

ERIP LLC v Tavakoli

2009 NY Slip Op 31750(U)

July 9, 2009

Supreme Court, New York County

Docket Number: 600316/09

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED
Justice

PART 60

ERIP LLC,
Plaintiff,
- v -

INDEX NO. 600316/2009
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

Nader Tavakoli,
EagleRock Capital Management, LLC, and
EagleRock Institutional GP, LLC,
Defendants.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

In accordance with the memorandum decision accompanying this grey sheet, it is

ORDERED that this motion GRANTED in part, and it is further

ORDERED that the parties shall proceed to arbitration in accordance with the terms of the arbitration agreement between them, and it is further

ORDERED that this action is stayed pending the outcome of arbitration.

SO ORDERED.

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NYS SUPREME COURT - SWT

COUNTY CLERK OF NEW YORK

Dated: 7/9/09

[Signature]

HON. BERNARD J. FRIED
J.S.C.

[Handwritten initials]

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 60

-----X
ERIP LLC,

Plaintiff,

-against-

Index No. 600316/09

NADER TAVAKOLI;
EAGLEROCK CAPITAL MANAGEMENT, LLC,
EAGLEROCK INSTITUTIONAL GP, LLC,

Defendants.

-----X

APPEARANCES:

For Plaintiff:

David E. Bamberger
BRICKMAN & BAMBERGER
317 Madison Avenue
21st Floor
New York, NY 10017

For Defendant:

Leonard A. Rodes
TRACHTENBERG RODES
& FRIEDBERG LLP
545 Fifth Avenue
New York, NY 10017

Fried, J.:

By Order to Show Cause dated May 26, 2009, Defendants Nader Tavakoli, EagleRock Capital Management, LLC, and EagleRock Institutional GP, LLC (collectively Defendants) seek an order dismissing or staying this action on the ground, *inter alia*, that the claims asserted in the Verified Complaint must be arbitrated. For the reasons that follow, I grant the motion insofar as it seeks to compel arbitration, order that the parties proceed to arbitration, and order that the action be stayed pending the outcome of arbitration. Therefore, I will not reach the issue of whether Defendants are entitled to the other relief they seek.

The entire procedural history of this matter is not relevant to the instant dispute and

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COUNTY OF NEW YORK
CLERK OF THE COURT

I will not recite it here. The application of Plaintiff ERIP LLC, made on May 18, 2009 (motion Sequence 001), seeking various relief has been held in abeyance pending resolution of Defendant's instant application for an Order to Show Cause compelling arbitration and granting other relief (Order to Show Cause). Because the Order to Show Cause is granted in part, motion sequence 001 will be held in abeyance pending the outcome of arbitration.

At issue is the applicability of an arbitration clause contained in a "side letter" to an agreement executed by Plaintiff and Defendants. The following facts regarding the side letter are not disputed. The letter was signed, in counterparts, by Plaintiff and all Defendants. The letter was executed contemporaneously with the partnership and other agreements governing Defendants' investment in Plaintiff's fund. The arbitration agreement requires "that any dispute arising out of or related to this Agreement that the parties are unable to resolve by themselves shall be settled by arbitration in New York, New York." Exh. 3 to May 26, 2009 Affirmation of Leonard Rodes in Support of Order to Show Cause, at § 19(d)(i).

The arbitration agreement's language is quite broad and Defendants correctly argue that it encompasses the subject matter of the parties' current dispute. Indeed, Plaintiff does not argue that the dispute does not either arise out of or relate to the agreement. Rather, Plaintiff argues that the agreement contains a "carve-out" whereby individual Defendant Nader Tavakoli (Tavakoli) is made a party to Section 15 of the agreement only.

In *Conwill v. Arthur Andersen LLP*, 12 Misc. 3d 1171(A), 820 N.Y.S.2d 842 (2006), I granted a motion to compel arbitration and stated that, "[t]he role of the court in such

instances is to determine: (1) whether the parties agreed to arbitrate; (2) whether the disputes fall within the scope of the arbitration clause; and (3) in the absence of any transcendent federal statutory claims, if some, but not all of the claims are arbitrable, whether to stay the balance of the proceedings pending arbitration.” *Id.* at 8 (citations omitted); *see also Tong v. S.A.C. Capital Management, LLC*, 16 Misc. 3d 401, 407, N.Y.S.2d 881, 886 (2007), affirmed in relevant part at 52 A.D.3d 386, 860 N.Y.S.2d 84 (1st Dep’t 2008). As discussed above, the arbitration agreement at issue is broad enough to embrace all disputes between the parties relating to Defendants’ investments in Plaintiff’s fund. Thus, the only remaining question is whether the Tavakoli agreed to arbitrate in his individual capacity.

Plaintiff’s “carve-out” argument is not compelling. Tavakoli’s signature (given in his individual capacity) on the executed document is not a clear expression that the parties intended to limit Tavakoli’s liability to Section 15 of the agreement. Rather, Tavakoli’s individual signature serves as an individual guaranty by Tavakoli of the agreement entered into between Plaintiff and the two hedge funds that are Tavakoli’s co-defendants (the Fund Defendants), both of which Tavakoli manages. Indeed, although Tavakoli signed the agreement as an individual with respect to Section 15, he signed the agreement in two other places as the manager of the Fund Defendants. Taken together, the language of the agreement and the signature page demonstrate that all parties intended that any dispute between the signatories to the agreement relating to activity between the Fund Defendants and Plaintiff would be resolved by arbitration.

In *Nardi v. Povich*, 12 Misc. 3d 1188(A), 824 N.Y.S.2d 764 (2006), I granted a

motion to compel arbitration with similarly broad language to that at issue here and ordered that the action be stayed pending the outcome of arbitration. In that case, as here, the arbitration agreement was patently valid and enforceable and the issue was whether the agreement bound all defendants. *Id.* at 5. Citing a substantial body of New York precedent, I held that the agreement bound not only the signatories to it, but their agents as well. Thus, even if Tavakoli's individual signature applied only to Section 15 of the agreement, he would still be individually liable under the entire agreement as an agent of the Fund Defendants. *Id.* See also *Brown v. Caldarella*, 2008 WL 857983 at *1 (S.D.N.Y. Mar. 31, 2008) (applying "ordinary principles of contract and agency" to deny a motion to stay arbitration) (citations omitted).

Having determined that all Defendants are bound by a valid and enforceable arbitration clause that encompasses the instant dispute, all further proceedings are stayed and the parties are to proceed to arbitration. *Conwill* at 8 ("Once it is determined that a binding arbitration clause exists, and that it is broad enough to encompass the subject matter of the dispute, courts have 'no business' weighing the merits of the dispute or determining which claims are viable before submitting the matter to arbitration.") (citations omitted).

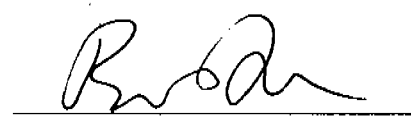
Accordingly, it is
ORDERED that Defendants' motion to compel arbitration and to stay litigation is granted;
and it is further

ORDERED that the Plaintiff shall arbitrate its claims in accordance with the terms of the arbitration agreement; and it is further

ORDERED that this action is stayed pending the outcome of arbitration.

Dated: 2/9/09

ENTER:



J.S.C. **HON. BERNARD J. FRIED**

FILED

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