SPA, respondents' sole contact was with petitioners, Narravula was Perosphere Corp.'s sole director, and Perosphere Corp. never fulfilled its obligations. From this, respondents maintain that equity requires piercing the corporate veil of Perosphere Corp.

"The general rule, of course, is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126 [2d Dept 2009] [citations omitted], *affd* 16 NY3d 775 [2011]). However, "[t]he corporate veil will be pierced and liability imposed when either (1) there is complete domination of a corporation by an individual or another corporation with respect to the transaction being attacked that resulted in a fraud or wrong against the complaining party, or (2) when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego" (*Belair Care Ctr., Inc. v Cool Insuring Agency, Inc.*, 161 AD3d 1263, 1270 [3d Dept 2018] [internal quotation marks and citations omitted]).

Respondents have not come forward with admissible proof establishing that petitioners, "through their [alleged] domination [of Perosphere Corp.], abused the privilege of doing business in the corporate form'" (*East Hampton Union Free School Dist.*, 66 AD3d at 126-127, quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142 [1993]).[FN2] Nor have respondents established any basis for the imposition of alter-ego liability. Accordingly, there is no record basis for deeming the obligations of Perosphere Corp., including the obligation to arbitrate any disputes arising from the SPA, to be those of petitioners.

3. Petitioners' Role as Preincorporation Promoters

Respondents further contend that petitioners are bound by the SPA and its arbitration clause based on their role as the preincorporation promoters of Perosphere Corp. "[B]y signing on behalf of a preincorporation entity and failing to provide evidence of any sort of novation between Perosphere Corp. and respondents that explicitly relieved them of their personal obligations, Petitioners bound themselves — individually — to arbitrate disputes under the SPA (Opp Mem, pp. 9-10).

"Generally, a promoter who executes a preincorporation contract in the name of a proposed corporation is . . . personally liable on the contract unless the parties have otherwise agreed" (*Clinton Invs. Co., II v Watkins*, 146 AD2d 861, 862-863 [3d Dept 1989]). This liability of the promoter remains in place even after "corporate adoption of [the] contract . . . unless there has been a novation between the corporation and the [counter-party]" (*id*. at 863). "Such liability is based upon the principle that one who assumes to act for a nonexistent principal is . . . liable on the contract in the absence of an agreement to the contrary" (*Universal Indus. Corp. v Lindstrom*, 92 AD2d 150, 151 [4th Dept 1983]).

As the Third Department's decision in *Clinton Invs.* makes clear, however, personal liability will not attach where it "appear[s] that in dealing with [the promoters], the [third party] knew it was contracting with an as yet nonexistent principal," rather than a "corporation [that] was . . . in existence" (146 AD2d at 863). "[A]n agent signing as such cannot be held specifically to perform a contract . . . where the fact of his [or her] assumption of the relation of agent was disclosed and there is nothing upon the face of the instrument to show that [the agent] intended to be personally bound by it" (*Weiss v Baum*, 218 App Div 83,

88 [2d Dept 1926] [promoter represented that corporation "was then being formed by him and that it was then in the process of incorporation"]).

In other words, personal liability will not attach where the "contract is executed by an agent on behalf of a corporation to be formed . . . [and] the proposed principal is disclosed but not yet created, and that relationship is known and agreed to by the other contracting party" (*Hampshire LIC Holdings, LLC v Toyoko Inn Dev. Co., Ltd.*, 2008 NY Slip Op 31692[U], 2008 NY Misc LEXIS 9742, *8-9 [Sup Ct, NY County 2008]). "In this type of situation, the proposed principal, when formed, would be the party liable under the agreement" (*id.*).

Here, petitioners' status as agents of a preincorporation entity was fully disclosed and acknowledged in the SPA and assented to by respondents. Indeed, the very first sentence of the SPA represents that petitioners, as representatives of an investor group, were acting on behalf of an as-yet unformed business entity. And after identifying petitioners as "representing an investor group referred to . . . as the 'Nominee' for the Buyer," the SPA recites that "[t]his will be replaced by an acquisition company called Perosphere Tech . . . after it is incorporated" (SPA, p. 1). Thus, the SPA was executed by petitioners in a representative capacity on behalf of a business entity to be formed, and those facts were known and agreed to by respondents.

The Court therefore concludes that petitioners did not become bound by Perosphere Corp.'s obligation to arbitrate under the SPA as the preincorporation promotors of the corporate entity that they caused to be formed.[FN3]

4. Petitioners' Failure to Disclose the Identity of Their Principal

Finally, respondents argue that petitioners are bound to the SPA in their personal capacity based upon their failure to disclose the identity of the "investor group" that they purported to represent "as the 'Nominee' for the Buyer" (SPA, p. 1). "Because Petitioners failed to adequately disclose their principal, they are responsible for their undertakings in the SPA, including to arbitrate disputes such as this one" (Opp Mem, p. 11).

"It is well settled that an individual who signs a contract as an agent for an entity will be held personally liable on the contract if the agency relationship is not disclosed" (*DeAngelis v Timberpeg E., Inc.*, 51 AD3d 1175, 1179 [3d Dept 2008] [citations omitted]).

"A principal is considered to be 'disclosed' if, at the time of a transaction conducted by an agent, the other party to the contract had notice that the agent was acting for the principal and of the principal's identity" (*Stonhard v Blue Ridge Farms, LLC*, 114 AD3d 757, 758 [2d Dept 2014] [internal quotation marks and citation omitted]; *see Winer v Valentino*, 121 AD3d 1264, 1265 [3d Dept 2014]). In contrast, a principal is considered "'partially disclosed'" if "the agency relationship was known, but the identity of the principal remained undisclosed" (*Stonhard*, 114 AD3d at 758-759, quoting Restatement [Second] of Agency § 4 [2]).

An agent for an undisclosed or partially disclosed principal "will be liable even if the third party is aware that an agency relationship exists, so long as the agent fails to disclose the principal's identity" (*Tarolli Lbr. Co. v Andreassi*, 59 AD2d 1011, 1012 [4th Dept 1977]; *see Stonhard*, 114 AD3d at 759).[FN4] And where the agent of an undisclosed or partially disclosed principal is sued on a contract that includes an arbitration clause, the agent will be compelled to arbitrate (*see Matter of Rieger [Elco Coat Co.]*, 34 Misc 2d 359, 360 [Sup Ct, NY County 1962]; *see also Beck v Suro Textiles, Ltd.*, 612 F Supp 1193, 1194 [SD NY 1985]; *cf. Weinreb v Stinchfield*, 19 AD3d 482, 483 [2d Dept 2005]; *Matter of Phillips-Van Heusen [Joseph & Feiss Co.—Itoh & Co. (Am.)]*, 50 AD2d 546, 547 [1st Dept 1975]).

Contrary to petitioners' contentions, the Court concludes that the identity of the principal they purported to represent, the Nominee "investor group," was not adequately disclosed to respondents. While petitioners argue that "a general description of the principal, not specific names, is sufficient to find notice" (NYSCEF Doc No. 35, p. 7), the cases they cite involve contracting parties who allegedly possessed knowledge of the agent's principal (*see id.*, citing *Deutsche Bank Sec. Inc. v Rhodes*, 578 F Supp 2d 652, 667 [SD NY 2008] ["no genuine issue of material fact exists regarding (counter-party's) awareness of the companies for whom (defendant) acted as agent when he signed the (agreement)"]; *Unger v Travel Arrangements*, 25 AD2d 40, 48 [2d Dept 1966] ["defendant asserts that the plaintiff in fact knew that the Caribbean Cruise Lines, Inc. operated the S. S. *Riviera*, and there is, therefore, a question of fact to be determined at trial. If the plaintiff had such knowledge, he cannot recover from the defendant . . . ."]; *see also* Restatement (Third) of Agency § 6.02, Comment *c* ["Ordinarily it is the agent who provides notice of the principal's identity. However, the source of the third party's enlightenment is irrelevant to the legal relations among the parties."]).

Here, petitioners offer no evidence that respondents had knowledge or notice of the identity of the individuals and/or entities comprising the "investor group" on whose behalf

they purported to act. Indeed, petitioners assert in their verified Petition that "[i]t was understood that [their] role would be to identify investors who would fund Perosphere Corporation's acquisition [*4]of Perosphere Technologies stock . . . [and] the COVID-19 pandemic *made it difficult to assemble the investor group* within the time frame prescribed for closing the stock purchase" (Petition, ¶ 22 [emphasis added]). Thus, the Petition itself calls into question whether petitioners' alleged principal, the investor group, even existed when petitioners executed the SPA as its purported agents.

Petitioners further argue that the duty "to consummate the contemplated [share purchase] transaction" (Notice; *see also* Draft Demand, ¶¶ 23-27, 32, 38) was that of the fully disclosed Buyer, Perosphere Corp., and not the "investor group" (Reply Mem, pp. 6-7; *see also* Part A.3, *supra*). But the issue before the Court is not whether the liability that petitioners may bear for acting as an agent of an undisclosed "investor group" extends to the specific breach of the SPA alleged in the Notice or Draft Demand. Rather, the only question before the Court is arbitrability, and the Court's focus must be on whether petitioners became bound to the Nominee's obligation to arbitrate "[a]ny dispute arising out of or related to [the SPA]" (§ 9.4) under the principles of agency law relied upon by respondents (*see Matter of Board of Educ. of W. Irondequoit Cent. School Dist. v West Irondequoit Teachers Assn.*, 55 AD2d 1037, 1038 [4th Dept 1977] ["It is not within (a) court's province to review the merits of an arbitration dispute upon an application brought pursuant to CPLR article 75"]).

The Court therefore concludes that respondents have sufficiently established that petitioners became bound under general principles of agency law for the undertakings of their principal, the "investor group," including the obligation to arbitrate any disputes arising out of, or relating to, the SPA.

B. Representative Capacity Claims

Finally, "[a] party who agrees to arbitration in its capacity as an agent can[not] . . . have a claim brought against it under the arbitration provision if the claim is not related to the scope of the agency" (*Mionis v Bank Julius Baer & Co.,* 301 AD2d 104, 111 [1st Dept 2002]; *see Hirschfeld Prods. v Mirvish*, 88 NY2d 1054, 1056 [1996]). The Court concludes that petitioners can be compelled to arbitrate in their capacity as representatives of the Nominee "investor group" for essentially the reasons stated immediately above. Petitioners' arguments

to the contrary go the merits of the claims that may be asserted against them in such capacity, which is not an issue that is properly before the Court.

CONCLUSION

Based on the foregoing,[FN5] it is

ORDERED that the Petition is denied; and it is further

ORDERED that respondents' cross motion to compel petitioners to arbitrate is granted in accordance with the foregoing; and it is further

ORDERED that petitioners Tharunidhar Narravula and Arun Savkur shall proceed to any arbitration demanded by respondents pursuant to Section 9.4 of the SPA; and finally it is

ADJUDGED that the Petition is dismissed in all respects.

This constitutes the Decision, Order & Judgment of the Court, the original of which is being uploaded to NYSCEF for filing and entry by the Albany County Clerk. Upon such entry, counsel for respondents shall promptly serve notice of entry on all other parties entitled thereto.

Dated: May 27, 2021

Albany, New York

RICHARD M. PLATKIN

A.J.S.C.

Papers Considered

NYSCEF Doc Nos. 1-8, 27-35, 43.

Footnotes

Footnote 1: Dr. Bakhru's name is spelled incorrectly in the caption (*see* NYSCEF Doc No. 33, n 1).

Footnote 2: "In a special proceeding, . . . '[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised'" (*Matter of FR Holdings, FLP v Homapour*, 154 AD3d 936, 938 [2d Dept 2017], quoting CPLR 409 [b]). "'Unlike a [pleading] in a plenary action, a [pleading] in a special proceeding must be accompanied by competent evidence'" (*id*., quoting *Matter of Trustco Bank, N.A. v Strong*, 261 AD2d 25, 27 [3d Dept 1999] [other citations omitted]). Thus, courts employ a summary judgment standard to special proceedings (*see id*.; *Matter of Friends World Coll. v Nicklin*, 249 AD2d 393, 394 [2d Dept 1998]; *accord Matter of Izzo v Lynn*, 271 AD2d 801, 802 [3d Dept 2000]; *see also* Siegel & Connors, NY Prac § 556 [6th ed 2018]).

Footnote 3: Since respondents have failed to demonstrate a basis for the imposition of promoter liability, there is no need for petitioners to demonstrate a novation or other release of the alleged liability.

Footnote 4: The Restatement (Third) of Agency explains that the term "partially disclosed" principal is synonymous with an "unidentified" principal, which means that the agent has disclosed that he or she "represents a principal without identifying the principal" (§ 1.04, Comment *b*). Such an agent will be "a party to the contract unless the agent and the third party agree otherwise" (*id.* § 6.02).

Footnote 5: To the extent not specifically referenced herein, the parties' remaining contentions have been considered and found to be without merit.

Return to Decision List