M.Y. Accessories, Ltd. v Ko
2005 NY Slip Op 30543(U)
September 22, 2005
Supreme Court, New York County
Docket Number: 104499/2005
Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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M.Y. ACCESSORIES, LTD, RICHARD WINTER and GARY ZAKARIN,

Index No. 104499/2005

Petitioners,

DECISION/JUDGMENT

-against-

JULIA KO,

Respondent.

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HON. CAROL EDMEAD, J.S.C.

Petitioners move, pursuant to CPLR 7503 (b), for an order permanently staying arbitration of certain new claims (New Claims) that respondent has raised. Those claims appear in the Second Amended Answer, Counterclaims and Third-Party Statement of Claim, that respondent has filed in an arbitration proceeding pending before a panel (Panel) of the American Arbitration Association, in New York City, Claim no. 13168 01758 04. The New Claims consist of respondent's (unnumbered) affirmative defense, that a shareholders' agreement (Agreement) that she entered into in May 1991, with petitioners Winter and Zakarin, is null and void, and her third and fourth counterclaims and third-party claims for, respectively, constructive fraud and rescission of the Agreement.

Petitioners contend that the New Claims are time-barred. Respondent contends that, in view of the broad arbitration clause in the Agreement, the issue of timeliness is for the Panel to decide; that in fact, the Panel "approved [respondent's] request to amend her answer and counterclaims" at a conference held on June 8, 2005 (Mem. of Law in Opp. to Pet., at 2); and that, in any event,

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the New Claims are timely.

The Panel's Preliminary Conference Order (Order), issued on June 9, 2005, provides that, by 5:00 p.m. that day, the parties would advise the Case Manager as to whether the Claimant, that is, petitioner M.Y. Accessories, Ltd. (MY), consented to having the Panel determine whether respondent's New Claims were timely; and that:

> [i]n the event that the attorneys for the Claimants [sic] have determined not to consent [to having the Panel determine the issue of timeliness], then and in that event, the attorneys for the Respondent shall have until June 17, 2005 to serve ... and file with the Case Manager an amended pleading, and the attorneys for the Claimants [sic] shall have until June 24, 2005 to bring on an application before the Supreme Court, New York County asserting [that the New Claims are time-barred].

Winter Aff., Exh. 8, at 2. By letter to the Case Manager, dated June 9, 2005 and referring to the June 8th conference call, MY reserved its right to make an application pursuant to CPLR 7502. By letter dated July 1, 2005, the Case Manager informed the parties that respondent's amended pleading would be accepted for filing, reminded the parties that the Order had set a June 24, 2005 deadline for MY to raise the timeliness issue in court, and requested MY to advise the Panel by July 7, 2005 as to whether it had done so. By letter to the Case Manager, dated July 7, 2005, MY confirmed that it had commenced this proceeding on June 24th. In view of those documents, all of which were contemporaneously sent to respondent, and one of which, the Case Manager's July 1st letter, appears as Exhibit C to respondent's affidavit, respondent's claim, that the Panel "ha[s] jurisdiction in this

matter and [has] granted [her] application to amend [her] pleadings to include [the New Claims]" (Ko Aff. in Opp, at 1), is entirely inexplicable. Plainly, the Panel allowed MY to decide whether the timeliness issue would be determined by the Panel or by a court, and plainly, MY decided to have the issue determined in court.

CPLR 7502 (b) provides, in relevant part, that

> [i]f, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court as provided in section 7503 ... .

The Agreement provides that it "shall be construed and enforced in accordance with the laws of the State of New York." Winter Aff., Exh. 2, at 15. Where, as here, an arbitration agreement provides for the arbitration of future controversies, and where, as here, it contains a choice of law provision, stating that New York law will govern both the agreement and its enforcement, the issue of whether a claim sought to be arbitrated is timely is governed by CPLR 7502 (b), and it is a threshold issue that is to be decided by a court. Matter of Diamond Waterproofing Sys. Inc. v 55 Liberty Owners Corp., 4 NY3d 247 (2005); Matter of Smith Barney, Harris Upham & Co. v Luckie, 85 NY2d 193, cert denied sub nom Manhard v Merrill Lynch, Pierce, Fenner & Smith, 516 US 811 (1995); Merrill Lynch, Pierce, Fenner & Smith v Benjamin, 1 AD3d 39 (1st Dept 2003); see also Matter of Cohen [Cohen], 17 AD2d 279 (1st Dept 1962), mod on other grounds, 28 AD2d 1099 (1st Dept 1967).

The court turns, accordingly, to the question of whether the

New Claims are time-barred. A cause of action for rescission of a contract is governed by the six-year limitation period set forth in CPLR 203. Rubin v Rubin, 275 AD2d 404 (2d Dept 2000); Goldberg v Manufacturers Life Ins. Co., 242 AD2d 175 (1st Dept 1998). So too, claims of constructive fraud are governed by the six-year limitation period (509 Sixth Avenue Corp. v New York City Tr. Auth., 15 NY2d 48 [1964]; Liberty Co. v Boyle, 272 AD2d 380 [2d Dept 2000]; Monaco v New York Univ. Med. Center, 213 AD2d 167 [1st Dept 1995]), and they accrue at the time of the alleged fraud. Wall St. Assocs. v Brodsky, 257 AD2d 526 (1st Dept 1999). The discovery-plus-two-years time that CPLR 213 (8) affords for actions based on fraud is unavailable for actions based on constructive fraud. Id. at 528. As noted above, respondent entered into the Agreement, which she now seeks to have rescinded, in May 1991, that is, approximately 14 years before respondent first sought to raise the New Claims. Respondent's constructive fraud claim has two branches, the first of which alleges that Winter and Zakarin unduly influenced her to enter into the Agreement, to her disadvantage. This claim, too, accrued in 1991. Finally, for purposes of this portion of the discussion, respondent's affirmative defense, that the Agreement is void, rests on the first branch of her claim of constructive fraud.

Respondent argues that petitioners should be estopped from raising the statute of limitations, because when Winter and Zakarin urged her to sign the Agreement, they took advantage of her alleged lack of command of English, her alleged unfamiliarity with business

or legal terms, and her personal, and allegedly sexual, relationship with Winter. The doctrine of equitable estoppel is based on the principle that a defendant who has violated a relationship of trust in a manner that has prevented plaintiff from bringing an action in a timely manner should not profit from his wrongdoing. See e.g. Nick v Greenfield, 299 AD2d 172 (1st Dept 2002). Except for her allegation that Winter and Zakarin falsely promised to make her an equal partner in MY, a promise that respondent testified was made several years after the six-year limitation period had expired, respondent has not alleged that either Winter or Zakarin has done anything, since May 1991, to prevent her from bringing any claims that she had concerning the formation of the Agreement. Accordingly, petitioners are not estopped from raising the statute of limitations as a bar to such claims, and respondent's affirmative defense, that the Agreement is void, as well as her claim for rescission of the Agreement, and the first branch of her claim of constructive fraud are time-barred.

The Agreement provides that Winter and Zakarin will each have 40% of the shares of MY, and that respondent will have 20%. The second branch of respondent's constructive fraud claim is based on the allegation that, although Winter and Zakarin promised that they would make respondent an equal partner, they did not do so. See Winter Aff., Exh. 1, ¶ 70. Respondent states in her affidavit in opposition to the petition that "[a]s a result of my continued involvement [in MY] ..., there came a time when ... it was agreed that I would become a one third shareholder of [MY]." At her

deposition, she testified that she was promised a one-third share several times, and she appears to have testified that that offer was made both before and after her salary was raised, an event that Winter dates, in his affidavit, as having occurred in 2001. Respondent raised this claim in June 2005. Accordingly, the claim is timely.

Petitioners brought this proceeding in reliance upon CPLR 7503 (b). By its terms, CPLR 7503 (b) may be invoked only by "a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration." Moreover, "arbitration will not be stayed unless the entire controversy is nonarbitrable." Matter of Silverman (Benmor Coats, Inc.), 61 NY2d 299, 299 (1984). However, because the New Claims were first raised only after the arbitration had commenced, plaintiffs could not have challenged their timeliness before participating in the arbitration. In effect, the New Claims constitute a new controversy, and the question of their timeliness is a threshold issue. Indeed, in describing the sweeping power of arbitrators, the Matter of Silverman Court noted that "the authority of the arbitrator is plenary" "once it is clear that ... the claim sought to be arbitrated is not barred by limitations." Id. at 307.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is granted to the extent of permanently staying respondent from arbitrating: (a) her

affirmative defense that the Agreement is void; (b) her counterclaim for rescission; and (c) her claim that she was constructively defrauded into entering into the Agreement.

This constitutes the decision and judgment of the Court.

Dated: September 22, 2005

ENTER:

J.S.C.

HON. CAROL EDMEAD

Clerk