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SCANNED ON 1/11/2010

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

PRESENT: Madden Justice

PART 11

Gab Robins N.A. Inc.

-v-

Safety Insurance Co.

INDEX NO. 108775/09

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Stay 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~~ petition to stay arbitration is decided in accordance with annexed Memorandum Decision + Order.

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).

Dated: December 30, 2009

J.S.C.

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):

[* 2]

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

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In the Matter of the Application of
GAB ROBINS N.A., INC.

Index No. 108775/09

Petitioner,

For an Order Pursuant to CPLR 7503(b)
Staying the Arbitration of a Certain
Controversy Against SAFETY INSURANCE
COMPANY,

Respondent.

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JOAN A. MADDEN, J.:

Petitioner GAB Robins N.A., Inc. ("GAB") moves pursuant to CPLR 7503(b) to stay the arbitration commenced by respondent Safety Insurance Company ("SIC") on the grounds that the doctrine of res judicata bars SIC from arbitrating its claims and that SIC waived its right to arbitrate. SIC opposes the petition, which is denied for the reasons below.

Background

GAB is a corporation organized under the laws of the State of Delaware with its principal place of business in New Jersey. SIC is a Massachusetts corporation. In or about October 2006, the parties entered into a contract under which GAB agreed to provide certain services in connection with the payment and adjustment of insurance claims ("the Contract").

Paragraph 16 (b) of Section III of the Contract contains in arbitration clause which provides, in relevant part, that:

> Any dispute arising out of this Agreement ... shall be resolved by binding arbitration

> under the current rules of the American Arbitration Association in the Borough of Manhattan, City of New York before a single arbitrator...The Arbitrator shall apply the substantive law of the State of New York in accordance with Section III. Para. 15 to the merits of any dispute or claim.

Paragraph 5 of Section III of the Contract provides that "this contract shall be interpreted and construed in accordance with the laws of the State of New York."

A dispute arose in connection with the Contract with respect to GAB's handling of an insurance claim arising out of a fatal car accident occurring in Florida. In or about October 28, 2008, SIC commenced an action against GAB in the County Court in Hillsborough County, Florida seeking various relief including "extra contractual damages" and a declaration that an exculpatory clause in the Contract was unenforceable. GAB subsequently removed the action to the Federal Court for the Middle District of Florida. By Order dated January 29, 2009, District Court Judge Richard A. Lazzara granted GAB's motion to dismiss the complaint with prejudice for failure to state a cause of action.

On May 28, 2009, SIC served GAB with a demand for arbitration before the American Arbitration Association ("AAA") in New York. GAB subsequently made a motion before Judge Lazzara to enjoin the arbitration on the grounds that SIC waived its right to arbitrate by bringing the court action, and that the claims in arbitration were barred by the doctrine of res judicita. By order dated June 18, 2009, Judge Lazzara denied

GAB's motion, holding that GAB "'can raise the issues of res judicata and waiver in the arbitration proceeding and, if its arguments are valid, have the arbitration dismissed.'" quoting Weaver v. Florida Power & Light Co., 172 F3d 771, 773 (11th Cir. 1999).

Then, on June 22, 2009, this court signed GAB's order to show cause seeking to stay of the arbitration.[1] GAB argues, as it did in its application before Judge Lazzara, that a stay is appropriate as SIC waived its right arbitrate by bringing a court action raising the same claims as are now the subject of the arbitration and that, under the doctrine of res judicata, the dismissal of the SIC's claims with prejudice bars SIC from re-litigating the claims in arbitration. In addition, GAB asserts that under New York law, which this court should apply, the court, and not the arbitrator, decides whether the arbitration of claims is barred by waiver or res judicata.

SIC counters that (1) the motion for a stay in untimely under CPLR 7503(c) as it was made more than 20 days after service of the arbitration demand, (2) the Federal Arbitration Act ("FAA") and not New York law applies and that under the FAA an objection based on waiver or res judicita is for the arbitrator to decide, and (3) even if the court reaches the issues of waiver and res judicata, that neither of these defenses bars arbitration

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[1]The court denied GAB's request in the order to show cause for a temporary stay, without prejudice to renewal prior to the date of the arbitration.

under New York or Federal law. With respect to the objection based on waiver, SIC argues that the action in Florida did not prejudice GAB since no discovery was done and it was dismissed approximately three months after it was commenced.

In reply, GAB asserts that it is not bound by the 20-day limit as the demand did not comply with the requirements of CPLR 7503(c). In addition, GAB argues that even if the court were to find that the FAA applies, the issue of whether conduct during litigation waives the right to arbitrate is for the court to decide and that SIC's conduct constituted a waiver under New York or Federal law.

Discussion

As a preliminary matter, since the arbitration demand did not contain a warning that if GAB did not move to stay arbitration in 20 days it would be precluded from doing so, the stay application cannot be considered untimely under CPLR 7503(c). See Cooper v. Bruckner, 21 AD3d 758, 759-760 (1st Dept 2005).

That being said, however, the application is without merit as GAB already sought to have the arbitration stayed on the grounds of waiver and res judicata before the District Court in Florida which denied the application based on its finding that under the FAA these issues are for the arbitrator to determine. Since the District Court in Florida necessarily determined that the arbitrator should decide the waiver and res judicata

defenses, any argument by GAB that the FAA permits the court to determine these defenses is not only barred by the doctrine of collateral estoppel (See Allied Chemical v Niagara Mohawk Power Corp., 72 NY2d 271 (1988), cert denied, 488 US 1005 (1989)), but contrary to the interests of judicial economy and consistency as well as the principles of judicial comity.

