

Quitko v Kapiloff

2010 NY Slip Op 30128(U)

January 11, 2010

Supreme Court, Nassau County

Docket Number: 017769-09

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
**HARVEY QUITKO and TOTAL SENIOR
SOLUTIONS, INC.,**

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

Plaintiffs,

**Index No: 017769-09
Motion Seq. No: 1
Submission Date: 11/23/09**

-against-

**GERALD KAPILOFF, THERESA THOMPSON,
QUANTUM LIFE SETTLEMENTS, LLC, and
ALANTRA LIFE SETTLEMENTS, LLC,**

Defendants.

-----X

The following papers having been read on this motion:

- Notice of Motion, Affidavit in Support, Affirmation in Support,
Exhibits and Memorandum of Law.....X**
- Affirmation in Opposition and Exhibit.....X**

This matter is before the Court for decision on the motion filed by Defendants Gerald Kapiloff, Theresa Thompson, Quantum Life Settlements, LLC and Alantra Life Settlements, LLC on October 14, 2002 and submitted on November 23, 2009. For the reasons set forth below, the Court grants the motion, dismisses the Verified Complaint, and directs the parties to proceed to arbitration, as provided in their agreements.

BACKGROUND

A. Relief Sought

Defendants Gerald Kapiloff (“Kapiloff”), Theresa Thompson (“Thompson”), Quantum Life Settlements, LLC (“Quantum”) and Alantra Life Settlements, LLC (“Alantra”) (collectively

“Defendants”) move for an Order, pursuant to CPLR §§ 3211(a)(1) and 7503, dismissing this action and/or compelling arbitration. Plaintiffs Harvey Quitko (“Quitko”) and Total Senior Solutions, Inc. (“TSS”) (collectively “Plaintiffs”) oppose Defendants’ application.

B. The Parties’ History

Defendants provide an Affidavit in Support of Thompson dated October 6, 2009 in which she affirms as follows:

Thompson is the Managing Member of Alantra,¹ a company that is involved in the insurance area. Alantra is located and licensed in the State of New Jersey, and maintains no offices or facilities in other states. Defendants sometimes work with individuals who are not Alantra employees.

An Alantra representative met Quitko, and determined that it might be beneficial for them to work together. In anticipation of that working relationship, Alantra, Quitko and Alantra executed a Marketing Agreement dated August 20, 2007 (“Marketing Agreement”) (Ex. A to Affirmation in Support). Thompson signed the Marketing Agreement in her capacity as Managing Member of Alantra, and Quitko signed the Marketing Agreement in his capacity as President of TSS.

To ensure that it would not have to defend any claims at a location far from its office, Alantra included provisions in the Marketing Agreement stating that 1) the transactions would be governed by New Jersey law; and 2) any disputes would be resolved by arbitration in New Jersey. Section 8.4 of the Marketing Agreement, titled “Choice of Law,” provides as follows:

This Agreement shall be construed and interpreted according to the laws of the State of New Jersey, without regard to the conflict of law principles thereof. Each of the Parties thereto hereby irrevocably agrees that any action, suit or proceedings with respect to this Agreement shall be brought before the exclusive jurisdiction of the federal and state courts located in the County of Bergen in the State of New Jersey. Each of the Parties hereto hereby submit to such exclusive jurisdiction.

Section 8.5 of the Marketing Agreement, titled “Arbitration,” provides as follows:

All controversies and claims arising under or relating to this Agreement are to be

¹ Thompson affirms that she is the Managing Member of “the Defendant Quantum Life Settlements, LLC d/b/a Alantra life Settlements” (Affidavit in Support at ¶ 3), although the caption lists Quantum and Alantra as separate entities.

resolved by arbitration in accordance with the rules of the American Arbitration Association before a panel of three arbitrators selected in accordance with those rules. The arbitration is to be conducted in Hackensack, New Jersey, U.S.A. The arbitrators are to apply New Jersey law, without regard to its choice of laws principles. Each Party shall submit to any court of competent jurisdiction for purposes of the enforcement of any award or judgment. Any award, order or judgment pursuant to the arbitration is final and may be entered and enforced in any court of competent jurisdiction.

Thompson affirms that, as a result of disagreements that arose between Alantra and Quitko/TSS, the parties executed two additional agreements. On October 2, 2008, Alantra and Quitko/TSS entered into an agreement regarding the payment of certain credit card bills for credit cards in the names of Quitko and Thompson (Ex. B to Affirmation in Support). That agreement (“Quantum Life Agreement”) states that it is “between Harvey Quitko and Quantum Life Settlements, LLC and/or Alantra Settlements Corp. Or [sic] Alantra Life Settlements LLC.” Thompson signed the Quantum Life Agreement in her capacity as Managing Member and/or President on behalf of Quantum Life Settlements, Alantra Settlement Corp. and Alantra Life Settlements, LLC. Quitko signed the Quantum Life Agreement, which contains his name and the words “Vice President” under his signature.

The final paragraph of the Quantum Life Agreement provides as follows:

In the event of any dispute, this agreement will fall under the laws of the State of New Jersey and any suit must be filed in the State of New Jersey, Bergen County through the American Arbitration Association for which they will oversee any dispute.

Thompson affirms, further, that on December 10, 2008, Alantra and Quitko/TSS entered into a Loan Repayment Agreement (“Repayment Agreement”) (Ex. C to Affirmation in Support). The Repayment Agreement states that it is “between Total Senior Solution, Inc. a New York Corporation and Harvey Quitko, President of said corporation, herein known as the ‘Lender,’ to Alantra Life Settlements, LLC d/b/a Quantum Life Settlements, a New Jersey limited liability company, herein known as the Borrower.”

