

Dinosaur Sec., L.L.C. v Townsend Analytics, Ltd.

2010 NY Slip Op 31849(U)

July 22, 2010

Supreme Court, New York County

Docket Number: 108387/2009

Judge: Jane S. Solomon

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

PRESENT: Hon. JANE B. SOLOMON, Justice PART 55

D. No Savv Securities
-v-
Towseand Analytics

INDEX NO. 10838709
MOTION DATE 2/22/10
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	<u>1-3</u>
Answering Affidavits - Exhibits _____	<u>4-6</u>
Replying Affidavits _____	<u>7-8, 9-10, 11-12</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed memorandum Decision and Order.

FILED
JUN 29 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/22/10

Jane B. Solomon, J.S.C.
JANE B. SOLOMON

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER/JUDG.

Form 16: Standard Form Order (Gray Sheet)

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

DINOSAUR SECURITIES, L.L.C.,
Plaintiff,

Index No. 108387/2009
DECISION AND ORDER

-against-

TOWNSEND ANALYTICS, LTD.,
Defendant,

FILED
JUN 29 2010
COUNTY CLERK'S OFFICE
NEW YORK

-----X

SOLOMON, J.:

Plaintiff Dinosaur Securities, LLC. (Dinosaur) sues for rescission of a software license agreement (the Agreement) it made with defendant Townsend Analytics, LTD. (Townsend) based on a claim of fraud in the inducement.

By motion (001) originally returnable on September 30, 2009, Townsend moved to dismiss the complaint under CPLR 3211(a)(7) for failure to state a cause of action. It argued that Dinosaur had not pleaded its fraud claim with sufficient particularity. The motion was denied by a decision dated November 30, 2009, which, noting that counsel were before the court, directed that defendant answer within 20 days. That decision also granted the oral application for *pro hac vice* admission to Robert W. Keddie, III (Keddie),¹ a New Jersey attorney affiliated with the law firm representing Townsend,

¹ Keddie's motion for admission (002) was pending at the time.

which firm has offices in both states.

Upon Keddie's affirmation and notice of motion dated December 11, 2009 Townsend brought the instant motion (003) for dismissal of the complaint under CPLR 3211(a)(2). By cross motion dated January 15, 2010, Dinosaur sought to hold Townsend in default for failure to answer, and for an order under 22 NYCRR 130-1.1, granting it attorneys fees for Townsend's alleged violation of the "one motion rule" in CPLR 3211(e).

It appears that an answer dated December 16, 2009 was timely prepared for Townsend; a copy was filed with this court's clerk on December 22 accompanied by an Affidavit of Mailing signed by Keddie, but lacking a notarization. This document dated December 17, includes the following text: "On December 18, 2009 I served, via Hand Delivery, a copy of the Verified Answer upon counsel for Plaintiff" It appears that Keddie did not know that all he had to do was get his New York office to deliver or mail a copy of the answer to Dinosaur's lawyer. Rather, he sent the document to a process serving business based near Syracuse, New York, which caused it to get to an employee in Brooklyn who never did deliver the document. Keddie seems to have learned of this when he received the cross motion.

After oral argument on February 22, 2010, the court issued an interim order denying Townsend's motion and the branch of Dinosaur's cross motion for default. The only issue

remaining is whether Townsend or its attorney, Robert W. Keddie, III (Keddie), should be sanctioned.

DISCUSSION

A review of the reasons behind the interim order is helpful in the determination of the sanction.

The relevant paragraphs of the parties' contract state:

21. GOVERNING LAW; EXCLUSIVE JURISDICTION. This Agreement is deemed to have been made and entered into in Chicago, Illinois, and all the rights and duties of the parties arising from or relating in any way to the subject matter of this Agreement or the transaction(s) contemplated by it, shall be governed by, construed and enforced in accordance with the substantive laws of the State of Illinois Any suit or proceeding relating to this Agreement shall be brought in the courts, state and federal, located in Chicago, Cook County, Illinois. LICENSEE AND ALL AUTHORIZED USERS HEREBY CONSENT TO THE EXCLUSIVE PERSONAL JURISDICTION AND VENUE OF THE COURTS, STATE AND FEDERAL, LOCATED IN CHICAGO, COOK COUNTY ILLINOIS.

* * *

25. ARBITRATION. Townsend and Licensee agree to submit any and all claims . . . arising out of or relating to this Agreement, or the failure or refusal to perform the whole or any part hereof, to arbitration The arbitration shall be held in Chicago, Illinois. . . . (Agreement, attached to Motion, Ex. B)

In the instant motion Townsend argued that paragraph 21 removes subject matter jurisdiction from this court. By its terms, however, the paragraph does not implicate subject matter jurisdiction, only venue and choice of law. Moreover, the decision in motion 001 held that the complaint sufficiently articulated the fraud claim. A fraud cause of action implicates

the validity of the very contractual obligation that Townsend relied on here (*see generally, Gordon v. Bialystocker Center*, 45 NY2d 692 [1978]). Accordingly, dismissal based on the language of paragraph 21 was unavailing. In any event, by bringing the first motion and not relying on paragraph 21 there, Townsend waived reliance on it for venue purposes.

Townsend next argued that the arbitration clause in paragraph 25 implicates subject matter jurisdiction, and so can be raised at any time, even in a second motion to dismiss. This may be true in some circumstances, but does not apply here. The Court of Appeals has stated that an arbitration clause, just like any other contract provision, can be waived (*Sherrill v. Grayco Bldrs*, 64 NY2d 261 [1985]).

The Court of Appeals in *Roggio v. Nationwide Mutual Ins. Co.*, 66 NY2d 260 (1985) stated that "[t]he courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration." Subsequently, the Court of Appeals has also held that "[a] litigant may not compel arbitration when its use of the courts is clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration" (*Stark v. Molod Spire DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007]). "[W]here the defendant's participation in the lawsuit manifests an affirmative acceptance

of the judicial forum, with whatever advantages it may offer in the particular case, his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory" (*DeSapio v. Kohlmeyer*, 35 NY2d 402, 405 [1974]). In case there is an "urgent need" to resolve an issue related to the arbitrable claim, the arbitration clause will not be waived (*Stark*, 9 NY3d at 66). There is no such need here.

Here, Townsend had actual knowledge of the arbitration clause. Instead of moving to stay this action pending arbitration or moving to dismiss the action based on the arbitration clause, Townsend first sought dismissal on grounds addressing the sufficiency of the pleading. In other words, Townsend attempted to gain a favorable resolution to this action in this court. When it did not, it sought to enforce the arbitration clause. Accordingly, Townsend's motion was denied. Then, the cross motion to hold it in default also was denied in order that Townsend not lose its day in court for its counsel's error regarding delivering the answer.


Based on the above, while Townsend's second pre-answer motion to dismiss did not invoke subject matter jurisdiction, it cannot be said to have been frivolous within the meaning of section 130-1.1 of the Rules of the Chief Administrator (22

NYCRR § 130-1.1).²

Nevertheless, Keddie's unfamiliarity with New York's rules and practices for service of the answer created needless litigation. Accordingly, Dinosaur is entitled to recover the costs of the cross motion which was occasioned by what nicely may be described as the service mishaps. The sum of \$500 seems appropriate recompense. It hereby is

ORDERED that Dinosaur's cross motion is granted to the extent that it is awarded \$500 in costs, to be taxed in its favor at the close of the case.

Dated: June 22, 2010

Enter: 

J.S.C.

JANE B. BELTON

FILED
JUN 29 2010
COUNTY CLERK'S OFFICE
NEW YORK

² Section 130-1.1 gives the court discretion to award costs and reasonable attorney's fees resulting from frivolous conduct. Frivolous conduct is defined as being completely without merit in law or fact, undertaken to delay or prolong the resolution of the litigation, or if it asserts material factual statements that are false (22 NYCRR § 130-1.1[c]).