SCANNED ON 1/28/2008

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

PRESENT: MADDEN PART 11

Justice

PROVIDENCE INVESTMENT MGMT

- v -

KIMBERLY STEER

INDEX NO. 113142/07

MOTION DATE 10-11-07

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this ~~motion~~ applicn to/for stay 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~~ application is decided in accordance with the annexed Memorandum Decision, Order + Judgment

UNFILED JUDGMENT

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

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

Dated: January 17, 2008

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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PROVIDENCE INVESTMENT MANAGEMENT COMPANY and RUSSELL JEFFREY,

Petitioners

Index No.: 113142/2007

-against-

KIMBERLY STEEL,

Respondent.

----------X

JOAN A. MADDEN, J.

Petitioners Providence Investment Management Company ("Providence") and Russell Jeffrey ("Jeffrey") move for a stay of arbitration pursuant to CPLR 7503(b) on the grounds that they did not enter into an agreement to arbitrate. Respondent Kimberly Steel ("Steel") opposes the petition, which is granted for the reasons below.

Background

In or about February 1995, Steel began working as the Managing Director of Investment Relations of non-party Watch Hill Management Corp. ("WHM"), a New York corporation providing management services to non-party Watch Hill Fund, L.P. ("WHF"), a New York limited partnership that invests in the mortgage market. Watch Hill Investment Partners, L.P. ("WHIP") is the general partner of WHF. At the time that Steel began to work for WHM, Jeffrey was one of two general partners of WHIP.

In or about December 2002, Jeffrey left WHIP, and thereafter formed Providence. Like WHM, Providence is a private investment company which creates limited partnership funds that focus on investing in the mortgage market and in managing the assets of those funds. Steel was

employed by WHM until 2004. In December 2006, WHM, WHF and WHIP ceased operations.

The terms of Steel's employment at WHM are set forth in an Employment Agreement dated February 8, 1995 ("the Agreement"). Paragraph 7(a) of the Agreement provides, in part, that "[t]his Agreement shall be construed and interpreted according to the laws of the State of New York. Any dispute shall be submitted to binding arbitration in New York, New York under the prevailing rules of the American Arbitration Association and judgment entered upon any award thereof in any court of competent jurisdiction...."

In accordance with paragraph 2(b) of the Agreement, Steel was "to solicit prospective investors to become limited partners of [WHF] ." Paragraph 3 of the Agreement addresses Steel's compensation. Of relevance here, paragraph 3 (b) provides, in part, that "[a]s a bonus for services in soliciting and obtaining investors for [WHF], WHM agrees to pay Steel in perpetuity a quarterly bonus based on the amount of investments in the [WHF] by limited partners who are introduced by Steel to [WHF] ("Referred to Limited Partners")....." It further provides that "[i]n the event WHIP or any affiliate thereof acts as general partner to or controls another security investment partnership, securities investment company, securities investment fund or securities investment account...Steel's bonus computation hereunder will ...include and be based, in addition, on the capital accounts of Referred Limited Partners in such other security investment partnership, securities investment company, securities investment fund or securities investment account, [and that].. [f]or the purposes of this Agreement an affiliate of [WHIP] shall include either of the individual general partners of the General Partner of their affiliates."

The Agreement is signed by Steel and a representative of WHM. Directly beneath the signature lines of the Agreement is a guarantor clause signed by Jeffrey and the other individual

general partner on behalf of WHIP. The clause "guaranties full and prompt payment and all of WHM's obligations to Steel under this Agreement and consents in advance and agrees that the validity of this guaranty and the undersigned's liability hereunder shall not be impaired, released, or terminated by any amendment to or change in this Agreement (and any such amendment or change shall be included in and covered by this guaranty). "

On or about September 10, 2007, Steel served a demand for arbitration before the American Arbitration Association ("AAA") on WHM, WHIP, Jeffrey and Providence pursuant to the arbitration provision in the Agreement, seeking to recover certain bonus payments under paragraph 3(b) of the Agreement. While Steel alleges that WHM paid her all the bonus payments due to her based upon investment in WHF, Steel asserts that she is owed bonus payments for investments in Providence made by limited partners introduced by Steel to WHF, and subsequently solicited by Jeffrey. Steel also alleges that since WHIP ceased operating its funds in December 2006, and cannot pay the Jeffrey and Providence debts to her, that Jeffrey, as a general partner of WHIP is personally liable for these payments.

