

ABA Consulting, LLC v Liffey Van Lines, Inc.

2009 NY Slip Op 30126(U)

January 22, 2009

Supreme Court, New York County

Docket Number: 105556/07

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB
Justice

PART _____

Index Number : 108232/2008

ABA CONSULTING, LLC

vs

LIFFEY VAN LINES

Sequence Number : 002

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied in accordance with the accompanying memorandum.*

FILED

JAN 23 2009

COUNTY CLERKS OFFICE
NEW YORK

Dated: 1/22/09

W
WALTER B. TOLUB

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 15

----- X

ABA CONSULTING, LLC,

Action 1

Plaintiff,

INDEX NO.
105556/07

-against-

LIFFEY VAN LINES, INC.,

Defendant.

----- X

ABA CONSULTING, LLC,

Action 2

Plaintiff,

INDEX NO.
108232/08

-against-

LIFFEY VAN LINES, INC.,

Defendant.

FILED

JAN 22 2009

----- X

COUNTY CLERK'S OFFICE
NEW YORK

WALTER B. TOLUB, J.:

Motion sequence no. 1 in action no.1 and motion sequence no. 2 in action no. 2 are consolidated herein for disposition.

In action no. 1 defendant moves for an order vacating the settlement agreement between the parties dated June 5, 2007.

In action no. 2 defendant moves for an order pursuant to CPLR 2221 granting it leave to reargue or renew its motion to dismiss the complaint and compel arbitration which resulted in this court's order dated August 20, 2008 (the "Prior Order").

Plaintiff cross-moves pursuant to Article 19 of the Judiciary Law “and any other applicable section of the CPLR” for an order: (i) enforcing the Prior Order compelling defendant to furnish a general release to plaintiff; (ii) punishing defendant for contempt of court for its willful refusal or willful neglect to obey said Order; (iii) fining defendant \$250 for each violation of said Order, and awarding plaintiff the costs and expenses in connection with this contempt proceeding including reasonable attorney’s fees pursuant to Judiciary Law § 773; (iv) directing that defendant may purge its contempt by paying the fines, costs and expenses imposed by the court and furnishing said general release within 10 days of service of this court’s order with notice of entry or at some other specified time as conditions for purging its contempt; (v) directing that upon defendant’s failure to timely purge its contempt, pursuant to Judiciary Law § 772, a warrant of commitment shall be issued confining its president and principal, Daniel Moloney, to jail; and, (vi) granting plaintiff renewal and upon renewal modifying the Prior Order to the extent of denying defendant’s motion to compel arbitration based on defendant’s failure to mediate.

The following facts, as modified, are taken from the Prior Order (defendant’s exhibit A in action no. 2). On March 25, 2004 plaintiff and defendant entered into a letter agreement (the “Consulting Agreement”) wherein plaintiff agreed to advise and assist defendant in identifying and qualifying for tax and business incentives and benefits. The Consulting Agreement provided in pertinent part that plaintiff’s fee would be based on 20% of the tax benefits received by defendant during 2004 through 2008, payable by April 15 of each year subsequent to the year that any credit is received (see defendant’s exhibit 1 in action no.1, p 3). The Consulting Agreement provided further that any disputes shall be submitted to mediation and that if the parties’ dispute

remained unresolved for 60 days after the mediator's first meeting then it shall be submitted to binding arbitration under the rules and procedures of the American Arbitration Association (*id.*). Defendant paid plaintiff the amount due for the 2004 tax year but did not pay anything for the 2005 and 2006 tax years.

On April 15, 2007 plaintiff commenced action no. 1 seeking compensation for tax years 2005 and 2006 and prospective compensation (in an amount to be determined at a future date) for tax years 2007 and 2008 (see complaint, defendant's exhibit 2). Prior to joinder of issue action no. 1 was settled and the settlement was memorialized by a letter agreement dated June 5, 2007 (the "Settlement Agreement"). The Settlement Agreement provided in pertinent part as follows: defendant's payment of \$99,297 was in full settlement of plaintiff's claims for \$101,767.63 plus interest; upon defendant's check clearing plaintiff would file a notice of discontinuance of its first, second, fourth and fifth causes of action with prejudice as to the 2005 and 2006 tax years but without prejudice to plaintiff's claims for the 2007 and 2008 tax years; and, the parties would exchange general releases with plaintiff's release of defendant limited to the extent that plaintiff would not release its claim for its fee with respect to any 2007 and 2008 tax credits (see defendant's exhibit 3). Thereafter, plaintiff delivered its notice of discontinuance and a general release to defendant. However, defendant failed to deliver a general release to plaintiff.

