

Valenzuela v Central Parking Systems Mexico

2006 NY Slip Op 30242(U)

January 6, 2006

Supreme Court, New York County

Docket Number: 0601927/2005

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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ROBERTO VALENZUELA and
MANUEL PENA,

Petitioners,

against

CENTRAL PARKING SYSTEMS MEXICO a/k/a
CENTRAL PARKING SYSTEM MEXICO, S.A.
DE C.V., and INTERNATIONAL CENTRE FOR
DISPUTE RESOLUTION, a division of the
AMERICAN ARBITRATION ASSOCIATION,
Respondents.

Index Number 601927/2005
Oral Arg. Date July 29, 2005
Mot. Seq. No. 001
Mot. Cal. No. 28

**DECISION, ORDER AND
JUDGMENT**

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Papers considered in review of this petition to dismiss or stay arbitration:

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	<u>1-12</u>
Memorandum of Law and Affidavits.....	<u>2-5</u>
Answer and Affirmation	<u>6-7</u>
Answering Affidavits, Notice and Memo of Law.....	<u>8-12</u>
Replying Affirmation, Affidavits and Memo of Law.....	<u>13-16</u>

This judgment is not to be filed with the County Clerk until the person to whom it is directed must appear in person at the County Clerk's Desk (Room 1412).

PAUL G. FEINMAN, J.:

In this Article 75 proceeding petitioner seeks to permanently stay an arbitration¹ that was commenced by respondent Central Parking Systems Mexico ("Central Parking") before the American Arbitration Association. For the reasons set forth below, the petition is denied and the

¹ Although petitioner seeks to have the arbitration "dismissed," as respondents correctly point out the correct relief is to have it "permanently stayed." As alternative relief, the petitioners seek a temporary stay of arbitration. The court has treated the petition as one for a permanent stay or arbitration, with a request for the alternative relief of a temporary stay.

proceeding is dismissed.

Factual and Procedural Background

Petitioners Valenzuela and Peña are citizens and residents of Mexico. They are former employees of respondent Central Parking. Central Parking is a joint venture of Central Parking Corporation of Nashville, Tennessee and G. Acción S.A. de C.V. of Mexico (Answer ¶ 2). Central Parking is incorporated in, headquartered in and has its operations in Mexico.

Valenzuela and Peña each signed an employment contract which contained a mandatory binding arbitration clause. The contract also contains forum selection and choice of law provisions requiring that any arbitration be carried out pursuant to the laws of the State of Tennessee and conducted in Nashville, Tennessee or wherever the employer chose (Pet. ¶ 7; Not. of Pet., Madrigal Aff. Ex. 1, 2, ¶ 11; Ex. 3, ¶ 13).

Specifically, the arbitration clause contained in Article 11 of the employment contract provides:

EMPLOYEE and EMPLOYER knowingly and voluntarily agree to submit to binding arbitration any claims, disputes, or controversies arising out of or relating to this employment relationship or this Agreement, or alleged breach thereof, including any present or future claim of employment discrimination by EMPLOYEE under either federal or state law. ... Arbitration shall serve as the exclusive forum for claims described above,

Any arbitration under this paragraph must be instituted within the applicable statute of limitations governing the dispute under state or federal law. The laws of the State of Tennessee shall govern all issues relating to such arbitration, including but not limited to the applicability and enforceability of this arbitration provision, without reference to the choice of law doctrine of such state. Such arbitration shall be conducted in Nashville, Tennessee (or such other location designated by EMPLOYER) in accordance with the governing rules of the Federal Mediation and Conciliation Service ("FMCS") then in effect, except for any rule in conflict with this paragraph. If for any reason FMCS cannot provide a panel from which to select an arbitrator, EMPLOYER may utilize any other arbitrator selection service, including the American Arbitration Association.

(*Id.*). The forum selection and choice of law provisions contained in Article 10

of the employment contract provide in relevant part:

This Agreement shall be interpreted, construed and governed by and under the laws of the State of Tennessee without reference to the choice of law doctrine of such state, and EMPLOYEE unconditionally submits to the jurisdiction of the courts located in the State of Tennessee in all matters relating to or arising from this Agreement, except to the extent that an issue is subject to the arbitration clause set out herein.

(*Id.*).

On January 27, 2004, Peña was terminated from his position as regional manager and Valenzuela was terminated as the marketing and operations manager. Both were allegedly terminated for cause after committing fraud and mismanagement throughout much of the course of their employment (Answer ¶ 4). The parties dispute who first sought relief from the Members of the Local Conciliation and Arbitration Board of the Federal District, Mexico City (“BCA” or “Labor Board”). The Labor Boards are “administrative, not judicial, bodies in the Executive Branch of the Mexican Government and provide arbitration services,” and are limited to the enforcement of Mexican Federal Labor Law (*Credit Suisse First Boston LLC v Padilla*, 326 F. Supp. 2d 508, 510 [SDNY 2004]). According to Central Parking’s Mexican attorney, it filed the Peña termination notice in early February 2004 with the Labor Board as it was required to do under the law but did not commence a proceeding (Roel Aff. in Opp. ¶ 10). In contrast, petitioners contend that Central Parking initiated a proceeding in early February 2004, seeking to compel Peña to accept his termination notice (Memo in Supp. of Pet. at 6).² It is undisputed,

²Petitioners submit the affidavit of a labor law professor at the Universidad del Valle de Mexico, active in several labor organizations, that explains that Article 47 of the Mexican Labor Law establishes the procedure to be used by an employer who terminates a worker for cause,

however, that on March 22, 2004, petitioners filed a grievance (Artwick Aff. in Opp. Ex D, Letter Artwick to Barcenes, Feb. 3, 2005, p. 4).³ According to Central Parking's Mexican attorney, the petitioners' claim is for wrongful termination and seeks three months salary, payment for unused vacation days, payments for life insurance, proportional bonus payments, and payment of stock options (Roel Aff. in Opp. ¶ 11). Their grievance alleges that Central Parking violated Article 47 of the Mexican Federal Labor Law because it terminated them from employment without sufficient notice, having failed to provide them with written reasons for their dismissal (Roel Aff. in Opp. ¶ 12). Central Parking answered the grievances on August 2, 2004 as to Valenzuela (Not. of Pet. Ex. 14), and on August 19, 2004 as to Peña (Not. of Pet. Ex. 15). Included in Central Parking's answers were the defenses of fraud and mismanagement and "ancillary claims" that the Labor Board lacked the "competence" and "legitimacy" to handle the claims based on the existence of the arbitration clause in the employment contract. Central Parking also asserted that Valenzuela and Peña should have submitted their case to arbitration in the first instance rather than to the BCA (see, Not. of Pet. Ex. 6, Letter Artwick to Bugbee, Mar. 7, 2005, pp. 2-3).

In October 2004, a criminal complaint was filed by Central Parking before the District Attorney for Guadalajara, claiming that Peña had committed fraud by giving an unauthorized guaranty in the approximate amount of \$325,000 (Cervantes Aff. in Opp. ¶ 11). An identical

which includes notification to the worker and if the worker rejects the notice, the employer "has the right to ask the Board of Conciliation and Arbitration . . . to notify the worker of the causes of termination. If the employer doesn't prove in the proceeding the termination causes or the fact that the worker didn't receive the termination notice, then the separation will be considered unjustified." (Anaya Aff. in Supp. ¶ 5).

³Copies of the grievance were not included among the parties' papers.

proceeding was filed in Mexico City (Cervantes Aff. in Opp. ¶¶ 11-12).⁴

By letter dated November 18, 2004, Central Parking's American law firm notified petitioners that it was seeking to arbitrate its claims against them pursuant to the terms of their employment contracts (Not. of Pet. Ex. 1, 2).⁵ The notice invoked the arbitration clause set forth in the contracts, and requested that the organization named in the contracts, the Federal Mediation and Conciliation Service ("FMCS"), undertake the arbitration proceeding. The notice set forth the nature of the claims, which include: the false reporting of the company profits; material errors in accounting; excess bonus payments; awards of company contracts to family and friends; failure to charge interest on loans; granting an unauthorized guaranty; purchasing of equipment and services without proper authorization, and a "pattern of mismanagement and personal transactions in violation of their employment contracts" (Not. of Pet. Ex. 2, unnumb. p. 3). Central Parking seeks \$17,422,466.87 in damages (Id. unnumb. p. 4).

On November 24, 2004, the FMCS notified Central Parking's counsel by letter that it believed the parties would be better served by using the American Arbitration Association ("AAA"). It wrote:

[W]e have determined that your case might be better served [by] an arbitrator from the American Arbitration Association. While many FMCS arbitrators

⁴In addition, according to Central Parking, petitioners filed a criminal claim on February 3, 2004 against various employees of the joint venture, alleging kidnaping, harassment, and forcible signing of false documents on the date of their termination (Cervantes Aff. in Opp. ¶ 7). This claim was dismissed, however Central Parking filed a counterclaim alleging that petitioners had committed "false Testimony in connection with their criminal proceeding," and this claim continues with arrest warrants issued (Cervantes Aff. in Opp. ¶¶ 9- 10).

⁵Although the letter was sent Federal Express to both petitioners, only Valenzuela claims to have actually received it (Not. of Pet. Ortner Aff. ¶ 4; see also Artwick Aff. in Opp. Ex. B, Letter Ortner to Artwick, Dec. 23, 2004, p. 1).

handle “employment” arbitration, we believe you would be better serviced by an arbitrator who has substantial experience in this particular type of “employment” matter.

(Artwick Aff. in Opp. Ex. C, Letter Thompson to Amerson, Nov. 24, 2004). On December 23, 2004, petitioners’ counsel wrote a letter objecting to arbitration (Artwick Aff. in Opp. Ex. B, Letter Ortner to Artwick, Dec. 23, 2004). In January 2005, Central Parking’s counsel notified petitioners’ counsel that it would proceed with arbitration before the AAA. Central Parking’s counsel made a formal request for arbitration to the AAA on February 3, 2005 (Artwick Aff. in Opp. Ex. D). The AAA assigned the proceeding to one of its divisions, co-respondent International Centre for Dispute Resolution (“ICDR”), based in New York City. Both sides corresponded with the ICDR representative with petitioners disputing the jurisdiction of the arbitration (Not. of Pet. Ex. 3,4). On February 16, 2005, the ICDR conducted a hearing by telephone with the parties’ counsel after which it stayed the matter until April 15, 2005 (Not. of Pet. Ex. 5).

On April 13, 2005, the BCA issued two rulings denying Central Parking’s challenge to the jurisdiction of the Board based on lack of competency and lack of legitimacy, and held that the arbitration provision contained in the employment contract did not deprive the tribunal of its authority to adjudicate the claims (Not. of Pet. Ex. 9, 10). As concerned the issue of legitimacy, the Board held (as translated):

[N]otwithstanding the fact that the labor agreement may provide that dispute[s] are to be settled in a certain state, said stipulation is inoperative in that it implies that there is a waiver of the rights consigned in article 5, section XIII of the labor law. . . . [T]he election made by the plaintiff determines the territorial jurisdiction . . . and . . . even if the labor agreement would have provided for submission of the dispute to the courts of a certain state, the related stipulation would have no legal effect.

(Not. of Pet. Ex. 9, Legitimacy Ruling, unnumb. p. 2, § 1). As concerned the issue of competency it held (as translated):

In fact, in labor matters the will of the parties does not constitute the supreme law of agreements as observed with civil matters. Accordingly, even if labor agreements would have agreed upon to submit any dispute to the courts of a certain state, said provision has no legal effects by implying the waiver of the rights consigned in terms of article 5, section XII of the Federal Labor Law nor may be above the Federal Constitution in article 123, section XX in that any discrepancies or conflicts between capital and labor will be settled by decision of a Conciliation and Arbitration Board.

(Not. of Pet. Ex. 10, Competency Ruling, unnumb. p. 3, § II). Both decisions ordered the recommencement of the proceedings to begin on April 22, 2005.

The parties contacted the ICDR with the Board's rulings, with petitioners arguing that the arbitration should not proceed based on the ruling of the Board, and Central Parking arguing that the issues facing the Mexican tribunal differ from those to be addressed by the arbitration and that arbitration should therefore proceed as to those issues (Not. of Pet. Ex. 12, Letter of Aug. 22, 2005, Artwick to Bugbee, pp.2-3). On April 27, 2005, the ICDR ruled that it would proceed with the arbitration, requested the parties begin the process of selecting an arbitrator, and stated that the issue raised by petitioners of whether the ICDR had jurisdiction, would be determined by its arbitrator (Not. of Pet. Ex. 13).

On May 31, 2005, petitioners filed the instant notice of petition and petition. The parties stipulated on June 10, 2005 to temporarily stay the arbitration proceeding pending this court's ruling on the petition (Artwick Aff. in Opp. Ex. H).

Petitioners seek to permanently stay the arbitration proceeding, or, in the alternative, to stay the proceeding until all of the matters in Mexico have been finally adjudicated. They also

seek an order directing Central Parking to refrain from commencing any further arbitration against them in the United States, and to pay their costs and attorney's fees for this proceeding. The petition sets forth five bases for having this court to grant an injunction permanently staying the arbitration. It identifies these different bases for the injunctive relief as "causes of action." They are: (1) Election of remedies and waiver; (2) Court to decide whether there is jurisdiction to arbitrate; (3) Arbitration provision contravenes Mexican law; (4) Remedy of arbitration has been exhausted, and (5) Comity. Although respondent Central Parking has answered the petition, it disputes the jurisdiction of this court to entertain any proceeding related to the arbitration.

Discussion

CPLR 7502(a)(i) provides that a petition to stay an arbitration "shall be brought in the court and county specified in the agreement." In the case at bar, the parties negotiated and agreed to an extensive arbitration clause, as well as forum selection and choice of law clauses set forth above in relevant part. The agreement makes clear that court litigation, including litigation ancillary to any arbitration, is to be conducted in the Tennessee courts using Tennessee law. Nothing in the agreement can be fairly interpreted as conferring jurisdiction on the courts of New York. Thus, notwithstanding the fact that IDCR, the arbitration service ultimately used pursuant to Article 11 of the agreement is in fact located in New York, there is simply no basis for the New York courts to assert jurisdiction over respondent Central Parking, a Mexican corporation which is a joint venture of a Tennessee corporation and a Mexican corporation, in contravention to the parties' agreement. Thus, the petition must be dismissed.

Were the court to entertain the petition on its merits, it would be denied. At its core,

petitioners' argument is that Central Parking should not be allowed to arbitrate its claims in the United States because it has already undertaken "a good deal of" legal activity in Mexico involving the same claims, and such action is inconsistent with any right to arbitrate, especially as the commencement of the arbitration proceeding was only brought nine months after Central Parking first contacted the BCA (Pet. Memo of Law at 12). They point to *Southern Sys., Inc. v Torrid Oven Ltd.*, 105 F. Supp. 2d 848, 855 (W.D. Tenn. 2000), which noted at least three decisions finding that the defendant had waived its right where a period of eight months had elapsed before arbitration was commenced (but see, *Flynn v Labor Ready, Inc.*, 193 Misc. 2d 721 [Sup. Ct., Kings County 2002], *mod* 6 AD3d 492 [2d Dept. 2004] [passage of 23 months not held to result in waiver]).

There is a strong public policy favoring and encouraging arbitration as a means to resolve disputes expeditiously (*Flanagan v Prudential-Bache Securities*, 67 NY2d 500, 506, *cert. denied*, 479 US 931 [1986]). Under the CPLR, written agreements that submit controversies to arbitration are enforceable (CPLR 7501). Where the claim is arbitrable, the courts are to "rigorously enforce" agreements to arbitrate (*see, Gaf Corp. v Werner*, 66 NY2d 97, 102 [1985], *cert. denied* 475 U.S. 1083 [1986] [concerning Federal Arbitration Act]). "The rule preferring arbitration, when agreed upon, had led to its corollary that any doubts concerning whether there has been a waiver are resolved in favor of arbitration." (*Leadertex, Inc. v Morganton Dyeing & Finishing Corp.*, 67 F3d 20, 25 [2d Cir. 1995, citing *Moses H. Cone Memorial Hosp. v Mercury Constr. Corp.*, 460 U.S. 1, 24-25 [1983]). A waiver of arbitration is therefore not lightly inferred

