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

PRESENT: WALTER B. TOLUB Justice PART 15

Shefl L. Emam

INDEX NO. 602199/08

MOTION DATE

- v -

Lehr Consultants Int'l

MOTION SEQ. NO. 02

MOTION CAL. NO.

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

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum opinion

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be given pursuant to CPLR 5513. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

FINAL ORDER

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

Dated: 1/29/09

J.S.C.

WALTER B. TOLUB

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

SHEF L. EMAM,

Plaintiff,

Index No.
602199/08

- against-

LEHR CONSULTANTS INTERNATIONAL, LLC, A/K/A LEHR CONSULTANTS INTERNATIONAL, LLP, DANIEL LEHR, VALENTINE LEHR, and ROBERT E. TOMPKINS,

Defendants.

WALTER B. TOLUB, J.:

Plaintiff Shef L. Emam moves for an order returning this case to the court's active calendar, awarding plaintiff attorney's fees and costs of the motion, and compelling discovery. If the matter is not restored to the active calendar, plaintiff seeks an order compelling defendants Lehr Consultants International, LLC, a/k/a Lehr Consultants International, LLP, Daniel Lehr, Valentine Lehr, and Robert E. Tompkins to pay the fees to arbitrate the matter.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff is a resident of Dubai, U.A.E. and is a former employee of defendant, Lehr Consultants International, LLP (defendant). Defendant is a limited liability company which has a main office in New York, New York. Plaintiff terminated his employment with defendant as of May 1, 2008. On or around June

29, 2008, plaintiff initiated an action against defendants, alleging that defendants had failed to pay plaintiff certain distributions for the year 2008, pursuant to the employment agreement between plaintiff and defendant.

On or about August 15, 2008, defendants sought, by order to show cause, an order to compel arbitration and stay this action, pursuant to CPLR 7503 (a). In their memorandum of law, defendants argued that, pursuant to the employment agreement entered into between plaintiff and defendant, the dispute in plaintiff's complaint is subject to arbitration. The arbitration provision in section 15 of the employment agreement stated as follows:

> In the event that any controversy or claim arising out of this Agreement cannot be settled by the parties, such controversy or claim shall be settled by arbitration in the city, town or village in which the Firm's then principal office is located, in accordance with the then current rules of the American Arbitration Association, and judgment upon the award may be entered in any court having jurisdiction thereof.

Plaintiff's Exhibit C, Employment Agreement, at 11.

On August 29, 2008, the court issued an order compelling arbitration for the original complaint. Plaintiff did not appear for oral argument on that date, and the motion was unopposed.

A status conference was scheduled for October 24, 2008 and adjourned to December 19, 2008. On December 18, 2008, plaintiff submitted an affirmation stating that he never consented to an

adjournment. Plaintiff dictates in his affirmation that the time to "institute arbitration has expired." Plaintiff Affirmation, ¶ 9. According to plaintiff, since the defendants have not proceeded with arbitration within 30 days of the signing of the order compelling arbitration, pursuant to CPLR 7502 (c), the order should be "null and void." *Id.*, ¶ 6. He requested a court order stating that the time to arbitrate has expired, that he is entitled to attorney's fees in the amount of $2,408.75, and compelling defendants to comply with plaintiff's discovery requests.

Both parties appeared for a status conference on December 19, 2008. At the conclusion of the conference, the parties were asked to submit a brief letter with legal support for their positions as to whom was required to commence arbitration of plaintiff's dispute.

On January 12, 2009, defendants submitted a letter to the court, in which they explained why, under CPLR 7503, an order compelling arbitration does not act to compel arbitration, but merely puts a permanent stay on the court action. Defendants Exhibit D, at 3. Defendants argued that New York law is deferential to arbitration provisions, and will not declare them void if the parties agreed by contract that arbitration should be the exclusive remedy. *Id.* Furthermore, defendants asserted that, as defendants in this action, it would "absurd" for them to

initiate arbitration against themselves. *Id.* at 2.

On January 22, 2009, plaintiff wrote a letter to the court in response to the January 12, 2009 letter from defendants. Plaintiff's Exhibit C. Plaintiff requested that the court stay the action. Plaintiff argued that defendants should have proceeded with the arbitration, and since they have not done so as of yet, they waived their rights to arbitration by failing to timely initiate the proceeding. *Id.* at 4. In his letter, plaintiff explained that he did not bring a motion to reargue earlier, as he thought that defendants would initiate the arbitration and pay the initiation fees. *Id.* at 6. Plaintiff stated that, had defendants requested that plaintiff initiate arbitration or pay the filing fees as part of its application, plaintiff would have opposed their requests. Plaintiff also argued that the issues to be litigated are not addressed in the employment agreement, and are not subject to arbitration. *Id.* However, plaintiff also indicated that, if defendants proceed with arbitration, they should be required to pay the filing fees, as these are too cost-prohibitive for plaintiff. *Id.* at 4.

According to plaintiff, a conference was scheduled for March 20, 2009 to discuss his letter motion. However, no one appeared for this conference. As such, plaintiff maintains that there has been no determination whether there is a stay of this action.

On April 6, 2009, plaintiff moved herein to have the case

restored to the active calendar, along with attorney's fees, and for an order requiring defendants to participate in discovery, or in the alternative, for an order directing the defendants to initiate and pay for the arbitration.

Although intertwined in its arguments, plaintiff attempts to question the validity of the August 29, 2008 court order compelling arbitration, as, according to him, this order was never properly appealed, and is not a subject of this proceeding. At this time, the only issues before the court are whether defendants are required to initiate the arbitration process and whether they are also required to pay the fee to initiate. The court answers both questions in the negative. If plaintiff chooses to initiate the arbitration, and is not satisfied with the outcome, he may move pursuant CPLR 7511 to vacate the award.

DISCUSSION

Plaintiff argues that, under CPLR 7502 (c), defendants waived their rights to arbitration, since 30 days have elapsed since the order compelling arbitration was signed. However, as defendants claim, CPLR 7502 (c) applies to provisional remedies which are granted in conjunction with the order compelling arbitration. Additionally, only the provisional remedy expires after 30 days, not the order compelling arbitration. In any event, the definitions of CPLR 7502 (c) are irrelevant to plaintiff's argument, since defendants are not subject to any

time line or waiver of arbitration, since it is not defendants' responsibility to proceed with arbitration.

Plaintiff is the alleged aggrieved party in the original cause of action. As such, if the plaintiff wishes to proceed, as logic suggests, he should be the one to initiate arbitration. In *Marillo v Shearson Hayden Stone, Inc.* (159 AD2d 1012, 1013 [4th Dept 1990]), a case cited by defendants, the court writes,

> "the granting of a motion to compel arbitration merely precludes the aggrieved plaintiff from proceeding with his action; it does not require the defendant to institute arbitration procedures. If the party with a grievance does not voluntarily turn now to the arbitral process he will find himself with no remedy at all [internal quotation marks and citation omitted]."

As such, as defendants correctly assert, after invoking their contractual right to arbitration, defendants are not required to initiate arbitration proceedings against themselves. If plaintiff wishes to proceed with a resolution for his complaint, he is free to initiate arbitration.

In his letter application, plaintiff asserts that litigation should proceed in lieu of arbitration, since the cost of initiating arbitration is too cost-prohibitive for plaintiff. Plaintiff states that if he is to initiate the arbitration, he will have to pay "$6,000 as an initial filing fee plus $2,500 for a Case Service Fee ... ."[1] Plaintiff's Exhibit C, at 4.

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[1]These fees were current as of January 22, 2009, and have changed since that date.

Plaintiff cites to *Res v Masterworks Development Corp.* (5 Misc 3d 1003[A], 2004 NY Slip Op 51169[U] [Sup Ct, NY County 2004]), in which the plaintiff made an argument that "because of the onerous costs associated with arbitration and her limited resources, she will have lost any opportunity to have her claims heard." *Id.* at *3. In *Res*, the plaintiff prepared for the court an extensive affidavit discussing the actual fees and expenses associated with the arbitration. The *Res* court agreed with the court in *Ball v SFX Broadcasting, Inc.* (165 F Supp 2d 230, 240 [ND NY 2001]), which stated that, if the party opposed to the arbitration can prove the prohibitive nature of the costs, "[s]uch a showing is sufficient to demonstrate that the challenged arbitration agreement does not provide an effective mechanism for the vindication of statutory rights." The court in *Res* concluded that the parties were to still proceed with arbitration, but, at the suggestion of the court, the defendants agreed to pay all but $5,000 of plaintiff's arbitration costs.

Despite the cases cited to by plaintiff, an unsupported argument that plaintiff "will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Green Tree Fin. Corporation-Alabama v Randolph*, 531 US 79, 91 (2000). For a plaintiff to object to the arbitration on the basis of cost, he must meet the burden of proving that the

arbitral forum is financially inaccessible to him. *Id.* at 93.[2] In a recent decision where the plaintiff alleged similar cost objections to arbitration as does the plaintiff in the present case, the court noted that *Res v Masterworks Development Corp.* is the "sole New York case addressing this issue of arbitration costs," and that the

> "burdensome amount of arbitration fees are raised almost exclusively in federal cases involving an employee asserting statutory rights against an employer in federal court. Federal courts, operating under a different set of statutory guidelines, do treat this hardship issue as a potential challenge to arbitrability of a dispute ... . [internal citation omitted]."

Cambridge v Allen, 9 Misc 3d 1124(A), 2005 NY Slip Op 51781(U), *2 (Civ Ct, NY County 2005).

In the present case, based on his requested damages, plaintiff has estimated that he would incur approximately $8,500 to initiate arbitration. Plaintiff has not provided any detailed information about his financial status and his alleged inability to pay the initiation fee. It appears from the employment agreement that, while plaintiff was working for the defendants, he was earning a base compensation of $225,000 annually. Without

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[2]Plaintiff also cites to *Brady v Williams Capital* (_ AD3d___, 878 NYS2d 693 [1st Dept 2009]), in which plaintiff claimed at least $21,150.00 as a known cost for her to pursue arbitration after the AAA determined that it was an employer-promulgated plan. Plaintiff had already initiated arbitration and filed an Article 75 proceeding alleging that she was unable to pursue her statutory rights due to her financial situation. The court concluded that her costs were not speculative and the employer was directed to pay the arbitration fees, subject to a later reallocation of those costs by the arbitrator.

any other financial documentation, the plaintiff has not met his burden of proving that the costs of arbitration are prohibitive.

Furthermore, as the court in *Cambridge* noted, "[i]t cannot be assumed that arbitration costs are higher than traditional litigation costs ... ." *Id.* at *2. Plaintiff has assumed that the costs of litigation would outweigh the costs of arbitration, but this is purely speculative.

As an alternative, plaintiff also argues that, should plaintiff proceed with arbitration, defendants should be liable for the initiation costs, since the prohibitive costs would preclude plaintiff from initiating arbitration. Plaintiff attaches a paragraph gleaned from the American Arbitration Association's (AAA) rules regarding the resolution of disputes arising from employer-promulgated plans. Plaintiff's Affirmation in Reply, ¶ 9. In pertinent part, plaintiff points to the section which dictates, "the employer shall pay the arbitrator's compensation." However, this sentence is of no import. First, the court is not aware, and the plaintiff does not indicate, under what form of employment arbitration the parties are subject.[3] Second, the issue herein, according to plaintiff, is

[3]On its website, http://www.adr.org, AAA provides different rules for disputes arising out of employer-promulgated plans versus disputes which arise out of individually negotiated employment agreements and contracts. Initially, the AAA makes the administrative decision as to which plan is appropriate. Plaintiff references a paragraph from the employer-promulgated plan, but then provides filing fee information given from the then-current AAA's commercial fee schedules, which applies to disputes arising out of individually negotiated employment agreements and contracts.

with the initial fee, which is the only fee along with the case service fee which must be paid in advance. The case service fee is refunded if the parties do not proceed to their first hearing. The arbitrator compensation is not included as part of the administrative fee by the AAA, and cannot be speculated at this time.

Plaintiff has not investigated any remedies which may be available to him, given his alleged financial distress. On its website, http://www.adr.org, under the Employment Arbitration Rules, the AAA states, "[r]ecognizing the continued fragility of the business environment and wishing to provide cost-saving alternatives to parties filing an arbitration case, the American Arbitration Association is offering an optional fee payment schedule that parties may choose instead of the Standard Fee Schedule." This optional fee payment schedule is a "pilot flexible fee schedule" for certain arbitration types. Additionally, the AAA is also offering a savings of 50% when the parties mutually select and appoint their arbitrator without the AAA "providing a list of arbitrators and an appointment process." Also on the AAA website, the statement for ethical principles indicates that "[t]he AAA has a fee reduction or deferral process based on evidence of financial hardship, for parties who cannot afford to pay the AAA's administrative fees."

According to the fees current as of June 1, 2009, the

initial filing fee for plaintiff's alleged type of action would cost only $1,000 and the case service fee (presently named proceed fee) would be $5,600. However, as indicated above, this proceed fee is subject to a 50% reduction if the parties pre-select and appoint the arbitrator. It appears that plaintiff did not give even a cursory glance to the remedies which may be available to him. Besides having his administrative fees reduced at the outset, the plaintiff may also have remedies after the arbitration process finishes. Under CLPR 7511, upon a motion in Supreme Court to confirm an award, "'[t]he court, on application, may reduce or disallow any fee or expense it finds excessive or allocate it as justice requires.'" *Matter of Coty Inc. v Anchor Construction, Inc.*, 2003 WL 139551, *10, 2003 Misc LEXIS 13, *33, (Sup Ct, NY County 2003), *affd* 7 AD3d 438 (1st Dept 2004).

Accordingly, the plaintiff has not met his burden of proving a financial hardship should he choose to initiate arbitration, and defendants are not responsible for paying for the initiation costs of arbitration.

The court has reviewed plaintiff's other contentions and finds that they are without merit.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the presentation of an appropriate bill of costs.

Dated: 7/24/07

ENTER:

J.S.C.