

<b>Palacios v American Academy of Personal Training, LLC</b>
2007 NY Slip Op 32938(U)
September 6, 2007
Supreme Court, New York County
Docket Number: 0600892/2007
Judge: Ramos
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) 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: Ramos  
Justice

PART 53m

Nestor Palacios

INDEX NO. 600892107

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

American Academy Etal

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

**FILED**  
SEP 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

is decided in accordance with  
accompanying memorandum decision and order.

Dated: 9/14/07

[Signature]  
**HON. CHARLES E. RAMOS** 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:COMMERCIAL DIVISION

-----X  
NESTER PALACIOS,

Plaintiff,

Index No. 600892/07

-against-

AMERICAN ACADEMY OF PERSONAL TRAINING,  
LLC STEVE SALVATORE, and HARRY HANSON

Defendants.

**FILED**  
SEP 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

-----  
**Charles Edward Ramos, J.S.C.:**

Defendants, American Academy of Personal Training ("AAPT"), Steve Salvatore and Harry Hanson move, pursuant to CPLR 7503, to compel the plaintiff, Nestor Palacios, to submit his claims to arbitration, stay the proceeding, and award attorneys' fees, costs and expenses.

The individual parties are all founding members and part-owners of AAPT, a New York LLC. In June 2005, the parties entered into two agreements. First, an Operating Agreement (the "Agreement") whereby Palacios was to serve as general manager, Salvatore as director, and Hanson as operations manager. Additionally under the Agreement, the individual defendants were each allotted a 40% interest in the LLC, the plaintiff a 20% interest. Furthermore, plaintiff, as general manager, was to manage and oversee day to day operations of AAPT, and "all aspects of starting up the business of the company." Agreement at §5.3.

The second agreement, the "Additional Schools Agreement," provided the parties the opportunity to expand the company, with plaintiff assuming equal ownership of any new school sites

opened, if he chose to contribute equal start-up capital.

In January 2007, at the time classes first commenced, and after alleged neglectfulness of plaintiff's duties, Salvatore sent two letters of termination to plaintiff. The first, dated January 12, 2007, terminates plaintiff:

(1) as a member of AAPT pursuant to Section 5.7(ii), (iii), (iv), (v), and (vi) of the Agreement, and (2) as a general manager pursuant to Section 5.2(b) of the Agreement.

The second letter, dated January 25, 2007, advised plaintiff of the reasons for his prior termination as follows:

(1) you admitted and accepted tuition fees from students lacking requisite degrees in knowing derogation of applicable New York State Educational laws; (2) you appeared at the school visibly intoxicated on at least one occasion; (3) you attempted to set up a second school, without the permission or consent of the required number of members of AAPT; (4) you proved unable to manage and follow-up on leads for potential AAPT students, pay bills in a timely manner and efficiently organize and maintain the office; (5) you showed complete lack of organizational ability by failing to obtain the necessary approvals for the school's organization and process the Sallie Mae loan; (6) you were given diminished work responsibilities and proved unable even to perform these responsibilities; (7) you refused to fulfill AAPT's thirty five (35) hour work week requirement; (8) you disrupted AAPT's work environment by allowing your daughter to spend after school hours at the school thereby providing you with reason to not work a full day; (9) you blatantly eschewed your responsibility to AAPT by taking an unscheduled and unapproved vacation immediately prior to the school's launch; (10) you refused to cooperate with other AAPT members in addressing and resolving business issues; (11) you walked off the job and stated to a member of the AAPT (and before a witness) that you were not coming back and were resigning immediately.

Thereafter, plaintiff brought the underlying action alleging sixteen causes of action for breach of contract, gross negligence, intentional harm, defamation, and an injunction.

On April 6, 2007 defendants wrote a letter requesting plaintiff to withdraw his complaint and submit his claims to arbitration pursuant to Section 11.12 of the Agreement. This motion followed.

#### Discussion

The motion is granted in its entirety. Plaintiff's complaint, given the underlying facts of this matter, was filed unnecessarily and contrary the broad arbitration clause in the Agreement.

The Court of Appeals has ruled, the issue of whether claims are arbitrable, i.e., whether there is a clear, unequivocal and extant agreement to arbitrate the claims, is for the court to determine, and not the arbitrator. *Sisters of St. John the Baptist v Geraghty Constructor*, 67 NY2d 997, 998 (1986).

New York public policy favors enforcement of contracts for arbitration. *Nationwide General Ins. Co. v Investors Ins. Co.*, 37 NY2d 91 (1975). Accordingly, all doubts as to if a dispute is arbitrable are resolved in favor of arbitration. *Cooper v Bruckner*, 21 AD3d 758, 759 (1st Dept 2005).

The terms "arising out of" and "relating to" evidence a broad arbitration clause. See *State of New York v Philip Morris Inc.*, 30 AD3d 26, 31 (1<sup>st</sup> Dept 2006), *appeal denied*. Here, there is no question (nor dispute) that the Agreement contains such a clause.

It reads:

"Any controversy or claim arising out of or related to this agreement, or the breach thereof, shall be settled by

arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules." Section 11.12.

A broad arbitration clause should be given the full effect of its wording in order to implement the intention of the parties. *Weinrott v Carp*, 32 NY2d 190 (1973). See e.g. *Lane v Abel-Bey*, 50 NY2d 864, 865 (1980) (all encompassing language considered a "broad" arbitration clause); *Solkav Solartechnik, G.m.b.H. v Besicorp Group Inc.*, 91 NY2d 482 (1998) (same).

Plaintiff argues that all of defendants' claims should be adjudicated by the Court and not an arbitrator because the Fourteenth, Fifteenth, and Sixteenth causes of action are outside the scope of the Agreement. They are defamation of character and interests allegedly created in the Additional Schools Agreement. This argument is wholly unfounded and unsupported by the facts and documentary evidence.

The causes of action in question (defamation and injunction) plainly arise from the plaintiff's termination as general manager under the Agreement. The Additional Schools Agreement speaks only to the expansion of the LLC and the requirements thereunder.

Further, plaintiff argues that because these allegedly unrelated claims are "inextricably intertwined" with the other thirteen causes of action, that all the claims should be adjudicated by the court, and not through an arbitration proceeding. The law provides for the exact opposite. As mentioned above, there is strong New York public policy that favors enforcement of contracts for arbitration. *Nationwide*

*General Ins. Co. v Investors Ins. Co.*, 37 NY2d 91, *supra*. All doubts as to if a dispute is arbitrable are resolved in favor of arbitration. *Cooper v Bruckner*, 21 AD3d 758, 759 *supra*. Emphasis added.

Additionally, because attorney fees and costs are directly related to the issues in the complaint, and the Agreement plainly addresses the subject, any award of which is directed to the arbitrator. See Section 8.3.

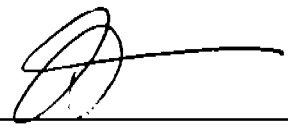
Accordingly, it is

ORDERED that the defendant's motion to compel arbitration and stay the proceedings is hereby granted; and it is further

ORDERED that the parties are to proceed to arbitration and a copy of this decision be served on the arbitration tribunal.

This shall constitute the judgment of the court.

Dated: September 6, 2007



**HON. CHARLES E. RAMOS**

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

**FILED**  
SEP 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE