UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSEPH DI MARTINO and EUGENE B. SHANKS, JR.,

Petitioners,

- against -

MARGARET DOOLEY,

Respondent.

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MEMORANDUM DECISION

08 Civ. 4606 (DC)

APPEARANCES:

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CHIN, District Judge

The issue presented in this case is whether petitioners Joseph Di Martino and Eugene B. Shanks, Jr., are bound to an arbitration clause contained in a long-term incentive plan (the "Plan") that they were charged with administering.

Respondent Margaret Dooley was employed by CDC IXIS Capital Markets North America ("Natixis"). Upon the termination of her employment in 2007, she was entitled to receive certain compensation from Natixis under the Plan. The Plan contains an arbitration clause requiring "the Company" -- Natixis -- and plan participants to mediate and arbitrate disputes arising out of the Plan.

Dooley was awarded certain benefits under the Plan, but she disputes the amount. She commenced arbitration proceedings against Natixis as well as three members of the Advisory Board of the Plan, including Di Martino and Shanks.

Di Martino and Shanks moved in the Supreme Court of the State of New York, New York County, to stay arbitration. Dooley removed the case to this Court and moved to compel arbitration. For the reasons set forth below, Dooley's motion to compel arbitration is denied, and petitioners' motion to stay arbitration is granted.

BACKGROUND

A. Facts

Dooley began working for Natixis[1] on May 5, 2003 as a managing director in its structured transactions group. (Dooley Mem. 2). Her employment contract, which she and a Natixis representative signed, included in its terms her eligibility to participate in the Plan, an unfunded long-term incentive plan that was governed by a document adopted in 1997 and restated in 2006.[2] (Id. 1; Dooley Aff. Ex. A; see also De Martino Aff. Ex. B

[1] Dooley's former employer has gone through numerous corporate reorganizations and restructurings, many of which resulted in name changes. As used herein, "Natixis" refers to the company that employed her at all times relevant to this case. (See Pet. State Court Mem. 1).

[2] The 2006 Plan is, in all relevant respects, the same as the 1997 version. (Pet. Mem. 16 n.9). Neither party explains why the Plan was restated in 2006. Unless otherwise indicated, references herein to the "Plan" shall refer to the 2006 version of the Plan. The 2006 version of the Plan was in effect when Dooley was fired and that version is therefore controlling.

(1997 Plan); Dooley Aff. Ex. G (2006 Plan)). The purpose of the Plan was to align the personal financial interests of Natixis's officers with the company's by giving officers a stake in Natixis's profits. (Dooley Aff. Ex. E). The Plan was adopted by an Advisory Board authorized to

> administer the Plan in accordance with its terms, and [] have full power and authority to construe and interpret the Plan, to prescribe, amend and rescind rules and regulations, agreements, terms and notices hereunder, and to make all other determinations necessary or advisable for the administration of the Plan.

(Plan § 3(a)). Under the Plan, Advisory Board members are indemnified for any "action, determination, or interpretation taken or made in good faith with respect to the [Plan]." (§ 3(c)).

Di Martino was a member of the Advisory Board in 1997; Shanks became a member on June 1, 1998. (Pet. State Court Mem. 5). Di Martino signed the 1997 Plan but Shanks did not. (Plan). Both Di Martino and Shanks signed the 2006 Plan, with their signatures appearing under the words, "As adopted on 30 Oct., 2006." (Dooley Aff. Ex. G).[3] The signature lines only indicated the Board member's name, not his title. (Id.).

The Plan contains an Arbitration Clause (the "Arbitration Clause") that provides as follows:

> In the event there is any claim or dispute arising out of or relating to this Plan, or

[3] The 1997 Plan was signed by the Board members under the heading, "As adopted by the Board on September 1, 1997." (Di Martino Aff. Ex. B).

> the breach thereof, and the Company and the Plan Participants shall not have resolved such claim or dispute within 90 days after written notice from one party to the other setting forth the nature of such claim or dispute, then such claim or dispute shall attempt to be settled by mediation through a mediator agreed upon by the parties for nonbinding, confidential mediation. If this is not successful, the dispute will be submitted to binding arbitration in New York, New York, in accordance with the Commercial Arbitration Rules of the American Arbitration Association by an arbitrator(s) selected according to such Rules. Judgment upon the award rendered by such arbitrator(s) shall be entered in any Court having jurisdiction thereof upon the application of either party.

(§ 5(h)).

Natixis terminated Dooley's employment on May 17, 2007. (Dooley Mem. 3). She was awarded certain compensation under the Plan, but disputed the amount.

B. Procedural History

On September 28, 2007 Dooley filed a request for mediation with the American Arbitration Association (the "AAA") to resolve the dispute as to her compensation under the Plan. (Pet. State Court Mem. 5-6). Specifically, Dooley claimed that the amount she is owed under the Plan was improperly calculated. (Dooley Mem. 3-4). Dooley named only Natixis as the responding party in the mediation. (Pet. State Court Mem. 5-6). The mediation commenced on November 15, 2007 but ultimately failed to resolve the dispute. (Id.).

On April 28, 2008 Dooley filed a demand for arbitration with the AAA in New York against Natixis and the members of the

Advisory Board: Di Martino, Shanks, and Anthony Orsatelli.[4] (Rubin Aff. Ex. B (Demand for Arbitration)). Her demand for arbitration asserted claims against Natixis for breach of the Plan, and claims against the Advisory Board members for breach of fiduciary duty vis-a-vis their administration of the Plan. (Id. ¶ 14). She also sought punitive damages against the Advisory Board members. (Id.).

On May 13, 2008, Di Martino and Shanks filed a petition to stay the arbitration in New York Supreme Court; Natixis has not moved to stay the arbitration as against it. (Id. 2). On May 19, 2008, Dooley removed the proceeding to this Court pursuant to the Convention on the Recognition of Foreign Arbitral Awards (the "Convention"), 9 U.S.C. § 201 et seq.[5] She then moved to compel arbitration pursuant to 9 U.S.C. § 206.

DISCUSSION

I consider first whether the issue of arbitrability is to be decided by the Court or an arbitrator. I conclude the issue is one for the Court. I consider next the issue of whether the claims against Di Martino and Shanks are arbitrable. I conclude that, while there is a factual dispute as to whether

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[4] There is a dispute as to whether Orsatelli was properly served with the arbitration demand. (See Pet. Mem. 2; Dooley Mem. 2). Orsatelli is not a party to the instant action, and thus this dispute is not before the Court.

[5] Dooley, a British citizen, has pled all the elements required for a claim to be covered by the Convention (Dooley Mem. 9-11), and petitioners do not dispute that the Convention governs.

petitioners are parties to the Plan, as a matter of law they are not bound by the Plan's Arbitration Clause.

A. Who Decides Arbitrability?

The parties devote most of their briefs to an argument over who decides whether this dispute is arbitrable -- the Court or an arbitrator. Dooley argues that the Arbitration Clause's reference to the Commercial Arbitration Rules of the AAA means that an arbitrator is to decide everything, including whether her claims against petitioners are arbitrable. Petitioners argue that this Court must first determine if petitioners are bound by the Arbitration Clause. While petitioners are correct, as explained below, the parties' disagreement on the question of who decides arbitrability is not surprising, as the law on this issue is quite muddled.

