

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

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In the Matter of

CAPITAL ENTERPRISES CO.

VERIFIED PETITION

Index No. ____

Petitioner,

-and-

ALVIN DWORMAN,

Respondent.

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VERIFIED PETITION TO COMPEL ARBITRATION PURSUANT TO CPLR § 7503(a)

Petitioner Capital Enterprises Co. (“Capital Enterprises”), by and through its attorneys, petitions the Court, pursuant to CPLR § 7503(a) and under the terms of its written arbitration agreement with Respondent, for an Order compelling arbitration. In support of this Petition, Capital Enterprises relies on the exhibits and affidavits annexed hereto, Capital Enterprises’ Memorandum of Law in Support of Petition filed herewith, and all the proceedings and pleadings had herein.

PARTIES

1. Petitioner Capital Enterprises is a general partnership based in New York, New York.
2. Respondent Alvin Dworman is a resident of New York, New York.

JURISDICTION AND VENUE

3. Petitioners have commenced this proceeding to compel arbitration pursuant to CPLR § 7503(a).
4. Jurisdiction in this Court is proper pursuant to CPLR 301 and 302.

5. Pursuant to CPLR § 7502(a)(i), the proper venue for this Petition is New York, New York, as the parties both reside and/or are doing business in New York, New York.

FACTUAL ALLEGATIONS

A. The Partnership & Partnership Agreement

6. Petitioner Capital Enterprises is the 50% owner of Capital Properties Co. (the “Partnership”) with Respondent Alvin Dworman (“Dworman”), who is the managing partner and the owner of the other 50% of the Partnership. The Partnership currently owns and operates three properties – 65 West 55th Street, 155 East 55th Street and 210 East 58th Street – all in Manhattan.

7. In 1981, Michael Palin agreed to invest and become a 50% owner of the Partnership along with Dworman, as reflected in the Amended and Restated Partnership Agreement of Capital Properties Company, dated July 1, 1981 and as amended by a First Amendment in 1993 (the “Partnership Agreement”, annexed hereto as Exhibit 1). In 1993, pursuant to the First Amendment, Capital Enterprises replaced Michael Palin as a general partner of the Partnership. Michael Palin has always been and still remains an owner and the managing partner of Capital Enterprises, and he directs all of Capital Enterprises’ affairs.

8. In 1981, the Partnership properties were nearly bankrupt, and Dworman, both personally and professionally, was heavily in debt. Dworman’s financial difficulties impeded his ability to manage the Partnership assets and secure financing for the properties. Dworman agreed that Michael Palin should assume management of the Partnership assets. Michael Palin’s stewardship of the properties was an overwhelming success. He brought the Partnership assets from the verge of bankruptcy into solvency and, eventually, profitability. He asserted effective management over the operations, oversaw important renovations and upgrades

to both the commercial and residential portions of the properties and stabilized tenancy through consistent management that was responsive to tenant needs. Both partners enjoyed the fruits of Michael Palin's labors, through the tremendous profitability and value appreciation of the assets.

9. Notwithstanding Michael Palin's assumption of management, the parties did not formally amend the Partnership Agreement to designate Michael Palin as managing partner, but the parties acted, through their ensuing course of conduct over the next several decades, as though that were the case. The Partnership Agreement formally named Carard Management Corp. ("Carard") an entity managed and controlled by Michael Palin, as the property manager. Carard was effectively a pass-through entity which existed solely to manage the assets owned by the Partnership.

10. Dworman did not personally direct the day-to-day management of the Partnership, but knew and approved of how Michael Palin was managing the Partnership. Dworman selected his own personal accountant to be the accountant for the Partnership. Dworman's designated representatives were in frequent contact with Michael Palin's staff, and were directly involved in and apprised of managerial decisions. Whenever decisions needed to be made by both partners, Dworman's designated representatives were directly involved. Dworman and Michael Palin spoke regularly, and whenever a dispute or disagreement arose, the two men were always able to resolve their disagreements by meeting or speaking directly on the telephone. The partners' direct dealings had a level of informality to them, which is how Dworman preferred to do business.

B. The Partners' Agreement To Dispose Of The Partnership Assets

11. In or about 2014, with Dworman in his 90s and Palin in his 80s, the two men began discussing the future of the business, including a possible winding up of the

Partnership. As was their usual manner of resolving any disagreements, the two met, and they agreed to a framework to liquidate and divide up the assets: Dworman would take title to 65 West 55th Street, Capital Enterprises would take title to 155 East 55th Street, and one of the partners would buy-out the other for 210 East 58th Street. Alternately, they would market and sell 210 East 58th Street to a third-party and split the proceeds. The only things that would need to be determined were the valuations and actual disposition of the third property. Michael Palin and Dworman shook hands on the deal.

12. Shortly after the meeting, however, Elizabeth “BJ” Hoppe, one of Dworman’s business associates who herself owns no interests in the Partnership, contacted Michael Palin and demanded that Dworman take 210 East 58th Street, and that he be given an enormous offset that would amount to giving Dworman several million dollars above Capital Enterprises’ share. She claimed to have Dworman’s authorization, but when Michael Palin attempted to call Dworman to discuss the matter, he was not permitted to speak to him. All communication with Dworman was suddenly cut off. In a marked departure from past practice of the last three-and-a-half-decades, Dworman was no longer permitted to speak to Michael Palin. Since that hand-shake deal was reached almost two years ago, Michael Palin still has never spoken to Dworman even once.

C. The Mandatory Arbitration Clause

13. As equal partners in the Partnership, Dworman and Capital Enterprises both have certain rights to participate in voting and managerial decisions, as enumerated in the Partnership Agreement. The Partnership Agreement also provides an express and compulsory mechanism for the partners to resolve any disputes that may arise concerning the governance of

the Partnership or, indeed, concerning any disputes concerning the Partnership. Specifically, the Agreement contained the following provision:

10.1 Arbitration.

[A]ny controversy or dispute arising out of or relating to this Agreement or the breach hereof shall be settled by arbitration. Such arbitration shall be effected by each Partner's counsel, who, in the event of a failure to reach a settlement, shall be empowered to appoint a third-party as the arbitrator of the dispute. Such third party shall be mutually agreeable to counsel for both Partners.

(Ex. 1, § 10.1.)

D. The First Proceeding & The Court's Order to Arbitrate

14. In Dworman's absence, the disputes between the partners have grown exponentially. Dworman's supposed representatives have refused to abide by the parties' prior manner of doing business, and suddenly began flinging unsubstantiated allegations of wrongdoing by Capital Enterprises, including claims of mismanagement and/or improper handling of Partnership affairs and funds. They demanded to review certain books and records and made inordinate demands designed solely to harass Capital Enterprises. They made baseless challenges to management decisions, including those pertaining to leasing strategies, performance of capital repairs, making of distributions and reimbursement of managerial expenses, even though Dworman's staff has no experience with actual property management.

15. In July 2015, Dworman's attorneys served a written notice of arbitration pursuant to Article 10.1 concerning the issue of access to books and records. In response, Capital Enterprises asked Dworman to identify unconflicted counsel but agreed to arbitrate and, in its written reply, added issues for arbitration. Dworman commenced a special proceeding in New York Supreme Court against Capital Enterprises and Michael Palin (the "First Proceeding")

requesting an order for access to company books and records, “pre-arbitration” discovery and to appoint a third party to arbitrate the parties’ disputes. (Attached hereto as Exhibit 2 is a copy of Dworman’s July 2015 Petition initiating the First Proceeding).

16. The Court ordered access to books and records, but further ordered, upon both Dworman’s motion and Capital Enterprises’ cross-motion, that the parties arbitrate their unresolved disputes by conducting a meet and confer within ten days and, if counsel were unable to settle the parties’ disputes, to appoint a neutral arbitrator within seven days. (Attached hereto as Exhibit 3 is a copy of the Court’s Order, dated October 1, 2015).

E. Dworman Refuses To Arbitrate and Foments Additional Litigation

17. Notwithstanding the Court’s Order, Dworman refused to arbitrate. Over the next several months, Dworman’s counsel purported to conduct an extensive and time-consuming forensic accounting of the books and records. During this time, as it was apparent there would be no ready resolution to the partners’ disputes, counsel for Capital Enterprises repeatedly attempted to schedule the meet and confer required by the Court Order. Dworman’s counsel adamantly refused.

