

Finder Cuomo & Adler v Adler
2005 NY Slip Op 30544(U)
June 13, 2005
Supreme Court, New York County
Docket Number: 104262/05
Judge: Kibbie F. Payne
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 4**

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FINDER CUOMO & ADLER,
Petitioner,

Index No. 104262/05
Motion Sequence 01 and 02

- against -

KENNETH ADLER,
Respondent.

DECISION/JUDGMENT

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KIBBIE F. PAYNE, J.:

Finder, Cuomo & Adler, LLP (hereinafter "FCA") petition the court pursuant to CPLR 7502 for a judgment compelling respondent Kenneth Adler (hereinafter "Adler") to arbitrate before the American Arbitration Association (hereinafter "AAA") in accordance with the parties' agreement dated September 21, 2001[Index No. 104262/05]. Additionally, FCA seeks to enjoin Adler, or anyone acting on his behalf, from conducting a public sale of assets of the former Adler law firm scheduled for March 31, 2005, in order to prevent any award in arbitration being rendered ineffectual. Consequently, the stay granted by the court on March 29, 2005, was continued by order dated April 6, 2005, on consent of the parties, pending determination of this proceeding.

In a separate proceeding brought under Index No. 104599/05, Kenneth Adler petitions this court pursuant to CPLR 7503 (b), to stay the arbitration demanded by FCA against Adler before the AAA. In response and in opposition to the petition to stay arbitration, FCA cross-moves to dismiss on the grounds that the petition is procedurally improper, that there is another proceeding pending for the same relief (CPLR 3211 [a] [4]), and further consolidating the proceeding to stay with a similar proceeding pending in Supreme Court, Suffolk County.

On September 21, 2001, Matthew A. Cuomo and Kenneth A. Finder, as individuals and

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members of the law firm of Finder and Cuomo LLP, entered into a Limited Liability Partnership Agreement (hereinafter "the partnership agreement") with Kenneth Adler of Kenneth Adler and Associates, to merge their respective law firms and to form the new firm of Finder, Cuomo & Adler, LLP. The parties contemplated a significantly more diverse group of insurance company clients and a substantially increased projected revenues as a result of the merger. The partnership agreement, in ¶ 6.3 thereof, provided, among other things, for a buy-out of Kenneth Adler and Associates at a purchase price of \$1,031,472, which was based on projected revenues of \$1.5 million, to be generated from clients transferred from Kenneth Adler and Associates to FCA. Under the partnership agreement, the purchase price was made payable to Adler in ten annual installments and evidenced by a series of promissory notes and a UCC financing statement, representing Adler's security interest in the assets constituting the partnership. However, when the parties' financial expectations were not realized as a result of the merger, FCA sought to negotiate a reduction in the amount of the payments to be made to Adler, on the ground that Adler had misrepresented the amount of revenue to be generated by the transfer of his former firm's clients. Apparently, FCA stopped payments to Adler on January 1, 2005, after which, Adler declared FCA to be in default under the partnership agreement. Thereafter, FCA alleges that Adler breached the partnership agreement by holding himself out as a separate law firm. As a consequence, FCA claims Adler should be compelled to arbitrate the parties' dispute pursuant to a demand served on March 11, 2005 and further barred from conducting a public sale of the firm's assets prior to a determination in arbitration.

In response, Adler contends that he cannot be compelled to arbitrate by FCA, who is not a signatory of the partnership agreement containing the arbitration clause, inasmuch as that

agreement was signed by Kenneth A. Finder, Matthew A. Cuomo and Kenneth Adler, individually. Adler claims further that because the partnership agreement expressly excludes any issue relating to the expulsion of a partner, arbitration cannot be compelled because he was expelled from FCA, after he refused to agree to a reduction of the payments due under the partnership agreement. In this regard, Adler alleges that Finder and Cuomo forced him to surrender his keys to the Suffolk County offices, placed his files outside of the offices and advised him that he was terminated.