1. Applicable Law

There are two principal types of cases involving disputes over who decides the issue of arbitrability:

First, there are those cases where the dispute concerns whether a certain issue is subject to a valid arbitration clause. In these cases, the parties do not dispute that an agreement to arbitrate exists, or that they are bound by an agreement to arbitrate. The dispute, instead, is whether a particular issue is within the scope of the arbitration clause. In such cases, the parties can refer that question -- i.e., whether that issue is arbitrable -- to an arbitrator. But there must be "clear and unmistakable evidence from the arbitration agreement, as

construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator." Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2005) (internal citation and quotations omitted). The "clear and unmistakable evidence" rule only applies, however, where the following two requirements have been satisfied: (1) there is a valid and enforceable arbitration agreement; and (2) the parties to that arbitration agreement are identified. In this scenario, federal policy favors arbitration, and thus the arbitrator will decide whether the particular issue is subject to arbitration. See McCarthy v. Azure, 22 F.3d 351, 355 (1st Cir. 1994) (holding that the federal policy favoring arbitration "presumes proof of a preexisting agreement to arbitrate disputes" and "does not extend to situations in which the identity of the parties who have agreed to arbitrate is unclear"); Local 205, Cmty. & Soc. Agency Employees Union, Dist. Council 1707 v. Day Care Council, 992 F. Supp. 388, 393 (S.D.N.Y. 1998) (holding that where the question is "not the 'scope of arbitrable issues,' [but] rather whether [defendant] agreed to submit any disputes to arbitration," the federal policy favoring arbitration does not apply because the policy "is not intended to force an interpretation requiring parties to arbitrate if they did not agree to submit any disputes to arbitration").

Second, there are those cases where the dispute concerns whether a certain party is subject to an arbitration clause, either because that party disputes the existence of an

agreement between it and the party seeking to invoke arbitration, or because that party disputes that it is subject to the agreement to arbitrate. In these cases, the Court -- rather than an arbitrator -- must decide whether the dispute is arbitrable. See id.; McCarthy, 22 F.3d at 355; Sarhank Group v. Oracle Corp., 404 F.3d 657, 661 (2d Cir. 2005) ("arbitrability is not arbitrable in the absence of the parties' agreement"); accord Ciago v. Ameriquest Mortg. Co., 295 F. Supp. 2d 324, 330 (S.D.N.Y. 2003) ("This Court's review of the [arbitration agreement] is limited 'to certain gateway matters, such as whether the parties have a valid arbitration agreement at all' . . . ."") (quoting Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003)).

2. Application

Here, the dispute does not concern whether a certain issue is covered by the Arbitration Clause; rather, petitioners argue that they are not subject to the Arbitration Clause because they are not parties to the Plan.[6] In essence, petitioners argue that they are not bound to any arbitration agreement at all. While Dooley argues that petitioners are parties to the Plan, they strenuously disagree. Under these circumstances, it is the

[6] Dooley is, for all intents and purposes, a party to the Plan. Although she did not sign the Plan, she did sign an employment agreement which incorporated the Plan by reference, and the sole purpose of the Plan is to provide compensation to Natixis officers. The Court will therefore treat her as a party to the Plan.

role of the Court to decide whether this dispute is arbitrable. In other words, given that there is a dispute as to whether petitioners are bound to an arbitration agreement, the issue of arbitrability is for the Court in the first instance.

B. Are Dooley's Claims Against Petitioners Arbitrable?

Dooley argues that her claims against petitioners are arbitrable principally based on her interpretation of the Arbitration Clause. She argues first that petitioners are parties to the Plan and therefore bound to the Arbitration Clause. She argues second that the Arbitration Clause is really two separate and distinct clauses -- the first clause requiring mediation only where the dispute is between Natixis and a plan participant, and the second clause requiring arbitration without restricting in any way the parties to that interpretation. Petitioners argue that Dooley's interpretation is absurd, and that a plain reading of the Arbitration Clause demonstrates that arbitration is only required for a dispute arising between Natixis and a plan participant such as Dooley.

I agree. The interpretation of the Arbitration Clause Dooley advances is indeed illogical, and petitioners are plainly not covered by the Arbitration Clause.

