STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-CV-11-25 ✓

HL 1, LLC and SHIPYARD BREWING COMPANY, LLC,

Plaintiffs,

v.

RIVERWALK, LLC; RIVERWALK VENTURE, LLC; OCEAN GATEWAY GARAGE, LLC; OG GARAGE VENTURE, LLC; PENNBROOK PROPERTIES, II, LLC; INTERCONTINENTAL FUND IV OCEAN GATEWAY, LLC; INTERCONTINENTAL REAL ESTATE INVESTMENT FUND IV, LLC; and INTERCONTINENTAL REAL ESTATE CORP.,

Defendants

PENNBROOK PROPERTIES, II, LLC; INTERCONTINENTAL FUND IV OCEAN GATEWAY, LLC; INTERCONTINENTAL REAL ESTATE INVESTMENT FUND IV, LLC; and INTERCONTINENTAL REAL ESTATE CORP.,

Third-party Plaintiffs,

v.

FRED M. FORSLEY and OGG, LLC,

Third-party Defendants

ORDER
(Motion to Compel Arbitration/ Motion to Stay)

RIVERWALK, LLC; RIVERWALK VENTURE, LLC; OCEAN GATEWAY GARAGE, LLC; and OG GARAGE VENTURE, LLC,
Third-party Plaintiffs,

v.

FRED M. FORSLEY,

Third-party Defendant

Pursuant to 14 M.R.S. § 5928 (2010), Defendant/Third-party Plaintiff Pennbrook Properties II, LLC (Pennbrook) and Defendants/Third-party Plaintiffs Intercontinental Fund IV Ocean Gateway, LLC, Intercontinental Real Estate Investment Fund IV, LLC, and Intercontinental Real Estate Corp. (collectively, Intercontinental) move to compel arbitration of each claim asserted by Plaintiffs HL 1, LLC (HL 1) and Shipyard Brewing Company, LLC (Shipyard) in their First Amended Complaint. The Court addressed a similar issue between these parties in *HL 1, LLC v. Riverwalk, LLC*, BCD-CV-08-19 (Me. Super. Ct., Sag. Cty., Apr. 3, 2009), which was affirmed by the Law Court, *HL 1, LLC v. Riverwalk, LLC*, 2011 ME 29, 15 A.3d 725. The Court begins with a brief summary of the relevant portions of the previous case.

BACKGROUND

I. The Previous Litigation

Third-Party Defendant Fred M. Forsley is the sole owner of HL 1 and owns an 80% interest in Shipyard. *HL 1, LLC*, 2011 ME 29, ¶ 4, 15 A.3d at 728. In 2003, HL 1, Pennbrook, and two other entities formed three limited liability entities related to a real estate development project: 1) Riverwalk, LLC (Riverwalk), to develop and construct a multi-use real estate

development, including a parking garage and condominiums; 2) Ocean Gateway Garage, LLC (Ocean Gateway), to own, construct, and manage the parking garage; and 3) OGG, LLC (OGG), to purchase the garage from Ocean Gateway Garage.[1] *See id.* The OGG Operating Agreement contained an arbitration clause for "all disputes and controversies between the parties hereto arising out of or in connection with" the agreement. *Id.* ¶ 10, 15 A.3d at 729.

Riverwalk funded the development project in part with a mezzanine loan from Intercontinental. *Id.* ¶ 6, 15 A.3d at 728-29. When the development project's costs escalated beyond expected proceeds, Intercontinental sent Riverwalk a notice of default and ceased funding the project. *Id.* ¶ 6, 15 A.3d at 729. After some negotiation, the parties signed a memorandum of understanding (MOU) outlining an agreement by which Intercontinental would resume funding.[2] *Id.* ¶ 7, 15 A.3d at 729. As part of the MOU, Intercontinental and OGG would each own 50% of a joint venture that would replace OGG as the buyer of the garage. *Id.* The joint venture was not documented because the parties could not reach an agreement on the final document. *Id.*

HL 1 and Shipyard, among other claims, sued for a declaratory judgment that the MOU was unenforceable, and Pennbrook and Intercontinental successfully moved to compel arbitration pursuant to the OGG Operating Agreement. *Id.* ¶¶ 9-10, 15 A.3d at 729-30. The arbitrators declared that although the parties did not complete all the paperwork contemplated by the MOU, the MOU nevertheless was "valid, effective, duly authorized and binding on the parties thereto," and the incomplete paperwork was due to the intransigence of Forsley during the pendency of the litigation. *Id.* ¶¶ 11, 40, 15 A.3d at 730, 738. This Court affirmed the

[1] Riverwalk, LLC, Ocean Gateway Garage, LLC, and OGG, LLC are all involved in the present litigation as Defendant/Third-party Plaintiff, Defendant/Third-party Plaintiff, and Third-Party Defendant, respectively.

