UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAMY LAKAH and MICHEL LAKAH,

Petitioners,

- against -

UBS AG, et al.,

Respondents.

MEMORANDUM & ORDER

07-cv-2799 (LAP)

LORETTA A. PRESKA, United States District Court Judge:

On the first day of trial, July 5, 2016, Petitioners Ramy and Michel Lakah ("Petitioners" or the "Lakahs") moved to dismiss this case for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. ("Rule") 12(b)(1) or, in the alternative, to dismiss this case voluntarily with prejudice pursuant to Fed. R. Civ. P. ("Rule") 41(a)(2). For the following reasons, the Court finds that it continues to have subject matter jurisdiction over this action. Further, although Petitioners' request to dismiss their own petition voluntarily with prejudice is granted, Respondents' cross-petition shall remain pending for adjudication, and the Court shall reserve judgment as to Respondents' request for attorneys' fees and costs in this action. Accordingly, Petitioners' motion is denied in part and granted in part.[1]

[1]The parties have filed the following submissions in this matter, hereinafter referred to by their docket entry numbers:

I. Background[2]

On June 8, 2006, Respondents UBS AG, Exporters Insurance Company, Ltd. (f/k/a Island Capital Ltd.), Arab Banking Corporation, National Bank of Abu Dhabi, and National Bank of Oman (collectively, "Respondents") commenced arbitration against, inter alia, the issuer of $100 million in Eurobonds, the four guarantor companies of those bonds, and Petitioners Ramy and Michel Lakah. (Dkt. no. 471-1.) The Respondents invoked three clauses in the Eurobond transaction documents as the bases for arbitration. (Id. at ¶¶ 31-33.)

On March 19, 2007, the Lakahs petitioned the Supreme Court of the State of New York to stay the arbitration proceeding against them on the ground that they did not sign the Eurobond transaction documents in their individual capacities for all purposes and, thus, had not made an agreement to arbitrate with Respondents. (Dkt. no. 468-1 at ¶¶ 18-20, 28.) Respondents then removed the petition to this Court on April 6, 2007, and filed a cross-petition on April 16, 2007. (Dkt. no. 3.) Respondents argued that Petitioners should be deemed bound by

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Petitioners' motion to dismiss, dated July 5, 2016 [dkt. no. 463]; Respondents' responses, dated July 6, 2016 [dkt. nos. 467, 469]; Petitioners' reply, dated July 7, 2016 [dkt. no. 470]; Respondents' sur-reply, dated July 7, 2016 [dkt. no. 472-1]; Petitioners' sur-sur-reply, dated July 8, 2016 [dkt. no. 473-1].

[2] Familiarity with the background of this case is presumed. See Lakah v. UBS AG, et al., 996 F. Supp. 2d 250 (S.D.N.Y. 2014).

the arbitration clauses contained in the Eurobond transaction documents (the "Arbitration Agreements") on the basis of veil piercing and estoppel theories and sought, pursuant to 9 U.S.C. §§ 4 and 206, an order compelling Petitioners to appear in the arbitration proceeding pursuant to the Arbitration Agreements. (See id. at 5; see also dkt. no. 5 at 17-34.)

The parties then engaged in more than nine years of litigation. During this period, Petitioners moved preliminarily to enjoin the arbitration panel from determining whether Petitioners were bound by the Arbitration Agreements. (Dkt. no. 468-3.) The Court granted this motion. See In re Lakah, 602 F. Supp. 2d 497, 498 (S.D.N.Y. 2009). Respondents, in turn, moved for summary judgment, which the Court denied on the basis that there were issues of fact as to the making of the Arbitration Agreements—namely whether Petitioners should be treated as parties to the Arbitration Agreements—and that a trial was therefore necessary. See Lakah, 996 F. Supp. 2d at 269.

