SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARRY R. OSTRAGER JSC, Justice

PART 61

The Port Authority of NY and NJ

-v-

2 World Trade Center LLC et al.

INDEX NO. 451362/17

MOTION DATE ______

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is denied and the Petition dismissed without prejudice in accordance with the annexed memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

Dated: 5-23-17

[signature], J.S.C.
BARRY R. OSTRAGER
JSC

1. CHECK ONE: .... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .... MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

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THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY,

Petitioner,

-against-

2 WORLD TRADE CENTER LLC, 3 WORLD
TRADE CENTER LLC, and 4 WORLD TRADE
CENTER LLC,

Respondents.

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INDEX NO. 451362/17

DECISION & ORDER

MOTION SEQ. NO. 001

OSTRAGER, J:

The Petitioner, the Port Authority of New York and New Jersey (the "Port Authority"), commenced this Special Proceeding pursuant to CPLR §7503(b) seeking a permanent stay of the arbitration commenced on April 3, 2017 by the Respondents, 2 World Trade Center LLC, 3 World Trade Center LLC, and 4 World Trade Center LLC (collectively, "WTC"), entities owned or controlled by Silverstein Properties. The Port Authority also moved by Order to Show Cause for a Temporary Restraining Order ("TRO") in connection with a hearing scheduled by the Arbitrator, Judge George C. Pratt, for May 19, 2017 to resume the arbitration between the parties after a brief suspension (*see* Kernen Affirmation, Exh. B). The arbitration concerns signage erected by non-party Westfield Corporation ("Westfield") at certain retail areas of the World Trade Center site and the potential placement of two kiosks in the space.

The Court granted the Port Authority a TRO as reflected in the Court's Interim Order of May 17, 2017,[1] temporarily staying the "MDA Arbitration." The Court now denies the Port Authority's Petition

[1] *See* NYSCEF Doc. No. 26.

for a permanent stay of the MDA Arbitration, finding that the issue of arbitrability should be decided by the Arbitrator, for the following reasons.

WTC commenced the arbitration pursuant to Article 9 of the Amended and Restated Master Development Agreement for Towers 2/3/4 of the World Trade Center dated December 16, 2010 ("MDA Agreement"), [2] on the grounds that, among other things, the Port Authority has improperly permitted Westfield to "rebrand" the visual identity of the World Trade Center campus in contravention of certain design standards (*see* Petition, Exhs. 3 and 6). It is undisputed that the Port Authority, WTC, and non-party "WTC Retail LLC," to which Westfield has succeeded as lessee, are parties to the Second Amended and Restated Reciprocal Easement and Operating Agreement of the East Bathtub of the World Trade Center dated November 16, 2006 (the "REOA Agreement"). [3] The REOA Agreement contains the design standards about which WTC complains. The Port Authority also claims that while the Port Authority and WTC are parties to the MDA Agreement, Westfield is not and that the REOA agreement governs the signage dispute. Thus, the Port Authority claims that arbitration under the MDA Agreement is improper. WTC, on the other hand, claims that Westfield is a party to the MDA Agreement (MOL in Opposition 4) and that arbitration under the MDA agreement is proper. The issue presently before the Court is whether the dispute is arbitrable under the MDA Agreement.

The Port Authority argues that the arbitration that WTC initiated on April 3, 2017 is improper because it fails to include an essential party, Westfield, and the dispute is not governed by the MDA Agreement but rather by the Commercial Design Guidelines ("CDG") contained in Section 6.9 of the REOA Agreement. As reflected in the Arbitration Notice and WTC's brief, WTC takes the position that

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[2] *See* Petition, Exh. 2.
[3] *See* Petition, Exh. 1.When the REOA was executed, the Port Authority controlled WTC Retail LLC, but Westfield later became the successor to WTC Retail LLC through an entity called "New WTC Retail Owner LLC." (Memorandum of Law in Support at 5); (Memorandum of Law in Opposition at 4).

both the MDA and REOA Agreements govern the signage dispute (*see* Petition, Exh. 6 at 4); (MOL in Support at 6), and that it is for the Arbitrator to decide whether this dispute is arbitrable because the MDA Agreement incorporates the American Arbitration Association (AAA) rules.

WTC sent the Petitioner a 9-page Notice of Dispute ("Notice") dated May 31, 2016,[4] which outlines, among other things, WTC's objection to the installation of Westfield's signs:

> SPI [WTC] has repeatedly notified the Port Authority that SPI does not accept the Port Authority's temporary signage, which degrades the unified aesthetic that is central to the CDGs. In a letter from our attorneys, Skadden, Arps to the Port Authority, dated May 7, 2015, SPI has made clear that it does not accept the Port Authority's plan to use signage to "rebrand" the visual identity of the World Trade Center campus, and it has repeatedly requested that the Port Authority adhere to the uniformity standard that is fundamental to the CDGs.