There is no dispute that Finder, Cuomo and Adler entered into a valid partnership agreement on September 21, 2001, which provided, in relevant part that: “Any and all disputes arising from or under this Agreement or the breach thereof, except regarding expulsion of a Partner shall be settled by arbitration in accordance with the rules of the American Arbitration Association then in effect”

It is well settled “that a partnership is not an entity separate from its [individual] members” (*Ruzicka v Rager*, 305 NY 191; Partnership Law § 10; *see, Great Lakes-Dunbar-Rochester v State Tax Commission*, 102 AD2d 1, 5 *reversed on other grounds* 65 NY2d 339; *Walker & Bailey v We Try Harder*, 23 AD2d 256, 257). Consequently, any argument that the law firm formed by the partner’s agreement is not entitled to enforce the rights and obligation arising under that agreement, lacks merit. In addition, because FCA is one and the same with its individual member partners, it is permissible “to impute the intent to arbitrate to a nonsignatory [FCA], where, as here the partnership agreement indicates in clear and unequivocal language the intent of the member partners to arbitrate all disputes, except those involving an expulsion of a partner. For example, several courts have imputed the intent to arbitrate to a nonsignatory of an arbitration

agreement in circumstances where a successor company, although not a party to a collective bargaining agreement, was bound by the predecessor company's agreement to arbitrate (*see e.g., John Wiley & Sons, Inc. v Livingston*, 376 US 543, 550, 551 *Matter of Vann Kreindler Relkin & Goldberg*, 78 AD2d 255, 259), or where there is a substantial similarity of operations and continuity of identity of the business enterprise before and after the change of ownership (*see, Wackenbut Corp. v International Union United Plant Guard Workers of America*, 332 F.2d 954, 958), or where an assignee of a written contract containing an arbitration clause takes over the rights of an assignor (*see, Blums Insurance v Ferro Union Corp.*, 36 AD2d 584, *affd* 29 NY2d 689), or where the successors in interest was the mere alter ego of a signatory to an arbitration agreement (*see Matter of Smullyan v SIBJET S. A.*, 201 AD2d 335, 336). Moreover, inasmuch as Adler seeks to recover payment of moneys owed under the partnership agreement, that financial obligation, if any, will be borne by FCA and not the individual partners. As such, FCA is entitled to compel arbitration on behalf of itself and its members *inter se*, provided the dispute is one encompassed by the arbitration clause.

“Arbitration agreements are favored in the law, and arbitration should not be stayed unless the arbitration clause cannot be reasonably interpreted to cover the disputed matter” (*League of American Theaters & Producers, Inc. v Cohen*, 270 AD2d 43).

In a separate proceeding under New York County Index No. 104599/05, Adler moves pursuant to CPLR 7503 (b), to stay the arbitration demanded by FCA, claiming that the dispute is not arbitrable because it involves an issue expressly excluded by the arbitration clause – the expulsion of a partner. The motion papers raise conflicting factual allegations concerning the action of the parties in this regard. In an attorney's affirmation in support of the petition to stay,

counsel for Adler claims that Adler was terminated by FCA and physically ousted from the FCA's Suffolk County offices, when he refused to agree to a reduction of the buy-out price. This claim, however, is not supported by an affidavit from Adler himself. In response, Finder and Cuomo submit affidavits alleging that Adler voluntarily withdrew from the firm. Consequently, the unsworn claim that Adler was expelled is of little probative value when considered in light of the contradictory sworn statements of Finder and Cuomo. Additionally, the allegations contained in the petition to stay arbitration and in the cross-motion to dismiss that petition suggests that the claim of expulsion is conveniently asserted by Adler in order to avoid compliance with the parties' agreement to arbitrate their disputes. Additionally, the fact that Adler had earlier commenced a proceeding to stay in Suffolk County, seeking relief identical to the petition to stay pending before this court, militates against retaining the proceeding to stay arbitration filed in Supreme Court, New York County and warrants its dismissal. Accordingly, the petition to stay arbitration filed under New York County Index No. 104599/05, is dismissed on the cross-motion of respondent FCA pursuant to CPLR3211 (a) (4).

Turning to Adler's remaining objection to arbitration, relating to a declaration cancelling the promissory notes and UCC filing statement, this court finds that those documents are evidence of the payment agreed to under Article 6.3 the partnership agreement; and, therefore, their validity or cancellation involve disputed issues "arising from or under" the partnership agreement (Article 9.1), which are for the arbitrators to resolve (*see e.g., Vann v Kreindler, Relkin & Goldberg*, 54 NY2d 936). It is, therefore

ORDERED AND ADJUDGED that the petition to compel arbitration brought on by Finder, Cuomo & Adler, LLP, under Index No. 104262/05, is granted and the parties are directed

to proceed to arbitration forthwith; and it is further

ORDERED AND ADJUDGED that petition to stay the arbitration demanded brought by petitioner Kenneth Adler, under Index No. 104599/05, is denied in all respects and the petition is dismissed on the cross-motion of respondent Finder, Cuomo & Adler, LLP pursuant to CPLR 3211 (a) (4). The foregoing constitutes the decision and judgment of the court.

DATED: JUN 13 2005

ENTER:



J.S.C.