The Court ultimately set a trial date for March 14, 2016. Petitioners' counsel thereafter filed a request to adjourn the trial on the basis that Petitioner Ramy Lakah would not be able to obtain his visa in time to attend and testify. (Dkt. no. 363.) The Court granted Petitioners' request and adjourned the trial to July 5, 2016. (Dkt. no. 376.) On June 30, 2016, the Court held a pretrial conference, at which it addressed several

of the parties' evidentiary objections and made a number of rulings that were adverse to Petitioners. (See dkt. no. 476.)

The evening before trial began—on July 4, 2016—Petitioners requested that the Court make certain disclosures and, if appropriate, recuse itself from this case. (Dkt. no. 460.) The following day, the Court denied this motion after explaining why it did not have a disqualifying interest. (Dkt. no. 468-6 at 2:9-10:12.) Immediately thereafter, Petitioners' counsel presented the Court with the instant motion. Although Petitioners were not present at trial, their counsel submitted declarations on their behalf, dated July 5, 2016, stating:

> As a result of the Court's denial of or failure to timely rule upon my Motion to Recuse, and because I do not believe that I can get a fair trial in this matter, I hereby irrevocably consent to arbitrate the claims previously asserted against me in the Statement of Claim filed in the arbitration pending before the [arbitration panel].

(Dkt. nos. 464, 465.)

Petitioners' counsel then argued that because the Petitioners had consented to proceed with arbitration, the instant action was moot and the Court no longer had subject matter jurisdiction. (Dkt. no. 468-6 at 11:10-12.) Petitioners requested, in the alternative, that the Court permit them to dismiss this case voluntarily with prejudice under Rule 41(a)(2). (See id. at 40:11-13.) Respondents noted their opposition, and the Court directed the parties to brief this matter. (Id. at 34:19-20.)

II. The Court Has Subject Matter Jurisdiction Over this Action.

For more than nine years, Respondents have sought a court order, under 9 U.S.C. §§ 4 and 206, compelling Petitioners to arbitrate pursuant to the Arbitration Agreements. Respondents have argued that Petitioners are bound to those agreements based on veil piercing and estoppel theories. Now, nearly a decade later and on the first day of trial, Petitioners have consented to arbitrate the claims previously asserted against them in the arbitration proceeding.

Petitioners appear to have provided their consent, however, in order to avoid having this Court render a decision. The Court, therefore, views Petitioners' unilateral attempt to moot this action and their instant motion with a critical eye. Cf. Knox v. Serv. Employees Int'l Union, Local 1000, 132 S. Ct. 2277, 2287 (2012) ("[[M]aneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."). Regardless, as will be described below, the parties retain a concrete interest in the Court's adjudication of Respondents' cross-petition, namely in the Court's determination as to whether the Petitioners are bound to the Arbitration Agreements in their personal capacities, and therefore the instant action has not been rendered moot. Finally, contrary to Petitioners' assertions, the Court—rather than an arbitrator—must make this determination.

i. *Petitioners' Consent Does Not Render This Action Moot.*

Even in light of Petitioners' consent to arbitrate, the Court still retains subject matter jurisdiction over this action. Article III of the Constitution limits the jurisdiction of federal courts to "cases" and "controversies." U.S. Const., Art. III, §2. This requirement "demand[s] that an actual controversy . . . be extant at all stages of review." Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 669 (2016) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997)) (internal quotation marks omitted).

"If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." Id. (quoting Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1528 (2013)). A case becomes moot, however, "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." Knox v. Serv. Employees Int'l Union, Local 1000, 132 S. Ct. 2277, 2287 (2012) (internal quotation marks omitted). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." Chafin v. Chafin, 133 S. Ct. 1017, 1023 (2013) (internal quotation marks omitted).

Here, Petitioners' consent to arbitrate the claims previously asserted against them does not render the instant

action moot. As a threshold matter, the parties dispute whether Petitioners' consent constitutes a settlement offer. Respondents argue that Petitioners have merely offered to enter into an ad hoc arbitration agreement and that this offer does not render the relief sought in their cross-petition unnecessary. (Dkt. no. 467 at 9-13.) Petitioners counter that they have not made an offer to settle this case and, instead, "have consented to arbitration, in direct response to Respondents' demand."[3] (Dkt. no. 470 at 4.) According to Petitioners, "[u]nlike an offer of settlement, which needs to be accepted, the consent is self-effectuating and no further action is required on the part of Respondents." (Id.)

