SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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Paul Wooten J.S.C.

STEVEN KAPLAN,

Plaintiff,

-against-

Index No. 103054/05

MUBARIK M. BUTT and "JOHN/JANE DOE" said names being ficticious and unknown,

Motion Seq. No. 003

Motion Cal. No. 55

Defendants.

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PAUL WOOTEN, J.:

The plaintiff Steven Kaplan (Kaplan) moves, pursuant to CPLR § 4403 for an order confirming the Special Referee's report dated December 20, 2007.

The defendant Mubarik M. Butt (Butt) cross-moves, pursuant to CPLR § 4403, for an order rejecting the report of Special Referee Lancelot Hewitt dated December 20, 2007.

This is an action to recover damages for personal injuries suffered by the plaintiff Kaplan in an automobile/pedestrian knockdown case. On December 14, 2006, Kaplan's former counsel, Mark Seitelman (Seitelman), signed an agreement to discontinue litigating, and to submit the matter to National Arbitration and Mediation (NAM) for binding arbitration. Subsequently, Kaplan discharged Seitelman, and engaged new counsel. On January 25, 2007, the parties appeared in court before Mediator Michael Tempesta who, based upon the arbitration agreement, marked the case settled, over Kaplan's objection. As a result, on April 26, 2007, the plaintiff Kaplan moved for an order setting aside the agreement to arbitrate, and restoring the case to

active status.

Justice Deborah Kaplan (no relation) signed an order referring to a Special Referee to hear and recommend, on the issue of "whether the parties' purported agreement to submit the underlying personal injury action to arbitration is valid and enforceable." After a hearing, Special Referee Hewitt reported that the parties' purported agreement to submit the underlying personal injury action to arbitration is invalid and unenforceable.

In support of his motion to confirm the report, Kaplan argues that there was sufficient evidence to support the referee's finding that the agreement to arbitrate was never finalized as no arbitrator was ever selected, the whole agreement would be void if none was agreed upon, and Seitelman never had the authority to enter into or finalize any purported agreement.

In support of the cross motion to disaffirm, the defendant Butt argues that, despite Kaplan testifying to several conversations with his former counsel, including that the arbitration agreement would not be binding until the parties agreed to an arbitrator, and that he only authorized Seitelman to begin the arbitration process, the Special Referee refused to admit any of the defendant Butt's proof that Kaplan authorized the arbitration.

Despite clearly waiving any attorney/client privilege by opening the door with his testimony, the Special Referee sustained Kaplan's objections made to the introduction of both written and oral proof that Kaplan authorized the arbitration. This was error.

CPLR § 4503 (a) (1) provides, in relevant part:

> Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action ... .

New York courts also continue to apply the common law privilege *(Spectrum Systems International Corp. v Chemical Bank*, 78 NY2d 371 [1991]) expressed at Alexander, Practice Commentaries (McKinney's Cons Laws of NY, Book 7B, CPLR 4503:1), as follows:

> "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." J. Wigmore, Evidence § 2292, at 554 [McNaughton rev. 1961]).

Here, by attacking his lawyer's action in signing an agreement to arbitrate, and then testifying in great detail as to the contents of his conversations with his lawyer, the plaintiff Kaplan clearly waived any attorney/client privilege under the at-issue doctrine (*G.D. Searle & Co. Inc. v Pennie & Edmonds LLC*, 308 AD2d 404 [1st Dept 2003]), and the Special Referee should have allowed the defendant Butt to place in evidence the oral and written proof tending to show that Kaplan authorized his lawyer to agree to arbitrate.

Moreover, even without the evidence improperly kept out of the record by the Special Referee, the evidence is overwhelming that the plaintiff Kaplan agreed to arbitrate his claim. Merely by Kaplan objecting to the introduction of the evidence, the

court is justified in presuming and inferring that the objected-to evidence would demonstrate that Kaplan agreed to the arbitration. The concept rests on "the commonsense notion that the "'nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause'" (*People v Savinon*, 100 NY2d 192, 196 [2003] quoting 2 Wigmore, Evidence § 285, at 192 [Chadbourn rev ed 1979]). In a civil matter, the rule is that a trier of fact may draw the strongest inference that the opposing evidence permits against a party who fails to testify or produce a document (*Matter of Nassau County Department of Social Services*, 87 NY2d 73 [1995]; *Bleecker v Johnston*, 69 NY 309 [1877]).

The plaintiff Kaplan's contention that the arbitration agreement is unenforceable is without merit. Notwithstanding Kaplan's protestation that he only consented to begin the arbitration process, or that the agreement was not binding until an arbitrator was selected, Kaplan is bound by the agreement to arbitrate because his former counsel, Seitelman, had actual and apparent authority to enter into it (*Hallock v State of New York*, 64 NY2d 224 [1984]).

Arbitration is favored as a matter of public policy (*TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335 [1998]). The arbitration agreement is clear and unmistakable in its waiver of Kaplan's right to a judicial forum. Kaplan's construction that the arbitration agreement is conditioned upon the appointment of an acceptable arbitrator is not compelling in view of the large pool of arbitrators from which a mutually acceptable choice can be made. Moreover, CPLR § 7504 provides for a simple

mechanism whereby the court assists in the selection of an arbitrator.

In *Massie v Crawford* (289 AD2d 66 [1st Dept 2001], *leave dismissed* 98 NY2d 693 [2002]), the Court held that the plaintiff could not simply unilaterally decide that she no longer wanted to submit a dispute to arbitration, and thus, her motion to restore the action to the trial calendar, despite a settlement stipulation calling for arbitration, was denied. Similarly, in the instant case, no question of fact exists as to whether Kaplan's attorney had apparent authority to settle the action. The signed stipulation is substantially the same as the terms Kaplan claims to have communicated to his attorney. Indeed, Kaplan concedes that he discussed the situation with his lawyer, and any resulting misunderstanding as to the effect of the ensuing clear and unambiguous stipulation fails to meet the heavy burden of demonstrating that the parties were operating under a substantial misapprehension (*260/261 Madison Equities Corp. v 260 Operating, Inc.*, 281 AD2d 237 [1st Dept 2001]).

Finally, because the arbitration agreement is silent on the matter, the parties' dispute relating to the existence of a high/low agreement, is referred to the arbitrator.

Accordingly, it is

ORDERED that the motion to confirm the Special Referee's report is denied; and it is further

ORDERED that the cross motion to disaffirm the Special Referee's report is granted; and it is further

ORDERED that the defendant's original motion to set aside the agreement to arbitrate, and to restore the case to active status is denied; and it is further

ORDERED that the parties are directed to serve a copy of this order, with notice of entry, on National Arbitration and Mediation, and to proceed to arbitration.

Dated: December 23, 2008

Paul Wooten
Paul Wooten J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

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