

ROBERT DAVID,

Plaintiff,

DECISION AND ORDER

v.

Index #2006/10766

TOTAL IDENTITY CORPORATION,  
TOTAL IDENTITY SYSTEMS CORPORATION,  
MATTHEW DWYER AND RICHARD DWYER,

Defendants.

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Defendant, Total Identity Corporation, moves pursuant to CPLR §7503(a) for an order staying the proceedings and compelling arbitration, as well as dismissal of the claim for lack of jurisdiction over the defendant. Plaintiff, Robert David, cross moves for an order pursuant to CPLR §7503(b) and/or (c) staying arbitration of all or any controversies set forth in the complaint on the grounds that a valid agreement to arbitrate was not made or has not been complied with. Plaintiff also submits an additional notice of motion seeking an order, pursuant to CPLR §308(5), directing and authorizing service of the summons and complaint to be made on defendants Total Identity Corporation and Matthew Dwyer through their attorney, James Sonneborn, as well as service of the summons and complaint on defendant Richard Dwyer by publication.

This action arises out of the sale of Total Identity Systems

Corporation ("TISC") to Total Identity Corporation ("TIC"), a corporation controlled by the individual defendants. Prior to the sale, plaintiff was the sole shareholder and president of TISC, and he sold his shares of stock in TISC to TIC in exchange for a promissory note by TIC and guaranty by TISC. Plaintiff was also employed under a Consulting Agreement, and TISC entered into a Lease Agreement with 2340 Townline Road Corporation, which lease was guaranteed by TIC. The rights of 2340 Townline Road Corporation were assigned to plaintiff prior to commencement of this action. The various agreements were amended in writing in February, 2004.

Shortly after the amendments were made, it is alleged that both TIC and TISC defaulted. Plaintiff alleges that the amended agreements were procured by fraud and that the individual defendants stripped TISC of its assets, diverted its accounts receivables, began selling off TIC's equipment in violation of security agreements, wrongfully terminated Plaintiff's Consulting Agreement, and charged TIC exorbitant management fees. TIC alleges that it was plaintiff that stripped TISC of its assets, and that plaintiff committed serious misconduct and was terminated from TIC for cause.

Both the Stock Purchase Agreement (as amended) and Consulting Agreement (as amended) provided for dispute resolution through arbitration conducted under the auspices of the American

Arbitration Association ("AAA"). The lease agreement has no arbitration provision. Plaintiff filed demands for arbitration with the AAA as against TIC and TISC under the terms of the Stock Purchase Agreement and Consulting Agreement. No arbitration demands were filed against the individual defendants or with respect to the lease agreement. TIC filed a counterclaim in the arbitration proceeding as against plaintiff. Neither party paid the required arbitrator compensation and administrative fees in advance of the hearings as required by the rules of the AAA. As a result, in December 2005, the AAA issued an order giving the parties thirty days within which to comply with the deposit requirements. Thereafter, the parties never made the required payments and, by order dated April 5, 2006, the arbitrators terminated the arbitration. The parties dispute on this motion who was required to make payment.

Five months after the arbitration was terminated by the AAA, plaintiff commenced this action. Plaintiff acknowledges that the individual defendants have not been served. Plaintiff's counsel has asked defense counsel for valid addresses, but defense counsel has indicated that Matthew Dwyer has instructed him not to share them and to not accept service on his behalf. The court received some word of Dwyer's interest to cooperate post argument, but the details have not been furnished to the court, and I must assume that the situation as alleged by plaintiff has

not changed.

Arbitration

The Stock Purchase Agreement dated October 13, 2003 states the following with respect to arbitration at Section 11(e):

...Each of the parties irrevocably and unconditionally agrees that any suit, action or legal proceeding arising out of or relating to this Agreement shall be settled by binding arbitration conducted in accordance with the Commercial Rules of Arbitration of the American Arbitration Association ("AAA"). The arbitration shall take place in Palm Beach County, Florida, and shall be heard by three arbitrators selected in accordance with AAA Rules of Commercial Arbitration. The Arbitrators shall render a reasoned award and such award shall be signed and dated. The decision of the arbitrators shall be final and binding upon the parties, and the arbitration award may be entered in any court of competent jurisdiction. Initially, each of the parties shall pay one-half of the fees of the AAA (other than filing fees), including without limitation hearing and arbitrators' fees, and the parties' obligation to pay such fees shall be enforceable in any court of competent jurisdiction. The parties to any arbitration hereunder agree to submit for determination by the arbitrators, the amount of fees and expenses, including reasonable attorney's fees, to be borne by each party.

Amendment No.1 to the Stock Purchase Agreement dated February 23, 2004, explicitly deleted Section 11(e) of the Stock Purchase Agreement and substituted the following:

Each of the parties irrevocably and unconditionally agrees that any suit, action or legal proceeding arising out of or relating to this Agreement shall be settled

by binding arbitration conducted in accordance with the Commercial Rules of Arbitration of the American Arbitration Association ("AAA"). The arbitration shall *take place at such location as the AAA determines*, and shall be heard by three arbitrators selected in accordance with AAA Rules of Commercial Arbitration. The Arbitrators shall render a reasoned award and such award shall be signed and dated. *Any witness residing outside of the state in which the arbitration is heard may testify by affidavit, and such affidavit shall be admissible at any arbitration hearing.* The decision of the arbitrators shall be final and binding upon the parties, and the arbitration award may be entered in any court of competent jurisdiction. Initially, each of the parties shall pay one-half of the fees of the AAA (other than filing fees), including without limitation hearing and arbitrators' fees, and the parties' obligation to pay such fees shall be enforceable in any court of competent jurisdiction. The parties to any arbitration hereunder agree to submit for determination by the arbitrators, the amount of fees and expenses, including reasonable attorney's fees, to be borne by each party. (Emphasis added).

Thus, Amendment No. 1's modification of the arbitration provision includes deleting the Florida venue provision and inserting language permitting out-of-state witnesses to testify by affidavit. TIC seeks to compel arbitration, whereas plaintiff seeks to stay arbitration. Plaintiff expressed concern over which of the defendants is making the motion. Each of Dwyer's affidavits in support of the motion, however, makes clear that he made them "on behalf of co-defendant, Total Identity

Corporation," Dwyer affidavit, sworn to October 17, 2006, at ¶1, and that Dwyer realizes that plaintiff's action against him in his individual capacity "will be in court" inasmuch as he is "not part of the arbitration agreement." Dwyer affidavit, sworn to November 28, 2006, at ¶17. Accordingly, the motion to stay the proceeding pending arbitration was brought by TIC only, but as discussed above, TIC seeks, in addition to a stay of all claims against it, a stay of the claims against the other defendants.

*FAA*

The arbitration agreement concerns the purchase and sale of a New York corporation to a Florida corporation registered with the SEC. The Federal Arbitration Act provides that a written arbitration provision in "a contract evidencing a transaction *involving commerce* . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. (Emphasis added). "The Supreme Court has interpreted the words 'involving commerce' as the functional equivalent of the phrase 'affecting commerce,' which ordinarily signals Congress' intent to exercise its Commerce Clause powers to the fullest extent." Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp., 4 N.Y.3d 247,252 (2005). Consequently, if disputes arise with respect to a contract containing an arbitration provision and the contract "affects" interstate commerce, the FAA will apply. Id. For

example, “[a] contract for the renovation and reconstruction of a building in New York was held to affect interstate commerce for purposes of the FAA where the project involved companies headquartered in New Jersey, Massachusetts, Oklahoma, Maryland, and Kansas.” Metrosvyaz v. Whale Telecom Limited, 11 Misc.3d 1055(A) (Sup. Ct. N.Y. Co. 2006), \*2, citing Diamond Waterproofing, 4 N.Y.3d 247. As the instant litigation involves a New York company’s purchase by a company headquartered in Florida, the FAA is controlling.

Moreover, under the FAA, “the ‘presumption is that the arbitrator should decide “allegations of waiver, delay or a like defense to arbitrability.”” Diamond Waterproofing, 4 N.Y.3d at 252 (quoting Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84-85 (2002), quoting Moses H. Cone Mem. Hosp. V. Mercury Constr. Corp., 460 U.S. 1, 25 (1983)). There is an exception “when the party seeking arbitration has already participated in litigation on the dispute.” Bell v. Cendant Corp., 293 F.3d 563, 569 (2d Cir. 2002). But TIC has not sought litigation of the matter, and there is no question of waiver by reason of forum shopping in the courthouse. Therefore, under the FAA, the issue of whether TIC waived the right to arbitrate should be determined by an arbitrator, not by the court.

TIC’s motion to compel arbitration as to it and stay the action against it is granted. TIC, however, seeks a stay of all

claims in the complaint, even those concerning nonsignatories, because the latter claims "relate" to the stock purchase agreements, their amendments, and the Consulting Agreement, each of which have broad arbitration clauses concerning disputes "related" to the agreements. Dwyer affidavit of October 17, 2006, at ¶¶7-8. Courts have inherent authority in circumstances such as these to enter such an order. Compare, Conwill v. Arthur Anderson LLP, 12 Misc.3d 1171(A), 2006 WL 1703621 (Sup. Ct. N.Y. Co. 2006) (Fried, J.) (all claims stayed pending outcome of arbitration), with, 212 Investment Corp. v. Kaplan, 6 Misc.3d 1031(A), 2006 WL 502852 (Sup. Ct. N.Y. Co. 2005) (Cahn, J.) (allowing claims against non-signatory parties to proceed in court while the arbitration proceeds). Dwyer agrees that claims against him will proceed in court if he is ever served. But he seeks a stay anyway, both as to him and the other defendants, despite his professed desire to aver only "on behalf of the co-defendant, Total Identity Corporation." Dwyer affidavit of November 28, 2006, at ¶1. In other words, he insists upon "a Court Order staying the proceedings [without limitation] and compelling arbitration of all disputes herein." Dwyer affidavit of October 17, 2006, text following ¶8. TIC's Memorandum of Law, on the other hand seeks a stay "of all disputes of all parties subject to the arbitration clause," together with an order severing the claims against "[t]hose parties not subject to the

binding arbitration clause . . . from the arbitration action.” Hence a stay of the proceedings against the other defendants is requested, but not for the purpose of compelling non-signatories to arbitrate. Cf., Choctaw Generation Ltd. Partnership v. American Home Assistance Co., 271 F.3d 403 (2d Cir. 2001); Hoffman v. Finger Lakes Instrumentation, LLC, 7 Misc.3d 179 (Sup. Ct. Monroe Co. 2005).

Caselaw under the FAA holds that a non-signatory to an arbitration provision may not obtain a stay under §3 of the FAA, but may obtain one from a court pursuant to the court’s inherent power by virtue of “the power in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants,” provided the moving party “demonstrate[s] to the satisfaction of the court that [it] ha[s] not taken nor will take any steps to hamper the progress of the arbitration proceeding, that the arbitration may be expected to conclude within a reasonable time, and that such delay as may occur will not work undue hardship.” Citrus Marketing Bd. of Israel v. Lauritzan, 943 F.2d 220, 225 (2d Cir. 1991) (quoting Landis v. North America Co., 299 U.S. 248, 254 (1936) and Nederlandse Erts-Tankersmaat Schappij v. Isbrandtsen Co., 339 F.2d 440, 442 (2d Cir. 1964)). These cases fall under the rubric of the “parallel-proceeding abstention doctrine.” IDS Life Insurance Co. v. SonAmerica, Inc., 103 F.3d 524, 529-30 (7<sup>th</sup>

Cir. 1996) (Posner, J.). See also, The Orange Chicken, LLC v. Nambe Mills, Inc., unreported, 2000 WL 1858556 (S.D. N.Y. December 19, 2000) (cited in Conwill v. Arthur Anderson LLP, supra, 12 Misc.3d 1171(A)). See CPLR 2201; Methodist Church of Babylon v. Glen-Rich Construction Corp., 29 A.D.2d 773 (2d Dept. 1968) (CPLR 7503 "no longer permits a simple stay of action" but one is authorized under CPLR 2201 as "merely an exercise of the general power of a court to stay proceedings in a proper case").

But here, TIC is the only moving party; no other defendant has moved for a stay, under the parallel-proceeding abstention doctrine or otherwise. Dwyer makes representations touching on his and his brother's circumstances, but he eschews any effort to appear in the action on behalf of either himself or his brother seeking a stay, preferring instead to maintain that the court has no jurisdiction over either Dwyer.

Notwithstanding, a stay may be granted by the court under CPLR 2201 without a motion on whose behalf the stay is granted or benefits if it would otherwise be appropriate. Halloran v. Halloran, 161 A.D.2d 562, 564 (2d Dept. 1990); Coburn v. Coburn, 109 A.D.2d 984 (3d Dept. 1985); and esp. Steinberg v. N.Y. Water Serv. Corp., 94 A.D.2d 723 (2d Dept. 1983) (which is an example of parallel-proceeding abstention). The Fourth, Fifth and Sixth Causes of Action against the individual defendants are clearly derivative of and secondary to the claims against TIC. In such

circumstances, a stay pending the outcome of the arbitration is warranted. Brown v. V & R Advertising, Inc., 67 N.Y.2d 772 (1986), aff'g for the reasons stated at, 112 A.D.2d 856, 861 (1<sup>st</sup> Dept. 1985); RAD Ventures Corp. v. Gotthilf, 6 A.D.3d 415, 416 (2d Dept. 2004); Marcus v. The Millwork Trading Co., 208 A.D.2d 448 (1<sup>st</sup> Dept. 1994); C.B. Strain & Son, Inc. v. Baranello & Sons, 90 A.D.2d 924, 926 (1<sup>st</sup> Dept. 1982); Edwards v. Bergner, 22 A.D.2d 808, 808-09 (2d Dept. 1964); DOT's Blvd. Corp. v. Rosenfeld, 285 App. Div. 425, 426 (1<sup>st</sup> Dept. 1955). Accordingly, the balance of the action is stayed pending the arbitration, of course without prejudice to a motion to vacate if arbitration proceedings are unduly delayed or frustrated by TIC or anyone acting on TIC's behalf.

This renders the balance of plaintiff's motion for an order facilitating service subject to the stay.

SO ORDERED.

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KENNETH R. FISHER  
JUSTICE SUPREME COURT

DATED: January \_\_\_\_, 2007  
Rochester, New York