Comtex News Network, Inc. v McNulty

2010 NY Slip Op 31013(U)

April 19, 2010

Sup Ct, NY County

Docket Number: 103126/2008

Judge: Louis B. York

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SCANNED ON 4/27/2010

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

PRESENT: LOUIS B. YORK J.S.C. Justice PART 2

Index Number : 103126/2008
COMTEX NEWS NETWORK
VS.
MCNULTY, RICHARD A.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
APR 26 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/19/10

LOUIS B. YORK J.S.C.

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

Check one: FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST [ ] REFERENCE

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

COMTEX NEWS NETWORK, INC.,

Plaintiff,

Index No. 103126/2008

-against-

RICHARD A. MCNULTY,

Defendant.

LOUIS B. YORK, J.:

According to the complaint, plaintiff Comtex News Network, Inc. sells real-time news to financial and other business information distributors. Defendant Richard A. McNulty was plaintiff's business development manager commencing June of 2003. Plaintiff alleges that around July 2007, during his tenure with plaintiff, defendant also began working with Llesiant, Inc. ("Llesiant"), a competitor of plaintiff's. Apparently plaintiff terminated defendant's employment although this is not stated in the complaint. The complaint seeks $200,000 allegedly due to it as a result of defendant's breach of loyalty and of fidelity to plaintiff; and also, under the theory of unjust enrichment, it seeks a return of the $25,000 plaintiff paid to defendant in salary and commissions while defendant allegedly worked for Llesiant.

In his answer defendant admits that he worked for Llesiant while in plaintiff's employ. However, he denies that he possessed propriety information of plaintiff's and denies that Llesiant was in competition with plaintiff during the period in question. Therefore, he denies liability under all causes of action.

Currently defendant moves for dismissal under CPLR § 3211(a)(7) and/or CPLR § 3212. Alternatively he moves to compel discovery and/or to award sanctions against plaintiff based on discovery failures. As to the substantive prong of the motion, defendant annexes an arbitration agreement between the parties. The parties, C2 Portfolio, Inc. ("C2") and defendant, entered into

the agreement on September 15, 2003. According to defendant, C2 includes plaintiff's company. The agreement relates to all claims, disputes and controversies between C2 and defendant regardless of whether directly related to defendant's employment. Among others, the agreement to arbitrate includes claims for breach of contract or of any express or implied covenant. Defendant states that this agreement is binding here and therefore plaintiff's action must be dismissed.

Plaintiff asserts that despite the arbitration agreement the action should not be dismissed because defendant waived his right to enforce it by his extensive participation in the discovery and general litigation process. Plaintiff notes that it served defendant with the complaint on March 27, 2008 and that defendant filed his *pro se* answer on April 15, 2008. Starting in June of that year, the parties engaged in good faith settlement negotiations and on July 23, 2008 held a preliminary discovery conference in this Part. By this time, defendant had retained counsel, who participated in the conference on defendant's behalf and served a formal notice of appearance in August of 2008. The parties exchanged discovery after this point, although plaintiff found the documentary discovery to be deficient and brought a motion to compel. The Court denied the motion in January of 2009 based on plaintiff's disregard of the preliminary conference order and the court-mandated procedures it contains. Moreover, on July 1, 2009, when the parties missed all of the deadlines in the Court order and did not file a Note of Issue, the Court held a status conference at which the parties were faced with the possibility of sanctions. At this point defendant asserted the existence of the arbitration clause as a bar to litigation. It was after the conference that, with the Court's permission, defendant made this motion and plaintiff made this cross-motion for discovery and/or sanctions.

The State has a longstanding policy favoring arbitration and the Courts interfere as little as possible with agreements to arbitrate. Stark v. Molod Spitz Desantis & Stark, PC, 9 N.Y.3d 59, 66, 845 N.Y.S.2d 217, 221-22 (2007). However, as with all rights governed by contract, "a right to arbitration may be modified, waived or abandoned." Sherrill v. Grayco Builders, Inc., 64 N.Y.2d 261, 272, 486 N.Y.S.2d 159, 162 (1985). The parties can waive the agreement explicitly

or by other conduct, such as their participation in the litigation process. Id. at 66, 845 N.Y.S.2d at 222. Moreover, once the right to arbitration is waived, it cannot be regained. Ryan v. Kellogg Partners Institutional Serv., 58 A.D.3d 481, 481-82, 871 N.Y.S.2d 108, 108 (1st Dept. 2009).

A plaintiff commencing an action governed by the agreement has waived its right to rely on the arbitration clause. See De Sapio v. Kohlmeyer, 35 N.Y.2d 402, 405, 362 N.Y.S.2d 843, 846 (1974). The defendant, on the other hand, has not opted for litigation. However, if defendant participates in a lawsuit to the point that he has "manifest[ed] an affirmative acceptance of the judicial forum . . . his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory." Id. His participation in the lawsuit "for an unreasonable period without asserting the right to arbitrate, may [also may waive his] right to [rely on the arbitration clause]." Castellone v. JP Morgan Chase Bank, N.A., 60 A.D.3d 621, 623, 875 N.Y.S.2d 130, 132 (2nd Dept. 2009).

Plaintiff currently argues that defendant's participation in the litigation process is sufficient to constitute waiver of the argument. First, the Court notes that the parties' attempts to settle their dispute arguably does not waive defendant's right to enforce or otherwise rely on the arbitration clause. See Pena v. New York Mexicana Car & Limousine Serv. Corp., Index No. 23819/01 (Sup. Ct. Queens County March 14, 2002)(avail at 2002 WL 34435705, at p 4); but see Hart v. Tri-State Consumer, Inc., 18 A.D.3d 610, 612, 795 N.Y.S.2d 606, 608 (2nd Dept. 2005) (where party demanded arbitration only after settlement talks failed in lawsuit, party waived right to pursue arbitration). However, defendant's conduct does not consist of mere settlement negotiations or a pleadings failure. He answered the complaint pro se, participated in settlement negotiations; and when the negotiations failed he retained counsel. Through his counsel, he appeared at the preliminary conference on July 1, 2008. He served Interrogatories and a Notice of Discovery and Inspection on August 11, 2008. Defendant continued to participate in the

discovery process, serving an answer to plaintiff's discovery demands on around September 19, 2008. In opposition to plaintiff's discovery motion, defendant failed to raise the issue of the arbitration clause. It was only at an additional conference, held here July 1, 2009, that defendant articulated his objection to the judicial forum.

In response, defendant states that none of the above is relevant because defendant does not seek to compel arbitration but to dismiss the action, leaving plaintiff without any remedy. Defendant relies on Island Cash Register, Inc. v. Data Terminal Sys., Inc., 244 A.D.2d 117, 676 N.Y.S.2d 146 (1st Dept. 1998)("Island"), a First Department case, for the proposition that where a defendant seeks to dismiss the case outright rather than to compel arbitration his participation in the lawsuit is irrelevant. However, although defendant is correct that where the parties' contract provides that arbitration is the sole remedy, a motion to dismiss should be granted, see Chaudhry v. Vital Holding Co of NY Inc., 51 A.D.3d 844, 846, 858 N.Y.S.2d 740, 742 (2nd Dept. 2008), Island does not hold that a waiver argument should be disregarded regardless of a party's conduct. In Island, the defendant's "participation" in the lawsuit was limited to the filing of an answer to the complaint – an action which, without more, does not constitute acceptance of the judicial forum. See Flynn v. Labor Ready Inc., 6 A.D.3d 492, 493, 775 N.Y.S.2d 359, 359 (2nd Dept. 2004). The plaintiff in Island argued that the defendant had waived its arbitration argument because of its failure to raise arbitration as an affirmative defense in the answer. The Court noted that the affirmative defense of "arbitration and award" did not apply as there had been neither an arbitration nor an award. See Island, 244 A.D.2d at 121, 676 N.Y.S.2d at 148.[1]