(*Leadertex, Inc.*, 67 F.3d at 25).⁶

In order for a party to waive its right to compel arbitration, it must be shown that the party participated in the action to such a degree that it manifested acceptance of the courts as the proper forum (*Two Central Tower Food, Inc. v Pelligrino*, 212 AD2d 441, 442 [1st Dept 1995]). The issue of waiver is fact-specific (*Matter of S & R Co. of Kingston v Latona Trucking, Inc.*, 159 F.3d 80, 83 [2d Cir. 1998] [citing *Leadertex*, 67 F.3d at 25], *cert. dismissed* 528 U.S. 1058 [1999]). Factors include the time elapsed from the commencement of litigation to the request for arbitration; the amount of litigation undertaken, including exchanges of pleadings, substantive motions, and discovery; and proof of prejudice, including taking advantage of pre-trial discovery not available in arbitration, delay, and expense (*Latona Trucking, Inc.*, 159 F.3d at 83). Thus, in *Latona Trucking*, the district court's findings were affirmed which found that petitioners had waived arbitration because they had failed to plead the defense of arbitration; they actively participated in the litigation for 15 months before seeking to invoke their right to arbitrate on the eve of trial; they participated in two settlement conferences, and they prejudiced defendant by engaging in extensive discovery and obtaining information otherwise unavailable in arbitration, and imposed undue delay and expense on the defendant. Similarly, in *Leadertex, Inc. v Morganton Dyeing & Finishing Corp.*, where the defendant submitted an answer, amended answer, and answer to the amended complaint, each of which raised numerous defenses and

⁶In Tennessee, arbitration contracts are favored (*Benton v Vanderbilt Univ.*, 137 S.W.3d 614, 618 [Nashville Sup. Ct. 2004]). Waiver of a right to arbitration must be by a "clear, unequivocal and decisive act of the party, showing such a purpose" (*Springfield Tobacco Redryers Corp. v Springfield*, 41 Tenn. App. 254, 274-275 [1956][quoting *Koontz v Fleming*, 17 Tenn App. 1, 9 (1933)]).

counterclaims, and none of which asserted the defense of arbitration, and during the same time period it energetically pursued discovery and only with trial imminent did it seek arbitration, it was held that its actions were inconsistent with invoking a right to arbitration.

Pretrial expense and delay, without more, does not constitute prejudice sufficient to support a claim of waiver (*Blimpie Int'l, Inc. v D'Elia*, 277 AD2d 69, 70 [1st Dept. 2000], citing *Leadertex, supra*, at 26). In *Blimpie*, no waiver was found where the Central Parking had engaged in minimal discovery to the extent of producing documents which had benefitted the petitioner, and had not engaged in motion practice prior to seeking arbitration. Compare with *Eagle Traffic Control, Inc. v James Julian, Inc.*, 945 F. Supp. 834 (E.D. Pa. 1996), where the court held that where the parties had engaged in extensive discovery and the defendants had vigorously contested merits of the plaintiff's claims in their motion to dismiss, assented to the court's pretrial orders, and gave no notice prior to filing the motion to compel arbitration that it intended to seek arbitration, such active litigating over a seven month period was a waiver of defendants' alleged contractual right to compel arbitration.

Here, although Central Parking filed two criminal complaints against petitioner Peña, both of which claiming that he had committed fraud by giving an unauthorized guaranty (see *Cervantes Aff. in Opp.* ¶¶ 11-12), it has otherwise only engaged in motion practice by answering the grievances and attempting to dismiss the proceedings underway at the BCA, and within three months of answering, filed its notice to arbitrate (see, *Sherrill v Grayco Builders, Inc.*, which stated that "measures taken by a defendant during litigation to assert a right to arbitrate, such as an affirmative defense or counterclaim setting up the arbitration contract . . . might preserve the right before it is forfeited and while arbitration is promptly sought." 64 NY2d 261, 274 [1985],

citation omitted). As for the several month period that elapsed prior to Central Parking's attempt to commence arbitration, it alleges that at least part of that time it was conducting an investigation and audit of the company's books in order to understand petitioners' actions (Answer ¶ 24). Given these circumstances, where there has been minimal litigation in the Mexican courts other than the two motions seeking dismissal in favor of arbitration, and given that the relief Central Parking seeks is different from what could be obtained through the BCA proceeding and the criminal complaint, were the court to have jurisdiction it would nonetheless conclude that Central Parking did not waive its right to arbitration.⁷

Petitioners' other arguments would also prove unavailing on the merits and petitioners, sophisticated high level executives, should not be heard to complain now that they must adhere to the bargain they made which requires that they arbitrate the disputes arising out of the agreement. Accordingly, it is

ORDERED and ADJUDGED that the petition is dismissed.

This shall constitute the decision, order and judgment of this court.

Dated: January 6, 2006
New York, New York

ENTER
Saul L. Linn

U.S.C.
This Judgment
and Order shall
obtain effect only if
appear in person at the
Security Clerk
and the Security Clerk
representative must
appear in person at the
Clerk's Desk (Room
141B).
