

Matter of KSL Media, Inc. v Egan
2008 NY Slip Op 32161(U)
July 28, 2008
Supreme Court, New York County
Docket Number: 0102816/2008
Judge: Kibbie F. Payne
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

In the Matter of the Arbitration of
KSL MEDIA, INC., et al.,

INDEX NO. 102816/08

MOTION DATE 03-12-08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

BRIAN EGAN, etc., et al.

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

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

These proceedings are decided as indicated.

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 147B).

Dated: July 28, 2008

[Signature]
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 4**

-----X

In the Matter of the Application of:

KSL MEDIA, INC., KALMAN LIEBOWITZ
and HANK COHEN,

Petitioners,

Index No. 102816/08

For an Order Pursuant to Section 7503 (b)
of the New York CPLR Staying Arbitration
on the ground that there is no valid
agreement to arbitrate between the
Respondent BRIAN EGAN and the Petitioners,

-against-

BRIAN EGAN, ASSIGNEE OF CORPORATE
TRADE SOLUTIONS, INC., and AMERICAN
ARBITRATION ASSOCIATION,

Respondents.

-----X

KIBBIE F. PAYNE, J.:

In this proceeding, petitioners seek to enjoin respondents from proceeding with arbitration before the American Arbitration Association (AAA), in *Brian Egan, Assignee of Corporate Trade Solutions, Inc. v KSL Media, Inc., Kalman Leibowitz and Hank Cohen* (Arbitration), on the ground that there is no valid agreement to arbitrate between the parties. Petitioners also seek sanctions against respondent Brian Egan (Egan), including costs, disbursements and attorneys' fees.

On February 22, 2008, petitioners made an application, by order to show cause, for an order staying the AAA Arbitration

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pending a determination of this application, and directing Egan to withdraw and discontinue the Arbitration. By stipulation dated February 22, 2008 (so-ordered by this court on February 26, 2008), Egan consented to the entry of a temporary restraining order staying the Arbitration pending the court's determination on this application.

AAA submits no papers in opposition to petitioners' application. Rather, AAA submits a letter, dated March 4, 2008, stating that it will not be appearing or otherwise participating in the litigation.

Petitioner KSL Media, Inc. (KSL) is a media placement company. Petitioner Kalman Liebowitz (Liebowitz) is the chairman of KSL and its former president. Petitioner Hank Cohen (Cohen) is the current president of KSL. Respondent Corporate Trade Solutions, Inc. (CTS) is a barter company certified as a minority vender. Non-party Donald Stukes (Stukes) is the president of CTS. Respondent Brian Egan (Egan) claims that, as an executive in the barter industry, he worked as a representative and consultant of CTS.

Egan submits an affidavit, stating that, in March 2000, he and Stukes executed a \$6 million trade contract with Boeing Company, which was CTS's primary source of business. According to Egan, CTS was established to service the Boeing account for the purpose of monetizing trade credits.

CTS and KSL entered into a Media Placement Agreement, effective January 15, 2001 (MP Agreement). The MP Agreement provided, among other things, for the division of profits and losses between CTS and KSL, and it required KSL to prepare monthly financial statements for use by CTS, indicating the results of current monthly periods. Paragraph 19 of the MP Agreement provided that "any controversy or claim arising out of or relating to this Agreement, or the breach thereof, will be settled by arbitration conducted by the [AAA]." Egan claims that CTS and KSL continued the MP Agreement through late 2003 or early 2004.

By letter dated February 1, 2008, Egan's counsel notified KSL, Liebowitz and Cohen that, through "Egan, the assignee of [Stukes] and [CTS]," CTS intended "to arbitrate CTS's claims as set forth in the attached Statement of Claim." Petition, Ex. 2. The Arbitration Statement of Claim referred to Egan as "assignee of [CTS]," and alleged as follows:

Pursuant to a Final Judgment Order and Settlement Agreement in an action filed in the United States District Court for the District of New Jersey, *Foth, et al. v. Corporate Trade Solutions, Inc., et al.*, Docket No. 01-CV-5763 (JWB), CTS assigned its rights, claims and causes of action against Respondents to Egan.

Arbitration Statement of Claim, ¶ 1.

Petitioners claim that CTS's February 1, 2008 demand for arbitration failed to attach a copy of the final judgment and

Settlement Agreement. However, petitioners now submit with their petition copies of an amended final judgment with supporting papers and a General Release and Settlement Agreement (Settlement Agreement), dated October 7, 2004 and June 20, 2003, respectively, in *Foth, Egan and Egan Intl., Inc. v Corporate Trade Solutions, Inc., et al.*, Docket No. 01-CV-5763 (JWB). Under the Settlement Agreement, Stukes and CTS (and other defendants) agreed to pay Egan (and other plaintiffs) \$300,000, whereby payment was to be made from future proceeds of the MP Agreement. The Settlement Agreement provided that Egan, and the other plaintiffs, were to receive funds directly from KSL, funds which were otherwise payable by KSL to CTS.

Egan avers that, at the time of the judgment, the parties calculated the amount of the judgment against CTS and Stukes as approximately \$300,000 and anticipated that KSL's future revenues under the MP Agreement for the Boeing account would approximate or exceed the amount of the judgment. Egan claims that, subsequently, he was informed by KSL that no revenue was due to CTS from the Boeing account, and CTS closed in 2004 due to financial difficulties. Egan maintains that, in March 2007, he learned from a former KSL employee that KSL owed substantial money to CTS under the MP Agreement.

On May 18, 2007, Egan, Egan International Inc., Stukes and CTS entered into a General Release, Settlement and Assignment

Agreement. Under the May 18, 2007 assignment, Stukes, CTS and CTS Media Services, Inc. assigned to Egan and Egan International Inc.:

all rights, claims and causes of action, whether actual or potential, that Stukes, CTS, and/or CTS Media Services, Inc. has, or could have had, against KSL Media, Inc., Kalman Liebowitz and/or Hank Cohen relating to moneys owed to Stukes and/or CTS, and Stukes and CTS shall also execute all documents presented by Egan which are further required, if any, to evidence the assignment.
Petition, Ex. 5, ¶ 1.

Petitioners do not argue that the arbitration clause in the MP Agreement is invalid. Rather, petitioners argue that there is no agreement to arbitrate with the individual petitioners, Liebowitz and Cohen, and that there was no valid assignment of the MP Agreement. In his opposition papers, Egan concedes that the claims against Liebowitz and Cohen are not properly in arbitration, and he agrees to voluntarily dismiss those claims without prejudice. The essence of Egan's argument is that he obtained specific rights pursuant to a properly executed assignment.

An assignee who has taken over the rights of an assignor may be bound to an arbitration clause in the assigned contract (*Matter of Vann v Kreindler Relkin & Goldberg*, 78 AD2d 255, 256 [1st Dept 1980]; *Blum's, Inc. v Ferro Union Corp.*, 36 AD2d 584, 585 [1st Dept 1971], *affd* 29 NY2d 689). "No particular words are necessary to effect an assignment; it is only required that there

be a perfected transaction between the assignor and assignee, intended by those parties to vest in the assignee a present right in the things assigned." (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Additionally, "[a]n assignment may properly relate to a future or conditional right which is adequately identified" (*Id.* at 89).

"To be a real party in interest, an assignee must have some title, legal or equitable, to the thing assigned. . . . If the assignment was legally made and delivered, defendants would be protected against any claims made by the assignor in the event they paid a judgment to the assignee." (*Sardanis v Sumitomo Corp.*, 282 AD2d 322, 323 [1st Dept 2001]) Consequently, "[s]o long as the wrongdoer against whom the cause of action is asserted is not subjected to the danger of a double recovery, he is in no position to complain.'" (*Andrew Carothers, M.D., P.C. v Geico Indem. Co.*, 13 Misc 3d 549, 554-555 [Civ Ct, Kings County 2006, Battaglia, J.], quoting *Sosnow, Kranz & Simcoe v Storatti Corp.*, 269 App Div 122, 126 (1st Dept 1945). "If, as between the assignor and the assignee, the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest. . . ." (*Andrew Carothers, M.D., P.C. v Geico Indem. Co.*, 13 Misc 3d 549, 555 [Civ Ct, Kings County 2006] *supra*, quoting *Cummings v Morris*,

25 NY 625, 627 [1862]; also see *Cardtronics, LP v St. Nicholas Beverage Discount Ctr., Inc.*, 8 AD3d 419, 420 [2d Dept 2004]).

In *James McKinney & Son, Inc. v Lake Placid 1980 Olympic Games, Inc.* (61 NY2d 836, 837-38 [1984]), the assignor assigned "'all rights' of plaintiff 'in, or growing in any manner out of' a contract guaranteed by any" bond provided by Reliance Insurance Company, a third-party surety. The Court of Appeals recognized the legitimacy of the assignment and enforced it, determining that the assignment "fully assigned" the assignor's rights to the surety (*Id.* at 838).

Here, the May 18, 2007 assignment assigned all of CTS's past and present "rights, claims and causes of action" against KSL. CTS did not retain any rights whatsoever, relinquishing "all rights, claims and causes of action" in exchange for Egan releasing CTS from the judgment. Therefore, this assignment divested CTS of all rights and claims against KSL, and vested in Egan a present right to prosecute claims under the MP Agreement as the assignee and the real party in interest, thereby protecting KSL from having to defend against the same claim made a second time by CTS. Thus, there is no danger of double recovery against KSL.

Accordingly, it is hereby

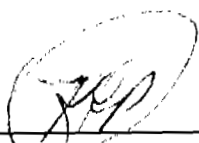
ORDERED that the arbitration before the American Arbitration Association in *Brian Egan, Assignee of Corporate Trade Solutions,*

Inc. v KSL Media, Inc., Kalman Leibowitz and Hank Cohen is dismissed as against respondents Kalman Leibowitz and Hank Cohen; and it is further

ADJUDGED that the petition of KSL Media, Inc., Kalman Liebowitz and Hank Cohen is denied, and the proceeding is dismissed.

Dated: July 28, 2008

ENTER:


KIBBIE F. PAYNE
J.S.C.

UNFILED JUDGMENT
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