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SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF ORANGE

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BRIARWOODS FARM, INC., ABRAHAM GOLDBERGER, FAIGY GOLDBERGER, ISRAEL HERSKOWITZ, JUDITH HERSKOWITZ, YOSEF HERSKOWITZ, RIVKIE HERSKOWITZ, ELIEZER HERSKOWITZ, GITTEL HERSKOWITZ, LAROE ESTATES, INC., IRENE DEVELOPERS, INC., COMFORT FARMS, INC., JOY DEVELOPERS, INC., JOY ACRES, INC., MALLORY CONSTRUCTION CORP., JOY BUILDERS, INC., CALL HOLLOW DEVELOPERS, INC., H&H PROPERTY DEVELOPMENT, INC., EASTVIEW PROPERTY, INC., BAKERTOWN ROAD CONDOMINIUM CORP. and MOUNTAINVIEW ROAD CONDOMINIUM CORP.,

Plaintiffs,

-against -

LEXINGTON FUNDING GROUP, LLC, JOHN DOES 1-10, KEYBANK NATIONAL ASSOCIATION, KEYBANK REAL ESTATE CAPITAL, JAY KIMMEL, AFFORDABLE HOUSING CONSTRUCTION, LLC and DANIEL P. KENNY,

Defendants.

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Decision & Order

Index No.5012-2010

Action No. 1[1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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LEXINGTON FUNDING GROUP, LLC,

Plaintiff,

-against-

BAKERTOWN ROAD CONDOMINIUM CORP., MOUNTAINVIEW ROAD CONDOMINIUM CORP., ABRAHAM GOLDBERGER, FAIGY GOLDBERGER, ISRAEL HERSKOWITZ, JUDITH HERSKOWITZ, YOSEF HERSKOWITZ, RIVKIE HERSKOWITZ, ELIEZER HERSKOWITZ, GITTEL HERSKOWITZ, IRENE DEVELOPERS, LLC, BRIARWOODS FARM, INC., LAROE ESTATES, INC., COMFORT FARMS, INC., JOY DEVELOPERS, INC., JOY ACRES, INC., JOY BUILDERS, INC., MALLORY CONSTRUCTION CORP., CALL HOLLOW DEVELOPERS, INC., H&H PROPERTIES DEVELOPMENT, INC., EASTVIEW PROPERTIES, INC., PROBUILD EAST LLC, TETZ ASPHALT LLC, JOHN DOE, and JANE DOE,

Defendants.

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Index No.2145-2010

Action No. 2

LUBELL, J.

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[1] Action "1" previously bore a Rockland County Caption with Index No.1725-10. Upon its transfer to Orange County and the filing of an RJI, it is now captioned as above noted.

The Court has considered the following papers in connection with this motion by way of order to show cause brought under the caption of Action "2" for an Order pursuant to CPLR §7503 to compel arbitration and to stay "this action" pending same:

PAPERS	**NUMBERED**
Order to Show Cause/Affirmations(3)/ Exhibits	1
Affirmation of Jacob Sofer/Affidavit/ Exhibits	2
Reply Affirmation (Fortuna)/Exhibits	3A
Reply Affirmation (Goldberger)/Exhibits	3B
Reply Memorandum of Law	3C
Sur-Reply Affirmation of Sofer/Exhibits	4
Response to Sur-Reply	5

Plaintiff Lexington Funding Group, LLC ("Lexington") brings Action "2", a commercial foreclosure action (the "Foreclosure Action" or "Action '2'") as, among other things, the alleged purported lawful assignee of certain notes, mortgages and collateral security agreements previously held by non-party KeyBank as successor to non-party Union State Bank relating to loans made to defendants Bakertown Road Condominium Corp. ("Bakertown") and Mountainview Road Condominium Corp. ("Mountainview"), sometimes collectively referred to as the "Condominium Defendants", in connection with the construction of a 342 unit market-value residential condominium development and a 120 unit affordable housing development in the Village of Kiryas Joel, County of Orange, State of New York (collectively referred to as the "Units"). Defendant Briarwoods Farm, Inc. is named in the Foreclosure Action as the holder of a collateral mortgage secured by the Condominium Defendants' properties. All of the remaining defendants in the Foreclosure Action are purported individual or corporate guarantors of some or all of the underlying loans.