[2] The parties to the MOU are Riverwalk, LLC, OGG, LLC, Ocean Gateway Garage, LLC, Intercontinental Fund IV Ocean Gateway, LLC, Intercontinental Real Estate Investment Fund IV, LLC, and Intercontinental Real Estate Corp. (Pls.' Opp'n M. Compel Arb. Exh. A at 4.)

arbitration award upon motion and entered summary judgment in favor of Riverwalk, Pennbrook, and Intercontinental on the remaining claims; the Law Court affirmed the judgment. *Id.* ¶¶ 13-15, 46 15 A.3d at 730-31, 739.

II. The Present Dispute

On June 17, 2011, HL 1 and Shipyard filed suit against the Defendants in Cumberland County Superior Court. As represented in Plaintiffs' complaint, following the Law Court decision, Plaintiffs requested the documentation that had been executed to implement the MOU and the documents that were proposed to complete the implementation. (Compl. ¶ 30.)[3] As represented by Defendants, Forsley refused to sign the remaining implementation documents, and Drew Swenson, the Manager of OGG and Riverwalk, executed the documents in his authorized capacity as Manager of both entities on June 23, 2011. (Driscoll Aff. ¶¶ 3-4; Driscoll Aff. Exh. 2.)

Plaintiffs assert that the implementation documents materially differ from the terms of the MOU and that the MOU is vague, ambiguous, and incapable of enforcement (Compl. ¶¶ 32-34). Plaintiffs thus seek a declaratory judgment that documents designed to implement the MOU are inconsistent with the MOU (Count I), and injunctive relief to implement the MOU according to its terms (Count II). In the alternative, should the MOU be deemed enforceable, Plaintiffs seek damages and punitive damages for breach of fiduciary duty for the execution of documents contrary to the MOU (Count III). Plaintiffs also seek damages for breach of a promissory note executed prior to the MOU (Count V). Finally, Plaintiffs seek judicial dissolution of Defendants Riverwalk, LLC and Riverwalk Venture, LLC (Count IV) and Ocean Gateway Garage, LLC (Count VI), and, pursuant to 31 M.R.S. § 703(1) (2010), the appointment of a liquidating trustee to wind up the business and affairs of all three entities (Count VII). In third-party complaints,

[3] All references and citations to the complaint are to Plaintiffs' First Amended Complaint, filed August 5, 2011.

Pennbrook and Intercontinental seek a declaratory judgment against OGG, LLC and Forsley that the MOU is complete and binding and enforceable against all parties to the MOU. Defendants Riverwalk, Riverwalk Venture, LLC, Ocean Gateway Garage, LLC, and OG Garage Venture, LLC (collectively, the "Riverwalk Defendants") seek similar relief against Forsley alone. Pennbrook and Intercontinental moved to compel arbitration on August 5, 2011. The case was transferred to the Business and Consumer Court on August 17, 2011. The Court heard oral argument on the motion to compel on November 4, 2011.

DISCUSSION

I. Standard of Review

"Maine has a broad presumption favoring substantive arbitrability." *V.I.P., Inc. v. First Tree Dev.*, 2001 ME 73, ¶ 4, 770 A.2d 95, 96 (quoting *Roosa v. Tillotson*, 1997 ME 121, ¶ 3, 695 A.2d 1196, 1197). Pursuant to Maine's adoption of the Uniform Arbitration Act (MUAA),

> **1. Application.** On application of a party showing an agreement [to arbitrate] and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.
>
> . . . .
>
> **4. Stay of action where arbitration ordered.** Any action or proceeding involving an issue subject to arbitration shall be stayed, if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

14 M.R.S. § 5928. "[W]hen two parties have included a provision requiring arbitration in their contract, a subsequent dispute should be deemed arbitrable unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted

dispute. Doubts should be resolved in favor of coverage." *Barrett v. McDonald Invs., Inc.*, 2005 ME 43, ¶ 16, 870 A.2d 146, 150.

II. Analysis

The parties agree that HL 1 and Pennbrook are the only signatories to agreements containing an arbitration clause. Thus, in the event that the Court orders the parties to proceed with arbitration, that order will only apply to HL 1 and Pennbrook.[4]

In support of its motion to compel, Pennbrook relies on identical arbitration clauses within the Riverwalk and OGG Operating Agreements, which provide:

> All disputes and controversies between the parties hereto arising out of or in connection with this Agreement shall be submitted to arbitration pursuant to the following procedure. Either party may, by written notice to the other within thirty (30) days after the controversy has arisen hereunder, appoint an arbitrator who shall be either an attorney or accountant. The other party shall, by written notice, within fifteen (15) days after receipt of such notice by the first party, appoint a second arbitrator who shall also be an attorney or accountant, and in default of such second appointment the first arbitrator shall sever as the sole arbitrator.

(Fryer Aff. Exhs. 3-4.) Pennbrook argues that the Plaintiffs' complaint is duplicative of what was decided in the prior litigation, where Plaintiffs were compelled to arbitrate, and that the present disputes are "controversies . . . in connection with" the operating agreements of OGG and Riverwalk. Plaintiffs counter that the disputes arise out of the MOU and its implementing documents and are unrelated to the operating agreements of either OGG or Riverwalk. Plaintiffs also challenge the timeliness of the arbitration demand on July 8, 2011.

The Court's task is to determine substantive arbitrability. *See Macomber v. MacQuinn-Tweedie*, 2003 ME 121, ¶ 14, 834 A.2d 131, 136. Substantive arbitrability is simply "whether

[4] Further, because Intercontinental is not a party to either agreement, Intercontinental cannot move to compel arbitration because they are not a party to the arbitration agreement and thus have no standing to compel arbitration. *See* 14 M.R.S. § 5927 (2010) ("A . . . provision in a written contract to submit to arbitration any controversy thereafter arising *between the parties* is valid, enforceable and irrevocable . . . . ." (emphasis added)). Because, however, Pennbrook and Intercontinental have filed joint briefs on this issue, the distinction makes no difference to the relevant arguments. The Court nevertheless refers only to Pennbrook in its analysis.

the parties intended to submit the dispute to arbitration," *Roosa v. Tillotson*, 1997 ME 121, ¶ 2, 695 A.2d 1196, 1197, or "substantive questions about the kind of disputes intended for arbitration," *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 10 (1st Cir. 2005). The Court will not, however, address any argument on the timeliness of the arbitration demand grounded in the procedural provisions in the Operating Agreement. Interpretation of a time limitation provision in an arbitration clause is a procedural issue that is presumptively for the arbitrator to determine. *See Marie*, 402 F.3d at 11 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002)). Thus, any timeliness argument based on the procedures in the OGG or Riverwalk, LLC Operating Agreements must be presented to an arbitrator first.

Pennbrook asserts in part that the present disputes are "controversies . . . in connection with" the operating agreements because the MOU implementing documents were executed by Drew Swenson in his capacity as manager of OGG and Riverwalk, and resolution will involve the propriety of his actions to execute those documents. Conversely, Plaintiffs contend that none of the counts in the complaint require any interpretation, construction, or enforcement of the operating agreements, and thus cannot arise under or be in connection with those agreements.

The Court is mindful of the standard of review on questions of arbitrability under MUAA: "[W]hen two parties have included a provision requiring arbitration in their contract, a subsequent dispute should be deemed arbitrable unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Barrett*, 2005 ME 43, ¶ 16, 870 A.2d at 150. While the arbitration clause does not cover all future disputes between HL 1 and Pennbrook regardless of the subject matter, because Swenson allegedly executed the implementing documents in his capacity as manager of both OGG and Riverwalk, Swenson's authority to

execute the documents and to agree to the terms of the documents, which authority is derived from the respective Operating Agreements, is within the scope of the current dispute. Accordingly, consistent with Maine's "broad presumption favoring substantive arbitrability" *V.I.P., Inc. v. First Tree Dev.*, 2001 ME 73, ¶ 4, 770 A.2d 95, 96 (quoting *Roosa v. Tillotson*, 1997 ME 121, ¶ 3, 695 A.2d 1196, 1197), because Plaintiffs challenge the enforceability of the MOU and implementing documents partly on the basis of Swenson's authority to execute the documents, the Court concludes that the dispute is "in connection with" the Operating Agreements. Pennbrook and HL 1 must, therefore, arbitrate the dispute based on the arbitration clauses in the Riverwalk and OGG Operating Agreements.

C. Stay of Proceedings

Pursuant to 14 M.R.S. § 5928(4):

> Any action or proceeding involving an issue subject to arbitration shall be stayed, if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

Because Pennbrook and HL 1 must arbitrate the dispute discussed above, and because resolution of the dispute will likely be relevant to the Court's disposition of the remaining issues in the case, the Court will stay the balance of the case pending completion of the arbitration proceedings.[5]

[5] The parties' filings generate the issue of whether the arbitration proceedings would include all of the parties to this action, and the issue as to the effect of any arbitration decision on the parties who are not party to the arbitration agreement. As explained above, the Court has determined that the parties subject to arbitration are Pennbrook and HL 1. The Court, however, has not determined the effect, if any, of any arbitration decision on the disputes that are not subject to arbitration. The Court presumably will address that issue when this matter resumes following completion of the arbitration proceeding.

CONCLUSION

Based on the foregoing analysis, the Court orders:

1. The Court grants Defendant Pennbrook Properties, II, LLC's Motion to Compel Arbitration.

2. The Court denies the Motion to Compel Arbitration of Defendants Intercontinental Fund IV Ocean Gateway, LLC, Intercontinental Real Estate Investment Fund IV, LLC, and Intercontinental Real Estate Corp. based on lack of standing.

3. The Court stays the balance of these proceedings pending further order of the Court, or completion of arbitration.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 1/11/12

Justice, Maine Business & Consumer Court

Entered on the Docket: 1-13-12
Copies sent via Mail ___ Electronically ✓