18. Dworman commenced second and third actions in New York Supreme Court in order, upon information and belief, to circumvent arbitration but still get a chance to litigate against Capital Enterprises. In the second action (Index. No. 651802/2016, the “Second Proceeding”), Dworman sued Carard – the entity controlled by Michael Palin and Capital Enterprises and through which they managed the Partnership – based upon the identical allegations of mismanagement, misappropriation and personal use of funds that it had previously identified against Capital Enterprises in the First Proceeding. The complaint in the Second Proceeding specifically alleged that “all of the conduct about which Dworman complains was

intentionally perpetrated by Michael Palin.” (See Exhibit 4, April 5, 2016 Verified Complaint, Index. No. 651802/2016, ¶ 53).

19. Subsequent to commencing the Second Proceeding, Dworman commenced a third action against Janover LLC, the accountants for Capital Properties and two of its partners, Alan Hoffman and Mark Solomon (Index No. 653144/2016) (the “Third Proceeding”). The Third Proceeding is also based on the same underlying allegations asserted against Capital Enterprises, Carard and Carard’s alleged officers.

F. Capital Enterprises Serves Dworman with Demands for Arbitration

20. Following Dworman’s commencement of the Second Proceeding, Capital Enterprises served a notice of intent to arbitrate on Dworman on April 7, 2016 which expressly included Dworman’s allegations that Capital Enterprises mismanaged and misappropriated assets. (See Exhibit 5). On April 18, 2016, Dworman’s counsel purported to reject arbitration, with no explanation or justification. (See Exhibit 6). On June 23, 2016, Capital Enterprises served a revised notice of arbitration (the “Notice of Arbitration”) on Dworman pursuant to the procedures set forth in CPLR 308(2). (See Exhibits 7-8). The Notice of Arbitration identified the many issues now in dispute between the two partners. On June 30, 2016, Dworman’s counsel purported to “decline to accept service” of the Notice of Arbitration. Dworman’s counsel asserted that the issues enumerated in the Notice had “already been addressed by Orders of the New York State Supreme Court, and [are] not a proper subject for arbitration.” (See Exhibit 9). Dworman did not, however, move to stay arbitration.

21. Dworman has no basis to continue to refuse to arbitrate his disputes with Capital Enterprises. The substance of the partners’ disputes – enumerated in the Notice of Arbitration – plainly fall within the broad mandatory arbitration clause in the Partnership

Agreement, and no Court has adjudicated these issues. This Court should, for the reasons set forth herein and in Capital Enterprises' concurrently-filed Memorandum of Law in Support of Petition, issue an order compelling arbitration of the disputes listed in the Notice of Arbitration, pursuant to Article 10.1 of the Partnership Agreement.

CLAIM FOR RELIEF
(Order Compelling Arbitration)

22. Several Partnership-related disputes currently exist between Petitioner and Respondent, which claims arise under the Partnership Agreement.

23. Article 10.1 of the Partnership Agreement provides for the mandatory arbitration of all disputes arising out of or relating to the Partnership Agreement or the breach thereof.

24. Petitioner has tried to commence arbitration proceedings by serving notices of arbitration on Respondent.

25. Respondent, however, refuses to honor his contractual obligation to submit to arbitration, thus depriving Petitioner of the ability to have any of the disputes heard and resolved.

26. Petitioner accordingly respectfully requests that the Court issue an order pursuant to CPLR § 7503(a) compelling Respondent to arbitrate the claims pursuant to Article 10.1 of the Partnership Agreement.

PRAYER FOR RELIEF

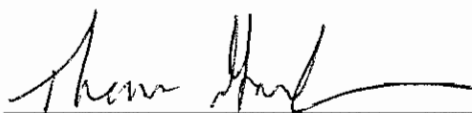
WHEREFORE, Petitioner respectfully requests that this Court issue an Order

(1) directing Respondent to arbitrate the claims identified in Capital Enterprises' Notice of Arbitration in accordance with Article 10.1 of the Partnership Agreement; and

(2) granting such other and further relief as the Court deems just and proper.

Dated: July 28, 2016
New York, New York

MORRISON COHEN LLP

By: 

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VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF New York)

Michael Palin, being duly sworn, deposes and says:

I am associated with Capital Enterprises Co., the Petitioner in this action. I have read the foregoing Verified Petition and know the contents thereof and that the same are true to my own knowledge, except as to matters stated to be on information and belief, and as to those matters I believe them to be true.



Subscribed and sworn to before me
this 17th day of July, 2016.

Michael R. Fremder
Notary Public

