

Doar Litig. Consulting, LLC v U.S. Elec., Inc.

2010 NY Slip Op 30090(U)

January 5, 2010

Supreme Court, Nassau County

Docket Number: 20396*09

Judge: Timothy S. Driscoll

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
DOAR LITIGATION CONSULTING, LLC,

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Plaintiff,

Index No: 20396-09

Motion Seq. No: 1

Submission Date: 11/18/09

-against-

U.S. ELECTRONICS, INC.,

Defendant.

-----X

Papers Read on this Motion:

- Order to Show Cause, Affirmation of Urgency,**
- Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affirmation in Opposition and Exhibits.....X**
- Memorandum of Law in Opposition.....X**
- Reply Affirmation in Support.....X**

This matter is before the court on the Order to Show Cause filed by Defendant U.S. Electronics, Inc. on October 23, 2009 and submitted November 18, 2009. For the reasons set forth below, the Court grants Defendant's motion in its entirety, stays the instant action, and directs the parties to proceed to arbitration.

BACKGROUND

A. Relief Sought

Defendant U.S. Electronics, Inc. (“USE”) moves for an Order, pursuant to CPLR § 7503(a), staying the instant action, and directing the parties to proceed to arbitration. USE also moves for an Order staying the current action pending resolution of this motion, which this Court granted on October 23, 2009.

Plaintiff DOAR Litigation Consulting, LLC (“DOAR”) opposes USE’s application.

B. The Parties’ History

In or about March 2007, DOAR and USE entered into an agreement, pursuant to which DOAR was to provide to USE certain electronic discovery support services in connection with litigation in which USE was involved (“2007 Agreement”). More particularly, DOAR designed a database that contained numerous litigation-related documents, as well as other information that USE provided to DOAR. In exchange for these services, USE was obligated to remit monthly fees to DOAR, and DOAR sent USE monthly invoices that detailed the amount that USE owed. A dispute arose between the parties and Plaintiff alleges that, as of June 2008, USE ceased remitting the amounts due under the 2007 Agreement.¹

As a result of USE’s alleged failure to pay DOAR, on September 2, 2009, DOAR sent USE a Notice of Termination of the 2007 Agreement (“Notice”). In addition to advising USE of DOAR’s termination of the 2007 Agreement, the Notice also included the following language:

Kindly advise me, in writing, within 5 days of this letter whether or not you wish DOAR to maintain the database and other work product created under the Agreement on a going forward basis. DOAR will provide such service for a monthly fee of \$35,000, payable in advance via cash or wire transfer, due immediately for the month of September and on the first of each month thereafter.

Mazer Aff. in Supp. at Ex. D

In response to the Notice, counsel for USE sent two separate e-mails on September 4, 2009 and September 11, 2009, both of which demanded that the databases be preserved because

¹ In connection with this dispute, DOAR commenced an action in Nassau County Supreme Court on July 9, 2009, which was assigned Index Number 13441/09, and moved for summary judgment in lieu of a complaint for the unpaid balance of \$255,408.70. By Notice of Discontinuance dated September 8, 2009, counsel for the plaintiff discontinued that action. Mazer Aff. in Support at Ex. E.

they contained evidence in several pending cases and arbitrations in which USE was involved. The e-mail dated September 4, 2009 specifically cautioned DOAR that any destruction of the databases “would unquestionably be spoliation of evidence . . .” Aff. in Opp. at Ex. C.

DOAR argues that, as of September 2, 2009 and in accordance with the Notice, the 2007 Agreement was immediately terminated and a new “express and/or implied contract” was formed. More particularly, counsel for DOAR submits that DOAR’S query directed to USE with respect to whether DOAR should maintain the existing databases was a “Post Termination Offer” to maintain the databases, which USE accepted via the September 4 and September 9 e-mails. In the Complaint, DOAR alleges that, as a result of this purportedly new agreement, which the Complaint refers to as the “September 2009 Contract” (hereinafter referred to as the “2009 Agreement”), USE “became contractually bound to pay DOAR the sum of \$35,000 (plus applicable state tax [of] \$38,106.25) per month for DOAR to maintain the Database for Defendant’s benefit...” Complaint at ¶ 14. USE’s alleged failure to make these payments precipitated the instant litigation.