1. Applicable Law

(a) Choice-of-Law

Section 6(f) of the Plan contains a choice-of-law provision designating New York as the governing law, and the

events giving rise to this dispute took place in New York. (Pet. State Court Mem. 1). The Court will therefore apply New York contracts law. See Motorola Credit Corp. v. Uzan, 388 F.3d 39, 51 (2d Cir. 2004) ("[W]here the parties have chosen the governing body of law, honoring their choice is necessary to ensure uniform interpretation and enforcement of that agreement and to avoid forum shopping."); see also Bell v. Cendant Corp., 293 F.3d 563, 566 (2d Cir. 2002) ("Because an agreement to arbitrate is a creature of contract . . . the ultimate question of whether the parties agreed to arbitrate is determined by state law.").

(b) Standard on a Motion to Compel Arbitration

On a motion to compel arbitration, the standard the court applies is similar to the standard applied on a motion for summary judgment: If there is a dispute as to a material issue of fact, then a trial to resolve the issue of fact is necessary. Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003). In considering a motion to compel arbitration, the Court must also bear in mind the "strong federal policy favoring arbitration as an alternative means of dispute resolution." Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp., 246 F.3d 219, 226 (2d Cir. 2001). This policy favoring arbitration does have limits, however, and arbitration will not be compelled if the parties did not agree to arbitrate their dispute. TNS Holdings Inc. v. MKI Sec. Corp., 92 N.Y.2d 335, 339, 703 N.E.2d 749, 751, 680 N.Y.S.2d 891, 893 (1998) (internal citation and quotations omitted); accord Waldron v. Goddess, 61 N.Y.2d 181, 183, 461 N.E.2d 273,

274, 473 N.Y.S.2d 136, 137 (1984) (holding that party cannot be compelled to arbitrate absent "evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes").

(c) New York Law on Arbitration Agreements

New York courts interpret arbitration agreements in the same way that they do other agreements -- to give effect to the parties' intent and reasonable expectations based on the language used in the agreement. Breed v. Ins. Co. of N. Am., 46 N.Y.2d 351, 355, 385 N.E.2d 1280, 413 N.Y.S.2d 352, 355 (1978); see also Cowen & Co. v. Anderson, 76 N.Y.2d 318, 321, 558 N.E.2d 27, 28, 559 N.Y.S.2d 225, 226 (1990) ("Arbitration agreements are contracts and their meaning is to be determined from the language employed by the parties under accepted rules of contract law."). As a general rule of contract law, a non-signatory cannot be bound by an agreement, but New York law recognizes five circumstances under which a non-signatory to an arbitration agreement may be forced to arbitrate a dispute -- namely, incorporation by reference, assumption, agency, veil-piercing/alter-ego, and estoppel. Denny v. BDO Seidman, LLP, 412 F.3d 58, 71 (2d Cir. 2005) (New York law).

Incorporation by reference applies where the signatory to an agreement containing an arbitration clause enters into a separate agreement with a party and that second agreement incorporates by reference the agreement containing the

arbitration clause. See Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 777 (2d Cir. 1995). Assumption applies where a non-signatory, through its conduct, indicates that it is assuming the obligation to arbitrate. See id. Agency applies where a non-signatory may be bound to an agreement under traditional principles of agency law. See id. Veil-piercing/alter-ego applies where the corporate relationship between a parent and its subsidiary is so close that one's agreement to arbitrate a dispute will bind the other. See id. at 777-78. Estoppel applies where a non-signatory exploits some benefit of an agreement containing an arbitration clause and then refuses to arbitrate a dispute arising out of that agreement. See id. at 778.

2. Application

Two issues are presented: First, whether petitioners are parties to the Plan; and second, if so, whether they are bound by the Arbitration Clause. Obviously, if petitioners are not parties to the Plan, bound by its terms, then they would not be bound by the Arbitration Clause. Even if petitioners are parties to the Plan, however, the issue remains as to whether they are bound by the Arbitration Clause.

(a) Are Petitioners Parties to the Plan?

I conclude that genuine issues of fact exist as to whether Di Martino and Shanks are parties to the Plan. The record contains some evidence from which a reasonable fact finder

could conclude that they are. For example, they both signed the 2006 Plan, and they did so simply by signing their names, without any indication that they were signing only in a representative capacity. The Plan also contains a limitation of liability clause, addressing certain rights and responsibilities of Advisory Board members under the Plan.

On the other hand, the record contains evidence to suggest that petitioners are not parties to the Plan. By its terms, the Plan was intended to benefit Natixis and plan participants. It was intended to assist Natixis to attract, retain, motivate, and reward employees -- its employees, not the employees of the individual Advisory Board members. With the exception of the limitation of liability clause, the Plan does not address aspects of Board members' engagement, such as their compensation, whether they are Natixis employees, their term of employment, and the like. In other words, clearly the Plan was not a document intended to cover the rights and responsibilities of Board members.

Accordingly, further evidence, such as the parties' subjective intent and understandings as to whether Advisory Board members were "parties" to the Plan, would be required to resolve this dispute, and a trial or evidentiary hearing would be necessary.

(b) Are Petitioners Bound By the Arbitration Clause?

Even assuming petitioners are parties to the Plan, however, they are entitled to a ruling in their favor as a matter of law because they are not bound by the Arbitration Clause.[7]

A plain reading of the Arbitration Clause compels the conclusion that it only applies to a dispute between Natixis and a plan participant. The Arbitration Clause -- so-called in the Plan itself -- concerns itself with a dispute between "the Company and the Plan Participants" arising out of the Plan. (§ 5(h)). Nowhere in the Clause is the Advisory Board mentioned. In addition, the Clause refers, in the context of confirming an arbitration award, to "either party," and not to "any party." The language used -- and, just as important, not used -- in the Arbitration Clause makes clear that it is meant only to apply to a dispute between Natixis and a plan participant such as Dooley. Cf. McPheeters v. McGinn, Smith & Co., 953 F.2d 771, 774 (2d Cir. 1992) (holding that provision compelling arbitration for "any controversy which may arise between myself and yourself" limits arbitration to two enumerated parties); Day Care Council, 992 F.

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[7] Even assuming petitioners are parties to the Plan, the issue of arbitrability remains a matter for the Court, not an arbitrator, because the Arbitration Clause does not contain "clear and unmistakable evidence" that petitioners and Dooley agreed to submit a dispute to arbitration. While the reference in the Arbitration Clause to the AAA's Commercial Arbitration Rules provides some evidence of an intent to submit all disputes, including arbitrability, to an arbitrator, see Contec Corp., 398 F.3d at 208, the language of the Arbitration Clause, as discussed below, demonstrates that the parties did not intend to bind Advisory Board members to the Arbitration Clause.

Supp. at 392 (holding that phrase "either party" limits arbitration clause to two enumerated parties).

The interpretation of the Arbitration Clause that Dooley advances makes no sense. She argues that the "mediation/arbitration clause" should be read, in effect, as two separate clauses, with the first sentence constituting a mediation clause and the second an arbitration clause. (Dooley Mem. 7-8). The first clause requires mediation, but only where the dispute is between "the Company and the plan participants." The second part requires arbitration, but has no limiting language on the parties subject to arbitration. From the omission in the second sentence of the words "between the Company and the plan participants," Dooley infers that arbitration is not restricted to Natixis and plan participants. (Id.).

This is simply not a plausible reading of the Arbitration Clause. It would make no sense to limit the mediation to Natixis and the plan participants and then remove the restriction when it comes to arbitration. The purpose of requiring a mediation first is to obviate the need for an arbitration, and it would therefore make no sense to require a mediation where the dispute is between Natixis and a plan participant but then not require a mediation where additional parties are involved. Moreover, the second sentence begins with the words, "If this is not successful" and subsequently refers to "the dispute" (emphasis added), clearly linking the second sentence to the first, and providing strong evidence that the

sentences in the Arbitration Clause are meant to be read together. See Reda v. Eastman Kodak Co., 233 A.D.2d 914, 915, 649 N.Y.S.2d 555, 556 (4th Dep't 1996) (holding that court should endeavor to "harmonize" all of contract's terms).

