UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-80372-CIV-MIDDLEBROOKS/BRANNON

EDMUND I. SHAMSI,

Plaintiff,

v.

OFER LEVIN, G.T.I. GLOBAL LTD. d/b/a GLOBAL TRENDS INVESTMENTS, and G.T.I. LTD. d/b/a GLOBAL TRENDS INVESTMENTS,

Defendants.
_____/

ORDER GRANTING MOTION TO COMPEL ARBITRATION AND STAYING CASE AS TO DEFENDANT G.T.I.

THIS CAUSE is before the Court on Defendants G.T.I. Global LTD. and G.T.I. LTD.'s (collectively "G.T.I.") Motion to Compel Arbitration and Stay Action ("Motion") (DE 50), filed September 29, 2017. Plaintiff Edmund I. Shamsi ("Plaintiff") filed a response on October 13, 2017 (DE 51), to which G.T.I. replied on October 20, 2017 (DE 53). In the alternative, G.T.I. filed a Motion to Dismiss on September 29, 2017 (DE 49). Plaintiff filed a response on October 13, 2017 (DE 52), to which G.T.I. replied on October 20, 2017 (DE 54). For the following reasons, G.T.I.'s Motion to Compel Arbitration is granted, and its Motion to Dismiss is denied as moot.[1]

[1] "[A] federal court has leeway to choose among threshold grounds for denying audience to a case on the merits" when "considerations of convenience, fairness, and judicial economy so warrant." *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422, 431-32 (2007); *see also, e.g.*, *Sea Bowld Marine Group, LDC v. Oceanfast Pty, Ltd.*, 432 F. Supp. 2d 1305, 1318 n.9 (S.D. Fla. 2006) (declining to consider motion to dismiss for lack of personal jurisdiction or *forum non conveniens* after ruling in favor of arbitration).

BACKGROUND

Plaintiff, a citizen of Florida,[2] brings suit against Ofer Levin ("Levin"), a citizen of Germany, Israel, and Austria, who resides in Austria, as well as G.T.I., incorporated in the Island of Nevis with principal places of business in Austria. (Amended Complaint ("Complaint" or "Compl."), DE 6 ¶¶ 6-9). Plaintiff alleges that Levin gained Plaintiff's trust over many years and eventually became a close family friend, who frequently visited Plaintiff in Florida. (*Id.* ¶¶ 13, 14, 17). During the course of their friendship, Levin repeatedly solicited Plaintiff's investment in Levin's investment firm, G.T.I., by touting the success of G.T.I's various investments. (*Id.* ¶ 14). Based on Levin's representations, in 2009, Plaintiff invested $2,500,000.00 in G.T.I. as part of an investment venture in Brazil to purchase land for agricultural purposes. (*Id.* ¶¶ 15-16).

Based on Levin's representations of the success of Plaintiff's 2009 investment, Plaintiff agreed to loan G.T.I. $18,347,000.00 (the "Loan"), which Plaintiff and Levin memorialized in a loan agreement (the "Loan Agreement") on February 23, 2011. (*Id.* ¶¶ 18-19). The Loan Agreement provided for 13.3% annual interest on the Loan, and repayment of the Loan upon demand. (*Id.* ¶ 19). Levin executed two affidavits, containing irrevocable and unconditional personal guarantee contracts relating to Plaintiff's funds. (*Id.* ¶ 25).

In 2015, after experiencing a spread in his cancer and deciding to get his estate in order, Plaintiff requested that Levin and G.T.I. return $5,000,000.00 of the Loan. (*Id.* ¶ 26). In an email exchange dated September 17, 2015, Plaintiff sent Levin an email stating: "Hi ofer I can't seem to find the loan agreement between us. I want to take this opportunity []to write a new loan

[2] Although Plaintiff has dual United States and Israeli citizenship, for jurisdictional purposes, an individual's citizenship is his domicile, and an individual may have only one domicile. *See McDougald v. Jenson*, 786 F.2d 1465, 1483 (11th Cir. 1986) ("Because everyone must at all times have a domicile somewhere, it is well settled that a domicile, once established, continues until it is superseded by a new one.").

agreement between us . . . ," to which Levin replied: "hi. i'll look for it. Anyway, no problem – lets meet this Sunday []and discuss . . . ." (*Id.* ¶ 27 n.5). However, Levin also claimed that he lost his copy of the Loan Agreement and insisted an agreement was necessary to effectuate the transfer of the requested funds to Plaintiff. (*Id.* ¶ 26).

Plaintiff alleges that he and Levin agreed to execute a new loan agreement that would include a 3.3% interest rate going forward, and would permit Levin to invest the excess funds that had been derived by virtue of the previously agreed-upon 13.3% interest rate in a Chinese art venture. (*Id.* ¶ 29). However, when Plaintiff and Levin met to execute the agreement, Levin allegedly refused to memorialize in writing any reference to the funds previously derived from the accrual of the 13.3% interest rate, and as a result, Plaintiff refused to sign the agreement. (*Id.* ¶ 30).

The Parties having been unable to execute a new loan agreement, Levin suggested that they enter a joint venture agreement ("Joint Venture Agreement"), which Levin maintained was necessary for him to repay Plaintiff the $5,000,000.00 that Plaintiff had requested.[3] (*Id.* ¶ 31). According to Plaintiff, based on Levin's representations as to the likely return on investment from the Chinese art and the Brazilian agricultural lands ventures, as well as that the Joint Venture Agreement was necessary for Plaintiff to obtain repayment of the Loan, Plaintiff agreed to sign the Joint Venture Agreement. (*Id.* ¶¶ 32-33, 35). Levin insisted that they should not involve attorneys because they would need to backdate the Joint Venture Agreement to 2011 to cover the prior Loan. (*Id.* ¶ 34). However, Plaintiff asked an Israeli lawyer to provide a template for the Joint Venture Agreement, which Levin used to fill in the terms. (*Id.*). At Levin's

[3] The Joint Venture Agreement appears to be two separate agreements, but the Parties refer to it as one agreement.

insistence, the Joint Venture Agreement was in Hebrew. (*Id.*). Because Plaintiff lacks reading proficiency when complex business or legal terms are written in Hebrew, Plaintiff asked Levin to explain the terms of the Joint Venture Agreement. (*Id.* ¶¶ 34-35). In explaining the terms, Levin misrepresented to Plaintiff how soon Plaintiff would be able to recover his Loan, as well as misrepresenting that a provision calling for 50/50 profit sharing applied only to funds newly applied to the venture, when the profit sharing provision actually applied to the entire Loan. (*Id.* ¶ 35). When Plaintiff later arranged for the Joint Venture Agreement to be translated into English, he learned that Levin had concealed or misstated certain terms of the Joint Venture Agreement. (*Id.* ¶ 38). Although Plaintiff requested that Levin conform the terms of the Joint Venture Agreement to what Levin had previously explained to him, Levin only agreed to correct certain errors. (*Id.*).

Shortly after executing the Joint Venture Agreement, Plaintiff requested an additional repayment of $1,000,000.00, which Levin returned only after "intense prodding." (*Id.* ¶ 39). Subsequent requests for return of funds have allegedly been declined through a series of excuses. (*Id.*). On February 12, 2017, Plaintiff's counsel delivered a letter to Levin, demanding full repayment of the Loan, plus 13.3% interest. (*Id.* ¶ 44). Levin has not complied. (*Id.*).

On March 22, 2017, Plaintiff filed suit. The Amended Complaint alleges the following Counts against Levin and G.T.I.: (1) fraud ("Count I"), (2) fraud in the inducement to enter the Loan Agreement ("Count II"), (3) fraud in the inducement to enter the Joint Venture Agreement ("Count III"), (4) breach of the Loan Agreement ("Count IV"), (5) unjust enrichment ("Count V"),[4] (6) Florida Deceptive and Unfair Trade Practices, Fla. Stat. § 501.201 *et seq.* ("FDUPTA") ("Count VI"), (7) civil theft under Fla. Stat. § 772.11 ("Count VII"), (8) conversion ("Count

[4] Count V is asserted against Levin only.

VIII"), (9) securities fraud under Fla. Stat. § 517.301 ("Count IX"), (10) breach of personal guarantee contracts ("Count X"), and (11) breach of fiduciary duty ("Count XI").

On August 24, 2017, this Court granted Levin's Motion to Compel Arbitration and Stay Case. (DE 45). At that time, G.T.I. had not been served. (DE 45 at 2 fn 3). Accordingly, this Court did not address whether the Joint Venture Agreement's arbitration clause requiring Plaintiff to arbitrate his claims against Levin also applied to Plaintiff's claims against G.T.I. Plaintiff filed proof of service as to G.T.I. on September 15, 2017. (DE 46). G.T.I. now moves to compel arbitration pursuant to the Joint Venture Agreement's arbitration provision, which provides for arbitration "[i]n the event of differences of opinion between the parties with respect to this agreement and/or any of its provisions."[5] (Joint Venture Agreement, DE 29-1, Exs. 1 & 2 ¶ 14). Plaintiff opposes G.T.I.'s Motion to Compel on the sole ground that G.T.I. does not have the right to enforce the arbitration provision as G.T.I. was not a signatory to the Joint Venture Agreement. (DE 51).

LEGAL STANDARD

Under 9 U.S.C. § 206 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"),[6] a party can bring a motion to compel arbitration "in accordance with the agreement."[7] *Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543, 545 (11th Cir.

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[5] The Joint Venture Agreement is governed by Israeli law, and provides that "[i]n the absence of agreement on the nature of the arbitrator, an arbitrator shall be appointed by the Tel Aviv District Committee of the Israel Bar Association . . . ." (Joint Venture Agreement, DE 29-1, Exs. 1 & 2 ¶¶ 16-17).

[6] "The United States became a signatory to the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards] in 1970," implementing it under Chapter 2 of the Federal Arbitration Act [("FAA")] . . . . '" *Suazo*, 822 F.3d at 545.

[7] Because G.T.I. seeks to compel Plaintiff to arbitrate outside the United States, in Israel, G.T.I. must seek relief under the Convention, rather than the domestic FAA. *See Todd v. Steamship*

2016) (citing 9 U.S.C. § 206). "[T]he Convention requires that a motion to compel arbitration must be granted 'so long as (1) the four jurisdictional prerequisites are met and (2) no available affirmative defense under the Convention applies.'" *Id.* at 546 (citations omitted). "An arbitration agreement falls within the jurisdiction of the [] Convention if: (1) the agreement is 'in writing within the meaning of the Convention'; (2) 'the agreement provides for arbitration in the territory of a signatory of the Convention'; (3) 'the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial'; and (4) a party to the agreement is not an American citizen or the commercial relationship has some reasonable relation with one or more foreign states." *Id.* (citation omitted).

As to the available affirmative defenses, "Article II [of the Convention] carefully prescribes [the following] limited set of defenses that may be considered at the arbitration-enforcement stage": (1) the agreement is "null and void," (2) the agreement is "inoperative," or (3) the agreement is "incapable of being performed." *Id.* (citing Convention, art. II(3)). As the party opposing arbitration, Plaintiff has the burden to prove that an affirmative defense applies, while the burden of establishing the jurisdictional prerequisites rests on the proponent of the award. *See Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 n.3 (11th Cir. 2004) (enforcement of arbitration award); *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1276 (11th Cir. 2011) (rejecting affirmative defense to motion to compel arbitration under the Convention because party opposing arbitration made no claim or showing that that the arbitration agreement was null and void); *Suazo*, 822 F.3d at 554 (putting burden on party opposing arbitration under Convention to establish affirmative defense on motion to compel); *Fernandes v. Holland*

Mut. Underwriting Ass'n (Bermuda) Ltd., 601 F.3d 329, 332 (5th Cir. 2010).

American Line, 810 F. Supp. 2d 1334, 1336 (S.D. Fla. 2011) (applying *Czarina* in context of motion to compel arbitration under Convention).

DISCUSSION

G.T.I. moves to compel arbitration of all claims against it under the Joint Venture Agreement's arbitration provision, arguing that Plaintiff's claims stem from Defendants' alleged failure to repay funds that are the subject of the Joint Venture Agreement. Plaintiff does not dispute that the jurisdictional prerequisites are met,[8] but argues that because G.T.I. is not a party to the Joint Venture Agreement, it may not enforce the arbitration provision contained therein. (DE 51 at 2; 8).

Neither the FAA nor the Convention precludes the enforcement of arbitration provisions "that are otherwise enforceable by (or against) [non-signatories]." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009) (FAA case). Although state law governs whether an arbitration agreement is enforceable under the FAA, the Eleventh Circuit has not decided whether federal substantive law or state law determines the enforceability of an arbitration agreement by a non-signatory under the Convention. *Escobal v. Celebration Cruise Operator, Inc.*, 482 F. App'x 475, 476 n.3 (11th Cir. 2012) ("We need not decide whether federal substantive law or state law controls this issue in this case; *Carlisle* involved the FAA rather than the Convention.").

In my Order granting Levin's Motion to Compel Arbitration, I applied federal substantive law to determine that Levin could enforce the arbitration clause against Plaintiff. (DE 45 at 9). I

[8] (1) The arbitration agreement is in writing within the meaning of the Convention; (2) the arbitration agreement provides for arbitration in the territory of Israel, a signatory to the Convention; (3) the arbitration agreement arises out of a commercial relationship between Plaintiff and Defendants in the form of investment for the purchase and sale of property located abroad; and (4) Levin, one of the Parties to the arbitration agreement, is not an America citizen. (DE 29 at 8).

noted that the Parties did not dispute that federal substantive law applies, and that applying federal law was consistent with the Convention's principal purpose which was to "'foster the adoption of standards which can be uniformly applied on an international scale' to agreements to arbitrate." (DE 45 at 9). I further noted that the outcome would be the same under Florida law. (*Id.* at 10). Because the Parties here do not dispute that federal substantive law applies, and in light of the Convention's principal purpose, I will apply federal substantive law to determine whether G.T.I. can enforce the arbitration provision against Plaintiff.

Federal law recognizes certain limited exceptions to the general rule that only signatories to an arbitration agreement can enforce the agreement. *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999). "Federal cases have set out at least three principles on which a nonsignatory to a contract can compel arbitration: equitable estoppel, agency, and third-party beneficiary." *In re Wholesale Grocery Products Antitrust Litigation*, 707 F.3d 917, 922 (8th Cir. 2013). The Eleventh Circuit recognizes two "circumstances giving rise to equitable estoppel." *MS Dealer*, 177 F.3d at 947.[9] "First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause 'must rely on the terms of the written agreement in asserting its claims' against the nonsignatory." *Id.* (*quoting Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993)). "When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate." *Id.* (internal quotations omitted). Second, equitable estoppel applies "when the signatory to the contract containing the arbitration clause raises allegations of

[9] Although after *Carlisle*, the exceptions discussed in *MS Dealer* no longer apply in the context of the FAA, *Escobal* applied the federal substantive law developed in *MS Dealer* in the context of a motion to compel arbitration under the Convention. *Escobal*, 482 F. App'x at 476.

substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *Id.* (internal quotations omitted). A plaintiff raises "allegations of substantially interdependent and concerted misconduct" when the allegations against both the signatory and the nonsignatory "are based on the same facts and are inherently inseparable." *Id.* at 948.

Here, equitable estoppel is appropriate under both theories. In my Order granting Levin's Motion to Compel Arbitration, I found that all Counts of the Complaint "relate to the formation and provisions of the Joint Venture Agreement." (DE 45 at 13). I explained that "[a]ll Counts incorporate the factual allegations in paragraphs one through forty-four that Levin misrepresented that the Joint Venture Agreement was necessary for repayment of the Loan and then refused to repay Plaintiff the funds allegedly owed to him under the Joint Venture Agreement." (DE 45 at 13). Therefore, "each of [Plaintiff's] claims against [G.T.I.] makes reference to or presumes the existence of" the Joint Venture Agreement such that Plaintiff's "claims arise out of and relate directly to the written agreement, and arbitration is appropriate." *MS Dealer*, 177 F.3d at 947.

Second, each Count "raises allegations of substantially interdependent and concerted misconduct" by Levin, a signatory to the arbitration agreement, and G.T.I. Plaintiff alleges that the G.T.I. companies are simply the "entities through which [Levin] perpetrated his deceitful scheme." (DE 6 ¶ 1). As G.T.I. was merely the corporate vehicle through which Levin engaged in the alleged misconduct, any claim against G.T.I. is "inherently inseparable" from the corresponding claim against Levin. *MS Dealer*, 177 F.3d at 948. Further, every Count asserted against G.T.I. is asserted against both Levin and G.T.I. jointly and thus each Count against G.T.I. is "based on the same facts" as the corresponding Count against Levin. *Id.* Equitable estoppel is

applicable here under both theories. Accordingly, it is appropriate to allow G.T.I. to enforce the arbitration provision against Plaintiff. It is hereby

ORDERED AND ADJUDGED that:

(1) G.T.I.'s Motion to Compel Arbitration and Stay Action (DE 50) is **GRANTED**.

(2) Plaintiff and G.T.I. are **COMPELLED** to arbitrate Plaintiff's claims against G.T.I. pursuant to the terms of the Joint Venture Agreement (DE 29-1, Ex. 1 & 2).

(3) This case is **STAYED pending arbitration.**

(4) Defendant's Motion to Dismiss (DE 49) is **DENIED AS MOOT.**

(5) The Clerk of Court shall **CLOSE THIS CASE for administrative purposes only.**

(6) The Parties shall file a joint status report within 20 days after arbitration concludes.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 26 day of October, 2017.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record