

Matter of Kennelly v Mobius Realty Holdings LLC

2006 NY Slip Op 30600(U)

January 20, 2006

Supreme Court, New York County

Docket Number: 113450/05

Judge: Ronald A. Zweibel

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: ZWEIBEL
Justice

PART 509

KENNELLY, JAMES P.

INDEX NO. 113450/05

MOTION DATE _____

- v -

MOTION SEQ. NO. 01

MOBIUS REALTY HOLDINGS, LLC

MOTION CAL. NO. _____

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

	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 is decided in accordance with the accompanying decision, order & judgment.

UNFILED JUDGMENT ENTER
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, claimant or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: PT. 500 JUN 20 05

Ronald A. [Signature]
RONALD A. [Signature] J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50Q

-----X

In the Matter of the Application for :
an Order Staying the Arbitration :
Between JAMES P. KENNELLY, :

Petitioner, :

-against-

Index Number 113450/05
:Decision, Order & Judgment

MOBIUS REALTY HOLDINGS LLC. :

Respondent, :

-----X

ZWEIBEL, J.:

Petitioner James P. Kennelly moves this Court for an order staying the arbitration demanded by respondent Mobius Realty Holdings LLC and now pending before the American Arbitration Association (the "Arbitration"), which was commenced by respondent's service of a Demand for Arbitration dated September 8, 2005, on the ground that no arbitration agreement exists. Respondent cross-moves to compel arbitration and opposes the application to stay arbitration.

Petitioner brings the instant proceeding seeking a stay of an arbitration proceeding between petitioner and respondent. The Arbitration was commenced pursuant to an August 2, 2003 brokerage agreement between the parties with respect to 968 Second Avenue, New York, New York 10022-6354 (Block/Lot: 1344/0002). The Arbitration Clause in the Arbitration Agreement provides as follows:

Any controversy or claim arising out of or relating to this agreement, or breach thereof shall be settled by arbitration in New York,

N.Y., administered by the American Arbitration Association (the "AAA") in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The award of the arbitrators made pursuant to this agreement shall be in writing, shall set forth the facts found by the arbitrators to exist and shall state their determination. Arbitration shall be by three arbitrators selected from the panels maintained by the AAA, each of whom shall be an attorney-at law engaged in the practice of law full-time in New York, N.Y. The prevailing party in any arbitration proceeding, or any proceeding relating to such arbitration proceeding, to enforce its rights hereunder shall be entitled to recover all costs and expenses, including, without limitation, reasonable attorneys' fees, costs and disbursements, and interest. The cost and expenses of such arbitration, including, without limitation, the compensation of the arbitrators and stenographers, shall be paid by the party against whom the majority of such arbitrators renders a decision as herein provided.

The agreement containing the arbitration clause was signed by petitioner and dated August 2, 2003. It was also signed by Clifford Katz, as President of respondent.

As a result of this Court granting a temporary restraining order, the American Arbitration Association ("AAA") has suspended proceedings in the Arbitration. Before that occurred, both petitioner and his attorneys corresponded with the AAA with respect to issues in the Arbitration, requesting relief similar to the relief that petitioner now requests from this Court. Specifically, in letters to the AAA dated September 13, 2005 and September 15, 2005, petitioner stated that there was no contract between the

parties upon which to raise a brokerage fee issue for certain premises commonly known as 968 Second Avenue in New York County and that he did not wish to be a party to an arbitration proceeding based on a non-existent contract and that the AAA lacks jurisdiction over respondent's claim. The AAA, upon its receipt of petitioner's letters of September 13 and 15, 2005, requested that respondent comment with respect to the issues and allegations set forth in petitioner's letters. Respondent did so by letter to the AAA, dated September 21, 2005, stating that the issues with respect to the purported validity of the parties' July 30, 2003 agreement could be fully adjudicated in the underlying arbitration proceeding before the AAA. Respondent argues that these letters constitute sufficient participation by petitioner in the Arbitration to constitute a waiver by petitioner of any right to relief claimed in a proceeding pursuant to Article 75 of the Civil Practice Rules and Law ("CPLR").

By way of background, after petitioner and respondent entered into the August 2, 2003 agreement, during October and November of 2003, Susan M. Meizinger, Marc D. Greenfield and Barbara Kahn Ziegler entered into a written agreement with Kennelly Development Company, LLC for the sale of the premises known as 968 Second Avenue, New York, New York ("Premises"). According to petitioner, respondent did not represent the sellers, namely Susan M. Meizinger, Marc D. Greenfield and Barbara Kahn Ziegler or

petitioner with respect to the contract for the sale of the 968 Second Avenue, New York, New York, premises. Petitioner also claims that respondent did not introduce, negotiate for or acquire the Premises for petitioner. He points to the contract of sale of the premises which provided, inter alia, that:

Each party warrants and represents to the other that no broker, person, corporation or entity was in any way instrumental or had any part in bringing about this transaction....

According to petitioner, respondent did not enter into a brokerage agreement with Susan M. Meizinger, Marc D. Greenfield and Barbara Kahn Ziegler. Notwithstanding the August 2002 Agreement signed by petitioner, petitioner claims that he did not enter into a brokerage agreement with respect to the sale of the Premises with respondent. Petitioner states that respondent was not in any way instrumental and did not have any part in bringing about the transaction.

Petitioner alleges that subsequent to execution of the contract of sale for the Premises, respondent approached Susan M. Meizinger, Marc D. Greenfield and Barbara Kahn Ziegler, purporting to represent Kennelly Development Company, LLC. Respondent was advised, in a letter dated April 22, 2004, that he had no such authority, and was instructed to cease and desist making such claims.

The contract of sale for the Premises was assigned from Kennelly Development Company, LLC to East 51st Street Associates,

LLC as purchaser. The title was transferred to East 51st Street Associates at closing on November 19, 2004.

Thereafter, eight months later, in a letter dated July 13, 2005, respondent wrote to petitioner requesting the brokerage fee it believed was owed to it under the August 2, 2003 agreement. Respondent was advised in a letter dated September 6, 2005 that respondent was not entitled to any such brokerage fee and was once again instructed to cease and desist making such claims.

On September 8, 2005, respondent sent petitioner a demand for arbitration. Petitioner, without denying that he signed the August 2, 2003 agreement, baldly states that there is no valid brokerage agreement between respondent and petitioner. He also denied participating in the demanded arbitration with respondent.

Petitioner commenced the instant proceeding by obtaining an order to show cause from this Court, dated September 27, 2005 and supported by a verified petition, dated September 23, 2005.

It is well settled that arbitration is favored as a matter of public policy since "this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties" (Matter of Nationwide Gen. Ins. Co. v. Investors Ins. Co., 37 N.Y.2d 91, 95 [1975]; see TNS Holdings v. MKI Sec., 92 N.Y.2d 335, 339 [1998]; Matter of Smith Barney Shearson Inc. v. Sacharow, 91 N.Y.2d 39, 49 [1997]; Matter of Weinrott [Carp], 32 N.Y.2d 190, 199 [1973]). CPLR 7503(b)

provides:

(b) **Application to stay arbitration.** Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.

CPLR 7503 (a) and (b) set forth the "narrow scope of threshold judicial inquiry permissible" on an application to compel or stay arbitration (Matter of United Nations Development Corp. v. Norkin Plumbing Co., Inc., 45 N.Y.2d 358, 363 [1978]). The Court's role is that of a "gatekeeper," limited to deciding only three threshold questions: whether the parties made a valid agreement; if so, whether the parties complied with the agreement; and whether the claim sought to be arbitrated is barred by the applicable Statute of Limitations (see CPLR 7503; Cooper v. Bruckner, 21 A.D.3d 758, 759 [1st Dept. 2005]).

Here, there is no issue presented with respect to whether conditions precedent to arbitration have been complied with as the only predicate to arbitration appears to be, as respondent argues, service of a demand for arbitration. Petitioner's papers appear to concede the issue of service. There also does not appear to be any issue with respect to any statute of limitations. Thus, the only question left for the Court to decide is whether there was a valid agreement to arbitrate.

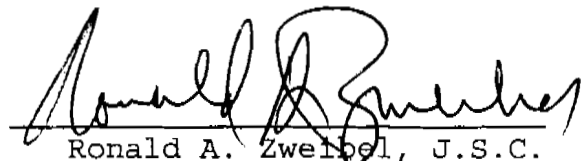
Despite petitioner's claim that the agreement containing the arbitration clause is non-existent, the Court finds that August 2, 2003 agreement constitutes an agreement to arbitrate. As long as the agreement to arbitrate is clear and unequivocal, the question of whether the agreement as a whole is enforceable due to fraud, or some other reason, is for the arbitrators to resolve (see Cooper v. Bruckner, 21 A.D.3d, at 759). There is no doubt that the agreement to arbitrate embraces the dispute, namely whether the parties had an enforceable brokerage contract for the premises in question under which respondent is entitled to brokerage fees. Moreover, the agreement containing the arbitration agreement is signed by both petitioner and respondent. All remaining questions, after the threshold ones reserved for the Court, are for the arbitrators (see Cooper v. Bruckner, 21 A.D.3d, at 759).

Accordingly, the petition to stay arbitration is denied and the petition is dismissed, the cross-petition is granted and the parties are directed to proceed forthwith to the arbitration .

This constitutes the Decision, Order and Judgment of this Court.

Dated: January 20, 2006

ENTER:


Ronald A. Zweifel, J.S.C.