

Arrowhead Golf Club, LLC v Bryan Cave, LLP

2008 NY Slip Op 31108(U)

April 14, 2008

Supreme Court, New York County

Docket Number: 0109472/2007

Judge: Barbara Kapnick

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

PRESENT: BARBARA R. KAPNICK
Justice

PART 12

ARROWHEAD GOLF CLUB

INDEX NO.

109472/07

- v -

MOTION DATE

BRYAN CAVE, LLP

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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APR 15 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

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

Dated: 4/14/08



BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X

ARROWHEAD GOLF CLUB, LLC,

Plaintiff,

- against -

BRYAN CAVE, LLP and BRANT K. MALLER,

Defendants.

-----X

BARBARA R. KAPNICK, J.:

Defendants Bryan Cave, LLP and Brant K. Maller, Esq. were retained in or about November 2003 to provide legal services allegedly in connection with plaintiff Arrowhead Golf Club, LLC's proposed purchase of real property located in Davie, Florida, commonly known as the Arrowhead Golf Course.

Although the plaintiff LLC was not technically "formed" until February of 2004, the Complaint specifically (and acknowledges) that

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9. In or about November, 2003, [ARROWHEAD Golf Club, LLC (hereinafter "ARROWHEAD" or "ARROWHEAD GOLF COURSE" or "Subject Premises" or "Subject Premises") entered into an agreement with MALLER and thereby retained the firm of BRYAN CAVE to represent ARROWHEAD in ARROWHEAD's proposed purchase of real property located in Davie, Florida, commonly known as the ARROWHEAD GOLF COURSE ("Subject Premises") ...

10. At all times herein mentioned, BRYAN CAVE and MALLER had a fiduciary duty to ARROWHEAD.

* * *

12. The defendants represented ARROWHEAD in connection with the negotiation, drafting and execution of the Contract.

In this action, plaintiff seeks, inter alia, to recover compensatory and punitive damages against defendants based on their alleged conversion of a \$100,000 escrow deposit, i.e., the "Initial Deposit" on the purchase of the property (first cause of action). Specifically, plaintiff contends that on or about October 29, 2004, the Escrow Holder, Stewart Title of Tampa, wired its \$100,000 deposit to Bryan Cave, and then, without plaintiff's consent or knowledge, Bryan Cave released half of the money to itself and the remaining \$50,000 to "Frances Sonnenschein Bald and Joseph Bald Foundation".

The sole members of the plaintiff LLC are Victorson & Associates, Inc. (50%) and Frances Sonnenschein (50%). Ms. Sonnenschein is married to Joseph Bald, the financial backer of the project. Pursuant to Arrowhead's operating agreement, Victorson & Associates was the Manager of the company.

Defendants dispute that the disbursement of half the escrow to Bryan Cave was without plaintiff's authorization. They claim instead that the money was released at the client's direction for the purpose of paying, at least partially, the substantial outstanding fees owed to Bryan Cave at the time.

Plaintiff also seeks to recover the legal fees it paid to the firm and an award of punitive damages on the grounds, inter alia, that the Bryan Cave partner representing its interests in connection with the purchase - i.e., defendant Maller - was not admitted to practice law in Florida (second cause of action).¹

Defendants now move for an order: (i) pursuant to CPLR § 7503(a) compelling arbitration of the claims made in this action based on the arbitration provision of their retainer agreements and (ii) pursuant to CPLR § 3211 dismissing the Complaint.

The November 20, 2003 retention letter was signed and approved by Mr. Bald on November 22, 2003 under the statement, "THESE TERMS, INCLUDING THE ATTACHED STATEMENT OF ENGAGEMENT TERMS AND BILLING PRACTICES, ARE APPROVED."

The Statement of Engagement Terms and Billing Practices provides, in relevant part, as follows:

¹ While plaintiff's counsel acknowledges in his Affirmation in Opposition that Florida counsel was retained by Arrowhead, he claims that said counsel "only provided services in connection with zoning issues, having nothing to do with the actual purchase of the real estate." Defendants, on the other hand, contend that plaintiff availed itself of not one but several local Florida attorneys to assist Bryan Cave in a variety of areas relevant to the Arrowhead transaction.