Following the service of the demand for arbitration, Jeffrey and Providence moved by order to show cause to stay the arbitration on the ground that they were not parties to the Agreement containing the arbitration provision, and that although Jeffrey signed the guaranty the guaranty did not incorporate the other provisions of the agreement, and thus did not indicate an intent by Jeffrey to arbitrate disputes arising under the Agreement.

In opposition, Steel argues that Jeffrey is required to arbitrate since he, was a general partner of WHIP at the time the Agreement was signed and WHIP was a party to the Agreement. In support of its position, Steel relies on the introductory paragraph of the Agreement that states

that WHM is retaining Steel's services for "WHM, [WHIP] and [WHF] on the terms and conditions set forth in this Agreement and that Steel is willing to undertake employment and [WHIP] is willing to guaranty WHM's obligations to Steel to induce Steel to undertake employment, upon these terms and provisions."

Steel further argues that Jeffrey is bound by the arbitration provision as the guaranty that he signed and the Agreement are "inextricably intertwined" particularly as WHIP is referenced throughout the Agreement, and that the arbitration provision in the Agreement is broad enough to bind non-signatories.[1]

With respect to Providence, Steel argues that although it was not a party to the Agreement and did not exist when it was signed, Providence should be equitably estopped from avoiding the Agreement's arbitration provision since it knowingly accepted benefits under the Agreement.

Discussion

On a petition to stay arbitration, the initial inquiry for the court is whether there was an agreement to arbitrate. CPLR 7503; Smith Barney Shearson, Inc. v. Sacharow, 91 NY2d 39, 45 (1997). As arbitration is contractual by nature, a party cannot be required to arbitrate any dispute that it has not agreed to arbitrate. Waldron v Goddess, 61 NY2d 181, 183 (1984); see also, Thomson-CSF, S.A. v American Arbitration Assn., 64 F3d 773, 776 (2d Cir 1995) . Since an agreement to arbitrate involves the "surrender [of] the right to resort to the courts," such an agreement must be clear, explicit, and unequivocal and must not depend upon implication or subtlety. Waldron v Goddess, 61 NY2d at 183-184.

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[1]Although Steel argues that Jeffrey personally assumed an obligation to pay Steel's bonus compensation under paragraph 3(b) of the Agreement, aside from the guaranty clause, there is no evidence that he undertook such an obligation.

Under this standard, it cannot be said that WHIP is a party to the Agreement and that Jeffrey, as a general partner of WHIP, is thus bound to arbitrate the dispute with Steel. While the introductory paragraphs indicate that WHM, WHF and WHIP were intended to benefit from the services provided by Steel under the Agreement, and refer to WHIP's guaranty of WHM's obligations under the Agreement, these provisions are insufficient to make WHIP a party to the Agreement. Significantly, the first paragraph of the Agreement states that it is between WHM and Steel. In addition, a review of the Agreement indicates it is an employment agreement between Steel and WHM only, and that the duties and obligations specified under the Agreement are between Steel and WHM. See Allegro Resorts Corp. v. Trans-Americainvest (St Kitts) Limited, 1 AD3d 269 (1st Dept 2003)(affirming the trial court's holding that the guarantor was not a party to a lease agreement containing an arbitration clause even though the guarantor was mentioned in the first paragraph of the lease since the lease otherwise provided that it was between the landlord and tenant only); Warner v. U.S. Securities & Future Corp., 257 AD2d 545 (1st Dept), lv denied, 93 NY2d 807 (1999)(argument that clearing broker was a party to agreement and therefore required to arbitrate based on an introductory clause depended too much upon "implication or subtlety" for the purposes of compelling arbitration with a nonsignatory).

Moreover, although Jeffrey guaranteed the obligations under the Agreement, such guaranty alone is insufficient to require him to arbitrate based on the arbitration provision in the Agreement. It has been held that the guarantor of a principal agreement that contains an arbitration clause may not be compelled to arbitrate a dispute under the principal agreement where the guarantee agreement does not explicitly or by incorporation contain an arbitration clause. Calvin Klein Co. v Minnetonka, Inc., 88 AD2d 503 (1st Dept 1982); Allegro Resorts

Corp. v. Trans-Americainvest (St Kitts) Limited, 1 AD3d at 270. Here, while the guaranty clause refers to and guaranties WHM's obligations under the Agreement, it does not contain an arbitration provision or expressly incorporate the terms of the Agreement, including the arbitration provision.

Next, even assuming arguendo that the guaranty and Agreement are "inextricably intertwined," such interrelatedness, standing alone, is insufficient to subject a nonsignatory to arbitration. See TNS Holdings, Inc. v MKI Securities Corp., 92 NY2d 335, 340 (1998); Mionis v. Bank Julius Baer & Co., LTD., 301 AD2d 104, 111 (1st Dept 2002). Furthermore, in the absence of language indicating that the guaranty incorporated the Agreement by reference, the broad wording of the arbitration provision is insufficient to require Jeffrey to arbitrate. Compare, Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela, 991 F2d 42, 48 (2d Cir. 1993)(parties to insurance policy were required to arbitrate when policy was subject to an agreement containing broadly-worded arbitration provision which was not restricted to the immediate parties to the agreement).

In addition, the guaranty's location beneath the signature lines of the Agreement does not evince an intent to bind Jeffrey by the terms of the Agreement, including the arbitration provision. See Grundstad v. Ritt, 106 F3d 201, 205 (7th Cir. 1997)(holding that the fact that the guaranty appeared immediately beneath signature line of underlying agreement containing arbitration clause did not establish that the guaranty was part of underlying agreement for purposes of determining whether the guarantor intended to be bound to arbitrate disputes arising from the guaranty); compare, Development Bank of the Phillippines v. Chemtex Fibers, Inc., 617 FSupp 55 (SD NY 1985)(holding that guarantor was required to arbitrate since it was a signatory

and a party to the underlying agreement, and it initialed every page of the agreement including the page containing the arbitration clause). Accordingly, Jeffrey cannot be required to arbitrate based on the arbitration provision in the Agreement.

The remaining issue is whether Providence is subject to arbitration based on an estoppel theory. A party who knowingly exploits an agreement with an arbitration clause and directly benefits from it, can be estopped from avoiding arbitration under the agreement even though the party never signed it. HRH Construction LLC v. Metropolitan Transportation Authority, 33 AD3d 568 (1st Dept 2006); Thomson-CSF, S.A. v American Arbitration Assn., 64 F3d at 777. Steel argues that the estoppel theory applies as Providence received substantial benefits from the work Steel performed under the Agreement since Providence engaged in a competing business with WHF and solicited and accepted investments from Referred Limited Partners that Steel introduced to WHF. Moreover, Steel argues that since Jeffrey controls Providence, these benefits were knowingly received by it.

However, this argument is without merit as although Providence arguably benefitted from the Agreement, such benefit was indirect since Providence "exploited the contractual relationship between the parties and not the agreement itself." MAG Portfolio Consultant, GMBH v. Marin Biomed Group LLC, 268 F3d 58, 61 (2d Cir 2001). In other words, any benefit obtained by Providence was a result of Steel's performance of her obligations under the Agreement for WHF and not the product of Providence's exploitation of the Agreement itself. See e.g. Thomson-CSF, S.A. v American Arbitration Assn., 64 F3d at 778-779 (holding that the benefit derived by a third-party competitor and nonsignatory to exclusive trade agreement between two companies was indirect where nonsignatory acquired one of the companies and

used the exclusive trade arrangement between the parties to squeeze the remaining company out of the market); compare, HRH Construction LLC v. Metropolitan Transportation Authority, 33 AD3d 569 (finding that nonsignatory to a construction management agreement directly benefitted from it when the non-signatory took over one of the party's performance under the agreement and received $7,000,000 in compensation as a result). Accordingly, as the estoppel theory does not apply, there is no basis for requiring Providence to arbitrate under the Agreement.

Conclusion

In view of the above, it is

ORDERED and ADJUDGED that the petition to stay arbitration is granted.

Dated: January 14, 2008

J.S.C.

UNFILED JUDGMENT

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