

Williamson v Lipper

2006 NY Slip Op 30298(U)

April 21, 2006

Supreme Court, New York County

Docket Number: 0602312/2005

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
RICHARD A. WILLIAMSON, ESQ., as Successor
Liquidating Trustee of Lipper Convertibles, L.P.

INDEX NO 602312/2005

Plaintiff,

MOTION DATE _____

-against-

MOTION SEQ. NO. 001

Kenneth Lipper,

MOTION CAL. NO. _____

Defendant.
-----X

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that the Decision and Order in motion 001 dated April 5, 2005 is vacated and replaced with the accompanying Decision and Order.

Dated: April 21, 2006

FILED
APR 28 2006
NEW YORK
COUNTY CLERK'S OFFICE



KARLA MOSKOWITZ

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: I.A.S. PART 3

-----X
 RICHARD A. WILLIAMSON, ESQ., as Successor
 Liquidating Trustee of Lipper Convertibles, L.P.

Index No. 602312/2005

Plaintiff,

-against-

DECISION and ORDER

Kenneth Lipper,

Defendant.

-----X
 MOSKOWITZ, J:

The court has detailed the facts underlying this case in several decisions in related cases and refers the parties to those decisions. By this motion, defendant Kenneth Lipper (Mr. Lipper) moves: (1) pursuant to CPLR Article 75, to stay this action and compel arbitration or (2) pursuant to CPLR 3211(a)(1), (5) and (7) to dismiss certain of the claims asserted against him. For the foregoing reasons, the court grants Mr. Lipper's motion to stay and compel arbitration and therefore need not address Mr. Lipper's additional request for dismissal.

Plaintiff, the Successor Liquidating Trustee that this court appointed on July 7, 2003 in the liquidation proceeding, *In the Matter of the Application of Lipper Holdings, LLC*, Case No. 603563/2002 (the "Trustec"), seeks to recover damages against Mr. Lipper for losses arising out of the demise of Lipper Convertibles, L.P.¹ ("Convertibles") and Lipper Fixed Income Fund, L.P. ("Fixed Income") (collectively the "Partnerships"). The court appointed the Trustee to replace Lipper Holdings LLC ("Lipper Holdings") as Liquidating Trustee.

Until October 1, 1997, the general partner of Convertibles was Lipper & Company, L.P. ("Lipper & Co."), a Delaware limited partnership. (Complaint ¶ 5). After October 1, 1997,

¹ Convertibles was formerly known as Lipco Partners, L.P.

Convertibles' general partner was Lipper Holdings LLCa Delaware limited liability company.

Lipper & Co., Inc., a Delaware corporation is the manager of Lipper Holdings. (Id.)

Mr. Lipper was the President, Chief Executive Officer and General Securities Principal of Convertibles. Mr. Lipper also owned the majority interest in Lipper Holdings and was its Chairman, President and Chief Exccutive Officer. As of December 31, 2001, Mr. Lipper owned 54.45% of Lipper Holdings. His daughters, Julie, Tamara, Joanna and Daniella each owned 11.1375% and Lipper & Co. Inc. owned 1%. Mr. Lipper also owned over 50% of Lipper & Co., L.P and was its president and chief executive officer. (Complaint ¶ 7).

Plaintiff premises his complaint on allegations that Mr. Lipper: (a) failed to supervise adequately Edward Strafaci, Convertibles portfolio manager; (b) permitted the payment of unearned incentive fees to Lipper Holdings, Convertibles' general partncr; (c) permitted limited partners of Convertibles to withdraw amounts in excess of the fair value of their capital investment; and (d) failed to assert claims against the Partnership's independent auditor (PriceWaterhouseCoopers). The Trustee also seeks to recoup performance fees distributed to Mr. Lipper in his capacity as a member of Lipper Holdings. The Complaint asserts causes of action for negligence, breach of fiduciary duty, unjust enrichment, money had and received, conversion, constructive fraudulent conveyance, breach of fiduciary duty to manage partnership assets and breach of fiduciary duty as Liquidating Trustee.

Mr. Lipper urges this court to order this case to arbitration based upon the arbitration clause in the Limited Partnership Agreement of Convertibles ("Convertibles LPA"). Section 12.2 of the Convertibles LPA states:

All disputes and questions whatsoever between and among the parties to this

agreement or their legal representatives that shall arise during the term of this Agreement or after the Termination date with respect to the rights, obligations and remedies hereunder of such parties or legal representatives or with respect to the construction or application of this Agreement shall be submitted to arbitration before and in accordance with the rules of the National Association of Securities Dealers, Inc. or, if such organization shall decline jurisdiction, to the American Arbitration Association for arbitration under its rules.

In addition, section 12.10 of the Convertibles LPA provides that the “Agreement shall be governed by the laws of the State of New York.” The limited partners and the general partner of Convertibles (i.e. Lipper & Co., L.P.) signed the Convertibles LPA.

The Trustee argues that this arbitration clause is inapplicable to him because the Trustee is not a party to the Convertibles LPA, nor a representative of a party to that agreement. The Trustee elaborates that he represents the Partnerships while the Convertibles LPA binds only the limited partners and the general partner. While technically the Trustee may be correct, he puts form over substance. “While the partnership is not a signatory to the agreement, the partnership must act through the general and limited partners.” (*212 Investment Corp. v. Kaplan*, 6 Misc. 3d 1031(A), 800 NYS2d 358 [New York Cty, 2005, Cahn, J]). Thus, that the partnership did not sign the Convertibles LPA is of no moment as the limited partners and the general partner signed it and the claims clearly fall under the LPA’s provision to submit to arbitration all “disputes and questions” concerning “the rights, obligations and remedies hereunder of such parties or legal representatives.” (*See 212 Investments*, supra, [rejecting plaintiff’s argument that the court should deny motion to compel arbitration because limited partnership was not a party to the agreement]).

The Trustee cites many cases stating the general principle that the claims of the individual limited partners and the claims of the partnership are distinct. (*See e.g., MK West Company v.*

Meridien Hotels Inc., 184 AD2d 312, 313 [1st Dep't 1992]). Indeed, the Appellate Division, First Department recently recognized this principle in a decision affirming this court in another case against Kenneth Lipper arising out of these very same facts:

The partnership agreement's characterization of incentive compensation as a partnership expense suggests that plaintiff's claims are derivative. . . On the other hand, the agreement's provision that only the limited partners were to pay incentive compensation, and the partnership's financial statements, which were audited and sent to the limited partners, stating that the incentive fee 'was treated as an allocation of income from the limited partners to the General Partner,' suggest that plaintiffs' claims are direct."

(*Morgado Family Partners v. Kenneth Lipper et al*, 19 AD3d 262, 263 [1st Dep't 2005])

Yet, nothing in *Morgado*, or the cases the Trustee cites, address the procedural question of what is the proper forum in which to bring the claims. Were it not for the presence of the Trustec, a limited partner would have had to assert these claims derivatively on behalf of Convertibles. (See *N.Y. Limited Partnership Law* § 115-a[1]). There is no dispute that under those circumstances, the limited partner would have had to proceed via arbitration. Indeed, the Trustee's very appointment came about because several limited partners requested, pursuant to NYRLPA § 121-803, that this court remove Lipper Holdings as liquidating trustee and appoint a new liquidating trustec.

The Trustee also argues that section 121-803 of the New York Revised Limited Partnership Act operates to afford him the opportunity to bring suit here. Section 121-803 provides that the persons winding up a limited partnership's affairs "may in the name of, and for and on behalf of , the limited partnership, prosecute and defend suits." The Trustee argues that this section makes him the representative of the Partnership, not the limited partners or the general partner, who are subject to the arbitration clause. Therefore, the Trustee argues, he need

not arbitrate because he does not represent anyone who would be subject to the arbitration clause.

However, again, a limited partnership takes action either through its general partner or through its limited partners, and New York law expressly permits limited partners to assert partnership claims derivatively. (*See N.Y. Limited Partnership Law* § 115-a[1]). There is nothing in section 121-803 that restricts the forum to court when the limited partners and the general partner had formerly agreed to arbitrate. It is not disputed that, were the limited partners prosecuting this case, it would be in arbitration because the limited partners are subject to the arbitration clause and the claims arise out of the Convertibles LPA. The Trustee is standing in the shoes of the limited partners for the procedural purposes of bringing this lawsuit. Therefore, this case belongs in arbitration. This is not to say that the Trustee can assert claims alleging direct damage to limited partners. (*See Morgado supra*). It is only for the procedural purpose of initiating this derivative claim that the Trustee stands in the shoes of the limited partners.

In addition, to the extent the complaint concerns Fixed Income, those claims must also proceed to arbitration. Fixed Income is a limited partner in Convertibles. The claims the Trustee purports to assert on behalf of Fixed Income arise out of its investments in Convertibles. For example, in paragraph eleven of his complaint, the Trustee states that “[t]he value of Lipper Fixed Income was also overstated by virtue of the overstatement of its investment in Lipper Convertibles.” In paragraph 14 of the complaint, the Trustee states:

Lipper Fixed Income also saw \$3,454,627 wrongfully flow out of the partnership as a result of the capital withdrawals by limited partners of Lipper Fixed Income who made withdrawals from their capital accounts at a time when those capital accounts were overvalued as a result of the inflation caused by Lipper Fixed Income’s investment in Lipper Convertibles.

Because Fixed Income is a limited partners in Convertibles and because the claims the Trustee

brings on behalf of Fixed Income arise out of its investment in Convertibles, that part of the Trustee's complaint also must proceed in arbitration.

I already held that the arbitrator must decide the issue of whether some of the Trustee's claims are barred by the statute of limitations on the record at oral argument on January 12, 2006 (See Tr. Pg 11-12). However, it bears repeating that in contracts affecting interstate commerce like this one, unless a choice of law provision states that New York law governs both the agreement and its enforcement, the issue of timeliness is for arbitration. (*See Diamond Waterproofing Systems, Inc., v. 55 Liberty Owners Corp.*, 4 NY3d 247, 253 [2005]). Here, the choice of law provision only states that New York law shall govern the contract. It does not mention enforcement. Accordingly, issues of timeliness are for the arbitrator.

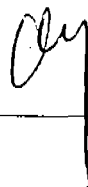
Accordingly, it is

ORDERED THAT that part of defendant Kenneth Lipper's motion to compel plaintiff's claims to arbitration is granted; and it is further

ORDERED THAT this case is stayed pending arbitration of this matter; and it is further

ORDERED THAT the court sets an outside control date of November 15, 2006 at Noon at which time the parties are to call in and apprise the court of the status of the arbitration.

Dated: April 21, 2006



J.S.C.

FILED

APR 28 2006

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