

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 1-28-11
SUBMITTED: 3-3-11
MOTION NO.: 001-MOT D; STAYED

TII NETWORK TECHNOLOGIES, INC.,

Plaintiff,

-against-

**MELTZER, LIPPE, GOLDSTEIN &
BREITSTONE, LLP**
Attorneys for Plaintiff
190 Willis Avenue
Mineola, New York 11501

**NEWOAK CAPITAL MARKETS LLC f/k/a J
GIORDANO SECURITIES LLC d/b/a J
GIORDANO SECURITIES GROUP,**

Defendant.

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Upon the following papers numbered 1-20 read on this motion to dismiss/compel ; Notice of Motion and supporting papers 1-5 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 6-17; Replying Affidavits and supporting papers 18 ; Other 19-20 it is,

ORDERED that the branch of the motion by the defendant which is for an order dismissing the complaint is denied; and it is further

ORDERED that the branch of the motion by the defendant which is for an order compelling the parties to proceed to arbitration is granted; and it is further

ORDERED that this action is stayed, and the parties are directed to proceed to arbitration.

This action arises out of a purported agreement by the defendant, J Giordano Securities Group (“Giordano”), to provide financial advisory and investment banking services to the plaintiff, TII Network Technologies, Inc. (“TII”), in connection with TII’s possible acquisition of Porta Systems Corp. A letter agreement dated July 9, 2007, was drafted, but not

signed by the parties. A subsequent letter agreement dated July 16, 2007, was signed by TII, but not Giordano. Both agreements required TII to pay Giordano a \$50,000 retainer plus 1.5% of the aggregate value of the transaction if it closed. Both agreements provided that, any disputes arising out of or relating to the letter agreement and/or the transaction contemplated thereby would be resolved through binding arbitration. TII paid Giordano the \$50,000 retainer. TII subsequently acquired the Copper Products Division of Porta Systems Corp. for \$8.2 million. TII failed to pay Giordano the 1.5% commission.

In September 2010, Giordano commenced an arbitration proceeding before the Financial Industry Regulatory Authority (FINRA) to recover the 1.5% commission from TII. However, because Giordano could not locate a fully executed copy of the parties' letter agreement, FINRA refused to hear the matter unless TII voluntarily submitted to its jurisdiction. By a letter dated December 1, 2010, Giordano advised TII that it would pursue the matter in New York State court if TII did not submit to FINRA's jurisdiction. TII refused and commenced this action, inter alia, to recover the \$50,000 retainer, alleging that Giordano had breached the parties' agreement by switching sides and negotiating on Porta's behalf. Giordano moves to dismiss the complaint and to compel arbitration. TII opposes the motion, arguing that Giordano waived any right to compel arbitration.

Giordano contends that it was not properly served with process pursuant to CPLR 311-a. The plaintiff has the burden of proving that jurisdiction was obtained over the defendant by proper service of process (*see*, **Rox Fiv 83 Partners v Ettinger**, 276 AD2d 782). A process server's affidavit of service constitutes prima facie proof of service and raises a presumption that service was proper (**Id.**). When there is a sworn denial of service by the party allegedly served, the affidavit of service is rebutted and jurisdiction must be established by a preponderance of evidence at a hearing (**Id.**). The court finds that TII has established, prima facie, that Giordano was properly served with process pursuant to CPLR 311-a. In opposition, Giordano submits the affirmation of its counsel, which is insufficient to rebut the statements in the process server's affidavit (*see*, **Lynch v New York City Transit Auth.**, 12 AD3d 644). Accordingly, the branch of the motion which is to dismiss the complaint for lack of personal jurisdiction is denied.

Giordano contends that dismissal of the complaint is warranted because the parties agreed to submit their dispute to arbitration. The cases on which Giordano relies, however, were erroneously decided (*see*, **Spatz v Ridge Lea Assocs., LLC**, 309 AD2d 1248, 1249; **Thomas v Mathieu**, 17 Misc 3d 93, 94-95 [Appellate Term, Second Dept]). CPLR 3211(a)(5) provides, in pertinent part, that a party may move to dismiss one or more causes of action asserted against him on the ground that the action may not be maintained because of "arbitration and award." This ground is available only when the dispute has already gone to arbitration and an award has been made. When, as here, what is sought is merely to preclude litigation on the ground that there is an outstanding and unfulfilled obligation to arbitrate the dispute, the remedy is not a motion to dismiss the action under CPLR 3211(a)(5), but a motion to compel arbitration under CPLR 7503(a), which merely stays the litigation in deference to arbitration (*see*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B,

C3211:21). Accordingly, the branch of the motion which is to dismiss the complaint on the ground that the parties agreed to submit their dispute to arbitration is denied.

TII contends that, by threatening to commence an action in New York State court, Giordano waived its right to compel arbitration. Like contract rights generally, the right to arbitrate may be modified, waived, or abandoned (**Sherrill v Grayco Bldrs.**, 64 NY2d 261, 272). While the party who commences the action may be assumed to have waived any right it may have had to submit the issues to arbitration, this assumption does not apply to the defendant (**De Sapio v Kohlmeier**, 35 NY2d 402, 405). Nevertheless, the defendant's right to compel arbitration, and the concomitant right to stay the action, is not absolute and may be waived by interposing a counterclaim, giving notice of trial, or obtaining an order for the taking of a deposition (**Id.**). The crucial question is what degree of participation by the defendant in the action will create a waiver of the right to stay the action (**Id.**). In the absence of unreasonable delay, as long as the defendant's actions are consistent with an assertion of the right to arbitrate there is no waiver (**Id.**). On the other hand, when the defendant's participation in the lawsuit clearly manifests an intent to accept the judicial forum, he will be deemed to have waived the right to arbitrate (**Id.**). Contesting the merits through the judicial process is an affirmative acceptance of the judicial forum and waives any right to a later stay of the action (**Id.**). Here, Giordano promptly moved for dismissal and to compel arbitration after service of the complaint. Moreover, Giordano neither sought nor engaged in any discovery. The court finds that, under these circumstances, Giordano did not waive its right to arbitrate this dispute (*see*, **Byrnes v Castaldi**, 72 AD3d 718, 720; **Spatz v Ridge Lea Assocs. LLC**, *supra* at 1249; **Flynn v Labor**, 193 Misc 2d 721, 724, *affd as mod* 6 AD3d 492. Giordano's threat to pursue the matter in New York State court if TII did not submit to FINRA's jurisdiction, without more, is insufficient to support a finding that Giordano manifested an affirmative acceptance of the judicial forum. Accordingly, the branch of the motion which is to compel arbitration is granted, and the parties are directed to proceed to arbitration.

In view of the foregoing, it is not necessary to reach Giordano's remaining contentions.

Dated: May 31, 2011

J.S.C.