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IN RE: John DENOBILE (2018)

Supreme Court, Appellate Division, Second Department, New York.

IN RE: John DENOBILE, etc., et al., Appellants-Respondents, v. Thomas PANETTA, et al., Respondents-Appellants; Michael Garnick, Nonparty-Respondent.

2016-03452

Decided: November 14, 2018

ALAN D. SCHEINKMAN, P.J., WILLIAM F. MASTRO, BETSY BARROS, FRANCESCA E. CONNOLLY, JJ. Knuckles, Komosinski & Manfro, LLP, Elmsford, N.Y. (John E. Brigandi of counsel), for appellants-respondents. Nixon Peabody LLP, Buffalo, N.Y. (Erik A. Goergen and Daniel J. Hurteau of counsel), for respondents-appellants. Fellheimer & Eichen LLP, New York, N.Y. (Alan S. Fellheimer of counsel), for nonparty-respondent.

DECISION & ORDER

In a proceeding pursuant to CPLR article 75 to disqualify the law firm of Nixon Peabody LLP, from representing Thomas Panetta and Thomas Panetta M.D. Vascular Surgery, PLLC, in an arbitration proceeding, the petitioners appeal, and Thomas Panetta and Thomas Panetta M.D. Vascular Surgery, PLLC, cross-appeal, from an order of the Supreme Court, Nassau County (Jack L. Libert, J.), entered March 7, 2016. The order, insofar as appealed from, granted that branch of the motion of nonparty Michael Garnick to permanently stay the subject arbitration insofar as asserted against him by the petitioners Mark Teitelbaum, derivatively on behalf of Axxess I, LLC, and Salvatore Coluccio, derivatively on behalf of Brooklyn Axxess, LLC. The order, insofar as cross-appealed from, granted the petition to disqualify.

ORDERED that the order is reversed insofar as appealed from, on the law, and that branch of the motion of nonparty Michael Garnick which was to permanently stay arbitration of claims asserted against him by Mark Teitelbaum, derivatively on behalf of Axxess I, LLC, and by Salvatore Coluccio, derivatively on behalf of Brooklyn Axxess, LLC, is denied; and it is further,

ORDERED that the order is affirmed insofar as cross-appealed from; and it is further,

ORDERED that one bill of costs is awarded to the petitioners, payable by the respondents appearing separately and filing separate briefs.

John DeNobile, derivatively on behalf of Axxess, Inc., Mark Teitelbaum, derivatively on behalf of Axxess I, LLC and Salvatore Coluccio, derivatively on behalf of Brooklyn Axxess, LLC (hereinafter collectively the petitioners), commenced an arbitration proceeding against Michael Garnick, Thomas Panetta, Thomas Panetta M.D. Vascular Surgery PLLC (hereinafter together Panetta), Axxess, Inc., Axxess I, LLC, and Brooklyn Axxess, LLC. Thereafter, the petitioners commenced this proceeding pursuant to CPLR article 75 to disqualify the law firm of Nixon Peabody LLP (hereinafter the law firm), from representing Panetta in the arbitration, and Garnick moved to permanently stay the arbitration against him. In the order appealed from, the Supreme Court granted the petition to disqualify the law firm from representing Panetta in the arbitration, and that branch of Garnick's motion which was to permanently stay arbitration against him of Teitelbaum and Coluccio's claims.

The Supreme Court providently exercised its discretion in disqualifying the law firm. The petitioners demonstrated that the law firm's prior representation of Axxess Inc., Axxess I, LLC, and Brooklyn Axxess, LLC, on behalf of which DeNobile, Teitelbaum, and Coluccio, respectively, were asserting claims derivatively in the arbitration, was on matters

substantially related to the arbitration, and it is undisputed that the interests of those former clients are materially adverse to Panetta's interests in the arbitration (see *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 651 N.Y.S.2d 954, 674 N.E.2d 663; *Gjoni v. Swan Club, Inc.*, 134 A.D.3d 896, 897, 21 N.Y.S.3d 341).

However, the Supreme Court should have denied that branch of Garnick's motion which sought a permanent stay of arbitration of the claims against him by Teitelbaum and Coluccio, derivatively on behalf of Axxcess I, LLC, and Brooklyn Axxcess, LLC, respectively. Axxcess I, LLC, and Brooklyn Axxcess, LLC, are not signatories to the Axxcess, Inc., shareholders agreement that contains the arbitration clause. Nevertheless, Garnick is estopped from avoiding arbitration with them based on the relatedness between Axxcess, Inc., and its subsidiaries, Axxcess I, LLC, and Brooklyn Axxcess, LLC, and the agreements and controversies at issue, which are intertwined with the Axxcess, Inc., shareholders agreement containing the arbitration clause, to which Garnick is a signatory (see *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 126–127 [2d Cir.]; *JLM Industries, Inc. v. Stolt-Nielsen, SA*, 387 F.3d 163, 178 [2d Cir.]; *Choctaw Generation L.P. v. Am. Home Assur. Co.*, 271 F.3d 403, 406 [2d Cir.]).

Garnick's remaining contention is without merit.

SCHEINKMAN, P.J., MASTRO, BARROS and CONNOLLY, JJ., concur.

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No

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