The plaintiffs in Action "1" are identical to the defendants in the Foreclosure Action with the exception of Irene Developers, Inc. in Action "1" (as compared to Irene Developers, LLC in Action "2"), Eastview Property, Inc. in Action "1" (as compared to Eastview Properties, Inc. in Action "2"), and the addition of Probuild East LLC and Tetz Asphalt LLC in Action "2".

Plaintiffs in Action "1" allege that one Jacob Sofer, a member of Lexington but a non-party in Actions "1" and "2", breached his duties and obligations to Bakertown and Mountainview when he allegedly purchased the underlying mortgages in the Foreclosure Action from KeyBank in the name of Lexington. More particularly, plaintiffs in Action "1" assert causes of action against the various defendants therein for, among other things, breach of fiduciary duty, declaratory judgment declaring certain assignments of mortgages from KeyBank to Lexington void, and breach of the covenant of good faith and fair dealing. (Action "1" is heretofore also referred to as the "Breach of Fiduciary Duty Action").

Under the caption of the Foreclosure Action, and from what the Court can glean from the moving papers, Foreclosure Action defendants Bakertown, Mountainview and all other named defendants therein except Faigy Goldberger, Israel Herskowitz, H&H Properties, Inc, Eastview Properties, Inc., Probuild East LLC and Tetz Asphalt LLC move for an Order pursuant to CPLR §7503 "compelling arbitration and staying this [Foreclosure] action pending arbitration." The ultimate thrust of their argument is that Lexington, through Sofer, and Abraham Goldberger, an officer of defendants Bakertown and Mountainview, on behalf of defendants Bakertown and Mountainview, entered into an agreement to arbitrate the "dispute between the plaintiff Mr. Abe Goldberger and defendant concerning the plaintiff's note with KeyBank which was sold by the bank to the company Lexington Funding Group LLC."[2]

As is all too often the case, movants have "blurred the lines" between the two actions. For example, while this motion is seemingly made in connection with the Foreclosure Action, the above referenced quote logically relates to the Breach of Fiduciary Duty Action wherein the companies in which Mr. Goldberger is an officer, Bakertown and Mountainview, are two of the named plaintiffs and Lexington is a defendant (along with KeyBank National Association and KeyBank Real Estate Capital, as well as others).

It is axiomatic that in order for one to succeed on a motion to compel arbitration (CPLR Article 75), the Court, must "in the first instance ... determine whether [the] parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement" (Sisters of St. John the Baptist, Providence Rest Convent v. Phillips R. Geraghty Constructor, Inc., 67 N.Y.2d 997, 999 [1986]; see Primex Intern. Corp. v. Wal-Mart Stores, Inc., 89 N.Y.2d 594, 598 [1997]; Eric Riebling, Co., Inc. v. Martin Woodworking Machines Corp., 294 A.D.2d 465 [2d Dept., 2002]). "No party is bound to arbitrate unless by clear language he has so agreed ... " (Kahn v. Biernbaum, 55 A.D.2d 589 [1st Dept., 1976]).

Interestingly, this motion to compel arbitration was made without the benefit of the very arbitration agreement sought to be enforced. Instead, movants admittedly rely upon the authority of the Rabbinical Court's alleged verbal assurances to them that a valid arbitration agreement exists. They also expressly rely upon an April 13, 2010 "written ruling" by the Beth Din requiring the discontinuance of the Breach of Fiduciary Duty Action as a condition to arbitration.