In the interim, on or about September 22, 2009, DOAR filed a demand for arbitration in which it characterized the nature of the dispute as “Account stated and breach of contract based on [USE’s] failure to pay for hosting and maintenance of electronic discovery database created by [DOAR] pursuant to written agreement between the parties.” Aff. in Supp. at Ex. F. In the instant application, USE seeks an order compelling the parties to arbitrate the disputes that underlie this action.

C. The Parties’ Positions

USE submits that the parties’ dispute relates to the 2007 Agreement, which is governed by a broad arbitration clause. USE also disputes that the 2007 Agreement was ever terminated, and asserts that the parties never consummated the 2009 Agreement.

DOAR opposes USE’s application, submitting that the current dispute concerns the new agreement that the parties formed after the termination of the 2007 Agreement, which could not have been within the parties’ contemplation when they reached the 2007 Agreement. DOAR argues that the question of DOAR’s entitlement to payment under the 2007 Agreement is already being arbitrated, and that the dispute *sub judice* concerns only “post-contractual issues” that do not arise out of, or relate to, the 2007 Agreement. Thus, DOAR submits that that this action is

based exclusively upon the 2009 Agreement which does not contain an arbitration clause and, accordingly, the Court should deny USE's application to stay this action and compel the parties to proceed to arbitration.

RULING OF THE COURT

CPLR § 7501, titled "**Effect of arbitration agreement**" provides:

A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

Generally, it is for the courts to make the initial determination whether a particular dispute is arbitrable, that is whether the parties have agreed to arbitrate the particular dispute. *Nationwide General Insurance Company v. Investors Insurance Company of America*, 37 N.Y.2d 91, 95 (1975) quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570-71 (1960). The ultimate disposition of the merits, however, is reserved for the arbitrator and the courts are expressly prohibited from considering whether the claim regarding which arbitration is sought is tenable, or otherwise passing on the merits of the dispute. *Nationwide General*, *supra*, at 75, citing CPLR § 7501.

With regard to the scope of an arbitration clause, a broad arbitration clause should be given the full effect of its wording in order to implement the intention of the parties. *Weinrott v. Carp*, 32 N.Y.2d 190 (1973). A court may exclude a substantive issue from issues that are submitted to an arbitrator only if the arbitration clause itself specifically enumerates the subjects intended to be put beyond the arbitrator's reach. *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299 (1984). Additionally, where there is a broad arbitration clause, all questions with respect to the validity and effect of subsequent documents purporting to work a modification or termination of the substantive provisions of their original agreement are to be resolved by the arbitrator. *Schlaifer v. Sedlow*, 51 N.Y.2d 181 (1980); *Inryco, Inc. v. Parsons & Whittemore Contractors Corp.*, 55 N.Y.2d 666 (1981).

In the instant matter, the arbitration clause provides as follows:

Any controversy or claim arising out of or relating to this agreement, or breach

thereof, shall be settled by arbitration in New York County before one arbitrator under the Commercial Arbitration Rules of the American Arbitration Association, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The prevailing party in the arbitration shall be entitled to payment of its legal fees by the other parties and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Mazer Aff. in Supp. at Ex. B

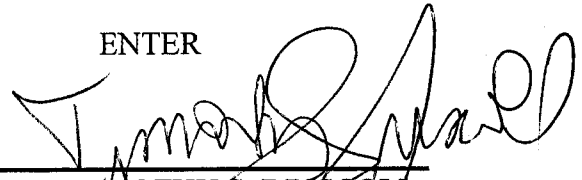
The arbitration clause dictates that the parties must proceed to arbitration, particularly when that clause is viewed through the prism of the parties' history as set forth in the motion papers. This action is predicated upon USE's purported failure to remunerate DOAR for its continued maintenance of the database, which was the subject of the 2007 Agreement. Thus, the instant dispute necessarily relates to the 2007 Agreement, which is clearly governed by the above-cited arbitration clause. Moreover, the validity and/or effect of the Notice that DOAR issued, which purportedly terminated the 2007 Agreement, is also clearly within the province of the arbitrator. Accordingly, the Court grants the Defendant's application, stays the instant action, and directs the parties to proceed to arbitration.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
January 5, 2010

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

JAN 13 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE