# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN Justice

PART 3

Index Number : 653377/2012
BOWERY PRESENTS LLC
vs.
PIRES, LIGIA
SEQUENCE NUMBER : 001
VACATE STAY/ORDER/ JUDGMENT

INDEX NO. 653377/12
MOTION DATE 1/30/13
MOTION SEQ. NO. 001

The following papers, numbered 1 to 4, were read on this motion to/for Stay arbitration

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 1
Answering Affidavits — Exhibits ____ No(s). 2
Replying Affidavits ____ No(s). 3, 4
cross motion ☒

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

IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 6-24-13

HON. EILEEN BRANSTEN, J.S.C.

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: IAS PART THREE

----------X

THE BOWERY PRESENTS LLC,

Petitioner,

-against-

Index No. 653377/2012
Motion Date: 1/30/2013
Motion Seq. No.: 001

LIGIA PIRES,

Respondent.

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BRANSTEN, J.

In this Article 75 proceeding, petitioner The Bowery Presents LLC ("Petitioner") seeks to permanently stay and vacate the arbitration (the "Arbitration") demanded by respondent Ligia Pires ("Respondent") on the grounds that Petitioner is not a party to an arbitration agreement with Respondent. Respondent opposes the petition and cross-moves to compel arbitration. Respondent also requests that, should this court deny her cross-motion to compel, that the Court deem her Arbitration statement of claim a complaint duly commenced under the CPLR.

## I. BACKGROUND

On May 1, 2007, Petitioner, a concert promoter, entered into a written Licensed User Agreement (the "License Agreement") with Live Nation Entertainment, Inc. (d/b/a Ticketmaster) ("Ticketmaster") under which Ticketmaster was to act as Petitioner's agent for the sale and distribution of tickets to entertainment events. (Declaration of Thomas I. Sheridan, III in Opposition to the Petition to Stay Arbitration and to Vacate Demand for

Arbitration and in Support of the Cross Motion to Compel Arbitration ("Sheridan Decl."), Ex. 8 ("License Agreement"); Affidavit of Jesse Mann ("Mann Aff."), ¶¶ 13-14.)

Petitioner was the promoter for a March 28, 2012 event to which Respondent purchased a ticket through the Ticketmaster website. (Sheridan Decl., Exs. 4, 5 & 6.) In order to purchase her ticket, Respondent was required to agree to the "Terms of Use" (the "TOU Agreement") on Ticketmaster's website. (Respondent's Memorandum of Law (I) in Opposition to the Motion (a) to Stay Arbitration and (b) to Vacate Demand for Arbitration and (II) in Support of the Cross-Motion to Compel Arbitration ("Respondent's Memo"), p. 2; Sheridan Decl., Ex. 2 ("TOU Agreement").) The TOU Agreement contains an arbitration clause. Specifically, § 18(A) of the TOU Agreement states, in pertinent part, "Live Nation and you [user of ticketmaster.com and its related websites] agree to arbitrate all disputes and claims between us. This agreement to arbitrate is intended to be broadly interpreted." (TOU Agreement § 18(A).)

In the Arbitration, Respondent asserts a claim pursuant to § 25.33 of the Arts and Cultural Affairs Law of the State of New York ("ACAL") to recover damages and injunctive relief arising from Petitioner's alleged violations of § 25.30(c) of the ACAL by employing a paperless ticketing system. (Verified Petition to Stay Arbitration and Vacate Demand for Arbitration ("Petition"), Ex. A ¶ 1.) The ACAL prohibits an operator of a place of entertainment from:

> employ[ing] a paperless ticketing system unless the consumer is given an option to purchase paperless tickets that the

> consumer can transfer at any price, and at any time, and without additional fees, independent of the operator or operator's agent. Notwithstanding the foregoing, an operator or operator's agent may employ a paperless ticketing system that does not allow for independent transferability of paperless tickets only if the consumer is offered an option at the time of initial sale to purchase the same tickets in some other form that is transferrable independent of the operator or operator's agent including, but not limited to, paper tickets or e-tickets.

N.Y. Arts & Cult. Aff. Law § 25.30 (McKinney). ACAL § 25.03 defines "operator" to include entertainment promoters. *Id.* § 25.03.

Respondent contends that Petitioner violated ACAL § 25.30(c) by employing a paperless ticketing system without providing the consumer the option of purchasing the tickets in a transferrable form. (Petition, Ex. A ¶¶ 1 & 2.) Respondent thus filed a demand for arbitration (the "Demand for Arbitration"), dated September 7, 2012, against Petitioner. (Petition, Ex. A.) On September 26, 2012, Petitioner filed the instant Verified Petition to Stay Arbitration and Vacate Demand for Arbitration (the "Petition"). On October 12, 2012, Respondent filed a cross-motion to compel arbitration pursuant to CPLR § 7503. Oral argument was held on January 17, 2013, and the motion was marked submitted when the Court received the transcript on January 30, 2013.

## II. DISCUSSION

On a motion to stay or compel arbitration, the court must first determine three threshold questions: (1) whether the parties' agreement to arbitrate is valid; (2) whether the agreement has been complied with; and (3) whether the claim sought to be arbitrated would be barred by the statute of limitations. *Rockland County v. Primiano Const. Co.*,

51 N.Y.2d 1, 6-7 (1980); *Cooper v. Bruckner*, 21 A.D.3d 758, 759 (1st Dep't 2005). The court here need only reach the first prong of this analysis.

New York public policy favors enforcing agreements to arbitrate disputes. *See Matter of Smith Barney Shearson v. Sacharow*, 91 N.Y.2d 39, 49 (1997). However, the general presumption in favor of arbitration does not apply when the parties dispute whether such an agreement to arbitrate exists. *Oxbow Calcining USA Inc. v. Am. Indus. Partners*, 96 A.D.3d 646, 648-49 (1st Dep't 2012). Arbitration is contractual by nature, and "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Unless the parties have subscribed to the arbitration agreement, the court will not infer a waiver of the safeguards and benefits of the court "on the basis of anything less than a clear indication of intent." *TNS Holdings, Inc. v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 (1998); *see also Waldron v. Goddess*, 61 N.Y.2d 181, 183-84 (1984) (citations omitted) ("The agreement must be clear, explicit and unequivocal and must not depend upon implication or subtlety.").

However, in certain limited circumstances, the court recognizes "the need to impute the intent to arbitrate to a nonsignatory." *TNS Holdings, Inc.*, 92 N.Y.2d at 339. "'[T]raditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel . . . .'" *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (quoting 21 Samuel Williston

& Richard A. Lord, A TREATISE ON THE LAW OF CONTRACTS § 57:19 (4th ed. 2001)); *see also Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995) (citations omitted) ("This Court has made clear that a nonsignatory party may be bound to an arbitration agreement if so dictated by the 'ordinary principles of contract and agency.'").

**A. Agency**

Here, Respondent argues that, though Petitioner is not a signatory to the arbitration agreement between Ticketmaster and Respondent, Ticketmaster had sufficient authority, as Petitioner's agent, to bind Petitioner to the arbitration clause in the TOU Agreement. (Respondent's Memo, pp. 6, 9-10.) Respondent further contends that Petitioner cloaked Ticketmaster with sufficient apparent authority to agree to arbitration by directing ticket buyers to Ticketmaster's website. *Id.* at p. 11.

Petitioner argues that Ticketmaster is Petitioner's limited agent, rather than its general agent, and thus did not have the authority to enter into dispute resolution agreements on Petitioner's behalf. (Memorandum of Law in Support of Petition to Vacate Demand for Arbitration and in Opposition to Cross Motion to Compel Arbitration ("Petitioner's Memo"), pp. 5-6.) Petitioner also contends that the plain language of the TOU Agreement does not purport to bind Petitioner. *Id.* at pp. 7-11.

An agent acting within the scope of its authority may bind a principal to an arbitration agreement. *See Jefferies & Co., Inc. v. Infinity Equities I, LLC*, 66 A.D.3d 540, 541 (1st Dep't 2009); *see also* 12 WILLISTON ON CONTRACTS § 35:11 (4th ed. 2013)

("An agent has the power to make contracts that are binding on a principal not only when the agent has actual authority, express or implied, but also when the principal, though not intending to confer authority on the agent, nevertheless holds the agent out to the public, or to the party with whom the agent deals, as having the appearance of authority.").

Here, the License Agreement provides that "[e]ach party is . . . not an agent . . . for any purpose other than as set forth in this [a]greement" and that neither party has "authority to act or create any obligation, express or implied, on behalf of the other party." (License Agreement § 17(e).) The agency relationship set forth in the License Agreement grants Ticketmaster the right to be "the exclusive seller" of tickets to Respondent's events. (License Agreement § 2(a).) The License Agreement does not contemplate, explicitly or by incorporation, dispute resolution between Ticketmaster and ticket purchasers, or between Petitioner and ticket purchasers. *See McPheeters v. McGinn, Smith & Co., Inc.*, 953 F.2d 771, 772-74 (2d Cir. 1992) (per curiam) (concluding that the agreement specifically limited the agency relationship to certain transactions and did not confer general authority). Accordingly, the Court finds that Ticketmaster was Petitioner's limited agent and, therefore, Petitioner is not bound by the arbitration clause in the TOU Agreement.

However, even if Ticketmaster did possess sufficient authority to bind Petitioner to an arbitration agreement, the plain language of the arbitration clause at issue binds only Ticketmaster and the ticket purchaser to arbitration, not Petitioner. Despite the TOU Agreement's § 18(A) language that "[t]his agreement to arbitrate is to be broadly

interpreted," the agreement to arbitrate is limited to claims between Ticketmaster and, in this case, Respondent. (TOU Agreement § 18(A) ("Live Nation and you agree to arbitrate all disputes and claims between us.").) *See Oxbow Calcining*, 96 A.D.3d at 648-49 (emphasis in original) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, — U.S. —, 130 S.Ct. 1758, 1774 (2010)) ("[P]arties may structure arbitration agreements to limit both the issues they choose to arbitrate and '*with whom* they choose to arbitrate their disputes.'"); *see also Warner v. U.S. Sec. & Futures Corp.*, 257 A.D.2d 545 (1st Dep't 1999) (holding that an arbitration clause, which made no mention of defendant either by name or by function, did not bind defendant).

Had Ticketmaster intended to bind parties such as Petitioner to its arbitration agreement, it could have easily done so. Ticketmaster's Purchase Policy, incorporated by reference in the TOU Agreement, mentions promoters and event providers in its "Who You Are Buying From" provision. (Sheridan Decl., Ex. 3, p. 1.) The TOU Agreement also refers to licensors (such as Petitioner) in its provisions intended to protect licensors' trademarks (TOU Agreement § 3), to limit licensors' liability (TOU Agreement § 16) and to indemnify licensors' (TOU Agreement § 17). Ticketmaster did not include similar language in the arbitration clause, and the Court therefore finds that Petitioner is not bound by the arbitration clause based on the clause's plain language.

**B. Equitable Estoppel**

Respondent also argues that Petitioner should be estopped from avoiding arbitration because Petitioner was a third-party beneficiary benefitting directly from the

TOU Agreement. (Respondent's Memo, p. 11.) Petitioner, in turn, maintains that it was at most an incidental beneficiary of the TOU Agreement. (Petitioner's Memo, pp. 11-13.)

"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. Metro. Transp. Auth.*, 33 A.D.3d 568, 569 (2006). A third-party beneficiary exists "only if the parties to that contract intended to confer a benefit on him when contracting; it is not enough that some benefit incidental to the performance of the contract may accrue to him." *McPheeters*, 953 F.2d at 773; *see also HRH Constr. LLC*, 33 A.D.3d at 569 (holding that, in purchasing another company's assets, HRH "knowingly assumed performance" of the contract containing the arbitration clause and "derived a direct benefit therefrom," and was, therefore, estopped from avoiding arbitration).

In order to find a third-party beneficiary relationship, "[i]t must appear 'that no one other than the third-party can recover if the promisor breaches the contract' or the contract language should otherwise clearly evidence 'an intent to permit enforcement by the third-party.'" *Borsack v. Chalk & Vermilion Fine Arts, Ltd.*, 974 F. Supp. 293, 300 (S.D.N.Y. 1997) (quoting *Artwear, Inc. v. Hughes*, 202 A.D.2d 76, 82 (1st Dep't 1994)).

Courts have limited applying equitable estoppel to situations in which the plaintiff's claims depend "in substantial part on the existence of an agreement that contained an arbitration clause." *Denney v. Jenkens & Gilchrist*, 412 F. Supp. 2d 293, 298-99 (S.D.N.Y. 2005), *cited in Rosenbach v. Diversified Grp., Inc.*, 39 A.D.3d 271 (1st

Dep't 2007). "The plaintiff's *actual dependence* on the underlying contract in making out the claim against the nonsignatory defendant is . . . always the *sine qua non* of an appropriate situation for applying equitable estoppel." *Denney*, 412 F. Supp. 2d at 298 (emphasis in original) (citations omitted) (internal quotation marks omitted).

As detailed by the Court *supra* in Part II.A, the contract language of the arbitration clause is limited to disputes between Ticketmaster and the ticket purchaser. The agreement does not evidence an intent that it is to be enforced by or against parties such as Petitioner.

Unlike the plaintiff in *HRH Constr. LLC*, Petitioner did not here assume performance of the TOU Agreement. *See HRH Constr. LLC*, 33 A.D.3d at 569. Although some sections of the TOU Agreement contain provisions that are beneficial to licensors (*see* TOU Agreement §§ 3, 16 & 17), the TOU Agreement governs first and foremost the use of ticketmaster.com and its related websites. In addition, Ticketmaster, rather than Petitioner, stands primarily to recover from non-performance of its TOU Agreement. *See Borsack*, 974 F. Supp. at 300 (concluding that the plaintiff was a third-party beneficiary of the contract because "[i]t is clear from that language that no one other than [the plaintiff] would be entitled to recover" if the parties failed to perform the contract).

Further, Respondent's claim is founded on a New York statute, rather than the TOU Agreement containing the arbitration clause. *See Denney*, 412 F. Supp. 2d at 298-99 (denying the plaintiff's motion to compel arbitration because the plaintiff's claims

were not "intimately founded in or intertwined" with the agreement containing the arbitration clause and the "[p]laintiffs could allege the same causes of action" were the agreement void). Respondent's claims exist independently of the TOU Agreement. Therefore, Petitioner cannot be estopped from avoiding arbitration.

Accordingly, Petitioner's request to permanently stay the Arbitration is granted, and Respondent's cross-motion to compel the Arbitration is denied. Petitioner's request to vacate the Demand for Arbitration is denied because CPLR § 7503(b) does not provide the court with authority to vacate a demand for arbitration. *See Vanguard Ins. Co. v. Polchlopek*, 23 A.D.2d 625 (4th Dep't 1965) (holding that CPLR § 7503(b) only contemplates staying an arbitration), *rev'd on other grounds*, 18 N.Y.2d 376 (1966).

Finally, Respondent's request that the Court deem her Arbitration statement of claim a complaint, should the Court deny her cross-motion to compel, is also denied. Respondent does not cite, nor does this Court find, any authority permitting this Court to do so.

*(Order of the Court follows on the next page)*

**ORDER**

Accordingly, it is

ORDERED that the petition of The Bowery Presents LLC to permanently stay arbitration is granted and the arbitration is permanently stayed; and it is further

ORDERED that the petition of the Bowery Presents LLC to vacate the arbitration demand is denied; and it is further

ORDERED that respondent Ligia Pires' cross-motion to compel arbitration is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
June 24, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.