Arbitration of Disputes. In the event that a dispute arises between us relating to our fees, you may have the right to arbitration of the dispute pursuant to Part 137 of the Rules of the Chief Administrator of the Courts. Upon your request, a copy of those Rules will be provided to you.

In the event that a dispute arises between us concerning the services we have provided to you, whether claims for legal malpractice, breach of fiduciary duty, breach of contract, or any other claim based upon alleged attorney misconduct, or a fee dispute to which Part 137 does not apply, then that dispute will be settled by arbitration before an arbitral forum other than that prescribed by Part 137. Such an arbitration shall be heard in the City of New York by a panel of three arbitrators, all of whom must be attorneys practicing in that City, with one arbitrator to be selected by each party and the third to be chosen by the two arbitrators or the parties to the arbitration. The arbitrators may establish such rules for the conduct of the arbitration as they may choose, except that those rules shall be consistent with the procedural rules of the American Arbitration Association for commercial arbitrations; the arbitrators shall have the power to award all relief available in a court of law; and the arbitration proceedings shall be private and confidential and shall not be disclosed to the public by either the arbitrators or the parties to the arbitration. The award of the arbitrators must be by a majority vote and shall be final and binding, not subject to challenge by either party in any court of law. The arbitrators shall determine which party shall pay for the arbitrators' fees and the costs of the proceedings, but in any event each party shall bear its own costs of legal representation, if any, in the proceeding. Although you can consult another lawyer with respect to this provision, we believe that it is desirable because, although both parties give up the right to a jury trial, to full discovery, and to appellate review, arbitration generally is a quicker and less expensive method of dispute resolution and the privacy of the process can be assured.

Defendants sent a second letter dated April 12, 2005, after the escrow funds had already been released, and more than eight

months after Arrowhead had terminated the Contract to purchase the Golf Course after unacceptable environmental conditions were found to exist, to Ms. Sonnenschein, Victorson & Associates (Attention: Fred Victorson) and to Mr. Bald, confirming that they had engaged the firm

to provide legal services to [them] in connection with the proposed purchase and development of the Arrowhead Golf Course in Davie, Florida, the proposed purchase and development of various sites, including approximately 55 acres of land on Las Vegas Boulevard in Las Vegas, Nevada, and such future matters that we mutually agree to undertake. This letter confirms that, although the original engagement letter was signed only by Joseph Bald on or about November 20, 2003, he was acting on behalf of all three of you and you all are, and have at all times been, our actual client since then. Consistent with our normal practice, this letter and the attached Statement of Engagement Terms and Billing Practices (New York) (the "Statement") set forth the terms of our engagement.

* * *

Notwithstanding that Victorson & Associates, Inc. is our client, we agree Frances Sonnenschein and Joseph Bald, jointly and severally, are solely responsible for the payment of our fees, expenses and other charges.

Defendants do not dispute that the April 12, 2005 letter superseded the November 20, 2003 agreement; however, the Statement annexed to the April 12, 2005 letter contained the same arbitration provision. The letter was signed by Ms. Sonnenschein and Mr. Bald. Although a signature line for Victorson & Associates was also provided, the letter was never signed by Mr. Victorson or anyone on behalf of Victorson & Associates.

Plaintiff argues that the arbitration provision contained in the alleged retainer agreements is not enforceable against it because the claims made by plaintiff are not arbitrable as a matter of public policy as they concern issues of attorney misconduct, and because the provision is onerous, unconscionable and deceptive.

Specifically, plaintiff contends that the only party that would benefit from arbitration in a case where the issues concern the unlicensed practice of law, breach of fiduciary duty and conversion of escrow money would be the defendant law firm. In addition, plaintiff argues that the arbitration provision at issue violates the trust between client and attorney since it compels binding, secret, unappealable arbitration, with a concomitant waiver of trial by jury and discovery.

However, it is well settled that "[p]ublic policy considerations do not require that claims of lawyer malpractice be adjudicated solely by the courts, where, as here, there is no showing that the retainer agreement on its face violates any rules of ethics." Derfner & Mahler, LLP v. Rhoades, 257 A.D.2d 431 (1st Dep't 1999). See also, Broadcast News Networks, Inc. v. Loeb & Loeb, LLP, 40 A.D.3d 441 (1st Dep't 2007); Nasso v. Loeb & Loeb, LLP, 19 A.D.3d 465 (2nd Dep't 2005), lv. dismiss'd, 8 N.Y.3d 827 (2007).

Plaintiff has not cited to any authority in support of its argument, nor does this Court find that a different result is warranted in this case, i.e., that public policy considerations require that claims sounding in breach of fiduciary duty and misconduct, rather than legal malpractice, must be adjudicated solely by the courts.

Moreover, the Appellate Division, First Department, recently held in another action involving the same law firm that

[t]he parties were free to agree to arbitrate disputes (see *Matter of Derfner & Mahler, LLP v. Rhoades*, [supra]), and the commercially sophisticated plaintiffs were informed of the ramifications of the arbitration provision and invited to contact Bryan Cave with any concerns. Contrary to plaintiffs' suggestions, the arbitration provision was not unconscionable. The provision is clearly not the product of disparate bargaining power and there is no evidence that plaintiffs lacked meaningful choice or were otherwise pressured into executing the engagement letters (citation omitted).

Thies v. Bryan Cave LLP, 35 A.D.3d 252, 253 (1st Dep't 2006).²

Finally, plaintiff argues that the arbitration provision is not binding on the plaintiff limited liability company since the

² Although the arbitration provision at issue in that case was not identical to the one at issue herein, it similarly provided that "there shall be no discovery and any proceedings conducted shall be private and confidential and shall not be disclosed to the public by either the arbitrators or the parties to the arbitration." Thies v. Bryan Cave, 13 Misc.3d 1220 [A] [Sup. Ct., N.Y. Co. 2006]), aff'd, 35 A.D.3d 252, supra.

second retainer agreement was never signed by Victorson & Associates.

Defendants, however, argue that a signature was not required because it was clear that Arrowhead intended to be bound by, and was the beneficiary of, the retainer agreement.

"Although CPLR 7501 confers jurisdiction on courts to enforce written arbitration agreements, '[t]here is no requirement that the writing be signed so long as there is other proof that the parties actually agreed on it' (citations omitted)." God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assoc., LLP, 6 N.Y.3d 371, 374 (2006). See also, McAlley v. Boise-Griffin S.S. Co., 81 A.D.2d 771 (1st Dep't 1981).

"To enforce an arbitration clause in an unsigned agreement, it must be shown that the other party's conduct evinced an intent to be bound by the agreement (citation omitted)." Rudolph & Beer v. Roberts, 260 A.D.2d 274, 276 (1st Dep't 1999). See also, Metropolitan Arts & Antiques Pavilion, Ltd. v. Rogers, 287 A.D.2d 372 (1st Dep't 2001).

In the instant case, plaintiff acknowledges that legal services were provided to and accepted by plaintiff pursuant to the 2003 retainer.

Moreover, plaintiff's claims in this action arise directly out of the fiduciary relationship between Arrowhead and Bryan Cave which was created pursuant to that agreement, "thereby acknowledging and relying on the very agreement that contains the arbitration clause it seeks to disclaim." God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Associates, LLP, supra at 374. See also, McAlley v. Boise-Griffin S.S. Co., supra at 771, in which the Appellate Division, First Department, held that "[i]nasmuch as the agreement has been adopted by plaintiffs as the basis for their respective claims, it is evident that they did agree that their unsettled disputes 'should' be put to arbitration."

Accordingly, based on the papers submitted and the oral argument held on the record on January 9, 2008, this Court finds that plaintiff is bound by the terms of the arbitration provision.

Defendants' motion to compel the arbitration of plaintiff's claims is, therefore, granted, and the Complaint is dismissed without costs or disbursement.


FILED

APR 15 2008

This constitutes the decision and order of this Court.

COUNTY CLERK'S OFFICE
NEW YORK

Date: April 14, 2008


Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.