

Recco Home Care Servs., Inc. v Recco

2010 NY Slip Op 30516(U)

March 2, 2010

Supreme Court, Nassau County

Docket Number: 022046-08

Judge: Timothy S. Driscoll

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

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X

RECCO HOME CARE SERVICES, INC.,

Petitioner,

- against -

**For an Order Pursuant to Article 75 of the
CPLR Staying Arbitration of a Certain Controversy**

- against -

MICHAEL RECCO,

Respondent.

-----X

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

**Index No: 022046-08
Motion Seq. Nos: 2, 3 & 4
Submission Date: 1/6/10**

The following papers have been read on these motions:

- Order to Show Cause, Affirmation in Support,
Affidavit in Support and Exhibits.....X**
- Respondent's Memorandum of Law in Support.....X**
- Affirmation in Opposition and Exhibit.....X**

- Order to Show Cause, Affirmation in Support,
Affidavit in Support and Exhibit (transcripts).....X**

- Notice of Cross Motion, Affirmation in Support/Opposition and Exhibits....X**
- Petitioner's Memorandum of Law in Support/Opposition.....X**
- Affirmation in Opposition/Reply.....X**

This matter is before the Court for decision on 1) the Order to Show Cause filed by Respondent Michael Recco on March 20, 2009, 2) the Order to Show Cause filed by Respondent

Michael Recco on October 28, 2009, and 3) the Cross Motion filed by Petitioner Recco Home Care Services, Inc. on November 5, 2009, all of which were submitted on January 6, 2010. For the reasons set forth below, the Court 1) denies Respondent's two Orders to Show Cause; 2) grants Petitioner's cross motion; 3) vacates the stay of arbitration issued on December 11, 2008; 4) directs the parties to proceed with arbitration with respect to their dispute; and 5) discontinues this action pursuant to CPLR § 3217(b).

BACKGROUND

A. Relief Sought

In Motion Sequence Number 2 ("First Order to Show Cause"), Respondent Michael Recco ("Michael" or "Respondent") moves for an Order 1) reinstating Respondent to the position of employment he occupied prior to October 15, 2008 with Petitioner Recco Home Care Services, Inc. ("Recco" or "Petitioner"); 2) permitting Michael to return to the job he occupied prior to October 15, 2008; and 3) reinstating Michael's salary of \$5,500 per week.

In Motion Sequence Number 3 ("Second Order to Show Cause"), Respondent moves, pursuant to CPLR § 1201, for an Order appointing a guardian *ad litem* for Norma Recco ("Norma"), the principal of Recco, on the grounds that she is incapable of adequately exercising her rights with respect to this litigation.

In Motion Sequence Number 4, Petitioner moves for an Order 1) lifting the stay of arbitration and referring this matter to arbitration; and 2) discontinuing this action pursuant to CPLR § 3217(b); or 3) striking Respondent's discovery demand dated October 28, 2009 or, in the alternative, issuing a protective order pursuant to CPLR § 3103(a).

B. The Parties' History

In support of his First Order to Show Cause, Respondent provides an Affidavit in Support of Michael dated March 6, 2009 in which he affirms as follows:

Norma, his mother, is the president of Recco. Michael began working for Recco in 1991. Beginning in 2006, his salary was increased to \$5,500 weekly and he was given the job title of Executive Budget Analyst Director. His duties for Recco included paying bills and supervising the payroll, accounts payable and vendor contracts. He provides pay stubs from 2008 confirming his salary.

In or about July 27, 2007 Michael signed an Employment Agreement (“Agreement”) that Norma signed in her capacity as President of Recco. Since the execution of that document, Norma denied signing the Employment Agreement, prompting the instant litigation.

On October 15, 2008, Frank Recco (“Frank”), Michael’s brother and an employee of Recco, advised Michael that he was no longer employed by Recco, at which time Michael left Recco (“Firing”). At her deposition, Norma testified that she did not authorize anyone, including Frank, to fire Michael. Michael’s firing has caused a financial hardship to him, as he has been unable to pay his household expenses, including those for his three minor children. Michael affirms that he is ready and willing to return to work.

Following the Firing, Michael’s Counsel made a Demand for Arbitration (“Demand”) dated November 26, 2008 (Ex. B to Aff. in Support). The Demand includes a copy of the Agreement dated July 33, 2007, which is signed by Michael and purportedly signed by Norma in her capacity as President of Recco. Paragraph 5 of the Agreement, titled “Arbitration of Disputes” (“Arbitration Provision”) provides that Michael and Recco agreed that any disputes regarding Michael’s termination would be subject to binding arbitration.

On December 11, 2008, Petitioner filed an Order to Show Cause in this matter (Motion Sequence Number 1), along with a Verified Petition to Stay Arbitration. On December 11, 2008, Justice Leonard B. Austin stayed the Arbitration and 1) outlined the scheduling of the depositions of Norma, Michael, Frank as well as Robert M. Leff, Esq. who was involved in drafting the Agreement; 2) directed that the original Agreement would be made available for inspection by the parties; and 3) directed that certain documents be produced in connection with the anticipated examination of the Agreement by a forensic expert. Michael’s counsel affirms that the depositions of Norma and Michael have been completed. Norma’s deposition took place on January 28 and February 24, 2009.

Norma testified at her deposition, *inter alia*, that 1) she had been the President of Recco for thirty five (35) years; 2) Michael’s duties at Recco in 2008 included paying bills and invoices; 3) nothing in Recco’s personnel files reflected that Michael performed his job poorly in October of 2008; 4) Michael did not perform in any way that was adverse to Recco in 2008; 5) Norma did not fire Michael; 6) Frank fired Michael but was not authorized to do so; 6) Norma believed that

Michael should not have been fired; 7) Norma told Frank that she wants to continue to pay Michael; and 8) Frank does not have the authority to decide whether Recco pays someone.

On March 6, 2009, Michael's counsel sent an e-mail to Petitioner's counsel in which he asked that Michael be reinstated at Recco. By letter dated March 12, 2009 (Ex. G to Aff. in Support), counsel for Petitioner advised counsel for Respondent that 1) Recco would not accept Michael back as an employee; and 2) Recco did not owe Michael money and would not provide him with any payment. Recco did agree to continue Michael's medical benefits. Counsel for Respondent submits that Norma is being "manipulated and controlled without her knowledge" (Aff. in Support at ¶ 31).

In Recco's Affirmation in Opposition, counsel for Recco submits that Norma's deposition testimony is irrelevant because Norma was not in charge of Recco when she provided that testimony. Pursuant to a Power of Attorney ("Power") executed in October of 2008, Norma designated Frank and Taryn Birkmire as her attorneys-in-fact.

Recco's counsel submits that, if Norma's signature on the Agreement is determined to be valid, then Michael's claim may proceed to arbitration. If, on the other hand, Norma's signature is determined to be a forgery, then Michael may seek his remedies in a court of law. Recco's counsel submits that there are no exigencies warranting injunctive relief.

In support of his Second Order to Show Cause, Michael provides an Affidavit in Support dated October 20, 2009 in which he affirms as follows:

Michael submits that Norma's deposition testimony on February 24, 2009 demonstrated her reduced mental faculties, and the need for the appointment of a guardian *ad litem* to represent her. Michael points to the following testimony of Norma in support of his contention, at pp. 113-115 of her deposition testimony (Ex. A to Aff. in Support):

Q: You testified earlier that Michael sued you. Are you aware that you've sued Michael?

A: No.

Q: Did your attorney ever discuss with you that you're suing Michael in a separate action?

A. I don't recall having that...

Q. How about Frank Recco, did he ever tell you that you're suing Michael?

A. No.

Michael affirms that, following the above testimony, Recco's counsel requested a recess and spoke privately with Norma for one half hour, at which time there was the following colloquy (pp. 114-115):

[Recco's counsel]: [Norma] would like to correct something she said.

[Michael's counsel]: I'm sure she would. Let me ask the question.

[Recco's counsel]: Well, wait a minute. She wants to make a correction.

[Michael's counsel]: Let the record reflect that we broke and you guys talked for half an hour.

[Recco's counsel]: Yes. [Norma] and I. No one else spoke to [Norma].

[Michael's counsel]: Basically you told her what to say, and now she's going to tell me.

[Recco's counsel]: No. I had a conversation with [Norma]. And I don't appreciate that last comment, [counsel]. [Norma] wants to correct something on the record. Go ahead.

A: I most certainly do, because the lawsuit is something that needs to be done.

Q: What are you talking about?

A: I think that Manny has to straighten out some of the issues that have occurred.

But in the midst of all of this, I'm sure that Michael wants everything to be resolved. I cannot hurt my son. I want him to be able to get his life back.

Michael further directs the Court to Norma's testimony, *inter alia*, that 1) until the date of her deposition, she was not aware of the allegations in the complaint; 2) as reflected in the testimony referred to above, Frank did not have the authority to fire Michael; and 3) in 2008, although she told her attorneys that she wanted Michael to be a trustee for Recco, he was never made a trustee. Michael also avers that, following his Firing, Frank ordered Norma's home aides not to permit Michael or his children to visit or speak with Norma.

Michael's counsel affirms that, although the Power was executed on October 15, 2008, he was not advised of the existence of the Power until after Norma's first deposition on

January 28, 2009. Counsel for Michael submits that Recco's counsel did this intentionally so that Michael's counsel would not question her about the circumstances of the execution of the Power. Michael submits that the appointment of a guardian *ad litem* is appropriate in light of Norma's alleged inability adequately to prosecute her rights with respect to this lawsuit.

Counsel for Recco submits an Affirmation in Support of Recco's cross motion in which he affirms as follows:

The only issue before the Court is the validity of the Agreement, which contains an Arbitration provision. The handwriting expert has determined that Norma signed the Agreement, and Recco has elected not to contest that determination. In light of that determination, and the Arbitration Provision, this matter should now proceed to Arbitration and the Court need not consider Michael's application for the appointment of a guardian *ad litem* with respect to Norma as that application is now moot.

Michael opposes Recco's motion, submitting that the Court should render a determination on Michael's petition for the appointment of a guardian *ad litem*. Counsel contends that this issue is one that the Court, and not an arbitrator, must decide. Thus, Michael submits, the Court should require Recco to respond to Michael's discovery demands.

C. The Parties' Positions

With respect to the First Order to Show Cause, Respondent submits that he has established that Petitioner is wrongfully preventing him from returning to work. Respondent contends that he has demonstrated a likelihood of success on the merits, irreparable harm without injunctive relief and a balancing of the equities in his favor warranting injunctive relief.

With respect to the Second Order to Show Cause, Respondent submits that, notwithstanding the applicable Arbitration Provision, the appointment of a guardian *ad litem* is appropriate in light of Norma's alleged inability adequately to prosecute her rights with respect to this lawsuit.

In its cross motion, Petitioner submits that, in light of its decision not to contest further the validity of the Employment Agreement, this matter should now proceed to Arbitration and Michael's application for the appointment of a guardian *ad litem* with respect to Norma is now moot.

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. See *White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Arbitration

Arbitration is favored in New York State as a means of resolving disputes, and courts should interfere as little as possible with agreements to arbitrate. *Shah v. Monpat Construction*, 65 A.D.3d 541, 543 (2d Dept. 2009). The Court must determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement. *Sisters of Saint John the Baptist v. Geraghty*, 67 N.Y.2d 997, 999 (1986). The Court's inquiry ends, however, when the requisite relationship is

established between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate. *Id.*

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).

C. Appointment of a Guardian *ad Litem*

CPLR § 1201 authorizes the Court, *inter alia*, to appoint a guardian *ad Litem* for an adult incapable of inadequately prosecuting or defending his rights. A court may appoint a guardian *ad litem* at any stage of an action in which an adult is incapable of adequately prosecuting or defending his or her rights, even when no formal adjudication of incompetence has been made. *Matter of John Doe*, 184 Misc. 2d 519, 521 (Sup. Ct. Queens Cty. 2000), citing, *inter alia*, *Tudorov v. Collazo*, 215 A.D.2d 750 (2d Dept. 1995), *app. disp.*, 92 N.Y.2d 846 (1998). While CPLR § 1202 authorizes the court “in which an action is triable [to] appoint a guardian *ad litem* at any stage in the action,” the clear language of this statutory provision presupposes that an action is underway in the court in which the appointment of a guardian *ad litem* is being sought. *Id.*

In *Matter of John Doe, supra*, counsel for the respondent in an arbitration proceeding before the New York Stock Exchange asked the court to appoint a guardian *ad litem* for respondent in conjunction with the arbitration, whom counsel claimed was of unsound mind and incapable of managing his affairs. *Id.* at 519. The court denied the application, concluding that the original and general jurisdiction of the Supreme Court does not vest in the court the inherent authority to appoint a guardian *ad litem* over a respondent in a proceeding before a contractual

forum. *Id.* at 521.

Respondent in the matter *sub judice* seeks to distinguish the *John Doe* case on the grounds that 1) unlike the situation in *Doe*, there is clearly an action pending in the Supreme Court; and 2) there is no arbitration pending in the matter at bar. Respondent also argues that, in light of the fact that the rules of the American Arbitration Association do not authorize the arbitrator to appoint a guardian *ad litem*, it is appropriate for the Court to make this determination. Petitioner submits that, in light of its decision not to contest the determination that Norma signed the Employment Agreement, this matter should proceed to arbitration.

D. Application of these Principles to the Instant Action

Preliminarily, the Court determines that the nature of the dispute, which is the appropriateness of Michael's Firing, is a matter to which the Arbitration Provision applies. Petitioner filed its Petition based on its position, at the time, that Norma's signature on the Employment Agreement was invalid and, therefore, that the Arbitration Provision was inapplicable to the dispute at issue. Since the filing of the Petition, in light of the conclusion of an expert regarding the authenticity of Norma's signature, Petitioner has elected to withdraw his objection to the Employment Agreement.

The Court has reviewed and considered the testimony of Norma which, the Court concludes, is indicative of Norma being torn regarding her allegiance to her feuding children rather than her incapacity. Indeed, as discussed *infra*, Norma testified that, "in the midst of all of this, I'm sure that Michael wants everything to be resolved. I cannot hurt my son. I want him to be able to get his life back." This testimony demonstrates Norma's awareness of the significance of the Firing to Michael, and belies the notion that she is incapable of adequately prosecuting or defending her rights. Moreover, Norma provided testimony regarding relevant details including Michael's duties at Recco and his performance evaluation. Even assuming, *arguendo*, that the Court were authorized to appoint a guardian *ad litem* for Norma in light of the pending Petition, the Court concludes that the record does not warrant such an appointment. The arbitrator will have the opportunity to assess and consider the credibility of the witnesses at the Arbitration, including any bias or motive of a witness or witnesses that may bear on that credibility.

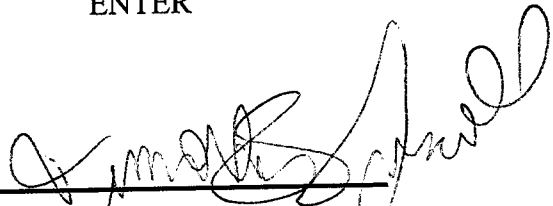
In light of the foregoing, the Court 1) vacates the stay of arbitration issued on December 11, 2008; 2) directs the parties to proceed with arbitration with respect to the Firing; and 3) discontinues this action pursuant to CPLR § 3217(b).

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
March 2, 2010


HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

MAR 08 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**