

Fiveco, Inc. v Haber

2006 NY Slip Op 30385(U)

June 16, 2006

Supreme Court, Nassau County

Docket Number: 7620-05/

Judge: Roy S. Mahon

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SCAN

SHORT FORM ORDER

MOD

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

FIVECO, INC. d/b/a MER'S INC.,

TRIAL/IAS PART 13

Plaintiff(s),

INDEX NO. 17620/05

- against -

MOTION SEQUENCE
NO. 1 & 2

BRUCE HABER,

MOTION SUBMISSION
DATE: March 14, 2006

Defendant(s).

The following papers read on this motion:

| | |
|------------------------|----|
| Order to Show Cause | X |
| Notice of Cross Motion | X |
| Reply Affirmation | XX |

Upon the foregoing papers, the motion by Petitioner, brought by Order to Show Cause for an Order enjoining Bruce Haber and his agents, employees, including the American Arbitration Association and restrain and enjoin such parties from proceeding to arbitrate and the cross-motion by the Respondent for an Order granting to Respondent Bruce Haber reasonable legal fees pursuant to paragraph 16 of the agreements and for bringing a frivolous application before the Court, are both determined as hereinafter provided:

The respective applications arise out of an Installation and Security Agreement dated November 21, 1997 that was assigned to and assumed by the Petitioner on June 1, 2001. Pursuant to subsection I of Section A, the Respondent agreed to "... install and service one or more automatic or other amusement devises, coin operated telephone or gaming devises if allowed by law in the Premises ...". Pursuant to subsection IV of Section A, the agreement "... shall be for the term of 7 years from the date hereof".

Germane to the respective applications are the provisions of subsection 16 of Section C of the Agreement. Said section provides:

"(16) In the event the Operator shall hereafter make payment, loan or advance to or on behalf of the Location Owner, the term of this agreement shall thereby be deemed extended automatically for an additional period of five (5) years from the expiration date of this contract. Any additional payments, loans or advances made to or on

behalf of the Location Owner shall extend this agreement for five (5) years from the date of such agreement, loan or advance or two (2) years from the end of the agreement whichever is longer."

The Respondent through counsel contends that the Respondent issued a personal check dated April 18, 2002 to the Petitioner in the amount of \$1000.00 which triggers the provisions of subsection 16 and as such seeks arbitration pursuant to subsection 12 of Section C.

In support of the Petitioner's application, the Petitioner submits an affidavit from Jerry Nardone, the Petitioner's President. In pertinent part, Mr. Nardone sets forth:

"6. That soon after the purchase of the Pub in 2001, Fiveco commenced renovations at the business location. At that time, I had seen a wall mounted juke box at "Inn At The Main". This pub is a competitor being operated by individuals that sold Mers Pub to Fiveco. These individuals indicated that Haber had provided the unit.

7. Given that renovations were on going, I requested that Haber provide Fiveco with a similar wall mounted unit. It is not uncommon for coin operated machines which are part of the security agreement to be substituted for others during the term of the contract.

8. Mr. Haber, initially indicated that he had no such units and had not provided the same to anyone else. When advised that, in fact, he had provided a wall mounted unit to our competitor, he stated "look, I will give you \$1,000.00 in lieu of replacing the unit and just keep the old floor model juke box". We accepted the offer and kept the old juke box until the termination of the agreement. A copy of the check is annexed hereto and marked as EXHIBIT B. Mr. Harber makes note of the fact that it is a "bonus", ostensibly to keep the old juke box.

9. At no time was there ever any agreement or understanding that the \$1,000.00 payment represented a new loan or formed the basis of any extension of the security agreement. The facts, as shown below, clearly demonstrate that no one, including Mr. Haber, ever relied or expected the \$1,000.00 offer to form the basis of any alleged extension of the original agreement."

The Court observes that there is no submission from the Respondent Bruce Haber himself that disputes the contentions of Petitioner's President Jerry Nardone.

In examining the issue of a contract and an agreement to arbitrate, the Court in **Sisters of Saint John The Baptist, Providence Rest Convent v Phillips R. Geraghty Construction, Inc.**, 67 NY2d 997, 502 NYS2d 997 stated:

"It is of course for the court in the first instance to determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement. The court's inquiry ends, however, where the requisite relationship is established

between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate. In disputes subject to arbitration, interpretation of particular contract terms must be left for the arbitrators (see, *Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 5' *Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co.*, 37 NY2d 91, 95-96)."
Sisters of Saint John The Baptist, Providence Rest Convent v Phillips R. Geraghty Construction, Inc., supra at 998

A review of the respective submissions establishes that the Installation and Security Agreement in issue expired by its own terms on November 21, 2004 unless extended pursuant to the provisions of subsection 16 of Section C. The Petitioner through the affidavit of Jerry Nardone has established that this was not a "payment, loan or advance" as set forth by subsection 16. This contention is not controverted by the Respondent Bruce Haber in relation to his personal check dated April 12, 2002 which delineates the payment as a "bonus". Based upon the absence of an issue as to the applicability of subsection 16, the agreement in issue terminated on November 21, 2004. Based upon said expiration, there is no agreement for arbitration.

Accordingly, based upon the foregoing, the Petitioner's application for an Order enjoining Bruce Haber and his agents, employees, including the American Arbitration Association and restrain and enjoin such parties from proceeding to arbitrate, is **granted**. The Respondent's motion for an Order granting to Respondent Bruce Haber reasonable legal fees pursuant to paragraph 16 of the agreements and for bringing a frivolous application before the Court, is **denied**.

SO ORDERED.

DATED: 5/14/2006

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Ray S. Malton
 J.S.C.

ENTERED

MAY 25 2006

NASSAU COUNTY
 COUNTY CLERK'S OFFICE