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

PRESENT: HON Joan A. Madden PART 11

Justice

Index Number : 101695/2009

TWENTY-ONES, INC.,

VS.

GANER GROSSBACH & GANER, LLC

SEQUENCE NUMBER : # 001

STAY PROCEEDING

INDEX NO. 101695-09

MOTION DATE 5/7/09

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for Compel arbitration

	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 decided in accordance with the annexed Memorandum Decision Order + Judgment.

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 141B).

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

Dated: June 29, 2009

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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TWENTY-ONES, INC., and
40/40 A.C., LLC,

Plaintiffs,

-against-

GANER, GROSSBACH & GANER, LLC,

Defendant.

----------X

JOAN A. MADDEN, J.

Defendant Ganer, Grossbach & Ganer, LLC ("GGG"), a New York accounting limited liability company, moves pursuant to CPLR 2201 and 7503(a) for an order staying this action and compelling arbitration. Plaintiffs Twenty-Ones, Inc. and 40/40 A.C., LLC (collectively "Twenty-Ones"), which retained GGG to perform accounting services for them, oppose the motion, which is granted for the reasons below.

Background

In connection with Twenty-Ones' retention of GGG to perform accounting services on its behalf, GGG sent Engagement Letters dated February 27, 2007, outlining the services to be undertaken by GGG as Twenty-Ones' accountants and Twenty-Ones' obligations to provide GGG with necessary information ("Engagement Letters"). The services to be performed under the Engagement Letters included the preparation of "federal, state and local partnership income tax returns [for Twenty-Ones] for the year ended on December 31, 2006 and subsequent years." GGG also agreed to "advise [Twenty-Ones] on income tax matters as to which you specifically request our advice." The Engagement Letters provided that GGG "is only responsible for

preparing the [tax] returns noted above" but that GGG is "available to represent you and our fees for such services are at our standard rates and would be covered under a separate agreement."

The Engagement Letters contained an arbitration clause, which provides:

> If any dispute arises among us, we agree to try first in good faith to settle the dispute by mediation administered by the American Arbitration Association (AAA) under its Rules for Professional Accounting and Related Services Disputes. All unresolved disputes shall then be decided by final and binding arbitration in accordance with the Rules for Professional Accounting and Related Services Disputes of the AAA. Fees charged by any mediators, arbitrators, or the AAA shall be shared equally by all parties. IN AGREEING TO ARBITRATION, WE BOTH ACKNOWLEDGE THAT IN THE EVENT OF A DISPUTE OVER FEES CHARGED, EACH OF US IS GIVING UP THE RIGHT TO HAVE THE DISPUTE DECIDED IN A COURT OF LAW BEFORE A JUDGE OR JURY AND INSTEAD WE ARE ACCEPTING THE USE OF ARBITRATION FOR RESOLUTION.

Although GGG signed the Engagement Letters, they were never executed or returned by Twenty-Ones.

On January 27, 2009, Twenty-Ones commenced this action against GGG seeking (1) damages in the amount of $241,877.62 for GGG's negligent failure to timely pay payroll taxes, file amended tax returns, and GGG's filing of tax returns late, (2) compensation for the $100,000 paid to a successor accounting firm whose services were required to file amended tax return and tax returns as a result of GGG's negligence and (3) the return of $100,000 of the $157,332.78 allegedly paid to GGG for services, including GGG's preparation and filing of tax returns and its payment of taxes.

Prior to answering the complaint, GGG made this motion to compel arbitration, and to stay this action, asserting that the claims asserted by Twenty-Ones are subject to arbitration in

accordance with the Engagement Letters. Although GGG acknowledges that Twenty-Ones did not sign the Engagement Letters, it asserts that the conduct of the parties in conformation with the Engagement Letters renders the Engagement Letters and their arbitration provisions enforceable.

In support of its motion, GGG submits the affidavit of one of its principals, Robert Ganer. ("Ganer") Ganer states that his firm was retained by Twenty-Ones to perform accounting services in February 2007, and that "on February 27, 2007,Twenty-Ones [was] provided with Engagement Letters outlining [its] obligations and the services GGG would provide" (Ganer Affidavit, ¶ 2). He further states that although Twenty-Ones was provided the Engagement Letters, they were never signed and returned but that GGG "commence[d] accounting services in accordance with the Engagement Letters, and Twenty-Ones issued payment to GGG in return for those services" (Id., ¶ 4).

Specifically, according to Ganer, "[p]ursuant to the Engagement Letter, Twenty-Ones provided GGG with pertinent financial information including books, ledgers, receipts, payroll information, bank records and prior tax information." (Id., ¶ 5). In addition, Ganer states that "in accordance with the Engagement Letters, GGG reviewed all the information provided by Twenty-Ones and filed the 2006 tax returns. GGG also began correcting hundreds of errors that were discovered in Twenty-Ones' books, arranging for automated payment of bills and negotiating down and paying hundreds of thousands of dollars owed to the Internal Revenue Service dating prior to GGG's engagement. Twenty-Ones were billed in accordance with the Engagement Letters for these services, and certain of these invoices were paid by Twenty-Ones" (Id., ¶ 6). Ganer states that GGG stopped work after "Twenty-Ones failed to pay bills for several

months that were invoiced for services rendered in accordance with the Engagement Letters" (Id., ¶ 7).

Twenty-Ones counters that they are not required to arbitrate as the work GGG performed was not pursuant to the Engagement Letters but rather in accordance with an oral agreement between the parties. In support of its position, Twenty-Ones submits the affidavit of Desiree Perez, who is the Director of Operations for Twenty-Ones and whose name appears under the signature line of the Engagement Letters. Ms. Perez states that she "has never seen these documents before" [and that] they do not fully express the agreements of the parties." (Perez affidavit, ¶ 4). She further states that "no one [from GGG] ever spoke to me about signing such a letter... [n]or did [GGG] ever inquire about why these letters had not been signed and returned to them" (Id., ¶ 5). Ms. Perez also states that in contrast to the Engagement Letters which "appear to be form engagement letters for standard accounting services... the oral agreement I made with [GGG] when I retained their services was not standard [and involved] additional services which included payment of all bills and reviewing and correcting errors made by our prior accountants" (Id., ¶ 6).

In reply, GGG asserts that the Engagement Letters do not purport to specify each and every service to be provided by GGG and it is undisputed that pursuant to the letters Twenty-Ones provided the information needed to file their 2006 tax returns, and GGG received such information and filed the 2006 tax returns.

Discussion

In New York, it is well settled that courts favor arbitration as an "effective and expeditious means of resolving disputes between willing parties." Maross Const. Inc. v. Central

New York Regional Authority, 66 NY2d 341, 345 (1985). CPLR 7503(a) provides that when there is no substantial question whether a valid agreement was made or complied with the court shall direct the parties to arbitrate. Once it is determined that there is a valid agreement, a broad arbitration clause leaves the resolution of nearly all disputes to the Arbitrator "to decide what the agreement means and to enforce it according to the rules of law which they deem appropriate in the circumstances." Exercycle Corp. v. Maratta, 9 NY2d 329, 334 (1961).

The issue in this case is whether the arbitration clause contained in the Engagement Letters can be enforced when Twenty-Ones never signed the letters. It is a "long standing rule that an arbitration clause in a written agreement is enforceable, even if the agreement is not signed, when it is evident that the parties intended to be bound by the contract." God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Associates, LLP, 6 N.Y.3d 371, 373 (2006). In God's Battalion of Prayer Pentecostal Church, Inc., supra, the Court of Appeals held that the arbitration clause of a standard clause contract between two parties was enforceable even though neither party signed it when the record showed that both parties operated under its terms. See also, Crawford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 35 N.Y.2d 291, 299 (1974) (noting that "there is no requirement that the writing be signed 'so long as there is other proof that the parties actually agreed on it"); Metropolitan Arts & Antiques Pavilion, Ltd. v. Rogers Marvel Architects, PLLC, 287 A.D.2d 372 (1st Dep't 2001) ("there is no requirement that a written agreement to arbitrate be signed by a party against whom arbitration is sought, as long as there is an express, unequivocal agreement to arbitrate").

Here, the court finds that although Twenty-Ones did not sign the Engagement Letters, the record is sufficient to support a finding that both parties were operating in accordance with their

terms with respect to the services performed by GGG in connection with the filing of tax returns so that Twenty-Ones is required to arbitrate the claims related to such services based on the unequivocal arbitration clauses in such letters. See Rudolph & Beers v. Roberts, 260 A.D. 2d 274, 276 (1st Dep't 2001)(parties are required to arbitrate despite their failure to sign the agreement with the arbitration provision in the absence of evidence that defendant ever acted inconsistently with the agreement or behaved as if a different payment schedule were in effect).

Significantly, Ms. Perez does not specifically deny Ganer's statements that Twenty-Ones acted in accordance with the letters by providing GGG with the relevant information regarding the 2006 tax returns and paying invoices based on the letters. In addition, Ms. Perez's self-serving and carefully tailored statement that she "did not see" the Engagement Letters is insufficient to demonstrate that the parties' conduct was not in accordance with the letters. Notably, she does not deny that the Engagement Letters were received by Twenty-Ones, or that she was aware of the letters and their terms.

That being said, however, the court recognizes that the Engagement Letters do not apply to various services the complaint alleges that GGG performed for Twenty-Ones, including the "management of accounts payable, bank reconciliations, bookkeeping services, management of payroll, insurance and credit cards and the payment of all bills" (Complaint, ¶ 4). However, the performance of these other services is not inconsistent with the Engagement Letters which contemplate that other services might be performed by GGG for Twenty-Ones pursuant to separate agreements. In addition, while these other services allegedly performed by GGG are referred to in the complaint, the gravamen of the action involves GGG's alleged negligence and omissions in connection with services related to filing of tax returns. Under these circumstances,

the inclusion of these other services in the complaint, which are outside the scope of the arbitration, cannot deprive GGG of its right to arbitrate. See Edmond Weil, Inc. v. Pintow, 20 A.D.2d 537 (1st Dept. 1963).

Finally, where as here, the arbitrable and non-arbitrable issues are inextricably interwoven, the proper procedure is to stay the court action pending the completion of arbitration. See Greenky v. Aytes, 40 A.D.3d 545 (1st Dept. 2007); In re Colonial Co-op Ins. Co. v. Muehlbauer, 46 A.D.3d 1012 (3rd Dept. 2007).

Conclusion

In view of the above, it is

ORDERED and ADJUDGED that the motion to compel arbitration is granted; and it is further

ORDERED that the action stayed pending the completion of arbitration, at which time this action may be restored to the calendar upon five days notice.

DATED: June 29, 2009

J.S.C.