Here, as already explained, defendant not only answered the complaint in April 2008 but participated in the lawsuit by appearing in court and participating in discovery. Significantly, too, he did not assert a challenge to the preliminary conference order based on the arbitration

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[1]For this reason, plaintiff's argument that defendant's failure to include the arbitration agreement as an affirmative defense waives the defense has no merit.

clause. His activity goes beyond the minimal participation in Island, in which the defendant answered the complaint and then made its motion to dismiss. Under these circumstances, an analysis of the equities, analogous to that applied in motions to compel, is proper.

Defendant argues that his failure to comply fully with the preliminary conference order or to appear for deposition strengthens his ability to rely on Island and establishes that it did not avail itself of the judicial forum. If in a timely fashion defendant had articulated an objection to the order based on the arbitration clause, his argument would have more merit. Instead, he allowed the order to stand and, as stated, waited until over a year after the original conference date to mention the arbitration clause. By the participation detailed above defendant availed himself of the litigation process and implicitly accepted the authority of the court's order even though he violated some of its terms. See St. Paul Travelers Co., Inc. v. Pelligrino, 36 A.D.3d 891, 892, 827 N.Y.S.2d 664, 664 (2nd Dept. 2007). His violation of portions of a court order indicates that his conduct was improper, not that he properly objected to the judicial forum. Moreover, to some extent he took advantage of the order, serving discovery demands and receiving discovery documents from his adversary. This enabled him to obtain discovery possibly not available to him through the arbitral forum. See Sherill v. Grayco Builders, Inc., 64 N.Y.2d 261, 273-74, 486 N.Y.S.2d 159, 164 (1985); The Accessory Corp. v. Capco Wai Shing, LLC, 39 A.D.3d 344, 345, 834 N.Y.S.2d 139, 139-40 (1st Dept. 2007)(in dicta, indicating that participation in the discovery process would have been sufficient to comprise waiver of right to rely on arbitration clause). Moreover, the lengthy delay in injecting arbitration into the controversy is unreasonable and sufficient to constitute a waiver of the argument. See Gabor v. Spicyn, 99 A.D.2d 1000, 473 N.Y.S.2d 457 (1st Dept. 1984); see also Ryan, 58 A.D.3d at 481, 871 N.Y.S.2d at 108 (involving delay coupled with participation in discovery process). Finally, defendant did not seek to dismiss until after this Court summoned him and plaintiff to a status conference in connection with their violations of the Court order. The fact that he did not raise

the argument with the Court until he faced possible sanctions also militates against granting his application to dismiss. Cf. Hadjioannou v. Avramides, 40 N.Y.2d 929, 931, 389 N.Y.S.2d 833, 834 (1976)(in dicta, in case in which plaintiff did not attempt to compel arbitration until defendant moved to dismiss). For all of these reasons, the Court concludes that defendant has availed himself of the judicial forum and therefore waived his right to rely on the arbitration clause in any capacity.

Plaintiff also has cross-moved for discovery and/or sanctions. This Court earlier scheduled a status conference to address all pending discovery issues, but adjourned the conference due to defendant's assertion of the arbitration argument. Now that the Court has denied the motion to dismiss, it grants the discovery motion to the extent of rescheduling the status conference. At the conference, the Court also will consider the parties' arguments as to why they did not follow the procedure set forth in the preliminary conference order and did not seek relief from this Court in a timely fashion. Then the Court will be better able to determine what discovery is proper at this juncture and to schedule an accelerated timetable for any appropriate discovery.

Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the cross-motion is granted to the extent of scheduling a status conference on Wednesday, May 26, 2010, at 2 p.m. in Part 2, 71 Thomas Street, room 205.

Dated: April 19, 2010

FILED

Enter: APR 26 2010

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LOUIS B. YORK, J.S.C.

LOUIS B. YORK
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