

Manhattan Residential Inc. v Elliman

2007 NY Slip Op 32519(U)

August 10, 2007

Supreme Court, New York County

Docket Number: 0601426/2007

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: _____

PART 35

Index Number : 601426/2007
MANHATTAN RESIDENTIAL
vs
PRUDENTIAL DOUGLAS EILLMAN
Sequence Number : 002
COMPEL

INDEX NO. 601426/07
MOTION DATE 8/6/07
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

_____ on this motion to/for _____

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

FILED
AUG 15 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The within motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the application of defendant Prudential Douglas Elliman is granted to the extent that plaintiff Manhattan Residential Inc is compelled to arbitrate the claims alleged herein before the Real Estate Board of New York. It is further

ORDERED that the application of defendant Prudential Douglas Elliman for a stay of the instant proceedings pending the resolution of the arbitration is granted, and the instant action is stayed, *sine die*. It is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiffs.

Dated: 8/10/07



HON. CAROL EDMEAD 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 35

MANHATTAN RESIDENTIAL INC., and
LAURENCE BEAME,

Plaintiffs,

-against-

PRUDENTIAL DOUGLAS ELLIMAN and
STANLEY GINSBERG,

Defendants.

EDMEAD, J.S.C.

Index No. 601426/07

DECISION/ORDER

FILED

AUG 15 2007

NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Defendant Prudential Douglas Elliman ("Douglas Elliman") moves for an order, pursuant to CPLR 7503(a) compelling the plaintiffs to arbitrate the claims alleged herein before the Real Estate Board of New York ("REBNY"), and staying the instant action. Plaintiffs oppose the instant motion.

Plaintiff real estate broker Manhattan Residential Inc. ("Manhattan") and its prospective purchaser the plaintiff Laurence Beame ("Beame") sue defendant Douglas Elliman and its agent defendant Stanley Ginsberg ("Ginsberg") alleging that the offer proffered by Manhattan in behalf of its prospective purchaser Beame, was not forwarded to the seller by Douglas Elliman as the exclusive listing broker.

Douglas Elliman's Contentions

Plaintiff Manhattan and the defendants Douglas Elliman and Ginsberg are all members of the REBNY. REBNY subjects its members to compulsory arbitration of any disputes before it, especially claims between real estate brokers.

The original complaint did not contain the plaintiff Beame, who is not a member of REBNY. Beame was added only after the demand for arbitration was made.

But despite adding Beame, who is not a member of REBNY, the nature of the claim remains the same.

Moreover, Beame is the disclosed principal of its agent, Manhattan, who is bound to arbitrate this claim before REBNY. "Agency" is one of the grounds where a non-signatory can be bound to an arbitration agreement, to wit by his agent. In other words, Beame is bound with all the other parties to this suit to arbitrate before REBNY.

Article XIII, Section 1 of the REBNY Constitution, entitled "Arbitration," provides, in part, as follows:

Section 1. Whenever (i) differences shall arise between Broker A, Broker B,....or the firm with which such members are affiliated,... shall demand the other member or the firm with which he is affiliated to submit the same to arbitration, *then it shall be compulsory upon such member and his firm to submit to arbitration* as hereinafter provided....Differences shall be defined to include any matter which may result in liability by reason of indemnification of a principal to a transaction by a broker who is subject to compulsory arbitration under this article. (Emphasis supplied)

The REBNY membership list includes Manhattan as a member. Further Manhattan's website displays the REBNY logo. As such, Manhattan is bound to submit this claim arising out of a real estate brokerage dispute including the related damages of the newly joined purchaser Beame, to REBNY for arbitration.

Beame is bound to arbitrate in light of his "agency" status. Manhattan is the agent of its disclosed principal, Beame, with respect to the real property subject of this dispute and legal action.

Plaintiffs' Contentions

Defendants fail to present any evidence that there was a clear and unequivocal agreement to arbitrate this claim between all the parties. And, defendants have failed to submit evidence establishing (1) that Manhattan is a current member of REBNY, or (2) that Douglas Elliman and/or Manhattan is a member in good standing of REBNY.

Defendants have failed to bring forth any documentation that Manhattan consented to compliance with REBNY's Constitution, more specifically, Article XIII, and the arbitration procedural rules.

The defendants also had no agreement whatsoever with Beame, who as an individual, is not and cannot be a member of REBNY. Defendants have failed to bring forth any evidence that there was any agreement, whether oral or written, with Beame, to arbitrate said claim, or evidence that would require Beame to arbitrate.

Pursuant to the Arbitration Procedure of REBNY, arbitration is not compulsory for non members. Beame states that he does not wish to arbitrate said matter with REBNY.

As to defendants' "agency" theory, a real estate broker or salesperson is an agent of Manhattan. Beame is not a real estate broker nor a salesperson of Manhattan. Rather, Beame is an innocent purchaser.

Further, this issue is outside of the scope of the REBNY. Not one of the plaintiffs' claims "include any matter which may result in liability by reason of indemnification of a principal to a transaction by a broker" which is the only issue definitively stated in REBNY's arbitration clause. REBNY's arbitration clause does not specifically provide for claims of fraud, misrepresentation, intentionally making false statements, negligence, tortious interference of

contract, to name a few. Moreover, REBNY's arbitration clause fails to provide for punitive damages.

Analysis

A written agreement to arbitrate is enforceable under New York law, CPLR § 7501. A court may issue an order compelling arbitration upon application by a party aggrieved by another party's failure to arbitrate. Such an order "shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration." CPLR § 7503(a).

Arbitration is a favored means of resolving disputes. *Nationwide Gen. Ins. Co. v Investors Ins. Co.*, 37 N.Y.2d 91, 95, 371 N.Y.S.2d 463, 332 N.E.2d 333 (1975). New York public policy strongly favors arbitration. *Hackett v Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146, 154 (1995); *Maross Constr., Inc. v Cent. N.Y. Reg'l Transp. Auth.*, 66 N.Y.2d 341, 345 (1985).

It is well-established that parties to a commercial transaction "will not be held to have chosen arbitration as the forum for the resolution of their disputes in the absence of an express, unequivocal agreement to that effect" (*Acting Supt. of Schools of Liverpool Cent. School Dist. v United Liverpool Faculty Ass'n*, 42 N.Y.2d 509, 512 [1977]; accord *Primex Intl. Corp. v Wal-Mart Stores, Inc.*, 89 N.Y.2d 594 [1997]; *Primavera Labs, Inc. v Avon Prods., Inc.*, 297 A.D.2d 505 [1st Dept 2002]; *Calvin Klein Co. v Minnetonka, Inc.*, 88 A.D.2d 503 [1st Dept 1982]). Thus, a party will not be compelled to arbitrate absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes (*Waldron v Goddess*, 61 N.Y.2d 181 [1984]; *God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assocs., LLP*, 10 AD3d 671 [2d Dept 2004], *lv granted* 5 NY3d 707 [2005]).

And, it is a judicial responsibility, and not the arbitrator's, to decide the threshold question

of whether the parties are bound by a valid agreement to arbitrate . *See Matter of County of Rockland [Primiano Constr. Co.]*, 51 N.Y.2d 1, 431 N.Y.S.2d 478, 409 N.E.2d 951 [1980]; *Prinze v Jonas*, 38 N.Y.2d 570, 381 N.Y.S.2d 824, 345 N.E.2d 295 [1976]).

A broad arbitration provision, such as the one here, “creates a presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute” (*Bank Julius Baer & Co. Ltd. v Waxfield Ltd.*, 424 F3d 278, 284 [2d Cir2005], quoting *WorldCrisa Corp. v Armstrong*, 129 F3d 71, 74 [2d Cir1997] [internal quotation marks omitted]).

Plaintiffs correctly argue that where the arbitration agreement does not clearly and unambiguously dictate arbitration of the claim at issue, compelling arbitration is improper. (*Gerling Global Reinsurance Corp. v Home Ins. Co.*, 302 A.D.2d 118, 123, 752 N.Y.S.2d 611 [2002], *lv. denied* 99 N.Y.2d 511, 760 N.Y.S.2d 102, 790 N.E.2d 276 [2003], citing *Matter of Siegel v 141 Bowery Corp.*, 51 A.D.2d 209, 212 [1976]; see *McShane v Singh*, 250 A.D.2d 656, 671 N.Y.S.2d 692 [1998]; see also *Eis Group/Cornwall Hill Dev. Corp. v Rinaldi Constr.*, 154 A.D.2d 429, 546 N.Y.S.2d 105 [1989]).

This court finds that as to plaintiff Manhattan Residential, Inc., there was a clear, unambiguous agreement to arbitrate. Manhattan Residential, Inc. “sports” the REBNY logo on its web page. It is a reasonable presumption that Manhattan is a member in good standing of REBNY. And, if it is not, Manhattan could have easily established same. Further, there is no requirement that an additional consent to comply with REBNY’s Constitution be provided.

The court notes that in opposing this motion Manhattan does not deny that it is a member in good standing of REBNY. And, Manhattan’s argument that it has not consented nor entered

into an Agreement to arbitrate the issues, which “expressly and unequivocally encompass[es] the subject matter of this particular dispute,” is unavailing.

Parties must arbitrate claims if their underlying factual allegations touch issues encompassed by the arbitration agreement (*Oldroyd v Elmira Sav. Bank*, FSB 134 F.3d 72,77 (2d Cir. 1998); see *Brown v V & R Advertising, Inc.*, 112 A.D.2d 856, 861 [1st Dept 1985], *affd* 67 N.Y.2d 772 1986] [“Once the courts have determined that there is a reasonable relationship between the arbitration ... clause and the subject matter of the dispute ... the court's inquiry ends”]

Again, as to plaintiff Manhattan Residential, Inc., claims in the Amended Complaint “touch issues” encompassed by the arbitration agreement.

In the instant case, to the degree that plaintiffs’ claims herein relate to “[a]ny matter which may result in liability by reason of indemnification of a principal to a transaction by a broker who is subject to compulsory arbitration under this article,” arbitration as to plaintiff Manhattan is warranted.

However, plaintiffs are correct in arguing that New York law does not permit arbitrators to award punitive damages. *Garrity v Lyle Stuart, Inc.*, 40 N.Y.2d 354, 356, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976).

As to plaintiff Beame, he is not of the membership classification as specified in the REBNY constitution. It has not been established that he is a real estate broker, nor a manager or real estate agent. Nor does he voluntarily consent to arbitration. On the issue of the “Agency” relationship of plaintiff Beame to plaintiff Manhattan, defendants have failed to sufficiently establish the type of agency relationship that would warrant this court compelling Beame to arbitrate.

Conclusion

Plaintiffs correctly argue that defendants fail to present any evidence that there was a clear and unequivocal agreement to arbitrate this claim between all the parties. However, defendants have established that there was a clear and unequivocal agreement to arbitrate this claim as between plaintiff Manhattan Residential Inc. and defendants. And, to that end, the application of defendant Prudential Douglas Elliman is granted to the extent that plaintiff Manhattan Residential Inc is compelled to arbitrate the claims alleged herein before the Real Estate Board of New York. Based on the foregoing, it is hereby

ORDERED that the application of defendant Prudential Douglas Elliman is granted to the extent that plaintiff Manhattan Residential Inc is compelled to arbitrate the claims alleged herein before the Real Estate Board of New York. It is further

ORDERED that the application of defendant Prudential Douglas Elliman for a stay of the instant proceedings pending the resolution of the arbitration is granted, and the instant action is stayed, *sine die*. It is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiffs.

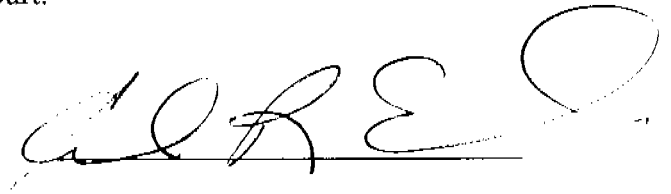
This constitutes the decision and order of this court.

Dated: August 10, 2007

FILED

AUG 15 2007

NEW YORK
COUNTY CLERK'S OFFICE



Carol Robinson Edmead, J.S.C.