Moreover, it must be emphasized that Dooley is not asserting claims against petitioners in their representative capacity to obtain her benefits under the Plan. Rather, she is seeking damages from petitioners personally and individually, including punitive damages. As petitioners point out, had they agreed to be bound by the terms of the Plan individually, they would be undertaking personal liability for over $100 million in Plan payments in 2008 alone. (Pet. Mem. 17). It would be absurd to think that petitioners would expose themselves to such significant liability, which is why New York imposes a heavy burden on any party claiming that an individual who signed an agreement on behalf of a corporation assumed personal liability in so doing. See Mason Tenders Dist. Council Welfare Fund v. Thomsen Constr. Co., 301 F.3d 50, 53 (2d Cir. 2002) ("New York courts have found individual liability only in rare cases since there must be overwhelming evidence of the signatory's intention to assume personal liability.") (internal citation and quotations omitted).

Dooley also argues that, even assuming they are not directly covered by the Arbitration Clause, petitioners can be compelled to arbitrate under any of the five theories for compelling non-parties to arbitrate, discussed above. This

argument is unavailing. Incorporation by reference is inapplicable because there is no agreement between petitioners and Natixis that incorporates the Plan by reference, as Dooley herself concedes. (Dooley Reply 3). Dooley has not adduced any facts to suggest that petitioners assumed the obligation to arbitrate. The agency theory is unhelpful to Dooley because she has not adduced any evidence -- much less the "overwhelming evidence" courts require, see Mason Tenders, 301 F.3d at 53 -- that petitioners intended to assume personal responsibility under the Plan. Veil-piercing/alter ego is wholly inapplicable here, as there is no suggestion that Natixis is being operated as a sham or shell for petitioners' personal benefit. That leaves estoppel. Dooley's claim fails there as well because the benefit petitioners received under the Plan was an indirect monetary payment for their work administering the Plan, which is insufficient to establish estoppel. See Barrack, Rodos & Bacine v. Ballon Stoll Bader & Nadler, P.C., No. 08 Civ. 2152 (PKL), 2008 U.S. Dist. LEXIS 22026, at **15-16 (S.D.N.Y. Mar. 20, 2008).

Under these circumstances, as a matter of law, neither Dooley nor petitioners could have reasonably expected that Advisory Board members would be subject to arbitration for their administration of the Plan, particularly for claims seeking compensatory and punitive damages against them personally and individually. Cf. Mionis v. Bank Julius Baer & Co., 301 A.D.2d 104, 109, 749 N.Y.S.2d 497, 502 (1st Dep't 2002) (holding courts

should interpret contracts to give effect to parties' reasonable expectations). Dooley asks this Court to simply ignore the parties' expectations as well as the clear and unequivocal language in the Arbitration Provision and permit her to arbitrate against the Advisory Board members on the ground that holding otherwise would create multiple proceedings -- with the concomitant possibility of inconsistent results -- and would "inflict upon [Dooley] an unfair result." (Dooley Reply 2-3). What would be unfair would be for this Court to compel petitioners to arbitrate a dispute when they never agreed to arbitrate, and thereby deprive them of the rights to which they would be entitled were Dooley's suit to proceed in court instead of arbitration. Cf. TNS Holdings Inc., 92 N.Y.2d at 339, 703 N.E.2d at 751, 680 N.Y.S.2d at 893 ("Although arbitration is favored as a matter of public policy, equally important is the policy that seeks to avoid the unintentional waiver of the benefits and safeguards which a court of law may provide in resolving disputes.") (internal citation omitted).

CONCLUSION

For the reasons set forth above, respondent's motion to compel arbitration is denied and petitioners' motion to stay

arbitration is granted. The Clerk of the Court shall enter judgment accordingly and close the case.

SO ORDERED.

Dated: New York, New York
January 6, 2009

DENNY CHIN
United States District Judge