Allegedly, in response to the aforementioned ruling, movants filed with the Court a "Notice of Voluntary Discontinuance" of the

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[2] Movants' contentions, as herein quoted, are expressly derived from an asserted February 25, 2010 "Rabbinical Authorization Regarding Litigation" (Exhibit "A" to the Affirmation of Rabbi Osher Gruber dated April 16, 2010).

Breach of Fiduciary Duty Action. The legal effectiveness of that document, however, has been called into question by Lexington. Since that issue is not now properly before the Court, it will remain unaddressed pending a timely and proper application for a judicial determination of the same by way of notice of motion or order to show cause.

In any event, and although submitted to the Court for the first time by way of a Sur-Reply Affirmation of Jacob Sofer, the Court is now in receipt of a copy of the "Arbitration Agreement" sought to be enforced. Most noteworthy, even a cursory examination of this document reveals that it was expressly signed by Jacob Sofer on February 25, 2010 "in [his] personal capacity, and not on behalf of Lexington Funding Group, LLC."

Given the multiplicity of parties and issues raised in these two actions coupled with movants' repeated, if not also intentional, "blurring of the lines" between and among the party-plaintiffs in Action "1" and between and among the party-defendants in Action "2", as well as the "blurring of lines" between the two actions themselves, and most of all, and cause enough unto itself to warrant the determination herein reached, the explicit individual capacity in which Mr. Sofer signed the subject Arbitration Agreement, the Court finds that movants have failed to meet their burden of establishing that there exists a "clear, explicit and unequivocal" agreement between *Lexington* and the movants, however now allegedly defined and constituted, to arbitrate the disputes raised in either or both actions (Waldron v. Goddess , 61 N.Y.2d 181, 184-185 [1984] citing Matter of Acting Supt. of Schools [United Liverpool Faculty Ass'n], 42 N.Y.2d 509, 512 [1977]) which does not depend upon "implication or subtlety" (Waldron v. Goddess , supra, citing Matter of Riverdale Fabrics Corp. [Tillinghast-Stiles Co.], 306 N.Y. 288, 291 [1954]; Matter of Doughboy Inds. [Pantasote Co.], 17 A.D.2d 216, 220 [1st Dept., 1962]). "Like a corporation, a limited liability company is a legal entity separate and distinct from its members." (People v. Highgate LTC Management, LLC, 69 A.D.3d 185, 187 [3d Dept., 2009] citing Limited Liability Company Law §203[d]; Michael Reilly Design, Inc. v. Houraney, 40 A.D.3d 592, 593 [2d Dept., 2007]).

In short, the subject Arbitration Agreement, expressly signed by Mr. Sofer in his individual capacity and not on behalf of Lexington, does not bind Lexington. This is especially so given the fact that there is no doubt that a genuine dispute exists between the plaintiffs in the Breach of Fiduciary Duty Action and Mr. Sofer, personally.

Taking into account plaintiffs' principal assertion in the Breach of Fiduciary Action that Sofer, in the guise of Lexington, wrongfully diverted the negotiated discounted mortgages to himself rather than for their benefit, the Court cannot help but note that what the movants are asking the Court to find in the context of this motion to compel arbitration goes to the very heart of the Breach of Fiduciary Action and, thus, the Foreclosure Action,

i.e., that Sofer and Lexington are one and the same. That determination has not now been made by the Court, nor can it properly be, given the papers now before the Court.

Even though not necessary for the ultimate determination herein reached, the Court further finds that the movants have failed to persuade the Court that the disputes sought to be arbitrated generally come within the scope of their arbitration agreement.

Based upon the foregoing, it is hereby

ORDERED, that, movants motion to compel arbitration is hereby denied; and, it is further

ORDERED, that, the parties are directed to appear before the Court at 9:00 a.m. on June 24, 2010 for a Status Conference.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: Goshen, New York
June 14, 2010

S/_____
HON. LEWIS J. LUBELL, J.S.C.

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