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

PRESENT: HERMAN CAHN Justice PART 49

Neal, Terry
Plaintiff
- v -
Goldsmith LLC
Defendant

INDEX NO. 604063/05

MOTION DATE 8/17/06

MOTION SEQ. NO. 002

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

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

April 25, 2007

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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JERRY NEAL,

Plaintiff,

-against-

GOLDSMITH LLC, GOLDSMITH HOLDINGS LLC and CRAIG A. STEIN,

Defendants.

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Index No. 604063/05

Herman Cahn, J.

Defendants move to compel arbitration of certain claims and to stay the remainder of the action pending conclusion of the arbitration, CPLR 7501 and 7503.

BACKGROUND

Goldsmith LLC[1] is engaged in designing and manufacturing mannequins and other supplies for retailers.

Plaintiff Jerry Neal was hired as President of Goldsmith LLC beginning in June 2004 and remained in that position until his employment was terminated on August 1, 2005. This dispute is based on defendants' alleged breach of various employment and compensation terms, as described in two different agreements discussed below.

The terms and conditions of employment are set forth in a letter by Goldsmith LLC, dated May 26, 2004 (the "Offer Letter"). The Offer Letter provided that: (1) plaintiff would be paid a

[1] In his complaint, plaintiff refers to defendants Goldsmith LLC and Goldsmith Holdings LLC collectively, without making any specific allegations with regard to each defendant.

base compensation of $225,000 per year; (2) he would be entitled to medical insurance benefits, vacation time and personal days; (3) he would be eligible for a "targeted total bonus" of $125,000; and (4) he would participate in a Stock Appreciation Rights Plan, pursuant to which he would receive 20% of the growth in enterprise value above a threshold of $11.5 million dollars. The Offer Letter also included a non-compete provision, whereby plaintiff agreed not to compete with Goldsmith for one year after leaving the company and would not hire any Goldsmith employees or solicit Goldsmith clients for two years.

On April 27, 2005, plaintiff and defendant Goldsmith Holdings LLC entered into a "Contingent Sale Payment Agreement" (the "CSPA") pursuant to which plaintiff was entitled to receive "an amount equal to (i) 20% multiplied by (ii) the excess (if any) of (A) the consideration received with respect to any Sale of [Goldsmith Holdings LLC] . . . over (B) the sum of (1) $11,500,000.00 plus (2) the aggregate value of consideration paid by [Goldsmith Holdings LLC] with respect to acquisitions of other business or entities after [April 27, 2005] . . . ." (CSPA ¶ 1.) The CSPA provides that the benefits afforded under the agreement would be completely forfeited should plaintiff be terminated for cause. (*Id.*) The CSPA also states that "[a]ny dispute arising out of this [Contingent Sale Payment Right] shall be exclusively resolved by submission to binding arbitration in the State of New York in accordance with the rules of the American Arbitration Association." (*Id.* ¶ 6.)

In the spring of 2005, plaintiff's performance was rated a three out of a possible five. As a result, plaintiff met with Stein, Goldsmith LLC's chairman, and Mark Goldsmith on June 27, 2005 to discuss his performance rating. Shortly after the meeting, plaintiff alleges that he submitted a ten-page assessment of his responsibilities, accomplishments and future initiatives to

Stein and Mark Goldsmith. Plaintiff contends that Stein assured him that any issues regarding his performance had been resolved to his satisfaction. Plaintiff also alleges that, shortly before his termination, Stein requested his assistance in an effort to sell Goldsmith.

In his complaint, plaintiff seeks a declaratory judgment against the Goldsmith defendants that: (1) they owe him compensation due to their promise that he would share in the growth of the value of the company under the Offer Letter and/or the CSPA; (2) he was terminated without cause; and (3) the non-compete agreement found in the Offer Letter is unenforceable. Plaintiff also alleges breach of contract, promissory estoppel, quantum meruit, unjust enrichment and breach of the implied covenant of good faith and fair dealing against both Goldsmith defendants. As against defendant Stein, plaintiff alleges fraud and negligent misrepresentation.

In this motion, defendants seek to enforce the arbitration provision of the CSPA and to stay the remainder of the action until the arbitration is completed.

DISCUSSION

New York's public policy has strongly favored arbitration. *Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 49 (1997). When the parties have expressly agreed to submit to arbitration, they are subsequently "deemed to have relinquished the right to litigate disputes in the courts and may be compelled, instead, to submit to arbitration." *Maross Constr., Inc. v Cent. N.Y. Reg'l Transp. Auth.*, 66 NY2d 341, 345 (1985).

Therefore, on a motion to compel arbitration, the court is limited to deciding threshold issues regarding arbitrability: "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 statute of limitations." *Cooper v Bruckner*, 21 AD3d 758, 759 (1st Dep't 2005).

Claims Against Goldsmith Holdings LLC under the CSPA

The CSPA contains a clear and enforceable arbitration provision relating to its terms. It states that: "Any dispute arising out of this [Contingent Sale Payment Right] shall be exclusively resolved by submission to binding arbitration in the State of New York in accordance with the rules of the American Arbitration Association." (CSPA ¶ 6.) Because the agreement to arbitrate has broad language covering *any* dispute under the CSPA, plaintiff's allegations regarding his right to payment as set forth in that agreement are clearly encompassed within the purview of the arbitration provision.

In his complaint, plaintiff has continuously discussed his causes of action against the Goldsmith defendants without making independent allegations against either of them. He similarly bases his claims on both the CSPA and the Offer Letter without distinction. Any rights plaintiff has under the CSPA can be alleged only against Goldsmith Holdings LLC, which was the signatory to that agreement. To the extent that plaintiff's causes of action are premised on the CSPA, as are Counts One through Six of the complaint at least in part, he is bound to arbitrate those claims, and the motion is granted as to those claims.

Claims Against Goldsmith LLC under the Offer Letter

As mentioned above, plaintiff has made allegations with regard to the CSPA and the Offer Letter, without distinguishing between the two. However, the claims based on the terms of the Offer Letter should be looked at separately because two facts make these claims distinguishable: (1) there is no arbitration clause in the Offer Letter, as there is in the CSPA; and (2) the signatory to this agreement was not the same party as the signatory to the CSPA.

Regarding the first of these distinctions, the Offer Letter is completely devoid of any

mention of arbitration. Further, there can be no argument that the two agreements should be read together as one to enforce the arbitration provision in the CSPA. The CSPA neither refers to the Offer Letter nor contains a merger clause. Defendants themselves acknowledge that "[p]laintiff's claims based on the offer letter . . . may not be subject to arbitration." (Def Br at 7.)

It is also important to note that the signatories to both agreements were not the same. In order for Goldsmith LLC, a non-signatory to the CSPA, to bind plaintiff to arbitrate, the CSPA must have so stated in express language. "The right to compel arbitration does not extend to a party that has not signed the agreement pursuant to which arbitration is sought unless the right of the nonsignatory is expressly provided for in the agreement." *Greater N.Y. Mut. Ins. Co. v Rankin*, 298 AD2d 263, 263 (1st Dep't 2002), citing *Matter of Waldron [Goddess]*, 61 NY2d 181, 185 (1984).

Plaintiff's causes of action that contain allegations with regard to the Offer Letter, Counts One through Six of the complaint, can only be brought against the party who entered that agreement, Goldsmith LLC. However, because Goldsmith LLC was not a party to the agreement that contained the arbitration clause, it cannot compel arbitration regarding these claims.

In addition, the court will not force plaintiff to arbitrate claims premised on the Offer Letter simply because the claims regarding the CSPA, which contain some similar issues, are being arbitrated. This court has previously stated that "no case has been found, and none has been cited . . . compelling a party who has agreed to arbitrate only one claim to submit to arbitration of another claim because of the alleged interrelatedness of both claims." *General Re Corp. v Foxe*, 177 Misc 2d 867, 877 (Sup Ct NY County 1998). Thus, the claims brought with regard to the Offer Letter are not arbitrable and remain subject to the court's jurisdiction.

However, because some of the issues regarding the CSPA and the Offer Letter are intertwined, and resolution of the arbitrable CSPA claims may also resolve a portion of the non-arbitrable ones, a portion of the remainder of the action should be stayed until arbitration is completed. New York courts have repeatedly stayed an action in this situation. *See, e.g.*, *Cohen v Ark Asset Holdings, Inc.*, 268 AD2d 285, 286 (1st Dep't 2000); *Pacer/Cats/CCS v MovieFone, Inc.*, 226 AD2d 127, 128 (1st Dep't 1996); *Marcus v The Millwood Trading Co.*, 208 AD2d 448, 448 (1st Dep't 1994). "Where arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where, as here, the determination of issues in arbitration may well dispose of nonarbitrable matters." *Cohen*, 268 AD2d at 286. This also has been done where the party not subject to arbitration is closely associated to a signatory of the agreement containing the arbitration clause since the issues were so closely related. *Pacer/Cats/CCS*, 226 AD2d at 128.

Any resolution during arbitration with regard to the employment relationship -- i.e. whether it was an at-will employment, whether cause was required to terminate plaintiff, whether plaintiff adequately performed his employment duties, and thus whether he was terminated for cause -- would necessarily impact plaintiff's ability to recover under the Offer Letter.

Claims Against Craig A. Stein

Similar to defendant Goldsmith LLC, Stein was not a signatory to the agreement that contained the arbitration clause and, therefore, the causes of action against him are not subject to arbitration.

However, because these claims are secondary to those alleged against the Goldsmith defendants, and any findings regarding whether Neal's termination was proper could influence

the determination on what Stein's intentions were when he made statements to plaintiff, they are stayed pending completion of the arbitration.

Notwithstanding the above, those portions of the complaint which seek a declaratory judgment that the non-competition clause of the agreement between the parties is unenforceable, are not stayed. The issues raised by this claim are not identical to the issues which will be arbitrated, although there may be an overlap. Furthermore, the existence of these unresolved issues will undoubtedly make it difficult for plaintiff to obtain employment either with a competitor of defendants or even with a firm which does not so compete. Therefore, these issues should not await completion of the arbitration proceeding.

Accordingly, it is

ORDERED that the claims against Goldsmith Holdings LLC under the CSPA are subject to arbitration; and it is further

ORDERED that the claims against Goldsmith LLC under the Offer Letter and the claims against Stein are stayed pending conclusion of the arbitration, except as to the claims for a declaratory judgment relating to the non-compete agreement, which shall proceed in this court; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: April 25, 2007

ENTER:

J.S.C.