

**Shapiro v Furgang & Adwar LLP**

2008 NY Slip Op 33126(U)

November 12, 2008

Supreme Court, Nassau County

Docket Number: 7951/08

Judge: Ute W. Lally

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SCAW

SHORT FORM ORDER

mg, mod

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6  
NASSAU COUNTY

EDWARD SHAPIRO, et al.,

Plaintiff(s),

MOTION DATE: 9/9/08

INDEX No.:7951/08

-against-

MOTION SEQUENCE NO:1,2

X X X

FURGANG & ADWAR LLP, et al.,

Defendant(s).

The following papers read on this motion:

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Upon the foregoing papers, it is ordered that this motion by defendant for an order pursuant to CPLR 7503(a) compelling arbitration between plaintiff Edward Shapiro, PC, and defendants Furgang & Adwar, LLP, Philip Furgang, and Stephanie Furgang Adwar, is granted.

Based upon said holding, the motion by defendants for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against all defendants on the grounds that the complaint fails to state a cause of action is granted as to defendant Brian Scanlon only, and denied as to all other defendants.

In addition, the motion by defendants for an order pursuant to CPLR 308, subd 2 dismissing the complaint on the grounds of *forum non conveniens*, and the motion pursuant to CPLR 308 subd 2 dismissing the complaint against defendant Brian Scanlon have not been considered, and are denied as academic.

It is alleged in the complaint that on February 17, 2006 plaintiff Edward Shapiro, PC retained defendant law firm Furgang & Adwar LLP("the law firm") to represent it in a copyright infringement case. The fully-executed three-page retainer agreement dated February 17, 2006 contains the following two handwritten

sentences: "Firm will obtain prior consent before engaging other lawyers or law firms" and "Arbitration paragraph is deleted in its entirety" immediately above the signatures. In addition, the typewritten arbitration provision is crossed out at the bottom of the second page. The provision on Amendments states: "No amendment or modification of this agreement shall be valid or binding upon you or the Firm unless it is made in writing and signed by both of us."

Defendants submit a second fully-executed three-page retainer agreement dated March 6, 2006 (annexed as Exhibit H to the same Furgang affidavit), wherein there is no similar handwriting and the typewritten arbitration paragraph is not crossed out. The later retainer agreement does have another change from the original: one sentence in the typewritten provision on Firm Rates and Charges is crossed out. The newly crossed out sentence provided, "You also consent to the Firm engaging other lawyers or law firms to act on your behalf."

Plaintiff Edward Shapiro rejects the second retainer, claiming that he signed it because he thought it included the additional handwritten language in the first retainer now "typed into the document." In essence, Shapiro is stating that he did not read the second retainer before he signed it.

Ordinarily, a party who executes a contract is presumed to know its terms and to consent to them [*Holcomb v TWR Express, Inc.*, 11 AD3d 530; see generally *Pimpinello v Swift & Co.*, 253 NY 159,162]. A party that signs a document is conclusively bound by its terms, absent a valid excuse for having failed to read it [*Guerra v Astoria Generating Co., LP*, 8 AD3d 617; *Shklovskiy v Khan*, 273 AD2d 371; *Freda v McNamara*, 254 AD2d 251]. As Mr. Shapiro is both a businessman and an attorney, his explanation that he signed the second retainer because he thought it was identical to the first and only converted handwritten provisions into typing, does not suffice [*Guerra v Astoria Generating Co., LP*]. As the second retainer meets the agreed-upon criteria in the first retainer for an amendment or modification, that is, "in writing and signed by both," the second retainer modifies the first and requires consideration of the arbitration clause.

New York has a long and strong public policy favoring arbitration [*Stark v Molod Spitz DeSantis & Stark, PC*, 9 NY3d 59, 66; *Smith Barney Shearson v Sacharow*, 91 NY2d 39, 49]. Consequently New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration [ 166 *Mamaroneck Ave. Corp. v 151 East Post Road Corp.*, 78 NY2d 88, 93; *Siegel v Lewis*, 40 NY2d 687, 689, rearg den 41 NY2d 901].

Where arbitration is agreed upon between the parties, a court is limited in its authority over a dispute. On a motion to compel arbitration, the court may address three threshold questions: (1) whether the parties have made a valid agreement to arbitrate; (2) whether the agreement has been complied with; and (3) whether the claim sought to be arbitrated would be time-barred if it were asserted in State court [CPLR 7503(a); *Smith Barney, Harris Upham & Co., Inc. v Luckie*, 85 NY2d 193, 201-202, cert den sub nom *Manhard v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 516 US811; *County of Nassau v Civil Service Employees Assn, Inc.*, 14 AD3d 509].

The arbitration provision in the second retainer covers "any dispute concerning fees and disbursements due and/or services rendered." This language is sufficiently broad to cover the instant dispute about fees charged by the law firm to Edward Shapiro, PC., and there is no question that there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the retainer agreement [*MH Kane Construction Corp. v URS Corp. Group Consultants*, 42 AD3d 512; *Vitals 986, Inc. v Healthwave, Inc.*, 15 AD3d 571]. The signatories of the second retainer agreement containing the arbitration agreement are Edward Shapiro, as president of Edward Shapiro, PC, and Philip Furgang on behalf the law firm. Under these circumstances, the first question for this court must be answered in the affirmative: Edward Shapiro, PC and Furgang and Adwar, LLP, do have a valid arbitration agreement that governs plaintiffs' claims.

While partners in a limited liability partnership cannot be held accountable for partnership liabilities, such partners may be held liable for wrongful conduct committed by them or a person under their direct supervision or control [Partnership Law §26(c)(i); *Connolly v Napoli, Kaiser & Bern, LLP*, 12 Misc 3d 530, 538 (Sup Ct, NY Cty, 2006)]. Consequently, as liability for the alleged improper billing practices may extend to defendants Philip Furgang and Stephanie Furgang Adwar, they too are subject to the arbitration provision of the second retainer agreement.

The second and third questions are easily answered. To date, the arbitration clause has not been complied with. On this record, no question of any limitations issue has been raised. Based on the foregoing, this action must be stayed between plaintiff Edward Shapiro, PC, and defendants Furgang & Adwar, LLP, Philip Furgang, and Stephanie Furgang Adwar, and the request for an order compelling arbitration between these parties is granted.

Once it has been determined that the parties have agreed to arbitrate the subject matter in dispute, the court's role has ended [*Praetorian Realty Corp. v Presidential Towers Residence, Inc.*, 40

NY2d 897 (1976); *Brown v Bussey*, 245 AD2d 255; *Dazco Heating and Air Conditioning Corp. v CBC Industries, Inc.*, 225 AD2d 578]. The request for judgment dismissing the complaint pursuant to CPLR 3211(a)(7) against the remainder of the defendants for failure to state a cause of action raises issues for the arbitrator, and must be denied.

There is no agreement to arbitrate between defendant Brian Scanlon and Edward Shapiro, PC. In addition, Mr. Scanlon was never a partner in the defendant law firm. For those reasons the court may consider the request for dismissal of the complaint to the extent that it is alleged against defendant Scanlon. Review of the complaint reveals that plaintiffs' seek reimbursement of monies paid to the firm in 14 causes of action, consequential damages in the 15<sup>th</sup> cause of action that does not involve Mr. Scanlon, and punitive damages in the 16<sup>th</sup> cause of action.

The basis of defendants' dismissal request is that Brian Scanlon was an associate at Furgang & Adwar, LLP, and not a partner, at the time all services were rendered by Mr. Scanlon to Edward Shapiro, PC on behalf of the law firm. Under these circumstances plaintiffs have no contractual causes of action against Mr. Scanlon [*Luddy v Osborn*, 186 Ad2d 1069], and must look to the law firm for relief. Mr. Scanlon is not mentioned in the 15<sup>th</sup> cause of action, and New York does not recognize an independent cause of action for punitive damages [*Aronis v TLC Vision Centers Inc.*, 49 AD3d 576; *Grazioli v Encompass Ins. Co.*, 40 AD3d 696; *Benjamin Park v YMCA of Greater New York Flushing*, 17 AD3d 333], as set forth in the 16<sup>th</sup> cause of action. Based on the foregoing, the motion by defendant Scanlon for an order dismissing the complaint against him for failure to state a cause of action as against him, must be granted.

Defendants' additional requests for judgment dismissing the complaint (i) against all defendants on the grounds of *forum non conveniens*, and (ii) against Scanlon pursuant to CPLR 308(2), which involves personal jurisdiction rather than subject matter jurisdiction, have not been considered and are both denied as academic.

Dated: NOV 12 2008

**ENTERED**  
NOV 18 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

*Whol*

J.S.C.