The Repayment Agreement sets forth the loans that the Plaintiffs made to Defendants, as well as the terms and conditions for the repayment of those loans. It also provides that, in the even of Defendants’ failure to make a timely payment, there is a period during which they may

cure the default. The Repayment Agreement then provides:

In the event of further breach, either party must seek relief for any damages resulting from such breach, remedy [sic] through the American Arbitration Association and which shall be arbitrated in Hackensack, Bergen County, New Jersey.

Quitko signed the Repayment Agreement in his capacity as President of TSS, and individually with respect to the confidentiality provisions.

In the Verified Complaint (“Complaint”) dated August 24, 2009, Plaintiffs allege that between September 2007 and December 2008, the parties entered into agreements to participate in a joint venture involving the sale and servicing of insurance policies, primarily in New York and New Jersey (Complaint at ¶ 14). The Complaint contains six causes of action: 1) fraud, 2) breach of contract, 3) quasi-contract/*quantum meruit*, 4) account stated, 5) breach of fiduciary duty in connection with the joint venture, and 6) request for an accounting. These causes of action are based on Plaintiffs’ allegations that Defendants breached their agreements with Plaintiffs in connection with this joint venture by, *inter alia*, 1) making misrepresentations to Plaintiffs that induced them to invest funds in the joint venture that Defendants improperly converted to their personal use; 2) failing to pay Plaintiffs their fair share of commissions; and 3) failing to procure business and potential customers on behalf of the parties.

The Complaint also alleges that Quitko resides in Suffolk County, New York and TSS is a corporation with its principal place of business in Nassau County, New York.

C. The Parties’ Positions

Defendants submit that it was the parties’ intent to submit any disputes arising from the parties’ transactions to arbitration in New Jersey, and to apply New Jersey law to the resolution of those disputes. Defendants contend that, in light of the arbitration and forum selection clauses in the relevant Agreements, the Court should dismiss the Complaint and/or direct the parties to proceed to arbitration in Hackensack, New Jersey.

Plaintiffs oppose Defendants’ application, submitting that 1) given the breadth and complexity of the allegations in the Complaint, the forum selection and arbitration clauses in the parties’ Agreements, which Plaintiffs characterize as narrowly-tailored, should not apply to this action; and 2) assuming, *arguendo*, that the forum selection and arbitration clauses in the Agreements apply to this action, the Court should set those clauses aside because they are

unreasonable and violate public policy.

RULING OF THE COURT

I. Legal Principles

A. Standards for Dismissal Based on Documentary Evidence

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

B. Arbitration

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.

CPLR § 7503(a) provides as follows:

A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502 [addressing limitations of time], the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

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*, 37 N.Y.2d at 95, 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).

C. Forum Selection

In support of their motion with respect to the forum selection clause, Plaintiffs cite, *inter alia*, *Horton v. Concerns of Police Survivors*, 62 A.D.3d 836 (2d Dept. 2009), *lv. app. den.* 13 N.Y.3d 706 (2009). In *Horton*, the court confirmed the principles that 1) the parties to an agreement may freely select a forum that will resolve any disputes over the interpretation or performance of the contract; and 2) such a forum selection clause is *prima facie* valid and enforceable unless the challenging party demonstrates that a) it is unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching; or b) trial in the selected forum would be so gravely difficult that the challenging party would effectively be deprived of its day in court. *Id.* at 836.

The plaintiff in *Horton* argued that, because she was a single mother who resided with her teenage daughter in Dutchess County, New York, enforcement of the forum selection clause in her employment agreement that required disputes to be decided in the courts of the State of Missouri would be unjust. 62 A.D. 3d at 836-837. In light of the facts that 1) plaintiff offered no evidence that the cost of commencing a wrongful discharge action in Missouri would be so financially prohibitive that it would effectively deprive plaintiff of her day in court; 2) plaintiff did not allege that the inclusion of a forum selection clause in her employment contract was the product of overreaching; and 3) plaintiff did not demonstrate that the clause in question was unconscionable, the court in *Horton* modified the lower court's order by granting defendant's motion to dismiss the complaint based on a forum selection clause. *Id.*

II. Application of these Principles to this Case

The Court concludes that the arbitration provisions in the Agreements are enforceable, and applicable to the allegations in the Complaint. By way of example, the Repayment

Agreement addresses money that Plaintiffs lent to Defendants, and the terms for repayment of those loans. The Complaint alleges that Plaintiffs provided Defendants with money that Defendants improperly diverted to their personal use. These issues are obviously related, if not identical, and the arbitration clause in the Repayment Agreement is therefore applicable to disputes regarding those moneys. Similarly, the issues addressed in the other Agreements are related to the allegations in the Complaint.

The Court also concludes that the parties in the matter *sub judice* freely selected a forum for the resolution of any disputes regarding the interpretation or performance of their Agreements, and that the applicable forum selection clauses are valid and enforceable. Plaintiffs' travel from New York to the neighboring state of New Jersey to address these disputes would not be so gravely difficult as to effectively deprive Plaintiffs of their day in court.

In light of the foregoing, the Court dismisses the Complaint and directs the parties to proceed to arbitration, as provided for in the parties' Agreements.

ENTER

DATED: Mineola, NY
January 11, 2010


HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JAN 15 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE