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

PRESENT: GOODMAN Justice

PART 17

KAMENOR LIMOUSINE SERVICE, INC., ET AL.

-V-

RAYMOND BERMUDEZ, ET AL

INDEX NO. 601607/06

MOTION DATE

MOTION SEQ. NO. 001

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 is decided per attached order

FILED
APR 05 2007
COUNTY CLERK'S OFFICE

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

Dated: 3/27/07

HON. EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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KAMERON LIMOUSINE SERVICE, INC.
a New York corporation and
KLS TRANSPORTATION SERVICE, INC.,
a California coporation

Plaintiffs,

-against- Index No. 601607/2006

RAYMOND BERMUDEZ, an Individual,
MARIA BERMUDEZ, an Individual,
JOHN DOE, an Individual, JANE DOE, an
Individual, ABC PARNERSHIP, XYZ
CORPORATION and Y2-K MILLENNIUM
LIMOUSINE, INC., a New York corporation

Defendants.

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EMILY JANE GOODMAN, J.S.C.

By order to show cause, plaintiffs seek an order staying an arbitration pending resolution of this action. Defendant Raymond Bermudez (Bermudez) filed a demand for arbitration, dated 5/11/06, seeking $75,000 for "Breach of contract/Employment Agreement" by Kameron Limousine, Inc (Kameron). Although not stated in his demand, the employment agreement apparently referenced in the demand is included in the Sales Contract and Operational Agreement, dated December 21, 2004, between plaintiffs, as Buyer, and Y-2K Millenium Limousine and Bermudez, as Seller (the Sales Contract) which includes provisions regarding the employment of Bermudez. Prior to demanding arbitration, Bermudez filed a Small Claims action against Kameron; a summons was mailed to Kameron, dated 3/23/06, indicating that Bermudez was seeking $3,769.23 in an "Action to recover monies arising out of nonpayment of

wages (over $300.00) Date of occurrence 3-15-06." Prior to the first Small Claims court appearance of 4/27/06, Bermudez discontinued his case by document, dated 4/7/06.

The Court rejects plaintiffs' argument that the arbitration clause in the Sales Contract does not cover the issues in this action because they are "unanticipated" and involve "a conspiracy of people who have been fraudulently taking property and funds from Kameron." As noted by defendants Raymond and Maria Bermudez (defendants), the arbitration clause is broad as it provides, in relevant part, that "[i]n the event of a dispute between or among the parties hereto, they each and all hereby agree to submit that matter to binding arbitration."[1]

In general, a broad arbitration clause creates a presumption of arbitrability with respect to disputes related to the underlying contract (see In Re Domansky, 2 AD3d 132, 133 [1st Dept 2003]). The court must "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" (Sisters of St John the Baptist, Providence Rest Convent v Phillips R Geraghty Constructor, Inc, 67 NY2d 997, 998 [1986]; see also, Liberty Management & Constr, Ltd v Fifth Avenue & Sixty-Sixth Street Corp, 208 AD2d 73, 76 [1st Dept 1995]). Here, the fact that plaintiffs allege that unknown parties might be involved in a conspiracy is not grounds to find that the dispute with Bermudez is not arbitrable. The fact that plaintiffs would have to litigate against those parties who did not agree to arbitrate and also arbitrate against Bermudez certainly requires duplication of resources, but is not a ground to invalidate an agreement to arbitrate. Nor does the allegation that plaintiffs did not anticipate the issues herein when they agreed to

[1]No issue is raised as regarding whether plaintiffs agreed to arbitrate with Bermudez, who is listed in the first paragraph of the Sales Contract as "Seller" but who was not a signatory to the agreement in his individual capacity.

arbitrate, dictate a finding that there was no agreement to arbitrate. Accordingly, plaintiffs have not supported their request to stay arbitration on the grounds that no arbitrable claim exists.

The Court further rejects plaintiffs' argument that the Sales Contract must be invalidated because it was "permeated with fraud." It is "well settled that in those instances where a challenge is made to the validity of the arbitration clause itself, such as fraud in the inducement, the issue is for the court to decide . . ." (Arc Elec & Mechanical Contractors Corp v Invensys Bldg Systems, Inc, 2 AD3d 314 [1st Dept 2003]). "In order to sustain a cause of action for fraudulent inducement, plaintiffs must show 'misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury'" (Shea v Hambros PLC, 244 AD2d 39, 45 [1st Dept 1998], quoting, Lama Holding Co v Smith Barney, Inc, 88 NY2d 413, 421 [1996]). "Such a claim, like any fraud cause of action, must set forth "the circumstances constituting the wrong . . . in detail" (id., quoting CPLR 3016[b]). However, plaintiffs do not claim that they were fraudulently induced to sign the Sales Contract, nor have they even particularized the alleged wrongdoings.

Nonetheless, the arbitration must be permanently stayed on the grounds of waiver. Defendants urge the Court to find that Bermudez did not waive his right to arbitration by filing, pro se, the Small Claims court action and withdrawing it two weeks later. Defendants maintain that no waiver can be found based solely on mere commencement of an action, where Bermudez did not actively participate in the action, citing, Braun Equipment Co., Inc. v Meli Borelli Assoc., 220 AD2d 311 [1st Dept 1995] [defendant service of routine pleadings did not waive defendant's right to arbitration]). Plaintiffs maintain that waiver has been found based on mere service of a

summons, citing, Esquire Indust., Inc. v East Bay Textiles, Inc., 68 AD2d 845 [1st Dept 1979] [plaintiff waived arbitration by serving a summons]). Plaintiffs also point out that once waived, the right to arbitrate cannot be regained, citing, Tengtu Intl. Corp. v Pak Kwan Cheung, 24 AD3d 170 [1st Dept 2005]).

Under New York law, a court determines the issue of there has been waiver of the right to arbitrate by litigation (see Sherrill v Grayco Bldrs., 64 NY2d 261, 272 [1985]). The party that seeks redress for arbitrable claims in judicial proceedings has waived the right to arbitrate those claims (Denihan v Denihan, 34 NY2d 307, 310 [1974]). "Where claims are entirely separate, though arising from a common agreement, no waiver of arbitration may be implied from the fact that resort has been made to the courts on other claims" (Sherrill, 64 NY2d at 273; see also Corcoran v Corcoran, 114 AD2d 881, 881 [2d Dept 1985]["A party may waive his right to arbitrate by utilizing the judicial system to attain the same relief or determination sought in arbitration"]).

Here, there is no argument that the claim made in Small Claims court was entirely separate and distinct from the claim made in the arbitration. In fact, the claim for lost wages asserted in the Small Claims case would be encompassed under the Sales Contract, which governs payment of Bermudez's wages. Braun Equipment Co., Inc is inapposite because cases have routinely drawn a distinction between the amount of participation required to establish waiver by a party affirmatively, versus defensively, litigating. Although it is true that he did not actively participate in the litigation, this Court is bound by the decision in the First Department, Esquire Indust., Inc., supra (compare Joyce Research & Dev. Corp. v Equi-Flow, 31 Misc2d 952 [1961] [mere commencement of City Court action did not result in waiver of arbitration], aff'd, 15 AD2d 821

[2d Dept 1961]). Esquire Indust., Inc. cannot be distinguished on the ground that Bermudez was pro se, given that pro se parties are generally held to the same standards as those parties who are represented. Further, there is no allegation that Bermudez was unaware of the agreement to arbitrate. Accordingly, when Bermudez affirmatively chose to resort to the courts, instead of demanding arbitration, he elected his forum and waived his right to arbitrate.

It is hereby

ORDERED that plaintiffs' motion for an order staying arbitration is granted and the arbitration is permanently stayed on the grounds of waiver.

Dated: March 27, 2007

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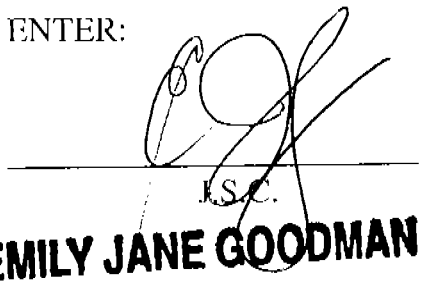

J.S.C.

EMILY JANE GOODMAN