The arbitration clause in Article 9 of the MDA Agreement provides in relevant part that, "All disputes, Claims or controversies arising under this Agreement [...] shall be resolved in accordance the procedures set forth below," and "Each arbitration commenced pursuant to this Article 9 shall be conducted in accordance with then-prevailing commercial arbitration rules of the AAA." Specifically, Section 9.2(c)(xiii) of the MDA Agreement provides that:

> The Arbitrator [Judge George C. Pratt] shall have *plenary power* to resolve the Dispute noticed in the Arbitration Notice in such manner as, in his discretion, he deems appropriate. In exercising his powers, the Arbitrator may, without limitation, determine what actions any party must take in order to effectuate the intent and purposes of this Agreement, impose sanctions, grant injunctive relief, award money damages and/or take such other actions as the Arbitrator shall deem necessary to enforce or implement a Decision. (Emphasis added).

It is a well-settled proposition that the question of arbitrability is an issue generally for judicial determination in the first instance. *See, Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 598 (1997); *Sisters of St. John the Baptist v Geraghty Constructor*, 67 NY2d 997, 999 (1986). Nevertheless, an important legal and practical exception has evolved which recognizes, respects and

[4] *See* Moving papers, Exh. 3 at 6-7

enforces a commitment by the parties to arbitrate even that issue when they "clearly and unmistakably [so] provide." *Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 47 (1997), citing *AT&T Technologies v Communications Workers,* 475 US 643, 649 (1986) and *First Options of Chicago v Kaplan,* 514 US 938, 944 (1995). Thus, the Court must examine whether the parties evinced a "clear and unmistakable" agreement to arbitrate arbitrability as part of their alternative dispute resolution choice in the MDA Agreement.

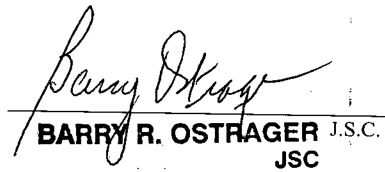
"When the parties' agreement specifically incorporates by reference the AAA rules, which provide that '[t]he tribunal shall have the power to rule on its own jurisdiction, including objections with respect to the existence, scope or validity of the arbitration agreement,' and employs language referring 'all disputes' to arbitration, courts will 'leave the question of arbitrability to the arbitrators.'" *See Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 95 (1st Dept 2009), *affd.* 14 NY3d 850, 901 (2010), citing *Matter of Smith Barney Shearson*, 91 NY2d at 47. *See also, Icdas Celik Enerji Tersane Ve Ulasim Sanayi A.S. v Travelers Ins. Co.*, 81 AD3d 481 (1st Dept 2011) ("We note initially that, given the arbitration clause's specific incorporation by reference of AAA rules, the question of arbitrability, which includes the existence, scope and validity of the arbitration agreement, is for the arbitrator to determine [citing *Life Receivables Trust,* 66 AD3d 95]. The petition to permanently stay arbitration should have been denied upon this ground alone"). *See also, Flintlock Const. Services, LLC. v Weiss*, 122 AD3d 51 (1st Dept 2014) ("Where parties agree that the AAA rules will govern, questions concerning the scope and validity of the arbitration agreement, including issues of arbitrability, are reserved for the arbitrators," citing *Life Receivables Trust). See also, 21st Century North America Ins. Co. v Douglas*, 105 AD3d 463 (1st Dept 2013). While the Port Authority attempts to distinguish the language of the arbitration clause in this case from the *Life Receivables Trust* case, the Court finds the Port Authority's argument unpersuasive.

This is apparently a long festering dispute among the parties and the lack of constructive communication among the parties to either consensually resolve their issues or promptly initiate an REOA Arbitration is perplexing. In all events, Counsel for the Port Authority has represented in open Court on May 17, 2017 that an REOA Arbitration has been commenced.[5] As noted in the transcript of proceedings of May 17, 2017, and as reflected in the Arbitrator's Scheduling Order, these issues could have been worked out consensually among the parties without Court intervention. Manifestly, if Westfield is subject to the REOA arbitration but not the MDA arbitration, common sense dictates that a more comprehensive arbitration should proceed and an arbitration involving less than all parties should not proceed. Since the parties have not conclusively demonstrated whether Westfield is subject to either the MDA or REOA arbitration, it will be for the MDA Arbitrator to determine that issue in the first instance.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Petition for a permanent stay of the arbitration commenced by WTC on April 3, 2017 is dismissed without prejudice, and the TRO is hereby vacated.

Dated: May 23, 2017



BARRY R. OSTRAGER J.S.C.
JSC

[5] WTC argues that the Port Authority cannot be compelled into an REOA Arbitration by virtue of Section 19.1 of the REOA entitled "Port Authority Not Bound by Arbitration," but the Port Authority can be compelled to participate in the MDA Arbitration (MOL in Support at 8). Nevertheless, Section 19.2 of the REOA recognizes that the Port Authority may agree to submit to arbitration in certain circumstances. It is unclear by whom the REOA Arbitration was initiated or whether the Port Authority agreed to submit to it and therefore be bound by it, as it was neither discussed in the papers nor discussed extensively at the oral argument.