

Majority Opinion >

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

ROYAL WINE CORPORATION, Plaintiff, - against - COGNAC FERRAND SAS (f/k/a COGNAC FERRAND, S.a.r.l.),
Defendant, and MYSTIQUE BRANDS, INC., Nominal, Defendant. Index No.: 650249/2018

650249/2018

February 26, 2018, Decided

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

HON. Andrea Masley, J.S.C.

Andrea Masley

Decision and Order

Masley, J.:

Plaintiff, Royal Wine Corporation (Royal) moves pursuant to CPLR 6301 , 7502 , and 7503 for a preliminary injunction enjoining the arbitration recently filed by defendant, Cognac Ferrand SAS (Cognac), against nominal defendant, Mystique Brands, LLC (Mystique). Royal asks for an order enjoining the arbitration until the court has resolved the issues raised in Royal's complaint in this action. In the complaint, Royal seeks: (1) a declaratory judgment that Royal is not, and never has been, the alter ego of Mystique; and (2) a permanent injunction barring Cognac from maintaining its arbitration action against Mystique.

In 2008, Cognac and Mystique entered into a five-year contract (the Agreement), which granted Mystique the exclusive right to import Cognac's non-Kosher products to the North American market, required Mystique to purchase a certain minimum amount of Cognac's goods, and bound Mystique to enter into an endorsement agreement with the rap artist Snoop Dogg. (*See generally* Friedberg Aff., Ex. A [Agreement].)

Section 14.5 of the Agreement provides for a termination fee. In a May 2009 letter, Cognac terminated the Agreement pursuant to Section 14.1 due to Mystique's insolvency. In a July 2009 letter, Sheldon Ginsburg—the Executive Vice President and CFO of Royal, as well as a Board Member of Mystique—demanded that Cognac pay a \$238,000 termination fee. In 2010, Mystique initiated an AAA arbitration action (the First Arbitration) to obtain the termination fee, and Cognac filed counterclaims for fraud and breach of contract in that matter. The arbitrator's decision, dated June 1, 2012, dismissed the claims of Mystique and granted those of Cognac, leaving only the issue of damages to be determined in further arbitration. On October 2, 2012, Cognac produced an expert report asserting damages of \$5,491,000.

On January 22, 2013, after the liability portion of the First Arbitration was completed, but prior to a resolution as to Cognac's damages, Mystique filed for bankruptcy, and the First Arbitration was stayed. (Snitow Aff., Ex. F [9/29/16

Bankruptcy Court tr], at 4-5; Complaint ¶ 7.) According to the Bankruptcy Trustee's Complaint, dated August 16, 2016, Royal funded Mystique's unsuccessful First Arbitration and filed Mystique's bankruptcy proceeding.

Mystique's bankruptcy action concluded on October 25, 2017. On December 6, 2017, Cognac filed a new notice of arbitration against Mystique (the Second Arbitration), in which Cognac raised claims nearly identical to its counterclaims in the First Arbitration; specifically, in the Second Arbitration, Cognac claimed breach of contract, and sought to recover \$5 million in damages. (Complaint ¶¶ 3-4.) According to Royal's complaint in this action, **[*2]** Cognac's seeks, in the Second Arbitration, to enforce against Mystique's principals and Royal, as Mystique's claimed alter ego, the judgment of liability that was awarded in favor of Cognac and against Mystique in the First Arbitration. (Complaint ¶ 9.) Also according to the complaint, Royal was a minority shareholder of Mystique, of which it held less than 2.5%. (Complaint ¶ 16; Herzog Aff. ¶ 2.) Royal now seeks to bar the Second Arbitration, filed by Cognac against Mystique, because: (1) Mystique is a defunct entity; (2) Cognac terminated the First Arbitration, which was commenced in 2010, and serial arbitrations are not permitted; and (3) Cognac filed the Second Arbitration, in 2017, more than 30 days after Mystique's bankruptcy was terminated.

On April 4, 2013 in Bankruptcy Court, Judge Bernstein denied Cognac's motion to lift the automatic stay to permit Cognac to continue the First Arbitration against Mystique, get a judgment against Mystique, and to then proceed against Mystique's principals on an alter ego theory. On June 18, 2013, by email, Cognac informed AAA that it had withdrawn its motion to lift the automatic stay, effectively ending the arbitration.

