Curtis, Mallet-Prevost, Colt & Mosle LLP v Graza-Morales
2002 NY Slip Op 30011(U)
May 3, 2002
Supreme Court, New York County
Docket Number: 0107719/7192
Judge: Emily Jane Goodman

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN PART 17
Justice

Curtis, Mallet-Prevost, Colt et al.

INDEX NO. 107719/02

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

-v-

Edgar Alfonso Morales

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	SC/
Replying Affidavits	MAY

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: May 3, 2002

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

EMILY JANE GOODMAN

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17
…… X
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP,

Petitioner,

Index No.
107719/02

-against-

EDGAR H. GARZA-MORALES,

Respondent.
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EMILY JANE GOODMAN, J.:

Petitioner Curtis, Mallet-Prevost, Colt & Mosle LLP (hereafter the "firm") brings this Order to Show Cause pursuant to CPLR 7501 and 7503 for an order (1) compelling Edgar H. Garza-Morales (hereafter "Garza-Morales") to arbitrate, in New York, the claims that he asserted before a labor court in Monterrey, Mexico (hereafter the "Mexican proceeding"), (2) enjoining Garza-Morales from continuing the Mexican proceeding, and (3) ordering him to withdraw that proceeding.

Garza-Morales opposes this motion, claiming that (1) the arbitration clause in the Curtis, Mallet-Prevost, Colt & Mosle LLP Amended and Restated Partnership Agreement, dated September 15, 1999 (hereafter the "Agreement"), which he signed, is not enforceable against him because he was an "employee" and not a "partner," (2) the firm subjected itself to Mexican laws when it opened a branch of the firm in Mexico City, and (3) Mexico has a greater interest in deciding the issue of whether Garza-Morales was

an "employee" or a "partner."

Background

Garza-Morales was born in Mexico and obtained a "green card" in 1983 (see, Affidatit [sic] of Respondant [sic] In Opposition To The Petition Denial For An Order Compelling Arbitration, Enjoining Respondent From Continuing With Mexican Legal Proceedings And Ordering Respondent to Immediately Cease And Withdraw Those Proceedings [hereafter "Garza-Morales Aff"]). The firm claims that Garza-Morales became a United States citizen in 1988, which he does not dispute (see, Affidavit of T. Barry Kingham [hereafter "Kingham Aff"]). Garza-Morales states that he maintains a residence in New York and Mexico, and pays taxes in both countries (see, Garza-Morales Aff).

In 1977, Garza-Morales commenced work as an associate with the firm, at its principal office in New York City (see, Garza-Morales Aff). He was also a founding father of the Mexico City firm Diez, Garza-Morales y Prida, S.C., which was later renamed Curtis, Mallet-Prevost, Colt & Mosle, S.C., in which the firm holds a 49 percent interest (see, Respondent's Reply In Opposition To Motion of Petitioner For An Order Compelling Arbitration, Enjoining Respondent From Continuing With Mexican Legal Proceedings And Ordering Respondent to Immediately Cease and Withdraw Those Proceedings [hereafter "Garza-Morales Reply"] at para 5). Garza-Morales contends that he holds a 15.10 percent interest in that firm (see, Ex B to Kingham Aff).

In 1991, Garza-Morales was admitted to the firm's Partnership as a non-equity partner (hereafter "Agreed Payment Partner"). However, his relationship with the firm subsequently soured. In 2001, the firm alleges that Garza-Morales recorded 867 non-billable hours and only 585 billable hours, of which 195 hours were inappropriately spent on family matters, costing the firm $230,906.53 (see, Ex C to Kingham Aff). The firm alleges that in October 2001, Garza-Morales admitted that he had taken most of that year to pursue his own political and family interests (see, Ex C, supra). Further, the firm alleges that when Garza-Morales ceased coming to the office in November, 2001, he instructed his secretary to arrange to transfer files and office furniture to his home in New York City (see, Ex C, supra). The firm contends that although it stopped the transfer, some firm files had already been improperly removed (see, Kingham Aff). Garza-Morales was voted out of the Partnership, effective December 20, 2001 (see, Kingham Aff).

On April 12, 2002, the firm alleges that it first learned of the Mexican proceeding (see, Kingham Aff).[1] Based on the firm's translation of the complaint, which Garza-Morales does not dispute, Garza-Morales seeks past due compensation and reinstatement to his position with the firm (see, Ex B, supra). On April 16, 2002, the firm filed a

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[1] Based on advice received from Mexican counsel, the firm contends that it must respond to the complaint, which was sworn to December 7, 2001, by May 13, 2002, the time of the initial hearing in the Mexican proceeding (see, Affidavit of Joseph D. Pizzurro).

Demand For Arbitration, alleging that Garza-Morales breached his fiduciary duty to the firm (see, **Ex** C, supra).

