

Arjent Servs., LLC v Gentile

2008 NY Slip Op 33298(U)

December 8, 2008

Supreme Court, New York County

Docket Number: 114221/08

Judge: O. Perter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

ARJENT SERVICES, LLC

Petitioner,

-against-

GUY GENTILE and JOAN GENTILE, JTEN,
GUY GENTILE, IRA, and JOAN AVELLA
GENTILE, IRA

Respondent.

INDEX NO. 114221 /08

MOTION DATE Nov. 19, 2008

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 9 were read on this motion by Order to Show Cause for a preliminary injunction

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-6

7

8-9

Cross-Motion: Yes No

Upon the foregoing papers, petitioner's motion, by Order to Show Cause, for a preliminary injunction, is decided in accordance with the accompanying decision and order.

This constitutes the decision and order of the Court.

FILED
DEC 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: December 8, 2008

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

-----x
ARJENT SERVICES, LLC,

Petitioner,

-against-

DECISION AND
ORDER

GUY GENTILE and JOAN GENTILE, JTEN, GUY
GENTILE, IRA, and JOAN AVELLA GENTILE, IRA,

Index.: 114221/08

Respondents.

-----x
O. PETER SHERWOOD, J.:

In this motion brought before the court by Order to Show Cause, petitioner seeks a preliminary injunction staying arbitration against it pending final judgment in this proceeding. Although the court granted a temporary stay of the arbitration as against petitioner only, thereby allowing the arbitration to proceed against all other respondents before the arbitration panel, the court is advised that the arbitration hearing has been adjourned pending the decision of the court on this motion. Having considered all of the papers submitted and having heard oral argument, the motion is now ripe for decision.

Respondents allege that they commenced an arbitration against their securities broker, Arjent, Ltd ("Limited"), before the Financial Industry Regulatory Authority ("FINRA") in December 2007. Limited ceased operations in February 2008. Thereafter respondents added petitioner, Arjent Services, LLC ("Services"), as a named respondent in the FINRA arbitration. Petitioner seeks to stay the arbitration as to itself on the ground that it is not a party to the arbitration agreement with respondents. Respondents counter that the arbitration agreement may be enforced against Services on the theory that Services is a successor-in-interest to Limited. Petitioner contends that it and Limited are separate entities and that there is no basis for a claim of successor liability.

Discussion

CPLR § 7503 (b) provides, *inter alia*, that:

[A] party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made.

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Because the authority to require arbitration arises from agreement of the parties to submit disputes relating to the contract to the arbitral forum, the most obvious question is whether the party against whom arbitration is sought has committed itself to arbitration (*see, Siegel, New York Practice* [4th Edition 2005] § 589); *County of Onondaga v U.S. Sprint Communications Co.*, 192 A.D.2d 1108, 1109 [4th Dept. 1993] [“(g)enerally, the right to compel arbitration does not extend to a nonparty unless the agreement itself so provides”]) Respondents concede that Services is not a party to any arbitration agreement with any of them. They argue that arbitration should be compelled, nevertheless, because there was a *de facto* merger of Services and Limited. Upon a finding of a *de facto* merger, a court may impose liability on a buyer for the debts of a seller despite efforts of the parties to the transaction to avoid that result (*see, e.g., Cargo Partner AG v Albatrans, Inc.*, 352 F.3d 41, 45 [2d. Cir. 2003]).

As one court has noted, “the *de facto* merger doctrine is a device the courts have used to treat transactions called acquisition of shares or reorganizations, but which are in legal effect mergers, as *de facto* mergers” (*In re Penn Central Securities Litigation v. Pennsylvania Co.*, 367 F. Supp. 1158, 1169 [E.D. Pa. 1973]). “A *de facto* merger occurs when a transaction, although not in the form of a merger, is in substance a consolidation or merger of seller and purchaser” (*Cargo Partner AG* at p. 45 [internal quotations omitted]). Under New York common law, the hallmarks of a *de facto* merger include: [1] continuity of ownership; [2] cessation of ordinary business and dissolution of the acquired corporation as soon as possible; [3] assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, [4] continuity of management, personnel, physical location, assets and general business operation (*see, Fitzgerald v. Fuhnestock & Co.*, 286 A.D.2d 573, 574 [1st Dept. 2001]). Respondents have not made a sufficient showing of these “hallmarks” of a *de facto* merger. Specifically, there is no showing that Services assumed any of the liabilities ordinarily required for the uninterrupted continuation of Limited’s business or of a continuity of the management, personnel, assets and general business operations of Limited.

Respondents assert that *Ryan Beck & Co, LLC v. Fakh*, (275 F. Supp. 2d 393 [E.D. N.Y. 2003]) involved facts similar to the facts in this case and that Magistrate Judge Mann’s decision in that case supports respondents argument that there is a basis for finding the existence of a *de facto* merger in this case. As petitioner points out and respondents tacitly admit, the question of whether

the *de facto* merger exception to the well established rule that non-signatories may not be bound to another's arbitration agreement applies, does not arise absent an initial showing of an actual transaction that may give rise to questions of fact concerning the existence of such a merger and any successor liability flowing therefrom (*see, Ryan, Beck, supra*. [where asset purchase agreement provided for acquisition of customer accounts, whether the transaction was a true asset purchase or a merger in substance, even though structured as an asset purchase in form, was a question of fact]. *see also, Barrack, Rodos & Bacine v Ballon Stroll Bader & Nadler, P.C.*, 2008 WL 759353, *7-8 [S.D.N.Y. 2008] [*de facto* merger exception did not apply in the absence of any purchase or stock agreement where the alleged transaction consisted of an attorney who merely switched employers and brought some of his caseload with him to another firm]; *Freeman v Complex Computing Co.*, 931 F. Supp. 1115, 1122 [S.D.N.Y. 1996] [asset purchase agreement did not constitute a *de facto* merger]; *Sands Bros. & Co., Ltd. v. Alba Perez Tee Catalina*, 2004 WL 2186574, *4 [S.D.N.Y. 2004] [no *de facto* merger where parties signed an asset purchase agreement that conveyed the assets from seller to buyer]; and *AT & S Transportation LLC v. Odyssey Logistics*, 22 A.D.3d 750, 753 [2d Dept. 2005] [a transaction structured as an asset purchase agreement found to be a *de facto* merger after court analyzed the four factors considered necessary for finding *de facto* merger]).

Respondents have not asserted that there was an asset purchase agreement between Services and Limited. In an affidavit of the managing member of Services, he states that Services did not acquire any assets from Limited and did not assume Limited's customer accounts (*see, Affidavit of Robert DePalo dated November 10, 2008*). The various payments or account receivables between Services and Limited which respondents have identified appear to be payments or receipts for services. They are not evidence of any agreement relating to a continuation of the business conducted by Limited.

Petitioner has satisfied the standards for grant of a preliminary injunction pursuant to CPLR §§ 6301 (2) and 7502 (c). Under CPLR § 6301 (2), a party seeking a preliminary injunction must establish "(1) a likelihood of success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor" (*New York City Off-Track Betting Corp. v. New York Racing Assn., Inc.*, 250 A.D.2d 437, 441 [1st Dept 1998]).

As the above discussion demonstrates, petitioner has shown a likelihood of success on the merits.

Irreparable harm has been called the most important prerequisite for the issuance of a preliminary injunction (*see, GFI Securities, LLC v Tradition Asiel Securities, Inc.*, 21 Misc 3d 1111 [A] * 6 [Sup. Ct. N.Y.Co. 2008] quoting *Natsource LLC v. Paribello*, 151 F. Supp. 2d 465, 469 [S.D.N.Y. 2001]). The federal courts have held repeatedly that “a party that has not agreed to arbitrate a dispute will suffer irreparable harm if it is forced to submit to arbitration” (*Int'l Trust Co. of Bermuder Ltd. v Farnstock & Co, Inc.*, 1995 WL 606275 at *3 [S.D.N.Y. 1995]); *see also, Mt. Ararat Cemetery v Cemetery Workers and Greens Attendants Union*, Local 365, 975 F. Supp. 445, 447 [E.D.N.Y. 1997])[a party “may be presumed to suffer irreparable harm if forced to arbitrate a dispute it did not intend to be subject to arbitration”]. I conclude that petitioner will suffer irreparable harm if forced to submit to arbitration.

Finally, the balance of the equities here tip decidedly in favor of petitioner. Services will be prejudiced were it required to participate in the arbitration. Respondents are not likely to prevail on the merits because, generally, a non-signatory cannot be compelled to submit to arbitration and the arbitration can proceed as to the parties that have agreed to arbitrate.

Accordingly, the motion for a preliminary injunction is granted. It is

ORDERED that the arbitration before the Financial Industry Regulatory Authority, FINRA Arb. No. 07-03438, is stayed as to Services pending a final judgment in this proceeding; and it is further

ORDERED that the parties shall appear on Monday, January 26, 2009 at 9:30 a.m., for an evidentiary hearing to determine whether a permanent stay should be granted.

This constitutes the decision and order of the court.

DATED: December 8, 2008

ENTER,

O. P. Sherwood

O. PETER SHERWOOD

J.S.C.

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