Moreover, although GAB did not argue before the District Court in Florida, as it does here, that New York law applies and that under New York law the defense of waiver and res judicata are for the court and not the arbitrator to decide, it could have, but failed, to raise these issues in the earlier stay proceeding and is barred by the doctrine of res judicata from doing so now. Marinelli Associates v Helmsley-Noyes Co., Inc., 265 AD2d 1, 5 (1st Dept 2000).

In any event, as discussed below, while New York's arbitration law provides a broader role for the courts in determining threshold issues of arbitrability than the FAA,[2] New York law does not apply here.

The underlying dispute "'arises out of a contract evidencing interstate commerce,'" and is thus subject to the FAA, 9 U.S.C. §§ 1-16. Smith Barney, Harris Upham & Co, Inc. v

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[2]Under New York law, the courts, rather than the arbitrator, decide whether a party waived the right to arbitrate by electing to litigate and whether the doctrine of res judicata bars a party from arbitrating a claim. See e.g. Sherrill v Grayco Builders, Inc., 64 NY2d 261, 272 (1985); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benjamin, 1 AD3d 39 (1st Dept 2003).

Luckie, 85 NY2d 193, 200-201 (1995) quoting 9 U.S.C. § 2. The FAA "creates a body of federal substantive law of arbitrability applicable to any arbitration agreement within the coverage of the Act." PaineWebber, Inc. v. Bybyk, 81 F3d 1193, 1198 (2d Dept 1996)(citation omitted).

At the same time, however, when the parties to an agreement "include a choice of law provision in their agreement,' ... the parties' choice will be honored unless the chosen law creates a conflict with the terms of, or the policies underlying, the FAA." Luckie, supra, at 201, citing, Volt Information Sciences Inc., v. Board of Trustees of Leland Stanford Jr. Univ., 489 US 468, 476 (1989).

In Luckie supra, the New York Court of Appeals held that the choice of law clause which provided that New York law would govern "'the agreement and *its enforcement*'" (emphasis in original) demonstrated an intention to arbitrate only to the extent permitted by New York law. Id., at 202. It explained that:

> Although the parties broadly agreed to arbitrate "any controversy" arising from the customer agreements, that clause--like all the other provisions in the contract-was subject to the parties' additional qualification that New York State law provides the basis of decision for questions concerning the agreement, *but more critically its enforcement*....the parties adopted as binding New York's rule that threshold Statute of Limitations questions are for the courts.

Id. (emphasis supplied).

Case law after Luckie has held that when there is a broad

arbitration clause and in the absence of the "its enforcement" language in the New York choice of law clause, the FAA applies and not New York's special arbitration rules which permit the court to decide such threshold matters as whether the arbitration is timely. See Diamond Waterproofing Co. v. 55 Liberty Owners Corp., 6 AD3d 101, 105 (1st Dept), lv granted, 2 NY3d 822 (2004)(since the relevant contract did not explicitly provide that the Agreement and "its enforcement" were governed by New York law, the arbitrator should decide timeliness issues); Hamershlag, Kempner & Co. L.P. v. Oestrich, 234 AD2d 172 (1st Dept 1996); Smith Barney Inc. v. Heiman, 235 AD2d 344 (1st Dept 1997).

In Smith Barney Shearson Inc. v. Sacharow, 91 NY2d 39 (1997), the question before the court was whether a New York choice of law clause required the court to determine if a controversy was eligible for arbitration under an NASD rule precluding the arbitration of claims more than six years old. The Sacharow court noted that six-year eligibility rule created "a substantive feature that may affect the right to arbitrate," and that the issue was therefore presumptively for the court to decide. However, despite this presumption, based on the broad arbitration clause, the court found an intent to submit all issues to arbitration, and that the arbitrator should determine whether the six-year eligibility rule precluded arbitration.

The Sacharow court reasoned that "[w]hile the choice of law

clause incorporates substantive New York principles, it does not also pull in conflicting restrictions on the scope of the authority of the arbitrators and the competence of parties to contract for plenary dispute resolution." 91 NY2d at 49. It distinguished its holding in Luckie, explaining that Luckie was based on the specific choice of law clause in the agreement which provided that New York applied to the "agreement and *its enforcement*" Id., at 48 (citations omitted)(emphasis in the original).

Under the above precedent, the New York choice of law clause in the Contract, which provides that "this contract shall be interpreted and construed in accordance with the laws of the State of New York" but does not have the and its enforcement language is insufficient to demonstrate an intention that New York law govern the arbitration process, particularly in light of the broad arbitration clause providing for arbitration of "any controversy." Instead, the New York choice of law clause indicates an intent that only substantive New York principles of law apply. Likewise, the arbitration clause, which states that the arbitrators will "apply the substantive law of the State of New York" in accordance with choice of law clause, does not indicate an intent to apply New York's special arbitration rules.

Accordingly, the FAA and not New York law controls whether the defenses of res judicata and waiver are arbitrable, and since as indicated above, the District Court in Florida has already

found that these defenses should be arbitrated, GAB cannot relitigate this finding before this court.

For the above reasons, the petition to stay arbitration is denied and the defenses of waiver and res judicata are to be decided by the arbitrator.

Conclusion

In view of the above, it is

ORDERED and ADJUDGED that the petition to stay arbitration is denied; and it is further

ORDERED that the parties are directed to proceed forthwith to arbitration.

DATED: December 30 ,2009

J.S.C.