

Mionis v Bank Julius Baer & Co. Ltd.

2002 NY Slip Op 30031(U)

February 6, 2002

Supreme Court, New York County

Docket Number: 0604471/4471

Judge: Richard B. Lowe

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

PRESENT: Lowe
Justice

PART 56m

Sabbag, Mironis et al
HON. RICHARD B. LOWE, III

INDEX NO. 604471/01

MOTION DATE 1/6/02

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Bank Julius et al

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 _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion resolved in accordance with the attached memorandum decision.

SCANNED
FEB 25 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 2/6/02

[Signature]
HON. RICHARD B. LOWE, III J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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SABBY H. MIONIS and CAPITAL MANAGEMENT
ADVISORS LTD.,

Plaintiffs,

Index No. 604471/01

-against-

BANK JULIUS BAER & CO. LTD., JULIUS
BAER TRUST COMPANY (CAYMAN) LTD.
PETER EMBIRICUOS, and THEODORE GONEOS,

Defendants.

-----x

RICHARD B. LOWE, III, J:

Defendants Bank Julius Baer & Co. Ltd. ("Bank JB"), Julius Baer Trust Company (Cayman) Ltd. ("JB Cayman"), Peter Embiricos, and Theodore Goneos (collectively referred to as "defendants"), move, pursuant to CPLR 7501 and 7503, for an order staying this action and compelling the mediation and, if necessary, arbitration of plaintiffs' claims under the rules of the American Arbitration Association.

This is an action for libel, tortious interference with existing and prospective contractual relations, and intentional infliction of emotional distress.

THE PARTIES

Plaintiff Sabby H. Mionis ("Mionis"), an investment manager, is a citizen of Greece, and the founder of T.C. Advisors, Ltd., the predecessor-in-interest to plaintiff Capital Management Advisors, Ltd., ("Capital Management"). Capital Management, a Bahamian corporation with its principal place of business in Nassau, Bahamas, is in the business of providing

management services to a group of open-ended mutual funds, set up at the direction of Mionis for his clients.

Defendant Bank JB is a Swiss bank, with a branch office in New York, among other places. One of the services Bank JB offers customers is what is known as a "private label fund." This service permits an independent investment manager to manage a pooled fund of investors' assets in a Bank JB account. Defendant JB Cayman has its principal place of business in Grand Cayman, Cayman Islands. Both Bank JB and JB Cayman are wholly owned subsidiaries of a Swiss holding company, Julius Baer Holding Ltd. Defendants Peter Embiricos and Theodore Goneos were, until recently, employees in the private banking and investment fund business for Bank JB. They were also the account officers at Bank JB, who were involved in the business relationship at issue herein between plaintiffs and Bank JB.

THE COMPLAINT

Plaintiffs allege that in or about March and April 1998, Mionis and T.C. Advisors entered into an oral partnership agreement with Bank JB and JB Cayman, pursuant to which Bank JB and JB Cayman would establish two offshore funds of funds¹ the "Funds"), otherwise known as private label funds, which would be domiciled in the Cayman Islands. Bank JB would supervise the set up of the Funds. Thereafter, Bank JB, together with its New York

¹Plaintiffs describe funds of funds as mutual funds that invest primarily in other mutual funds. They offer individual investors access to funds that are generally open only to institutional investors.

affiliate, Julius Baer Securities, Inc. ("JB Securities"), would provide custodial, banking, and brokerage services to the Funds, and would assist in the formation of the Funds, in exchange for fees. JB Cayman was to serve as the administrator, transfer agent and registrar of the Funds, in exchange for administration fees. Mionis and T.C. Advisors, as the investment advisor to the Funds, were responsible for identifying and purchasing investments.

In May 1998, the Funds, known as T.C. Investment Ltd. and TC Multi-Hedge Ltd., were created, and accounts were established for the Funds at Bank JB (the "Account"). Directorate, Inc. ("Directorate"), a separate legal entity, was designated as "director" of the Funds, responsible for all formal acts for the Funds. The subscription agreements for each of the Funds provided that each was governed by the laws of the State of New York. Plaintiffs contend that, thereafter, the parties agreed to develop private banking and investment businesses and to split the fees.

