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

PRESENT: RICHARD B. LOWE III PART 56

Index Number : 602058/2005

UNIBANCO, S.A.

VS

GLOBAL EMERGING MARKETS

Sequence Number : 004

DISMISS

C

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

FILED
APR 17 2006
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/11/2006

RICHARD B. LOWE III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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UNIBANCO, S.A.,

Plaintiff,

Index No. 602058/2005

-against-

GLOBAL EMERGING MARKETS NORTH AMERICA, INC.,

Defendant.

DECISION AND ORDER

----------X

HON. RICHARD B. LOWE, III, J.:

Defendant Unibanco, S.A. moves to dismiss plaintiff Global Emerging Markets North America, Inc.'s claims for lack of subject matter jurisdiction and because of arbitration and award. In the alternative, defendant moves to dismiss, and alternatively stay, plaintiff's cause of action and compel plaintiffs to mediation/arbitration pursuant to the conflict resolution clause in the parties' agreement.

Background

Plaintiff, Unibanco, S.A. ("Unibanco"), and defendant, Global Emerging Markets North America, Inc. ("GEM"), entered into a joint venture agreement ("agreement") by which the parties would purchase the debt of non-party Carsa, S.A. ("Old Carsa") and form a new company called Nuevo Carsa ("Company"). The agreement was drafted by Unibanco and consists of a letter to GEM from Unibanco dated March 18, 2005 ("March 18 letter") and the executed and detailed Summary of Terms and Conditions dated March 22, 2005 ("Terms").

According to the Terms, each party was required to contribute $1.3 million to acquire a sufficient amount of Old Carsa's debt to secure control of Old Carsa's upcoming creditor's

meeting. Unibanco contributed their portion of the funds and GEM never contributed any funds to the transaction. GEM was the party responsible for purchasing Old Carsa's debt; and with Unibanco's $1.3 million, GEM purchased some of Old Carsa's debt, but not enough to gain control of Old Carsa. GEM and Unibanco subsequently terminated their relationship. As a result, Unibanco instituted an action in this court against GEM for breach of contract, breach of fiduciary duties, fraud, and unjust enrichment.

Pursuant to the Terms, the parties agreed that the method for conflict resolution is mediation; and if mediation fails, then the parties can proceed to arbitration. The conflict resolution clause ("ADR") states:

> Conflict Resolution.
>
> First resort (Joint resolution): A Mediation Committee made up of three members shall be established, one member to be elected by each party and a third member elected by the other two members of the Mediation Committee. The decision made by said Mediation Committee shall be binding on the parties.
>
> Second resort: Only in the event that the first resort proceedings fail to resolve the conflict, the matter shall be brought before a Court of Arbitration.
>
> The Parties agree to maintain the continuity of Company operations until a resolution to the conflict has been reached (*See* Constantini Aff, Ex. B [Ex. 1]).

GEM moves the court to dismiss Unibanco's cause of action claiming that this court does not have subject-matter jurisdiction due to the arbitration clause and because of arbitration and award. And in the alternative, GEM requests that the court dismiss, or alternatively stay, Unibanco's cause of action and compel the parties to proceed to mediation/arbitration pursuant to the agreement.

Discussion

I. GEM's motion to dismiss pursuant to CPLR 3211 (a) (2) and (a) (5)

a. CPLR 3211 (a) (2)

GEM claims that Unibanco's cause of action should be dismissed pursuant to CPLR 3211 (a) (2) because this court does not have subject matter jurisdiction. GEM agrees that the reason this court does not have subject-matter jurisdiction over plaintiff's cause of action is because the matter is subject to mediation/arbitration pursuant to the conflict resolution clause in the contract.

There is a difference between whether the court has subject matter jurisdiction and whether the parties have agreed to resolve their issues by alternative means. A court can have subject-matter jurisdiction even though the parties have decided to resolve their issues through mediation or arbitration. Subject matter jurisdiction is "judicial empowerment to adjudicate a particular cause of action" (CPLR P 3211.09). Whether the cause of action must be mediated is not dispositive of whether the court has the power to adjudicate the particular cause of action, but rather whether the matter was brought into the proper tribunal according to a particular contract.

The presence of an arbitration clause in a contract is not grounds to dismiss pursuant to CPLR 3211 (a) (2) and therefore the application is denied.

b. CPLR 3211 (a) (5)

GEM also seeks to dismiss Unibanco's complaint pursuant to CPLR 3211 (a) (5). GEM claims that dismissal is appropriate because an arbitration and award exist. GEM has, again, incorrectly applied the statute. In order to invoke CPLR 3211 (a) (5), a completed arbitration proceeding resulting in an award must already exist (CPLR P 3211.26). The parties have not proceeded to arbitration and no arbitration award exists. Since no arbitration and award exists

GEM does not have grounds to dismiss pursuant to CPLR 3211 (a) (5) and therefore the application is denied.

II. GEM's motion to dismiss due to the ADR clause in the parties' agreement

GEM asserts that Unibanco's claims are subject to the conflict resolution clause of the Terms and therefore Unibanco's cause of action should be dismissed and the parties must proceed to mediation/arbitration pursuant to CPLR 7501. Pursuant to the Terms of the agreement, the parties have agreed that the laws of the State of New York will apply to the parties agreement (*see* Constantini Aff, Ex. B [Ex. 1]). Therefore this court will analyze the issue under applicable New York law.

"When assessing a motion to compel arbitration, two issues must be resolved: 1) whether the parties agreed to arbitrate, and 2) whether the claims asserted fall within the scope of the arbitration agreement" (*Darrah v Friendly Ice Cream Corp.*, 328 F Supp 2d 319, 321 [ND NY 2004]).

a. Agreement to mediate/arbitrate

The first issue is whether the parties agreed to mediate/arbitrate their disputes according to their agreement. Although the clause in dispute requires the parties to mediate prior to arbitration, the analysis for whether the parties agree to arbitrate or mediate is equivalent because mediation and arbitration, in effect, manifest the parties' intent to "provide an alternative method to 'settle' controversies" (*C.B. Richard Ellis v American Envtl. Waste Mgt.*, 1998 U.S. Dist. LEXIS 20064, * 3-*4, US Dist Ct, ED NY). Therefore, the outcome of the analysis of arbitration agreements will be applicable to the mediation/arbitration clause in the parties' agreement.

GEM correctly states that New York courts favor and encourage arbitration "as a means

of conserving the time and resources of the courts and the contracting parties" (*Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 [1975]). Generally, it is left to the court hearing the issue to determine whether the parties to an agreement have chosen to arbitrate a particular dispute (*id.*). To determine whether the parties actually agreed to the ADR, the court ideally confines analysis to the arbitration clause itself (*id.*).

The language of the ADR clause in this case states that the parties must first go to mediation and then to arbitration if mediation does not remedy the conflict. The parties do not dispute that they agreed to the ADR clause.

It appears from reading the ADR clause that mediation is a condition precedent to arbitration. This case is similar to *Darrah v Friendly* (328 F Supp 2d at 322) in which the parties agreed to arbitrate conflicts that were not resolved through their "Open Door Policy" (*id.*). The court determined that engaging in the Open Door Policy was a condition precedent to initiating arbitration proceedings (*id.*). Likewise, here, it is clear that the parties agreed to arbitrate their conflict "only" if their conflicts were not resolved through mediation (*see* Constantini Aff, Ex. B [Ex. 1]). Therefore, it is the opinion of this court that mediation is a condition precedent to arbitration and the parties must first engage in mediation before they proceed to arbitration pursuant to the contract.

b. Scope of the mediation/arbitration agreement

The second issue is regarding the scope of the ADR clause. Generally, the court hearing the issue has the authority to determine the scope of an arbitration agreement (*Nationwide*, 37 NY2d at 95). The scope of the ADR clause depends on the intent of the parties (*S.A. Mineracao da Trinadade-Samitri v Utah Intl. Inc.*, 745 F2d 190, 194 [2d Cir 1984]). GEM claims that the

clause applies to all issues that arise from the parties' relationship and Unibanco claims that the clause applies only to issues arising out of the second phase of the agreement.

To determine the scope of the ADR clause, it must first be classified as broad or narrow (*Darrah*, 328 F Supp 2d at 323). Based on the plain language of the clause, it is very broad. There is no restricting language that addresses when the clause is applied or the circumstances under which it applies. The ADR clause only outlines the method of conflict resolution and that Company operations should be maintained during the process; therefore, it appears to refer to any conflict that arises without regard to phases.

Unibanco argues that the ADR clause should be construed narrowly because acquisition and formation of Nuevo Carsa was a condition precedent to enforcement of the clause. Unibanco claims that since Nuevo Carsa was not formed, the mediation committee could not be formed; and formation of the mediation committee was a condition precedent to enforcement of the ADR clause. Unibanco reasons that since the parties were unable to select members of the mediation committee, they were not bound by the Terms to proceed to mediation or arbitration.

Based on the plain language of the ADR clause, there is no indication in the clause itself that the formation of Nuevo Carsa was a condition precedent to formation of a mediation committee. A condition precedent occurs where the agreement states that one thing must happen before another thing can exist (*Darrah,* 328 F Supp 2d at 322*)*. The language of the conflict resolution clause states that "a mediation committee shall be formed," and that the mediation committee will consist of three members, each party will elect one member and the third member will be selected by the other two members of the mediation committee (*see* Constantini Aff, Ex. B [Ex. 1]). There is no reference to the time when the committee shall be formed, where the

members will come from, or any other language restricting the formation of a mediation committee that would create a condition precedent to formation of the mediation committee (*id.*). If the parties intended that the mediation committee consist of persons from within Nuevo Carsa, they could have explicitly expressed that intention.

Furthermore, mediation committees are generally formed when a conflict arises. There is nothing in the Agreement that prohibits the parties from forming a mediation committee and proceeding to mediation to resolve the conflict in this case. It does not appear that formation of Nuevo Carsa was a condition precedent to formation of a mediation committee and the ADR clause, nonetheless, appears broad on its face.

Additionally, Unibanco argues that there were two phases of the transaction and that the ADR clause is not enforceable against issues arising out of the first phase. The first phase of the transaction, according to Unibanco, was the period during which GEM was to purchase Old Carsa debt and the second phase was the period following formation of Nuevo Carsa. As with the formation of Nuevo Carsa as a condition precedent to mediation, there is no indication in the language of the conflict resolution clause that the clause was intended to apply only to the first phase of the agreement. In fact, various phases are not addressed in any part of the Terms. The only place where any phase is addressed is in the March 18 letter which addresses the first phase of the agreement; but it does not address how and when the terms will apply. Thus, it is still not clear whether the arbitration agreement was enforceable against all issues arising out of the transaction.

Unibanco's strongest argument is that the phrase "[t]he Parties agree to maintain the continuity of Company operations until a resolution to the conflict has been reached" implies that

the arbitration clause can apply only to conflicts that arise as a result of Nuevo Carsa (*see* Constantini Aff, Ex. B [Ex. 1]). While that may be Unibanco's reading of the ADR clause, the statement is ambiguous regarding what is "Company operations."

On its face, maintaining "Company operations" during times of conflict implies that all company operations will be maintained irrespective of certain developments within the parties' relationship; and that things will progress according to plan. This implication is strengthened by the fact that there is no restricting language regarding what is "Company operations." Additional interpretations are that "Company operations" refers to operations in preparation to form the Company or operations after the Company has already been formed (as Unibanco argues). But because whether the parties agreed to arbitrate issues arising before or after creation of Nuevo Carsa is not clearly expressed, the court hearing the issue can look beyond the language of the clause to determine the scope of the agreement (*Nationwide*, 37 NY2d at 95).

In the Terms, the purpose of the entire agreement is stated as "an attempt to define the terms and conditions under which Unibanco *will become* a shareholder of Nuevo Carsa" (*see* Constantini Aff, Ex. B [Ex. 1]) (emphasis added). The key phrase in this statement is "will become." "A small [phrase] with a large legal significance" can have a large impact on the outcome of the case (*Adirondack Transit Lines, Inc. v United Transp. Union*, Local 1582, 305 F3d 82, 87 [2d Cir 2002]). This phrase has a large legal significance because it is the clearest expression of the parties' intent regarding the agreement. It implies that this agreement governs all stages of the process of Unibanco becoming a shareholder of Nuevo Carsa. To become is to turn into. And, according to Unibanco, becoming (or turning into) a shareholder, not actually being a shareholder, is the first phase of the process. Based on the purpose of the agreement, it

appears that the parties intended the Terms to govern the first phase of the process. Since the ADR clause is within the Terms, it follows that the ADR clause governs the first phase of the transaction as well.

It is the opinion of this court that the parties are bound by the conflict resolution clause and must go to mediation before proceeding to arbitration pursuant to CPLR 7501. GEM's motion to dismiss Unibanco's cause of action is denied and this action is stayed pending the outcome of the mediation/arbitration.

III. Costs and Attorney's fees

GEM requests that this court award its costs and attorney's fees pursuant to 22 NYCRR 130-1.1 (a) for having to bring this motion. GEM claims that they did not need to bring the motion and that Unibanco's claims that the arbitration clause applies only to the second phase of the parties' relationship is a frivolous argument. This court is of the opinion that Unibanco has not engaged in frivolous conduct. It appears that Unibanco argued in food faith that the Terms of the agreement did not apply to the entire transaction. Additionally, as stated above, whether an arbitration agreement is applicable is an issue that the court decides (*Nationwide*, 37 NY2d at 95). Therefore this court denies GEM's request for attorney's fees and costs.

Conclusion

For the reasons stated, it is hereby

ORDERED that defendant's motion to dismiss for lack of subject matter jurisdiction is denied; it is further

ORDERED that defendant's motion to dismiss because of arbitration and award is denied; it is further

ORDERED that defendant's motion to dismiss is granted and plaintiff is compelled to arbitration pursuant to the Terms of the parties' agreement.

THIS SHALL CONSTITUTE THE DECISION AND ORDER OF THE COURT.

Dated: April 11, 2006

ENTER:

RICHARD B. LOWE, III, J.S.C.

RICHARD B. LOWE III

FILED
APR 17 2006
NEW YORK
COUNTY CLERK'S OFFICE