In June 2008 plaintiff commenced action no. 2 for breach of the Settlement Agreement and specific performance seeking to recover 20% of defendant's tax savings for 2007 and prospective savings for 2008, and to compel defendant to execute the general release. Instead of serving an answer defendant moved to dismiss the complaint and to compel arbitration (the

“Prior Motion”). In the Prior Order the court denied defendant’s request to dismiss the complaint, granted defendant’s request to compel arbitration to the extent that it sought resolution of the issues pertaining to the 2007 and 2008 tax years, and directed the defendant to deliver a general release to the plaintiff in accordance with the Settlement Agreement within 20 days of service of a copy of the Prior Order with notice of entry (see defendant’s exhibit A in action no. 2, p 6).

Defendant has now moved in action no. 1 to vacate the Settlement Agreement (and thereby avoid its obligation to deliver a general release to plaintiff) on the ground that the New York State Department of Taxation and Finance reversed the tax credits issued to defendant for 2006 and instead sought a tax payment from defendant in the sum of \$147,365.98. Defendant claims that it was induced to enter into the Settlement Agreement in the mistaken belief “that any audit reducing the tax credits received would result in a proportional refund or credit from the Plaintiff” (see Moloney September 24, 2008 supporting affidavit, ¶ 13).

The court finds that defendant’s motion should be denied. Defendant was represented by counsel. Surely, if defendant believed that a reduction in tax credits by the New York State Department of Taxation and Finance would entitle it to a refund from plaintiff, such provision, clearly material, would or should have been in the Settlement Agreement. “While defendant[s], with the benefit of hindsight, may have made a bad bargain, it is not the function of [the court] to rewrite the parties’ agreement” (*Lease Corporation of America, Inc., v Resnick*, 288 AD2d 533, 535 [Third Dept 2001]; see also *Schneider v Phelps*, 41 NY2d 238, 243 [1977] [“the businessman will not be relieved from the consequences of his bad bargain”]).

In action no. 2 defendant seeks leave to reargue or renew its Prior Motion contending

that the court should not have become involved in the parties' dispute and should not have directed the defendant to deliver a general release to plaintiff because the Consulting Agreement provides that all disputes are to be resolved by arbitration. Defendant adds that it would be inequitable for plaintiff to retain that portion of its fee for which defendant did not get a tax credit.

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR 2221[d][2]). A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221[e][2]). The court will treat defendant's motion as one to reargue since no new facts or changes in the law are presented.

In its Prior Order the court found that the issues pertaining to plaintiff's claims for tax years 2005 and 2006 had been resolved by the Settlement Agreement and that plaintiff was entitled to a release of all claims pertaining to those years as provided therein (see defendant's exhibit A in action no. 2, p 4). The court found further that the issues pertaining to plaintiff's claims for tax years 2007 and 2008 had not been resolved by the Settlement Agreement (because plaintiff preserved those claims) and were therefore governed by the Consulting Agreement and subject to the mediation/arbitration provision contained therein (*id.*). The Consulting Agreement provides in pertinent part that the parties' disputes "shall be submitted to mediation If the matter remains unresolved 60 days after the mediator's first meeting then it shall be submitted to binding arbitration" (see defendant's exhibit 1, p 3 in action no. 1). Mediation was a condition precedent to arbitration. There was no mediation. The court will therefore modify its Prior

Order to the extent of directing the parties to mediate their disputes pertaining to tax years 2007 and 2008.

Plaintiff has cross-moved in action no. 2 to punish defendant for contempt because defendant refused to furnish the general release required by the Prior Order. Plaintiff also seeks modification of the Prior Order to the extent of denying the branch of defendant's Prior Motion which sought arbitration on the ground that plaintiff failed to meet the condition precedent of mediation.

The draconian relief sought by plaintiff, including a request that defendant's principal, Daniel Moloney, be sent to jail, will be denied for the following reasons: plaintiff failed to serve a certified copy of the Prior Order on Mr. Moloney as required by CPLR 5104; plaintiff failed to personally serve its cross-motion on Mr. Moloney as required by Judiciary Law § 761; there is no showing that Mr. Moloney's conduct was willful as required by Judiciary Law § 750(A)(3); defendant timely filed the instant motion for leave to reargue or renew its Prior Motion to dismiss the complaint and compel arbitration which called the Prior Order into question; plaintiff's cross-motion for contempt was served less than 10 days prior to the return date in violation of Judiciary Law § 756; and, the equities favor defendant. Plaintiff's request for renewal, which is actually a request for reargument, will be denied as untimely (see *Matter of Huie*, 20 NY2d 610, 612 [1967]).

Accordingly, it is hereby

ORDERED that defendant's motion in action no. 1 to vacate the Settlement Agreement is denied, and it is further

ORDERED that defendant's motion in action no. 2 for leave to reargue its Prior Motion

