IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL OF PENNSYLVANIA
CIVIL TRIAL DIVISION

BDO SEIDMAN, LLP	:	
	:	May Term 2004
Plaintiff,	:	
v.	:	No.: 973
	:	
KADER HOLDINGS COMPANY, LTD.,	:	Commerce Program
KADER INDUSTRIAL COMPANY, LTD.,	:	
GREAT HOPE INVESTMENTS, LTD.,	:	Control Nos.: 020706
and BACHMANN INDUSTRIES, INC.	:	
	:	
Defendants	:	

O R D E R

AND NOW, this 11th day of March, 2005, upon consideration of Plaintiff BDO Seidman, LLP's Motion to Compel Defendant Kader Industrial Company, Ltd. to Arbitrate, the Response thereto, following a hearing before the Court on March 4, 2005, and in accordance with the attached Memorandum, it is hereby **ORDERED** and **DECREED** that the Motion is **DENIED**.

BY THE COURT,

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C. DARNELL JONES, II, J.

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and BACHMANN INDUSTRIES, INC.	:	
	:	
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MEMORANDUM

JONES, J.

Presently before the Court is Plaintiff BDO Seidman, LLP's ("BDO") Motion to Compel Defendant Kader Industrial Company. Ltd. ("Kader") to Arbitrate. A hearing was held before the Court on March 4, 2005, to resolve the Motion.

BDO provided auditing services to Bachmann Industries, Inc. ("Bachmann") for a series of years, ending in 2001, pursuant to a series of engagement letters. The engagement letters contained a dispute resolution provision that mandated negotiation followed by arbitration.

Bachmann is a wholly-owned subsidiary of Kader. Kader, Bachmann, and related entities engaged in a tax planning scheme. Subsequently, an audit by the U.S. Internal Revenue Service determined that the scheme resulted in underpayment of withholding taxes by Bachmann for 1997-98.

After the taxes were imposed, Bachmann sought damages from BDO. In accordance with the engagement letters, these two parties are scheduled to begin an arbitration proceeding on March 28, 2005 (the "Arbitration").

BDO initiated this action to compel Kader, Kader Holdings Company, Ltd. ("Holdings"), and Great Hope Investments, Ltd., to participate in the Arbitration. Holdings is the parent of both Kader and Great Hope Investments, Ltd.[1] Alternatively, BDO seeks indemnification and/or contribution from these parties in the event BDO is found liable in the Arbitration. At this juncture, the sole issue before the Court is whether Kader must participate in the Arbitration.

DISCUSSION

Typically, since arbitration is a matter of contract, Smith v. Cumberland Group, Ltd., 455 Pa. Super. 276, 284, 687 A.2d 1167, 1171 (1997), it is restricted to the parties to the agreement. Common law principles of contract and agency law, however, have enabled courts to bind non-signatories to an arbitration clause. See, e.g., Bel-Ray Co. v. Chemrite (PTY), Ltd., 181 F.3d 435, 444 (3d Cir. 1999); Amkor Tech., Inc. v. Alcatel Bus. Sys., 278 F. Supp.2d 519, 521 (E.D.Pa. 2003). In the current matter, BDO asserts such principles justify Kader's participation in the Arbitration.

BDO contends that Bachmann was a mere instrumentality of Kader, allowing the Court to disregard the corporate form and compel Kader to arbitrate. "There is a strong presumption in Pennsylvania against piercing the corporate veil." Lumax Indus., Inc. v. Aultman, 543 Pa. 38, 41, 669 A.2d 893, 895 (1995). This applies to corporations with one owner, id., such as Bachmann. Although no precise test determines when the corporate veil should be pierced, Good v. Holstein, 787 A.2d 426, 430 (Pa. Super. 2001),

[1] On February 11, 2005, this Court dismissed Holdings from this case due to lack of jurisdiction.

a strong showing of domination and control by the parent corporation is required, see, e.g., Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145 (3d Cir. 1988); Pearson v. Component Tech. Corp., 80 F. Supp.2d 510 (W.D.Pa. 1999); Garden State Tanning, Inc., v. Mitchell Mfg. Group, Inc., 55 F. Supp.2d 337 (E.D.Pa. 1999); Nazarewych v. Bell Asbestos Mines, Ltd., 19 Phila. 429 (C.P. Phila 1989). Essentially, Kader must dominate and control Bachmann to the extent that the latter has "no separate mind, will, or existence of its own," Nazarewych, at 441, and leave Bachmann without a "separate existence but … merely [as] a conduit," Craig, at 149, for Kader. In addition, the corporate veil should only be pierced to prevent "fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from public liability for crime." Village at Camelback Property Owners Ass'n v. Carr, 371 Pa. Super. 452, 461-62, 538 A.2d 528, 533 (1988).

BDO cannot establish that Kader controlled Bachmann to the requisite extent. BDO, focusing on significant factors, demonstrated that Bachmann and Kader had several common directors; Kader guaranteed Bachmann's bank loans; Kader conceived and directed the tax planning scheme; Bachmann did not issue a dividend; the highest ranking officer of Bachmann did not attend its board meetings; and, Bachmann almost exclusively sold a product supplied by Kader. While significant, these factors are not dispositive. Kader, however, established that Bachmann had a minimum of 40 employees, its own headquarters halfway around the globe from Kader, its own officers, maintained its own records, developed its own retirement plans, negotiated with its own union, and received no working capital from Kader. In addition, Bachmann's financial statements reveal, for the period in question, that it had a positive net worth, ranging from almost $5,000,000 to more than $7,000,000, annual sales in excess of $10,000,000, and

held inventory worth at least $2,700,000 each year. This evidence demonstrates that Bachmann's management was responsible for its day-to-day operations and that Bachmann was a true company, not a mere conduit for Kader. Therefore, BDO cannot utilize this theory to compel Kader's presence at the Arbitration.

BDO asserts that agency principles require Kader to participate in the Arbitration. BDO utilizes Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3d Cir. 1993) and Weiner v. Pritzker, No. 010802846 (C.P. Phila., December 11, 2001) to support its conclusion. In Pritzker, the principal who signed the agreement containing the arbitration provision sought to include its own agents in the arbitration. In Weiner, non-signatory agents, whose principal had signed the relevant agreement, sought to enforce the arbitration provision. Despite the differences between these two cases, they contain a common thread: since the principal was bound to arbitration by signing an agreement, its agents were likewise bound. By contrast, in the instant matter BDO seeks to bind the principal to the agent's agreement to arbitrate. No cases support that proposition. Therefore, agency principles cannot compel Kader's participation in the Arbitration.

BDO looks to dictum in E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 198 (3d Cir. 2001) ("To bind a principal by its agent's acts, the plaintiff must demonstrate that the agent was acting on behalf of the principal and that the cause of action arises out of that relationship."), to support its position. According to BDO, since Bachmann served as the agent of Kader in one context – the tax planning scheme – it served as the agent of Kader with respect to the auditing services provided by BDO. Assuming arguendo that this dictum applied, BDO puts forward no evidence to show that Kader was Bachmann's principal for the auditing services. Kader does not issue an annual report. The letter from KPMG to BDO

directing the performance of the Bachmann audit is issued on behalf of Holdings. The memorandum sent from William Li discussing the underlying dispute is from Holdings. Significantly, BDO's engagement letters with Bachmann make no mention of Kader. Even from this perspective, Kader cannot be put before the arbitrators.

BDO argues that Kader is a third-party beneficiary to the agreements of BDO and Bachmann, via the engagement letters, which requires its participation in the Arbitration. BDO, however, can point to no cases in which the promisor can enforce the contract against the third-party beneficiary. Instead, BDO cites cases in which the third-party beneficiary seeks to enforce the contract. See, e.g., Guy v. Liederbach, 501 Pa. 47, 59, 459 A.2d 744, 751 (1983) ("permit[ting] a properly restricted cause of action for beneficiaries"); Stone v. Pennsylvania Merchant Group, Ltd., 949 F. Supp. 316, 321-22 (E.D. Pa. 1996) (beneficiary "can enforce the agreement"). BDO also places undue weight upon language in Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190 (3d Cir. 1983), apart from its context. Although the Coastal Steel court recognized that the "law of contracts" does not allow third-party beneficiaries to avoid "contractual provisions otherwise enforceable," id. at 203, in that case the third-party beneficiary brought the cause of action. Here, by contrast, Kader has not sought to resolve any claims against any parties. BDO presents no rationale for following the Coastal Steel language when the third-party beneficiary does not bring the action. In effect, BDO concedes the importance of this posture by highlighting the potential of Kader to bring an action against BDO. Third-party beneficiary status provides no basis for compelling Kader to Arbitration.

BDO contends that estoppel requires Kader to participate in the Arbitration. In Amkor Tech., Inc. v. Alcatel Bus. Sys., 278 F. Supp.2d 519, 522 (E.D. Pa. 2003), the

court held a non-signatory to an arbitration clause because it had received a "'direct benefit' from the contract containing the clause." In the current matter, BDO considers the "direct benefit" to be Kader's use of the Bachmann audits in its own financial statements, although BDO only shows that Holdings used such information. However, a "direct benefit" is more than a "shareholder benefit." Id. (citing E.I. DuPont, 269 F.3d at 197). As BDO presents no additional benefits to Kader from its activities for Bachmann, the estoppel theory cannot lead to Kader's presence at the Arbitration.

Therefore, based upon the foregoing, the Motion to Compel Defendant Kader Industrial Company. Ltd. to Arbitrate is Denied.

BY THE COURT,

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C. DARNELL JONES, II, J.