

Kaplan v BST Advisory Network, LLC

2008 NY Slip Op 30880(U)

March 24, 2008

Supreme Court, New York County

Docket Number: 0602820/2007

Judge: Michael D. Stallman

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

PRESENT:

PART 7

Justice

Index Number : 602820/2007

KAPLAN, ELLIOT L.

vs.

BST ADVISORY NETWORK, LLC

SEQUENCE NUMBER : # 001

COMPEL

INDEX NO. 602820-07

MOTION DATE 10/26/07

MOTION SEQ. NO. #001

MOTION CAL. NO. 12

read on this motion to/for CPLR 7503(b), 321

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-C

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4

5-6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached memorandum decision.*

Counsel shall appear in Part 7, 111 Court St., Rm 949 for a preliminary conference on Thursday, May 22, 2008 at 9:30 AM.

Copies to both sides.

FILED

MAR 27 2008

NEW YORK

COUNTY CLERK'S OFFICE

MICHAEL D. STALLMAN
J.S.C.

Dated: 3/24/08

[Signature]
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: I.A.S. PART 7

-----X
ELLIOT L. KAPLAN,

Index No. 602820/07

Plaintiff,

DECISION AND ORDER

- against -

BST ADVISORY NETWORK, LLC, BOLLAM,
SHEEDY, TORANI & CO., LLP, BST
ADVISORS, LLC, JOSEPH A. TORANI,
BRIAN W. NOBIS, STEPHEN L. FERRARO,
RONALD L. GUZIOR, JOHN R. JOHNSON,
JEFFREY L. SAPPER, JEFFREY P. ROUDE,
ANDREA MILLER and JOHN and JANE DOES
1-10,

Defendants.

-----X
HON. MICHAEL D. STALLMAN, J.:

FILED
MAR 27 2008
NEW YORK
COUNTY CLERK'S OFFICE

Defendants move for an order, pursuant to CPLR 7503(a), compelling arbitration of plaintiff's claims, and staying this action; or in the alternative, dismissing the instant complaint, pursuant to CPLR 3211(a)(1) and (7).

BACKGROUND

This action arises out of plaintiff's alleged termination as a member of defendant BST Advisors, LLC (BST Advisors) and a partner of defendant Bollam, Sheedy, Torani & Co., LLP (BST Partners). In 2005, plaintiff Elliot L. Kaplan, a licensed Certified Public Account, joined the accounting firm of Hoffberg, Oberfest, Burger & Berger CPA's (HOBB), as a partner, pursuant to a written agreement. On October 2, 2006, the partners of HOBB,

[* 3]

including Kaplan, and defendant BST Advisory Network, LLC¹ (BST) entered into a written agreement (the Agreement), whereby the HOBBS partners would become partners and/or members in BST and/or its affiliated entities, BST Advisors and BST Partners. Pursuant to the Agreement, plaintiff, inter alia, would obtain a 1% equity interest in BST Partners and a 1% equity interest in BST Advisors. In the instant action, plaintiff alleges that, in June 2007, he was terminated as a member and partner of BST Advisors and BST Partners, respectively (the BST entities).

The instant complaint alleges five causes of action: breach of contract against BST (first); tortious interference with prospective economic advantage (second), defamation (third); violation of the New York Payment of Wages Statute, NY Labor Law § 190 (fourth), and conversion (sixth) against all defendants; and breach of fiduciary duty (fifth) against defendants Joseph A. Torani, Brian W. Nobis, Stephen L. Ferraro, Ronald L. Guzior, John R. Johnson, Jeffrey L. Sapper, and Jeffrey P. Roude, alleged members and/or partners of BST Advisors and BST Partners.

¹ According to defendants, BST is the parent and umbrella company of all BST entities, including BST Advisors and BST Partners.

I

Defendants move to compel arbitration of Kaplan's claims. They argue that plaintiff is required to submit his claims to arbitration, because the Agreement is an addendum to the existing Operating and Partnership Agreements of BST Advisors and BST Partners, respectively (Operating Agreements), which contain arbitration clauses. Defendants maintain that plaintiff's claims are within the scope of these arbitration clauses, since they concern disagreements with members and/or partners of the BST entities concerning salary and wage payment, termination and other financial payments allegedly due to him after his termination in June 2007. Additionally, upon his admission as a member/partner of the BST entities, defendants contend that, pursuant to Limited Liability Company Law § 602 (a)(1), plaintiff's rights and obligations were subject to the terms and conditions of the Operating Agreements of these entities, including the arbitration clauses.

While plaintiff acknowledges that the Agreement refers to the Operating Agreements of the BST Entities, he disputes defendants' contention that the arbitration clauses contained therein apply to his claims.

CPLR 7501 provides, in relevant part, that "[a] written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable ... and confers jurisdiction on the courts of the state to enforce it." Furthermore, "[w]here there is no substantial question whether a valid agreement was made or complied with ... the court shall direct the parties to arbitrate" (CPLR 7503 [a]). Thus, it is for the courts to determine, in the first instance, whether the parties have entered into a binding agreement to arbitrate (see Sisters of St. John the Baptist, Providence Rest Convent v Phillips R. Geraghty Constructor, Inc., 67 NY2d 997, 998 [1986]).

This Court initially notes that the Agreement, executed by plaintiff, provides that it is "intended to outline the general terms and agreements made between [BST and HOBBS] and their partners, pursuant to executing addendums to the Operating Agreement and Schedules of the BST Advisory Network, LLC" (the Agreement, Preamble). Although defendants submit the operating agreements of BST Advisors and BST Partners, the record is devoid of a copy of the Operating Agreement and Schedules of BST, referred to in the Agreement. Thus, this Court is unable to determine whether BST's operating agreement contains an arbitration clause, and whether it applies to the instant action.

Defendants instead rely on the arbitration clauses contained in the Operating Agreements and claim that plaintiff is subject to the arbitration clauses contained in the Operating Agreements of the BST Entities, since the Agreement incorporates some of its provisions. Plaintiff argues, inter alia, that he did not sign the Operating Agreements, and thus cannot be compelled to arbitrate under the arbitration provisions they contain.

While CPLR 7501 requires that an agreement to arbitrate be in writing, "[t]here is no requirement that the writing be signed 'so long as there is other proof that the parties actually agreed on it' [citation omitted]" (Crawford v Merrill Lynch, Pierce, Fenner & Smith, Inc., 35 NY2d 291, 299 [1974]). An agreement to arbitrate must be clear and unambiguous, (see Thomas Crimmins Contracting Co., Inc. v City of New York, 74 NY2d 166 [1989]). Arbitration clauses may be incorporated by reference when an agreement expressly adopts another document by reference, including its arbitration clause (see Liberty Management & Construction Ltd. v Fifth Avenue & Sixty-Sixth Street Corp., 208 AD2d 73 [1st Dept 1995]; see also Gabriel Capital, L.P. v CAIB Investmentbank Aktiengesellschaft, 28 AD3d 376 [1st Dept 2006]). This principle has been applied where a main contract incorporates the general terms or conditions of another contract, including the provision for arbitration (see id.; see also Willard

[7]
Alexander, Inc. v Glasser, 38 AD2d 546 [1st Dept 1971], affd 31 NY2d 270 [1972]).

Here, it is undisputed that the Agreement contains references to specific provisions in the aforementioned Operating Agreements, concerning the rights of HOBBS's partners, including Kaplan, as to vesting requirements, deferred compensation, defined contribution plan, and termination benefits. There is no indication, however, that the Agreement incorporates, either explicitly or by reference, the arbitration provisions of the Operating Agreements of BST Advisors and BST Partners (see Gabriel Capital, L.P. v CAIB Investment Bank Aktiengesellschaft, 28 AD3d 376, supra; see also Aerotech World Trade Ltd. v Excalibur Systems, Inc., 236 AD2d 609 [2d Dept], lv denied 90 NY2d 812 [1997]). Therefore, in the absence of a clear or specific intent to arbitrate, Kaplan cannot be compelled to arbitrate (see Crawford v Merrill Lynch, Pierce, Fenner & Smith, Inc., 35 NY2d 291 [1974]).

Defendants additionally argue that, pursuant to Limited Liability Company Law § 602, plaintiff's admission as a equity member of both BST Partners and BST Advisors subjected him to the terms and conditions of their respective operating agreements. Limited Liability Company Law § 602 sets forth the date upon which a person becomes a member of a limited liability company, which

includes, as noted by defendants, if the operating agreement does not provide, upon the vote or written consent of a majority in interest of the members (Limited Liability Company Law § [b][1]). The operating agreements of BST Advisors and BST Partners provide that a person may, respectively, become an equity member or equity partner upon election by a 75% vote of all equity members/partners in the Limited Liability Company and by amendment to the operating agreement subscribed by the new member/partner and the other equity members/partners (BST Advisors' Operating Agreement, Article 14, 14.1; BST Partners' Operating Agreement, Article 13, 13.1).

Although the language of the Agreement provides that certain HOBBS partners, including Kaplan, "will become equity partners" in BST Partners and BST Advisors, the Agreement is devoid of any indication of a vote or written consent of plaintiff's membership by the members of BST Partners or BST Advisors, and the required amendment. Furthermore, defendants do not demonstrate evidence of any such vote or written consent. Thus, defendants fail to show how Limited Liability Company Law § 602 supports their argument that plaintiff's claims are arbitrable.

Therefore, that branch of defendants' motion for an order compelling arbitration of plaintiff's claims is denied.

II

In the alternative, defendants move to dismiss the first, fourth and sixth causes of action of the instant complaint against the individual defendants, pursuant to CPLR 3211 (a)(1) and (7). On a motion pursuant to CPLR 3211 (a)(7), the court is limited to ascertaining whether the pleading states any cause of action and not whether there is evidentiary support for the complaint (Guggenheimer v Ginzburg, 43 NY2d 268 [1977]). The complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true (id.; Morone v Morone, 50 NY2d 481 [1980]). Affidavits and other evidence submitted by plaintiffs may be considered for the limited purpose of remedying any defects in the complaint and thus preserving inartfully pleaded, but potentially meritorious claims (Rovello v Orofino Realty Co., Inc., 40 NY2d 633 [1976]). Under CPLR 3211 (a)(1), a motion to dismiss based on the existence of a defense founded upon documentary evidence, defendants have the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law (Fortis Fin. Servs., LLC v Fimat Futures USA, Inc., 290 AD2d 383 [1st Dept 2002]).

Defendants argue that the first, fourth and sixth causes of action for breach of contract should be dismissed to the extent that

they are asserted against the individual defendants, because the Agreement was executed solely by BST. A review of the first cause of action discloses that the breach of contract claim is asserted only against BST, and not any of the individual defendants. Because this claim sufficiently sets forth the terms of the Agreement upon which liability is predicated (see Sud v Sud, 211 AD2d 423 [1st Dept 1995]), a breach of contract claim has been stated against BST. In the absence of an allegation asserting a claim against any of the individual defendants, that branch of defendants' motion to dismiss the first cause of action for breach of contract against the individual defendants is granted.

Plaintiff's fourth cause of action seeks relief against all defendants, under Labor Law § 190, et seq., based on defendants' alleged withholding of monies from his salary after his termination. Article 6 of the Labor Law (Labor Law § 190, et seq.) provides the means by which employees may statutorily compel employers to pay wages and other benefits rightfully owed (see Labor Law §§ 197, 198). The definition of "employer" includes "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). The Agreement reflects that it was executed by defendant Torani, as managing agent of BST, and plaintiff,

[* 11]

together with other HOBBS partners. There is no indication in the Agreement that any other entity or individual besides BST, a limited liability company, was the employer. Furthermore, plaintiff fails to proffer a basis that could subject the individual defendants to liability under Article 6 of the Labor Law. In view of the foregoing, that branch of defendants' motion to dismiss the fourth cause of action for violations of Labor Law § 190, et seq., asserted against the individual defendants is granted.

The sixth cause of action purports to state a claim for conversion regarding monies allegedly withheld from plaintiff, as well as personal property. Conversion is the unauthorized assumption and exercise of the rights of ownership of goods belonging to another, to the exclusion of the owner's rights (Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex., 87 NY2d 36 [1995]). In order to assert a cause of action for conversion, a plaintiff must have exercised ownership, possession or control of the property in the first place (see City of New York v 611 W. 152nd St., Inc., 273 AD2d 125 [1st Dept 2000]).

Although this cause of action claims that defendants converted his personal property, the only property identified concerns his wages. Money may be the subject of an action in conversion (Peters Griffin Woodward, Inc. v WCSC, Inc., 88 AD2d 883 [1st Dept 1982]),

where there is a "specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question" (Manufacturer Hanover Trust Co. v Chemical Bank, 160 AD2d 113, 125 [1st Dept 1990], appeal denied 77 NY2d 803 [1991]).

Here, plaintiff alleges, inter alia, that defendant reversed the deposits for his final check for his base salary from his bank accounts, totaling \$4,496.10. The exact sum allegedly taken from plaintiff's bank accounts is a sufficiently identifiable and discrete sum that it may be the subject of an action in conversion in that it adequately reflects plaintiff's ownership, possession or control of these funds (see Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro, 187 AD2d 384 [1st Dept 1992]). Thus, when analyzed under the standards for analyzing a motion to dismiss, it sufficiently pleads a claim for conversion of funds against BST, plaintiff's employer. However, as argued by defendants, no basis has been alleged by plaintiff that could subject the individual defendants to liability for conversion of his wages. Therefore, that branch of defendants' motion to dismiss the sixth cause of action for conversion against the individual defendants is granted.

CONCLUSION

Accordingly, it is

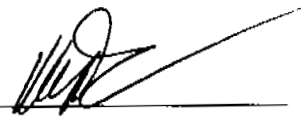
ORDERED that the branch of defendants' motion for an order compelling arbitration and staying the action is denied; and it is further

ORDERED that the branch of defendants' motion for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the first, fourth and sixth causes of action against the individual defendants is granted and the first, fourth and sixth causes of action are dismissed against Joseph A. Torani, Brian W. Nobis, Stephen L. Ferraro, Ronald L. Guzior, John R. Johnson, Jeffrey L. Sapper, Jeffrey P. Roude, and Andrea Miller; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: March 24, 2008
New York, New York

ENTER:



J. S. C.

FILED
MICHAEL D. STALLMAN
J.S.C.
MAR 27 2008
NEW YORK
COUNTY CLERK'S OFFICE

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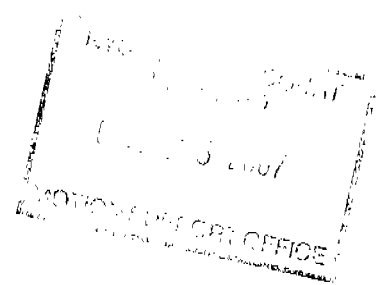
SERVICE BY FACSIMILE
NOT ACCEPTED

October 25, 2007

Via Federal Express

New York County
Motion Support Office
Room 130
60 Centre Street
New York, NY10007

RE: Kaplan v. BST Advisory, et al
Index No.: 602820/2007



Dear Sir or Madam:

Enclosed please find for filing our Affidavits in Support of Application to Compel Arbitration in connection with the above-entitled action. I use the mail method as we do not have an office in New York City.

Also enclosed is the Affidavit of Service upon opposing counsel, together with a copy of our cover letter to him.

Thank you for your time and attention to this matter.

Very truly yours,

Paul E. Davenport

PED:dwp
Enclosures

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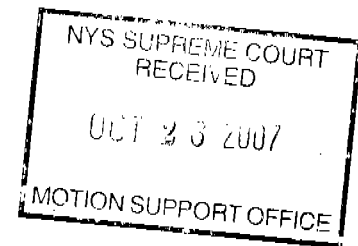
SERVICE BY FACSIMILE
NOT ACCEPTED

October 25, 2007

Via Federal Express

Michael N. Morea, Esq.
Cole, Schotz, Meisel, Forman & Leonard, P.C.
900 Third Avenue - 16th Floor
New York, New York 10022

RE: Elliot L. Kaplan
v.
BST Advisors, LLC, et al
Index No.: 602820/2007



Dear Mr. Morea:

Enclosed please find for service upon you our Affidavits in Support of Application to Compel Arbitration in connection with the above-entitled action.

Thank you for your time and attention to this matter.

Very truly yours,

Paul E. Davenport

PED: Enclosure

cc: Supreme Court of the County of New York