

HL 1, LLC, et al.,

Plaintiffs

v.

Riverwalk, LLC, et al.,

Defendants

ORDER

This matter is before the Court on Certain Defendants' Motion to Compel Arbitration and Stay Proceedings. Plaintiffs object to the motion. Defendants Downeast Holdings, LLC and HP Longfellow, LLC, represented to the Court, through the moving Defendants, that they do not object to the motion.¹

The Court has reviewed the parties' memoranda in support of and in opposition to the motion.²

Discussion

In this declaratory judgment action, Plaintiffs request that the Court "adjudicate, determine and declare that: A. Fred M. Forsley is the sole manager of OGG, LLC [and] B. HL 1, LLC is the sole member of OGG, LLC." (*Complaint for Declaratory Judgment, p. 8*). As the prayer for relief suggests, and as the substantive allegations of Plaintiffs' Complaint confirm, the case involves a

¹ Defendants Riverwalk, LLC, Ocean Gateway Garage, LLC, and OGG, LLC, did not file a written response to the motion and, therefore, they are deemed to have waived objection to the motion. M.R. Civ. P. 7(c)(3).

² The Court granted Plaintiffs' Motion for Leave to File Surreply in Opposition to Motion to Compel Arbitration and Stay Proceedings and, therefore, considered Plaintiffs' surreply memorandum.

dispute over the management and operation of OGG, LLC. Central to the dispute is at least one of the provisions of the Operating Agreement of OGG, LLC (the Operating Agreement).

The Operating Agreement provides that “[a]ll disputes and controversies between the parties hereto arising out of or in connection with this Agreement shall be submitted to arbitration ...” (*Operating Agreement, § 11.01*). The parties appear to agree that Plaintiffs’ substantive claims are within the scope of the arbitration provision.³ The parties disagree, however, as to whether Defendants asserted their right to arbitration in accordance with the Operating Agreement. In particular, Plaintiffs maintain that Defendants’ March 26, 2008, arbitration demand was not made “within thirty (30) days after the controversy [arose]” as required by the Operating Agreement. (*Operating Agreement, §11.01*).

The principal issue at this stage of the proceeding is the date on which the “controversy” arose as contemplated by the Operating Agreement. Plaintiffs assert that the controversy arose as early as December 7, 2007, while Defendants contend that it arose on February 26, 2008. In their memoranda, each party cites facts that purport to support their respective position. There is, therefore, a factual dispute as to whether Defendants timely invoked the right to arbitrate.

Based on the parties’ filings, the Court is convinced that resolution of the timeliness dispute will require an evidentiary hearing. The question thus becomes whether the Court or the arbitrator will conduct the hearing. Although the Maine Law Court has not addressed the issue, courts in other jurisdictions have concluded that the issue is one for the arbitrator’s consideration. For instance, in *Rosecroft Trotting & Pacing Assoc. v. Electronic Race Patrol, Inc.*, 518 A.2d 137 (Md. Ct. Spec. App. 1986), the court found that that the “timeliness of the substantive claim to be arbitrated” required “factual determinations” including “when [the] specific incidents occurred, and whether, based on the time of the occurrences, they may be subject of arbitration.” 581 A.2d at 141. The court then concluded that “[t]he resolution of such matters falls within the province of the arbitrator, and not the court.” *Id.* See also, *City of Cottonwood v James L. Fann Contracting*, 877 P.2d 284, 292 (Ariz. Ct. App. 1994) (“ apart from repudiation, arbitrator has sole jurisdiction to consider the issue of timeliness”).

³ In the event that the parties do not agree that Plaintiffs’ substantive claims fall within the scope of the arbitration provision of the Operating Agreement, the Court hereby concludes that the claims asserted in Plaintiffs’ Complaint are within the scope of parties’ arbitration agreement.

Consistent with the conclusion of other courts, the Court believes that when the timeliness of a substantive claim is at issue, as it is in this case, logic, judicial economy and this State's favorable view of arbitration suggest that the arbitrator should decide the issue in the context of the arbitration proceeding. In order to determine when the events giving rise to the controversy occurred, a fact-finder must consider evidence that is central to the dispute. That is, at a hearing on the timeliness issue, the parties would present much of the same evidence that they would introduce at a hearing on the substantive claim. To require two potential separate hearings with the same evidence, one before the court and one before the arbitrator, would only delay the proceedings and unnecessarily increase the cost to the parties. While the Court recognizes that the parties might be required to try the case to the Court if the arbitrator determines that the matter is not subject to arbitration because the controversy arose more than 30 days before Defendants requested arbitration, particularly given Maine's "broad presumption" in favor of arbitration,⁴ the Court concludes that the timeliness of the claim, i.e., when the controversy arose, should first be decided by the arbitrator.

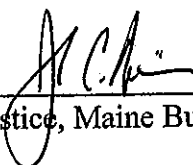
Conclusion

Based on the foregoing analysis, the Court finds and orders as follows:

1. Plaintiffs' substantive claim, as asserted in the Complaint, is within the scope of the matters subject to arbitration pursuant to the Operating Agreement.
2. To the extent that Plaintiffs' contend that Defendants did not request arbitration within 30 days of the controversy, in accordance with the Operating Agreement, the arbitrator shall decide that issue in the context of the arbitration hearing.
3. Proceedings in this action are stayed until further order of the Court.

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

Date: 6/27/08



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⁴ *Champagne v. Victory Homes, Inc.*, 2006 ME 58, ¶ 58.