It is alleged by plaintiffs that once the Funds were set up, tensions developed between the parties due to Bank JB New York's efforts to persuade Mionis that his clients would be better served if Mionis and his company became a marketing agent for the Bank, instead of an investment advisor for the Funds, and allowed the investment advisory services to be provided by Julius Baer. Mionis allegedly rejected these proposals. Mionis further claims that based upon, inter alia, his dissatisfaction with JB Cayman's

work as the Fund's administrator, and his doubts about the Julius Baer Group in general, he terminated the partnership between T.C. Advisors and the Julius Baer entities in writing, effective July 31, 2000.

Mionis claims that after he terminated the partnership with the Julius Baer entities, he was defamed in a letter, on Julius Baer letterhead, sent to the Greek authorities, accusing Mionis and certain of his clients of money laundering. The letter, dated August 5, 2000, although unsigned, reflects the name of Charles Farrington, the head of JB Cayman. Mionis contends that this letter caused the Greek Ministry of Justice to raid his premises, take all of his documents and computer files, and caused his relationship with his customers in Greece to be ruined. This letter precipitated the claims by plaintiffs in the instant action.

Plaintiffs base their claims on a conspiracy theory among defendants to force Mionis and his investment company, Capital Management, out of business. Plaintiffs allege that defendants' actions, which resulted in significant harm to Mionis' health, and his and his company's reputation and financial well-being, were in retaliation for Mionis' decision to terminate his relationship with defendants, and that defendants' actions were motivated by their attempt to steal Mionis' clients and investment fund business from him.

MOTION TO COMPEL MEDIATION OR ARBITRATION

Defendants submit a signed arbitration and mediation agreement, which, they argue, is binding on the claims alleged in this action. The agreement, dated April 27, 1998, is entitled "Management Authorization For Third Parties" (the "Authorization Agreement"). Bank JB states that, since the Funds were the account holders, it required the Authorization Agreement to obtain the Fund's consent to T.C. Advisors' having access to the Account to manage the Fund's assets. The Authorization Agreement appointed T.C. Advisors as the Funds' agent and attorney-in-fact for the Account "with full authorization to give instructions in connection with the Account ... ", including instructions in managing the investments in the Account.

The Authorization Agreement contained two separate clauses relating to mediation/arbitration. The first clause, which applies to the Funds only, requires the Funds to settle any dispute, controversy or claim with Bank JB which "arises out of or relates to any business relationship between [the Funds] or the Bank" in accordance with the "Acknowledgments and Agreements - Mediation and Arbitration form given to and signed by [the Funds]".

The second clause of the Authorization Agreement applies T.C. Advisors only, and states:

[T.C. Advisors] hereby expressly agrees to settle by mediation and Arbitration any controversy between or among [T.C. Advisers], [the Funds], and/or [Bank JB New York] subject to the rules of the American Arbitration Association. Any award the

arbitrator makes will be final and judgment on it may be entered in any court jurisdiction.

Directorate executed the Authorization Agreement and the Acknowledgments and Agreements form on behalf of the Funds. Mionis signed the Authorization Agreement on behalf of T.C. Advisors, but not the Acknowledgments and Agreements form, since the clause governing T.C. Advisors did not incorporate the Acknowledgments and Agreements form.

Plaintiffs argue in opposition to defendants' motion, that T.C. Advisors agreed to arbitrate any controversy only in its limited capacity as attorney-in-fact for the Funds, and not in its corporate capacity, and point to the language in the agreement wherein T.C. Advisors is defined in the Authorization Agreement as "Attorney", and Mionis signed as "attorney-in fact". They further argue that, inasmuch as the partnership between T.C. Advisors and the Julius Baer entities was terminated in July 2000, T.C. Advisors cannot be suing Bank JB in its capacity of "Attorney" for the Funds. Plaintiffs also maintain that none of the claims asserted against Bank JB relates to T.C. Advisors' role as investment advisor for the Funds.

Finally, plaintiffs argue that even if this court finds that T.C. Advisors must mediate and/or arbitrate its claims against defendants, Mionis, who signed the Authorization Agreement only in his representative capacity, should not be compelled to arbitrate his claims against the defendants.

Defendants argue that the plain terms of the broad mediation/arbitration clause in the Authorization Agreement clearly require Capital Management, as successor-in-interest to T.C. Advisors, to settle "any controversy" with Bank JB through mediation and, if necessary, arbitration in New York.² They maintain that since this action constitutes a "controversy" between the parties, plaintiffs are obligated to mediate and/or arbitrate their claims.

They further challenge plaintiffs' contention that T.C. Advisors agreed to arbitrate only in its capacity as the Funds' representative. They point out that it is not disputed that the Funds' authorized representative was Directorate; that Directorate signed the Authorization Agreement as the Funds representative; and that only Directorate could sue on behalf of the Funds. Defendants maintain, that even accepting plaintiffs' argument, plaintiffs' own allegations contained in the complaint, i.e., that the dispute arose from the termination of plaintiffs' relationship with Bank JB, make clear that this controversy arose out of T.C. Advisors' relationship with Bank JB as the Funds' investment advisor, as well as the Funds' "Attorney".

With regard to Mionis, defendants point out that Mionis signed the Authorization Agreement in his own name. They also argue that a review of the complaint clearly demonstrates that Mionis treats himself and T.C. Advisors as a single entity, and

²It is undisputed that if this court determines that T.C. Advisors must mediate/arbitrate, then Capital Management, as successor-in-interest to T.C. Advisors, must do so.

that Mionis' claims are totally interwoven with Capital Management's claims.

Finally, defendants argue that the claims against the non-signatory defendants, JB Cayman, Peter Embiricos and Theodore Goneous, are also subject to the mediation/arbitration clause because these defendants are closely related to Bank JB, and the claims against them are closely intertwined with the claims against Bank JB, since they are alleged to have engaged in the same wrongful conduct.

It is well established that New York public policy favors arbitration (Rio Algom v Sammi Steel Co., 168 AD2d 250 [1st Dept 1990], lv denied 78 NY2d 853 [1991]). The question of whether a party is bound to arbitrate is an issue for the court (AT&T Technologies v Communications Workers of Am., 475 US 643, 649 [1986])). Once the court has determined that a valid arbitration agreement was made "the court shall direct the parties to arbitrate" (CPLR 7503[a]).

"It is settled that where parties have entered into an agreement containing a broad arbitration provision, the court's inquiry is limited to whether or not the subject matter of the dispute is encompassed by its provisions; the question of whether the arbitration clause governs a particular aspect of the controversy, as well as the determination of the merits of the dispute, are matters within the exclusive province of the arbitrator" (De Shazo v Hirschler, 282 AD2d 257, 258 [1st Dept

2001]; see also, Poly-Pak Indust., Inc. v Collegiate Stores Corp., 269 AD2d 130 [1st Dept 2000]).

It is well established that where the intention of the parties is expressed in plain and unambiguous terms, it does not become ambiguous merely because the parties urge different interpretations in the litigation (Breed v Insurance Co. of N. Am., 46 NY2d 351 355 [1978]; Wallace v 600 Partners Co., 205 AD2d 202, 208 [1st Dept 1994], affd 86 NY2d 543 [1995]). Furthermore, a contract should be construed so as to give full meaning and effect to all of its provisions (Trump-Equitable Fifth Ave. Co. v H.R.H. Construction Corp., 106 AD2d 242, 244, affd 66 NY2d 779 [1985]).