In contrast to these allegations, Garza-Morales contends that he was voted out of the Partnership because the firm was upset with an argument which he raised in a lawsuit brought against him and other firm partners, which resulted in a dismissal in his favor (see, Garza-Morales Reply at para 10-12). Garza-Morales also contends that the firm was upset with his criticism of management (see, Garza-Morales Reply at para 8). As to his lack of productivity, Garza-Morales claims that on or about October 15,2000, he was admitted to Lenox Hill Hospital for emergency treatment for life threatening septic shock (see, Garza-Morales Reply at para 12). For the next six months, Garza-Morales contends that he was advised by his physicians to recover in a non-stressful environment, and the firm was aware that he was doing so (see, Garza-Morales Reply, supra).

During the entire period that Garza-Morales worked at the firm, the firm contends that he was never based in any office other than in New York, and that for his last two years with the firm, he never billed for any time spent in Mexico (see, Reply Affidavit of T. Barry Kingham). Garza-Morales generally notes that "[t]hroughout his employment with Curtis, Garza-Morales' [sic] divided his time between Mexico and the United States" but he does not otherwise dispute the firm's contentions (see, Garza-Morales Reply at para 7).

The Arbitration Clause

Article 10 of the Agreement contains an arbitration clause which covers "[a]ny dispute or claim arising out of or in any way related to this Agreement or the Partnership" and covers "all disputes and claims between or among Partners arising out of or in any way relating to [the] Agreement or the Partnership, regardless of whether the Partnership is a party, as well as disputes or claims between one or more Partners and the Partnership" (Ex A to Kingham Aff at Art. 10). Partners are defined to include both Percentage Partners and Agreed Payment Partners (see, **Ex** A, supra, at Art. 1). Pursuant to the Agreement, all disputes are to be arbitrated in New York by the American Arbitration Association under its Commercial Arbitration Rules (see, Ex A, supra, at Art. 10).

Garza-Morales erroneously argues that the arbitration clause is not enforceable against him because he was an "employee" and not a "partner." He correctly observes that as an Agreed Payment Partner, he did not share in the firm's profits, assets or losses, did not make capital contributions, had no management authority, and was compensated by a **fixed** salary and bonus. However, although he was not entitled to the same rights as a Percentage Partner, he nevertheless signed the Partnership Agreement, evidencing an intent to be bound by arbitration in New York. In fact, Garza-Morales signed the Agreement below the line which read "In Witness Whereof, this Agreement has been executed by all of the current Partners as of the date first above written" (Ex A, supra). Intent of parties is the governing consideration in determining the scope of an arbitration

agreement (see, Sheets v Sheets, 22 AD2d 176, 180 [1st Dept 19641). A signatory to a contract providing for arbitration may not evade his obligation by masking himself under another identity (see, Glasser v Price, 35 AD2d 98, 101 [2d Dept 19701; Walters v Harmon, 135 Misc 2d 905,907 [Sup Ct, New York County 19871). Further, not only did the Agreement cover disputes relating to the Partnership, it covered disputes "arising out of or in any way related to [the] Agreement" (Ex A, supra, at Art. 10). Garza-Morales' complaint in the Mexican proceeding, which seeks past due compensation and reinstatement, arises out of the Agreement (see, Ex A, supra, at Arts. 3 (f) and 4 (c)). Accordingly, Garza-Morales is bound by the arbitration clause in the Agreement.

Injunctive Relief

A more difficult question, however, is whether this Court should enjoin Garza-Morales, who is subject to this Court's jurisdiction, from continuing with the Mexican proceeding. The firm contends that it is entitled to injunctive relief because Garza-Morales agreed to arbitrate in New York, and the firm will suffer irreparable harm due to the cost of litigating in Mexico and the **risk** of inconsistent results (see, Kingham Aff).[2] In support of the injunction, the firm cites New York State's policy favoring arbitration (see, e.g., Matter of Smith Barney Shearson Inc. v Sacharow, 91 NY2d 39 [1997]; Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp., 78 NY2d 88 [1991]). The firm

[2] The additional expense of litigating in a foreign court is insufficient to warrant an injunction (see, Indosuez Intl. Finance B.V. v Natl. Reserve Bank, 263 AD2d 384 [1st Dept 19991).

also cites two cases, each holding that a New York State trial court properly enjoined a party from pursuing litigation previously commenced in California, in violation of an arbitration agreement (see, Matter of PricewaterhouseCoopers LLP v Rutlen, 284 AD2d 200 [1st Dept 20011; PromoFone, Inc. v PCC Mgt., Inc., 224 AD2d 259 [1st Dept 19961).

In arguing against the injunction, Garza-Morales implicitly invokes the policy of comity, and claims that Mexico has a greater interest in determining whether he was an "employee" or a "partner." In a surprising omission, the firm, which has offices worldwide, does not address this policy. Garza-Morales argues that by opening a branch office in Mexico, the firm has agreed to be sued there and has accepted that its activities would be governed by Mexican law (see, Garza-Morales Reply at para 24). Garza-Morales claims that it would be unconstitutional for him to be subject to the arbitration clause under Mexican law, and, that the Agreement is unenforceable under Mexican law because a worker may not waive his right to severance pay and back wages, as well as his right to continued employment (see, Garza-Morales Reply at para 20).

Although the propriety of enjoining a party from proceeding with a foreign litigation was not at issue in Matter of Propulsora Ixtapa Sur, S.A. De C.V. v Omni Hotels Franchising Corp. (211 AD2d 546 [1st Dept 1995]), the case is relevant to this Court's analysis.[3] In Matter of Propulsora Ixtapa, the Court held that the IAS court erred in staying a New York arbitration, as a matter of comity, so that the validity of a

[3] Neither party has cited this case, despite its significance.

marketing agreement (which provided for arbitration in New York) could be determined in a previously commenced Mexican lawsuit (see, Matter of Propulsora Ixtapa, supra). The petitioner claimed that the marketing agreement was invalid under Mexican law because it had not been notarized and because the respondent was not licensed to do business in Mexico (Matter of Propulsora, supra, at 547-48). However, the Court noted that the agreement was, by its terms, to be construed in accordance with New York law, and that the agreement provided that disputes were to be settled by arbitration in New York (Matter of Propulsora, supra, at 548). Further, the Court noted that comity "'is not a rule of law, but one of practice, convenience and expediency' and does not, of its own force, compel a particular course of action" (Matter of Propulsora Ixtapa, supra, [quoting Ehrlich-Bober & Co., Inc. v University of Houston, 49 NY2d 574, 580 [19801). In deciding that the trial court's stay of arbitration was in error, the Court also cited to New York's strong policy favoring arbitration of disputes, coupled with the marketing agreement's plain language providing that disputes were to be resolved by arbitration in New York (see, Matter of Propulsora Ixtapa, supra, at 549).

Accordingly, this Court finds that it is proper to enjoin Garza-Morales from continuing the Mexican proceeding based on New York's strong policy favoring arbitration, coupled with the Agreement's plain language (see also, Smoothline Ltd. v North American Foreign Trading Corp., 249 F3d 147 [2d Cir 20011 [company that commenced litigation in Liechtenstein, in violation of an arbitration agreement, was

enjoined from continuing that action]).[4] Mexican law is inapplicable to the Agreement because, by its terms, all disputes are to be arbitrated in New York by the American Arbitration Association under its Commercial Arbitration Rules.

Accordingly, it is hereby

ORDERED that Petitioner's motion is granted in accordance with the terms of this Decision and Order; and it is further

ORDERED that Respondent is enjoined from continuing with the Mexican proceeding (but is not directed to withdraw it) because the issues raised in the Mexican proceeding should be arbitrated in New York; and it is further

ORDERED that Respondent is enjoined from directing his agents, servants, employees and other persons acting under his jurisdiction, supervision and/or direction from continuing the Mexican proceeding on his behalf; and it is further

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[4] A different approach was taken in Faberge Intl., Inc. v Di Pino, 109 AD2d **235** [1st Dept 19851, a case not cited by either party. In that case, the Court held that it was error to enjoin an Italian-born American citizen, who worked in Italy, from commencing a suit against his employer in an Italian labor court, despite the fact that his employment contract contained a clause providing for arbitration in New York (Faberge Intl.. Inc., supra). In vacating the injunction, the Court noted that the use of injunctive power to prohibit a person from resorting to a foreign court is rarely employed because it represents a challenge, albeit an indirect one, to the authority of that tribunal (see, Faberge Intl.. Inc, supra, at 240). The Court's decision may have been based upon the fact that the employee had been working for the employer in Italy for thirteen years before he was terminated from his employment there. Although Garza-Morales states that he has homes in both Mexico and the United States, and has worked for the firm in both countries, he does not dispute the firm's contention that his primary office was in New York, and that for his last two years with the firm, he has never billed for any time spent in Mexico.

ORDERED that an undertaking is fixed in the amount of $200,000, conditioned that if it is determined that Petitioner was not entitled to this injunction, Petitioner will pay Respondent all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that a copy of this Decision and Order, with Notice of Entry shall be personally served on Respondent by May 9,2002.

This constitutes the Decision and Order of the Court.

Dated: May 3,2002

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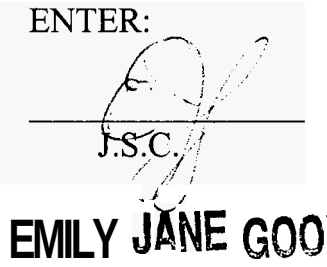

J.S.C.

EMILY JANE GOODMAN