

**Human Care Servs. for Families & Children, Inc. v
Lustig**

2015 NY Slip Op 32603(U)

March 5, 2015

Supreme Court, Kings County

Docket Number: 505179/14

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of March, 2015, *nunc pro tunc to the 23rd day of February, 2015.*

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

HUMAN CARE SERVICES FOR FAMILIES AND CHILDREN, INC.,

Plaintiff,

- against -

Esther Lustig,

Defendant.

-----X

**AMENDED
DECISION / ORDER**

Index No. 505179/14

Mot. Seq. # 1 & 3

The following papers numbered 1 to 11 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
Memos of Law _____

Papers Numbered

1-3 4-7

8

9, 10, 11

Upon the foregoing papers, defendant Esther Lustig (Lustig), moves for an order, pursuant to CPLR 7503 (a), staying this declaratory judgment action and compelling plaintiff to arbitrate the parties' dispute before the American Arbitration Association (AAA).

Plaintiff, Human Care Services For Families and Children, Inc. (HCS), cross-moves for an order: (1) staying the arbitration of any claims; (2) compelling Lustig to comply with

HCS's notice of deposition; or, alternatively, (3) granting HCS a default judgment.

Background

The Employment Agreement

Lustig was employed by HCS as its Executive Director, pursuant to a written employment agreement dated December 14, 2010 (Employment Agreement).¹ Section 5.6 of the Employment Agreement provides that any controversy arising out of, or relating to, the Employment Agreement "shall be settled by binding arbitration":

"5.6 Arbitration of Disputes. Any controversy or claim arising out of, or relating to the interpretation or meaning of this Agreement *shall be settled by binding arbitration* before a single arbitrator. The arbitration will be conducted by and in accordance with the rules for employment disputes of the American Arbitration Association or New York Arbitration and Mediation Service. The costs and expenses of the arbitration proceeding, such as the costs and expenses of the arbitration service, arbitrator, and court reporter, will be paid by the Company. However, each party to the dispute will be responsible for its or her own attorneys' fees and legal expenses. The arbitrator's determination of the dispute will be final and binding, and a judgment may be entered upon the arbitrator's determination in any court of competent jurisdiction. Nothing in this provision requires the parties to submit a claim or defense arising out of the federal or state constitution or arising under federal or state law to arbitration" (emphasis added).

Bernard Spitzer, as the Chairman and President of the Board of Directors of HCS (Board), executed the Employment Agreement on behalf of HCS in 2010.

HCS terminated Lustig's employment on September 12, 2012.

Lustig Commenced An Arbitration With AAA

Lustig thereafter commenced an arbitration with the AAA to recover severance

¹It was indicated at oral argument by Lustig's attorney that Lustig had been employed by HCS for five years prior to the date of the contract, but that the contract was necessary for HCS's state funding.

compensation that she alleges HCS owes her under the Employment Agreement, by filing and serving HCS with an Employment Arbitration Rules Demand for Arbitration on April 24, 2014.

HCS responded to the arbitration demand with a June 2, 2014 answer which alleges that the Employment Agreement is null and void because it was never approved by HCS's Board. HCS also asserted counterclaims alleging that Lustig received excessive and unreasonable compensation and breached her fiduciary duties to HCS. HCS sent a June 2, 2014 letter to the AAA objecting to arbitration and advising of its intention to seek a stay in court.

Declaratory Judgment Action

HCS commenced this declaratory judgment action on June 6, 2014, challenging the validity of the Employment Agreement on the grounds that "it was never known to or approved by the Board of HCS, and in any event is excessive and violates public policy" (Complaint at ¶ 8). HCS alleges that it "properly and reasonably rejected defendant's demand for arbitration, as HCS and its Board never agreed to arbitrate any dispute with Defendant" (*id.* at ¶ 11). Essentially, HCS contends that the arbitration provision in the Employment Agreement is not binding and enforceable because the Employment Agreement "was never presented to, or approved by, the full Board of HCS" (*id.* at ¶ 12 [a]).

Lustig's Instant Motion To Compel Arbitration

Lustig now moves for an order staying this action and compelling HCS to arbitrate the dispute before the AAA, contending that the arbitration provision in the Employment

Agreement broadly requires that “any controversy or claim arising out of, or relating to the interpretation or meaning of this Agreement shall be settled by binding arbitration² . . . ”

Lustig also relies on Rule 6 of the AAA Employment Arbitration Rules and Mediation Procedures, which specifically provides that “[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objection with respect to the existence, scope or validity of the arbitration agreement . . . ” (Lustig Affidavit ¶ 4).

Lustig contends that the case of *Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's* (66 AD3d 495, 495-496 [2009], *aff'd* 14 NY3d 850 [2010]), is “directly on point” and holds that “the issue of arbitrability should be determined by the arbitration tribunal.”³

Lustig thus argues that an evidentiary *arbitration* hearing is necessary to determine whether HCS’s Board had actual knowledge of, and approved of, the Employment Agreement. Lustig submits documents which she claims are evidence that HCS’s Board had actual knowledge of her Employment Agreement, including HCS’s Form 990s (annual reporting returns for non-profits) that were submitted to the IRS for the 2010 and 2011 tax years, in which HCS reported that it established the compensation of its Executive Director with a “written employment contract” and “[a]pproval by the board or compensation committee.” Lustig also submits a copy of HCS’s 2011 New York State Consolidated Fiscal Report prepared by the New York State Office for People with Developmental Disabilities, which specifically references Lustig’s Employment Agreement.

² See the July 10, 2014 affidavit of Esther Lustig (Lustig Affidavit) at ¶ 4.

³ See Lustig’s July 11, 2014 memorandum of law in support of her motion to compel arbitration at 8.

HCS's Cross-Motion

HCS opposes Lustig's motion and cross-moves for an order staying arbitration, compelling Lustig to appear for a deposition or, alternatively, granting it a default judgment. HCS acknowledges that Spitzer executed the Employment Agreement, yet asserts that he "did not realize what he was signing . . . he was in the hospital and on medication."⁴ HCS contends that Lustig's compensation required Board approval under New York law⁵ and that the contractual provision for Lustig's compensation is "grossly excessive" and in violation of both state (New York) and federal law. HCS also criticizes the attorney who drafted Lustig's Employment Agreement, asserting that he "lacked background and expertise in nonprofit law issues" (*see* Samuels Affirmation ¶ 20). HCS further argues that "arbitration is not available or appropriate" because "[t]he Purported Agreement is null and void, as it was never presented to or approved by the Board of HCS, and in any event is excessive and unreasonable and violates public policy" (*id.* at ¶ 26). According to Aaron Oberlander, HCS's current President and CEO, "[t]he Board of HCS never agreed to arbitrate any dispute with Ms. Lustig (other than in a Rabbinical Court)" (Oberlander Affirmation ¶ 7 [f]).

HCS contends that the enforceability of the arbitration provision in the Employment Agreement "cannot be resolved in arbitration" since "whether there is a clear, unequivocal,

⁴ *See* the August 13, 2014 affirmation of David G. Samuels, Esq. in opposition to Lustig's motion and in support of HCS's cross motion (Samuels Affirmation) at ¶ 15 and the August 12, 2014 Affirmation of Aaron Oberlander (Oberlander Affirmation) at ¶ 7 (g).

⁵ HCS relies on N-PCL § 715 (f), which provides that "[t]he fixing of salaries of officers, if not done in or pursuant to the by-laws, shall require the affirmative vote of a majority of the entire board unless a higher proportion is set by the certificate of incorporation or by-laws."

and extant agreement to arbitrate is for the court and not the arbitrator to determine.”⁶

Discussion

(1)

When presented with a motion to compel or stay arbitration, “the court must determine, in the first instance, whether the parties made a valid agreement to arbitrate” (*Brown v Busey*, 245 AD2d 255, 255 [1997]). The Second Department has explicitly held that “[t]he issue of whether there is a clear, unequivocal, and extant agreement to arbitrate is for the court and not the arbitrator to determine” (*Jalas*, 85 AD3d at 1181). The court, however, does not determine the enforceability of the parties’ contract, as a whole, but only whether the parties made a valid agreement to arbitrate (*Wagner Acquisition Corp. v Giove*, 250 AD2d 857, 857 [1998]), because “the scope and validity of the parties’ arbitration agreement, including issues of arbitrability, are for the arbitration tribunal to determine” (*Life Receivables Trust*, 14 NY3d at 851).

HCS argues that the parties never made a valid agreement to arbitrate because Lustig’s Employment Agreement (with the arbitration provision) was never approved by HCS’s Board. Essentially, HCS contends that Spitzer, its former Chairman and President, lacked actual or apparent authority to execute the Employment Agreement on behalf of the Board or HCS, and they raise claims that dispute Spitzer’s mental capacity at the time that he signed the Employment Agreement and Spitzer’s authority to bind HCS. They also dispute that HCS subsequently ratified Spitzer’s allegedly unauthorized execution of the

⁶ See HCS’s August 12, 2014 memorandum of law in opposition to Lustig’s motion and in support of HCS’s cross motion at 3 (quoting *Jalas v Halperin* [85 AD3d 1178, 1181 (2011)]).

Employment Agreement. Lustig, in contrast, has produced documentary evidence, including HCS's own IRS 990 annual reports, which suggest that HCS ratified Spitzer's prior execution of the Employment Agreement with Lustig.

Thus, the defendant has raised issues of material fact that cannot be resolved on this record regarding the validity of the contract containing the agreement to arbitrate. Hence, a framed-issued hearing, pursuant to CPLR 2218,⁷ emerges as the most appropriate course of action at this juncture.

(2)

Alternatively, HCS cross-moves, pursuant to CPLR 3215 (a), for a default judgment against Lustig based on her failure to timely answer or move to dismiss HCS's complaint. CPLR 3215(f) provides, in relevant part, that on an application for judgment by default, the movant "shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party." Inasmuch as HCS has failed to submit an affidavit of service proving that Lustig was served with the summons and complaint and that she failed to timely answer the complaint or otherwise appear in this action, HCS's cross motion for a default judgment is denied.

Accordingly, it is

ORDERED that Lustig's motion to compel arbitration before the AAA and the branch of HCS's cross motion to stay arbitration before the AAA are held in abeyance

⁷ CPLR 2218 provides, in relevant part, that "[t]he court may order that an issue of fact raised on a motion shall be separately tried by the court or a referee . . . An order under this rule shall specify the issue to be tried."

pending the outcome of a framed issue hearing before a referee to hear and report⁸ solely on the issue of the validity of the Employment Agreement, to be scheduled by the court pursuant to the referee referral order executed simultaneously herewith; and it is further

ORDERED that a temporary stay of arbitration is granted pending the outcome of the framed issue hearing; and it is further

ORDERED that the branch of HCS's cross motion for a default judgment against Lustig is denied; and it is further

ORDERED that the branch of HCS's cross motion to compel Lustig to appear for a deposition is denied without prejudice to renewal if the framed-issue hearing is resolved in HCS's favor and the arbitration is permanently stayed.

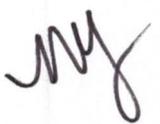
This shall constitute the decision and order of the court.

E N T E R :



Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court


**FILED
KINGS COUNTY CLERK
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⁸Unless the attorneys consent that the Referee may hear and determine.