The plain language of the Authorization Agreement makes clear that T.C. Advisors entered into a broad arbitration agreement to mediate and, if necessary to arbitrate, any controversy between itself, the Fund and/or Bank JB subject to the rules of the American Arbitration Association. The term "any controversy" is not ambiguous. It is undisputed that a controversy exists between Bank JB and T.C. Advisors. There is no limiting language in the arbitration clause. Giving effect to all the provisions of the Authorization Agreement, and gleaning the intention of the parties from the plain and unambiguous terms contained therein, including the obligations it imposes, this court finds that Capital Management, as successor-in-interest to T.C. Advisors, is compelled to resolve its claims with Bank JB in accordance with the arbitration clause.

With regard to Mionis, this court finds that he is required to resolve his claims through mediation, and, if necessary, arbitration, as well. Even assuming that Mionis did not sign the Authorization Agreement in his individual capacity as he claims, a non-signatory may compel a signatory to arbitrate where the issues in the overall dispute are inextricably interwoven (Promofone, Inc. v PCC Management, 224 AD2d 259 [1st Dept 1996]; see also, Thomson-CSF, S.A. v American Arbitration Assn., 64 F3d 773, 776 [2d Cir 1995]).

As noted by the defendants, the complaint is framed by plaintiffs in such a fashion that Mionis and T.C. Advisors are treated as a single entity. For example, Mionis refers to the Funds interchangeably as his clients and T.C. Advisors' clients; he alleges that he entered into an agreement to work with the Julius Baer entities to set up the Funds; and he alleges that he and T.C. Advisors were the investment advisors for the Funds. The facts and issues underlying Mionis' and T.C. Advisors' dispute with defendants, and plaintiffs' claims against Bank JB, are so interrelated as to be inseparable (see, Matter of Lane v Abel-Bey, 50 NY2d 864 [1980]; see also, Matter of Russian Brazilian Holdings, Inc., v Saraev, 197 AD2d 391 [1st Dept 1993]).

Likewise, plaintiffs' claims against JB Cayman, Peter Embiricos, and Theodore Goneos are also subject to mediation and, if necessary arbitration, on the same basis as Mionis' claims. The individual defendants were account representatives for the

Funds at the time of the alleged wrongful conduct. JB Cayman and Bank JB are wholly owned by the same corporate defendant. All of the defendants are alleged by plaintiffs to have engaged in substantially the same wrongful conduct, and the issues in the overall dispute are inextricably interwoven (Promofone Inc. v PCC Management, *supra*; *see also*, Hirshfeld Prods., Inc. v Mirvish, 88 NY2d 1054 [1996]).

Finally, plaintiffs' argument, that the mediation/arbitration clause does not apply here because the Authorization Agreement was terminated prior to the occurrence of the alleged wrongful conduct, is unavailing. Where an agreement contains a broad arbitration clause providing for arbitration of "any controversy" arising between the parties, generally it "survives and remains enforceable for the resolution of disputes arising out of that agreement ... " (Matter of Primex Intl. Corp. v Wal-Mart Stores, 89 NY2d 594, 598-599 [1997], citing Nolde Bros. v Bakery Workers, 430 US 243, 251-253 [1977]; Poly-Pak Indus., Inc. v Collegiate Stores Corp., *supra*; Berger v Cantor Fitzgerald, Inc., 240 AD2d 222 [1997]).

Plaintiffs' claims for defamation, tortious interference with ongoing and prospective business relations, and intentional infliction of emotion distress, all arose out of defendants' alleged retaliation against Mionis for terminating their business relationship, including the Authorization Agreement, which contained the arbitration clause. Thus, the arbitration clause survives the termination of the Authorization Agreement.

Accordingly, it is

ORDERED that defendants' motion to stay this action and compel mediation, and if necessary arbitration, is granted; and it is further

ORDERED that a copy of this order is to be served on the American Arbitration Association within 30 days of service of service of a copy of this order with notice of entry..

DATED: *February 6, 2002*

ENTER:


J.S.C.

HON. RICHARD B. LOWE, III