The court finds that, at this time, pursuant to CPLR 7502, Royal has no standing to stay the Second Arbitration against Mystique. First, Royal is not a signatory to the Agreement. (*Mark Ross & Co., Inc. v XE Capital Mgt., LLC*, 46 AD3d 296, 297, 847 N.Y.S.2d 83 [1st Dept 2007].) Next, Royal denies that it sought affirmative relief in an arbitral forum, and, thus, cannot seek relief under CPLR 7502 (c). (*Matter of Kal Data v AMC Computer Corp.*, 268 AD2d 589, 703 N.Y.S.2d 199 [2d Dept 1999] [finding that, since "petitioner did not seek an arbitration award in its favor, it failed to prove that any award to which it might be entitled would be rendered ineffectual"]). Finally, there does not appear to be any arbitration proceeding to stay at this time, since, as Royal informed the court at oral argument, Mystique has yet to be served notice of the Second Arbitration. This is an issue for the arbitrator to address. (*See Matter of Rabinor*, 23 AD2d 741, 742, 258 N.Y.S.2d 431 [1st Dept 1965]).

For injunctive relief under CPLR 6301, Royal must establish the likelihood of success on the merits of the action, the danger of irreparable harm in the absence of a preliminary injunction, and that the balance of equities favors the moving party.

Royal has not established a likelihood of success on the merits. Royal claims it is not Mystique's alter ego, yet it relies on the bankruptcy code, 11 USC 108 (c) (2), in arguing that Cognac's arbitration claims against Mystique are barred by the statute of limitations which applies to bankrupt parties. The court also rejects Royal's argument that Cognac is barred from filing two successive arbitration proceedings against Mystique. While serial arbitrations may be precluded by law, that argument belongs to Mystique, which has yet to be served in the 2017 Second Arbitration. Likewise, Royal's other arguments—that the arbitration cannot proceed because Cognac voluntarily abandoned the first arbitration, and Cognac's 2017 arbitration claim was untimely filed two weeks too late after the bankruptcy stay was terminated— **[*3]** belong to Mystique, not to Royal.

The court confirmed with Royal's counsel at argument that it does not represent Mystique in either this action or the arbitration. Royal cannot deny that it is Mystique's alter ego while, at the same time, asserting Mystique's defenses to the arbitration in this action. Royal may not have it both ways: if Royal is an alter ego of Mystique, it may not avoid the arbitration clause; if it is not an alter ego of Mystique, it has no right to interfere with the arbitration. (*See President Self Service, Inc. v Affiliated Restaurateurs, Inc.*, 280 NY 354, 360-361, 21 N.E.2d 188 [1930].) Since the focus is on Royal's success on the merits, the court does not address the merits of Cognac's responses to Royal's above arguments.

The court rejects Royal's further claim that it would suffer irreparable harm if it is unable to assert Mystique's defenses

in this action. Specifically, Royal argues that, since Mystique is a defunct corporate entity, Royal, the alleged alter ego, faces a potential default judgment for an amount as great as \$5 million. At argument, Royal suggested that Cognac would suffer no harm if the Second Arbitration is delayed briefly while this court determines the issue of Royal's alter ego status. However, that is not the applicable test. The focus is on the irreparable harm that Royal would sustain if the preliminary injunction is not granted, and Royal is later successful. Here, if Royal is successful, it will establish that it is not Mystique's alter ego, rendering moot Royal's ability or inability to raise Mystique's defenses. Accordingly, the court declines to find, as Royal suggests, that extraordinary irreparable harm compensates for Royal's deficiencies as to the applicable factors for obtaining a preliminary injunction.

Finally, this request to stay the arbitration is procedurally defective. CPLR 7502 (a) requires a special proceeding. Here, Royal filed a plenary action seeking a declaratory judgment. Alternatively, under CPLR 7502 (a) (iii) , Royal could have filed a motion in the unsuccessful special proceeding (Index No. 652586/2012) filed by Cognac to confirm the arbitrator's award on liability.

Accordingly, it is

ORDERED that Royal's motion to stay Cognac's arbitration against Mystique is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference at 60 Centre Street, Room 242, New York, NY 10007 on March 6, 2018 at 9:30 a.m. for an expedited discovery schedule; and it is further

ORDERED that all stays are hereby lifted.

DATED: 2/26/18

ENTER:

/s/ Andrea Masley

Andrea Masley, J.S.C.