

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

DANIEL BRIAN & ASSOCIATES, INC,
Plaintiff,

v.

**Case No. 16-151231-CB
Hon. James M. Alexander**

NORMAN A. YATOOMA, ET AL,
Defendants.

OPINION AND ORDER RE: MOTION TO DISMISS AND COMPEL ADR

This matter is before the Court on Third-Party Defendants’ motion to dismiss Third-Party Complaint and compel ADR. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

This case generally involves a dispute over Defendants’ claimed ownership of or entitlement to a portion of the revenue of certain Plaintiff-related companies.

In an April 2016 Opinion re: Defendants’ prior motion to dismiss and compel arbitration, the Court ruled on the enforceability of an ADR provision found in the February 18, 2003 Engagement Agreement:

the plain language of the “arbitration” provision¹ . . . unequivocally states that “Any dispute over this Agreement shall be resolved by a decision from Pastor Dominic Russo, or his respective successor if he is incapable of making the decision.” This sentence is unconditioned and unambiguous.

While the provision goes on to say that the parties may mutually agree to use a three-person arbitration panel, this language is not contingent upon failure with Pastor Russo. It simply presents another option for the parties (or if Pastor Russo requests).

¹ The provision does not actually use the term “arbitration.”

In other words, the above provision begins that all disputes are resolved by a decision of Pastor Russo. But the next part of the provision provides another option at Pastor Russo's request or if the parties so agree. But in this case, there is no indication that the parties have so agreed or that Pastor Russo requested three-person arbitration. But the Court ruled that it could not enforce said provision at that time because the actual signatories to the Engagement Agreement were not parties to the case when the prior motion was decided.² As a result of said ruling, Third-Party Plaintiffs filed their Complaint naming the appropriate parties and seeking to enforce the ADR provision.

Despite previously objecting to enforcement of the ADR provision, Third-Party Defendants then filed the present motion seeking an order providing:

1) that the ADR provision . . . applies to the Third-Party Plaintiffs, 2) that as a result they must bring their claims to Pastor Russo for resolution rather than to this Court, and 3) that Third-Party Plaintiffs should pay Third-Party Defendants their costs and attorney fees incurred in bringing this motion.

And Third-Party Defendants seek said rulings under MCR 2.116(C)(7) or (C)(10). A (C)(7) motion tests whether a claim is barred, among other grounds, by an agreement to arbitrate, and a (C)(10) motion tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

In response, Third-Party Plaintiffs "agree that the ADR provision found in the 2003 Engagement Agreement is clear and unambiguous and should be enforced." This was, in fact, the subject of the prior motion. But despite the apparent agreement that this dispute belongs in ADR, rather than enter a stip, Third-Party Defendants chose to file the present motion.

It appears that the parties really only have a single dispute – whether the Court previously found the ADR provision **mandatory**. Although it thought this was clear in its April 6 Opinion, the Court will further clarify. Paragraph 10.c. of said Agreement provides (emphasis added): "Any

dispute over this Agreement **shall** be resolved by a decision from Pastor Dominic Russo, or his respective successor if he is incapable of making the decision.” This provision is mandatory.³

The provision goes on to say that the parties can mutually agree to (or Pastor Russo may request) a three-person arbitration panel to resolve the dispute. But there is no indication that the parties have so agreed or that Pastor Russo so requested. Unless one of these things happens, the parties are bound to the first sentence of Paragraph 10.c.

For the foregoing reasons (and based on the agreement of the parties) that Court will enforce the ADR provision as written and compel the parties (with the exception of Daniel Brian & Associates) into “arbitration” with Pastor Russo.

Under the Uniform Arbitration Act, “If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.” MCL 691.1687(7).

Because the bulk of the parties’ dispute is subject to arbitration, the Court finds it appropriate to stay the remainder of the case pending arbitration on Third-Party Plaintiffs’ claims. Once arbitration is concluded, Plaintiff’s case with respect to Daniel Brian & Associates may proceed (unless the parties agree to also submit said claim to arbitration).

If either party objects to Pastor Russo serving as an arbitrator, said party must raise its objection by motion timely filed and heard no later than July 13, 2016. Otherwise, any such objection is deemed waived.

2 The Court also held that the provision was inapplicable to the original Plaintiff, Daniel Brian & Associates, because the same was not a signatory to the Engagement Agreement.

3 Indeed, “[i]t is . . . well recognized that ‘may’ is permissive and ‘shall’ mandatory.” *Moore v Parole Bd*, 379 Mich 624, 641; 154 NW2d 437 (1967). See also *Goldstone v Bloomfield Tp Pub Library*, 268 Mich App 642, 657; 708 NW2d 740, 749 (2005), *aff’d* 479 Mich 554; 737 NW2d 476 (2007) (reasoning “the term ‘may,’ which has historically been interpreted to be discretionary, as opposed to the term ‘shall,’ which is universally recognized as

The parties must complete arbitration before **September 20, 2016** and appear for a status conference **at 8:30 am** on said date.

THIS ORDER CONTAINS A DATE SET BY THE COURT. YOU WILL NOT RECEIVE FURTHER NOTICE OF THIS DATE.

IT IS SO ORDERED.

June 21, 2016
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge