

Ryan v Kellogg Partners Inst. Servs.

2008 NY Slip Op 30855(U)

March 24, 2008

Supreme Court, New York County

Docket Number: 0601909/2005

Judge: Barbara Kapnick

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

PRESENT: KAPNICK
Justice

PART 12

RYAN, DANIEL

INDEX NO.

601909/05

MOTION DATE

KELLOGG PARTNERS
INSTITUTIONAL SERVICES

MOTION SEQ. NO.

03

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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

MAR 26 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/24/08

BARBARA R. KAPNICK

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 12

-----X

DANIEL RYAN,

Plaintiff,

-against-

KELLOGG PARTNERS INSTITUTIONAL
SERVICES,

Defendant.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 601909/05
Motion Seq. No. 003

FILED
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Defendant moves by Order to Show Cause for an order: (i) compelling plaintiff to submit his claims to mandatory arbitration before FINRA (f/k/a NASD); (ii) staying this action in its entirety, including but not limited to the deposition of Kirk Kellogg, pending final resolution at arbitration; and (iii) granting defendant leave to amend its Answer to include an affirmative defense for mandatory arbitration.

-----X
Plaintiff argues in opposition that defendant, which has asserted thirty-two affirmative defenses and four counterclaims, and has taken part in proceedings before this Court over a period of nearly three years, has waived its right to demand arbitration in this action which is now pending on the trial calendar.

It is well settled that "[w]hile arbitration is favored as a matter of public policy" (Accessory Corp. v. Capco Wai Shing, LLC, 39 A.D.3d 344 [1st Dep't 2007]), a "defendant's right to compel arbitration, and the concomitant right to stay an action, does not remain absolute regardless of the degree of his participation in the action" (De Sapio v. Kohlmeyer, 35 N.Y.2d 402, 405 [1974]).

The Court of Appeals has thus held that "contesting the merits through the judicial process is an affirmative acceptance of the judicial forum and waives any right to a later stay of the action." De Sapio v. Kohlmeyer, supra at 405.¹ See also, Flores v. Lower East Side Service Center, Inc., 4 N.Y.3d 363, 371-372 (2005) which held that defendant "did not timely assert an arbitration claim either by raising it as a defense in its answer or by moving to compel arbitration (see CPLR 7503), electing instead to fully participate in this litigation for more than 16 months through discovery and the filing of a note of issue", concluding that those "acts were clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration" (citations omitted); Accessory Corp. v. Capco Wai Shing, LLC, supra at 345, which held that "even had defendants possessed a

¹ The Court reasoned that "[t]he courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration." De Sapio v. Kohlmeyer, supra at 406.

right to compel arbitration of this dispute, their participation in discovery would have constituted an affirmative acceptance of the judicial forum, with a concomitant waiver of any right to arbitration"; Johnson v. Brooklake Associates, 271 A.D.2d 382 (1st Dep't 2000) which held that "[d]efendant waived any right to arbitrate the claim by affirmatively participating in this lawsuit."

Similarly, the United States Court of Appeals for the Second Circuit has held that a party is deemed to have waived its right to arbitration under Section 4 of the Federal Arbitration Act (FAA), 9 U.S.C. § 4

if it "engages in protracted litigation that results in prejudice to the opposing party." [citations omitted]. While waiver of arbitration is not to be lightly inferred, the issue is fact-specific and there are no bright-line rules. [citation omitted]. Factors to consider include (1) the time elapsed from the commencement of litigation to the request for arbitration; (2) the amount of litigation (including exchanges of pleadings, any substantive motions, and discovery); and (3) proof of prejudice, including taking advantage of pre-trial discovery not available in arbitration, delay, and expense.

Matter of S&R Co. of Kingston v. Latona Trucking, Inc., 159 F.3d 80, 83 (2nd Cir. 1998), cert. dismiss'd, 528 U.S.1058 (1999).

Based on the papers submitted and the oral argument held on the record on February 27, 2008, this Court finds that an application of these factors to the particular facts of this case leads to the inescapable conclusion that defendant has long since waived its right to arbitration through its extensive participation in this lawsuit for almost three years.

Defendant also argues that plaintiff failed to timely challenge its Notice of Intention to Arbitrate which was served upon plaintiff on or about November 30, 2007.


However, "[o]nce waived, the right to arbitrate cannot be regained." Tengtu Int'l Corp. v. Pak Kwan Cheung, 24 A.D.3d 170, 172 (1st Dep't 2005).

Accordingly, defendant's motion to compel plaintiff to submit his claims to arbitration, for leave to amend its Answer to include an affirmative defense for mandatory arbitration and to stay this action is denied in its entirety.

This constitutes the decision and order of this Court.

Date: March 24, 2008

FILED


 Barbara R. Kapnick
 J.S.C.

BARBARA R. KAPNICK
J.S.C.

MAR 26 2008
 NEW YORK
 COUNTY CLERK'S OFFICE