Regardless, there remains a live dispute between the parties for which the Court could grant effectual relief. If, as Respondents argue, Petitioners' consent is construed as a settlement offer, the action has not been rendered moot because the Respondents have not accepted the offer, the parties continue to dispute whether complete relief has been provided, and the Court has not yet entered an order of judgment. See Campbell-Ewald Co., 136 S. Ct. at 672 (2016) ("[A]n unaccepted settlement offer or offer of judgment does not moot a

[3] Respondents note that their Demand for Arbitration and Statement of Claim was an initial arbitration pleading, not an offer to arbitrate under any terms. (Dkt. no. 472-1 at 3 n.3.)

plaintiff's case."); Jones-Bartley v. McCabe, Weisberg & Conway, P.C., 59 F. Supp. 3d 617, 631 (S.D.N.Y. 2014) ("[A] genuine dispute over whether the offer satisfies the entirety of the claim may, by itself, constitute a live case or controversy." (citation omitted)); Hepler v. Abercrombie & Fitch Co., 607 F. App'x 91, 92 (2d Cir. 2015) (summary order) ("[T]he offer by itself does not moot anything, since an offer cannot bind the defendant to provide relief. It is the entry of judgment pursuant to that offer that 'moots' the case." (internal citations omitted)). If, on the other hand, Petitioners' consent is "self-effectuating" and does not require Respondents' acceptance, the parties still retain a concrete legal interest in this action, and, therefore, this Court has not been stripped of its subject matter jurisdiction.

As noted earlier, Respondents' cross-petition seeks a court order, under 9 U.S.C. §§ 4 and 206, compelling the Petitioners to arbitrate pursuant to the Arbitration Agreements. Under 9 U.S.C. § 4, "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4; see also 9 U.S.C. § 206 ("A court . . . may direct that arbitration be held in accordance with the

agreement at any place therein provided for."). In deciding whether to grant such relief, a court must determine whether "the making of the arbitration agreement is in issue." 9 U.S.C. § 4. "[T]he question [of] whether a person is a party to [an] arbitration agreement . . . is included within the statutory issue of the making of the arbitration agreement." McAllister Bros., Inc. v. A & S Transp. Co., 621 F.2d 519, 524 (2d Cir. 1980) (citation and internal quotation marks omitted).

In the instant case, Petitioners have not agreed that the "arbitration [will] proceed in the manner provided for in [the Arbitration Agreements]," see 9 U.S.C. § 4, and do not concede that they are bound to the Arbitration Agreements. Contrary to Petitioners' assertions, therefore, a live controversy still exists as to whether the Petitioners should be treated as parties to the Arbitration Agreements in the arbitration proceedings. Further, although Respondents' cross-petition sought a court order directing that the arbitration proceed in the manner provided for in the Arbitration Agreements (see dkt. no. 3), Petitioners have only provided a declaration stating their consent to proceed with arbitration (see dkt. nos. 464, 465). Because Petitioners' agreement, supposedly arising on July 5, 2016, to arbitrate certain claims in a certain forum is not congruent with Respondents' cross-petition that Petitioners be required to arbitrate certain claims in a certain forum under

the Arbitration Agreements, signed in December 1999, there is additional relief the Court could grant to Respondents.

Accordingly, the Court finds that the parties still have a concrete legal interest in the Court's determination of whether Petitioners should be treated as parties to the Arbitration Agreements and, because the Respondents have sought a court order directing Petitioners to proceed to arbitration in the manner provided by the Arbitration Agreements, it would not be "impossible for [the] court to grant any effectual relief." See Chafin, 133 S. Ct. at 1023. The Court, therefore, retains subject matter jurisdiction over this action.

ii. *The Determination of Whether Petitioners Are Bound by the Arbitration Clauses Must Be Decided by the Court.*

Petitioners further argue that an arbitrator, and not the Court, must decide whether the Petitioners are bound by the Arbitration Agreements.[4] As courts in this circuit have described, there are two principal types of cases involving disputes over who—the Court or an arbitrator—decides an issue of arbitrability. See Di Martino v. Dooley, No. 08 CIV.4606, 2009

[4] The Court notes that, in 2009, Petitioners sought to enjoin the arbitration proceedings and argued that the Court—and not an arbitrator—must decide whether they were bound to the Arbitration Agreements at issue. The Court granted Petitioners' motion, finding that the arbitration panel did not have the authority to decide this question. See In re Lakah, 602 F. Supp. 2d at 499.

WL 27438, at *3 (S.D.N.Y. Jan. 6, 2009) (Chin, J.). First, "there are those cases concerning whether a certain issue is subject to a valid arbitration clause." Id. Although there is a general presumption that this issue of arbitrability should be resolved by the court, see First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45 (1995), the parties may refer this question to an arbitrator "if there is clear and unmistakable evidence from the arbitration agreement" that the parties intended to do so. Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2005) (quoting Bell v. Cendant Corp., 293 F.3d 563, 566 (2d Cir. 2002)).

Second, as is relevant here, "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." Di Martino, 2009 WL 27438, at *3. Where "there is a dispute as to whether [a party is] bound to an arbitration agreement, the issue of arbitrability is for the Court in the first instance." Id. at *4; see also Sarhank Group v. Oracle Corp., 404 F.3d 657, 661 (2d Cir.2005) ("[A]rbitrability is not arbitrable in the absence of the parties' agreement."). Additionally, and as is relevant here, 9 U.S.C. § 4 requires that a court must resolve any issues

concerning "the making of the arbitration agreement," which includes "the question [of] whether a person is a party to [an] arbitration agreement." See McAllister Bros. Inc., 621 F.2d at 524 (citation and internal quotation marks omitted).

Here, Petitioners argue that the parties to the Arbitration Agreements agreed to submit issues of arbitrability to an arbitrator. (See dkt. no. 470 at 2-4; dkt. no. 473-1.) As evidence of this, Petitioners note that the Arbitration Agreements[5] incorporate the American Arbitration Association's Commercial Arbitration Rules that were in effect at that time, which state that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." (See dkt. no. 473-1 at 2.)

However, even if the parties to the Arbitration Agreements intended to delegate issues of arbitrability to an arbitrator, here, the question is whether Petitioners should be treated as parties to those agreements. Petitioners have not conceded as

[5] Section 110 of the Indenture, for example, states that "any dispute or difference whatsoever arising between the Issuer or any Guarantor, as the case may be, and the Trustee (or a Holder of Bonds) or any Agent arising out of or in connection with the Bonds, the Guarantee or this Indenture shall be finally settled by submission to arbitration by the American Arbitration Association under its Commercial Arbitration Rules, as at the time in force, by a panel of three arbitrators appointed in accordance with such rules." (See dkt. no. 167-67 at 15.)

such in their declarations, and the parties continue to dispute this issue. Accordingly, this Court—and not an arbitrator—must resolve whether Petitioners are bound in their personal capacities to the Arbitration Agreements.[6] See Di Martino, 2009 WL 27438, at *3.

III. The Lakahs' Petition to Stay Arbitration is Dismissed with Prejudice.

Petitioners also seek a voluntary dismissal with prejudice pursuant to Fed. R. Civ. P. ("Rule") 41(a)(2). Although Petitioners initially moved to dismiss this case under Rule 41(a)(2) (see dkt. no. 463), Petitioners' subsequent submissions request that the Court only dismiss their petition (see, e.g., dkt. no. 470 at 8). To the extent Petitioners seek merely to dismiss their own petition, the Court grants this request on the condition that Respondents' cross-petition remains pending for independent adjudication. Further, the Court shall reserve judgment as to payment of attorneys' fees and costs as a

[6] Petitioners further argue that, under certain circumstances, a party to a contract containing an arbitration clause can be compelled to arbitrate claims against a non-signatory to the agreement based on an estoppel theory. (See dkt. no. 473-1 at 3 (citing Choctaw Generation L.P. v. American Home Assurance Co., 271 F.3d 403, 404, 407 (2d Cir. 2001).) However, here, Petitioners have not moved to compel arbitration, and the question now before the Court is limited to whether Petitioners' consent renders this action moot.

condition of dismissal after more than nine years of litigation until it has rendered its decision concerning Respondents' cross-petition.

Pursuant to Rule 41(a)(2), absent a stipulation of dismissal between the parties, the Petitioners may obtain a voluntary dismissal at this stage in the litigation "only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). "Although voluntary dismissal without prejudice is 'not a matter of right,' courts have generally subjected motions for voluntary dismissal with prejudice to far less scrutiny." Commercial Recovery Corp. v. Bilateral Credit Corp., LLC, No. 12 CIV. 5287 (CM), 2013 WL 8350184, at *5 (S.D.N.Y. Dec. 19, 2013) (quoting Zagano v. Fordham Univ., 900 F.2d 12, 14 (2d Cir. 1990)).

In determining whether such a motion should be granted, "[t]he essential question is whether the dismissal of the action will be unduly prejudicial to the defendants." Wainwright Sec. Inc. v. Wall St. Transcript Corp., 80 F.R.D. 103, 105 (S.D.N.Y. 1978) (citation omitted). "This rationale applies even when, as here, the plaintiff seeks a dismissal with prejudice." Id. (citation omitted). Further, "[i]f a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's

objection only if the counterclaim can remain pending for independent adjudication." Fed. R. Civ. P. 41(a)(2).

Here, although Respondents oppose Petitioners' motion,[7] Respondents have not identified any undue prejudice that they would suffer if the Court dismissed the Lakahs' petition to stay arbitration. Contrary to Respondents' assertions, if the Court grants Petitioners' motion to dismiss their petition voluntarily with prejudice, the Petitioners do not necessarily avoid an adverse decision at a dispositive stage of this proceeding. (See dkt. no. 467 at 16.) Accordingly, the Court grants Petitioners' request to dismiss their petition with prejudice.

However, as the Respondents request, the cross-petition in this action will remain pending for adjudication. Further, the Lakahs' petition is dismissed on the condition that the Court shall reserve judgment with respect to Respondents' request for attorneys' fees and costs until after the Court has rendered its decision concerning Respondents' cross-petition. Thereafter,

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[7] Respondents argue that the Court should deny Petitioners' motion based on the factors identified in Zagano v. Fordham Univ., 900 F.2d 12 (2d Cir. 1990). Courts, however, generally apply these factors to evaluate whether a dismissal without prejudice would be appropriate under Rule 41(a)(2). Here, Petitioners request that the Court dismiss their petition with prejudice, and, therefore, the application of such factors is unnecessary. Regardless, these factors weigh in favor of dismissing the petition with prejudice given that the instant motion was filed on the first day of trial after more than nine years of litigation and substantial expense.

Respondents may file a motion renewing such requests and providing evidence of their fees and costs.

IV. Conclusion

For the foregoing reasons, Petitioners' motion (dkt. no. 463) is denied in part and granted in part. Petitioners' motion to dismiss this case for lack of subject matter jurisdiction is DENIED. Petitioners' motion to dismiss their own petition voluntarily with prejudice is GRANTED on the condition that Respondents' cross-petition shall remain pending for adjudication by this Court and that the Court shall reserve judgment as to Respondents' request for attorneys' fees and costs.

As noted on the record at trial, Respondents may file a motion seeking to amend the relief sought in their cross-petition. The parties shall confer and inform the Court of a briefing schedule.

SO ORDERED.

Dated: New York, New York
July 28, 2016

Loretta A. Preska

LORETTA A. PRESKA
United States District Judge