

Matter of Maller v Arrowhead Golf Club, LLC

2010 NY Slip Op 33107(U)

October 25, 2010

Supreme Court, New York County

Docket Number: 600998/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 600998/2010
MALLER, BRANT K.
VS.
ARROWHEAD GOLF CLUB LLC
SEQUENCE NUMBER : 001
COMPEL OR STAY ARBITRATION
CAL# 55

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

in this motion to/for stay arbitration

PAPERS NUMBERED
1, 2, 3, 4
5
6, 7

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)

Dated: 10/25/10

BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
Application of BRANT K. MALLER and
BRYAN CAVE LLP,

Index No. 600998/10

Petitioners,

Motion Date: 9/7/10
Motion Seq. No.: 001

-against-

DECISION AND JUDGMENT

ARROWHEAD GOLF CLUB, LLC,

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1434).

-----X
BARBARA JAFFE, JSC:

For petitioners:
Howard M. Rogatnick, Esq.
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New York, NY 10104
212-541-2000

For respondent:
Matthew Dollinger, Esq.
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Carle Place, NY 11514-9010
516-747-1010

By notice of petition dated April 19, 2010, petitioners move pursuant to CPLR 7502(b) and 7503(b)(1) for an order permanently staying the arbitration sought to be commenced by respondent and awarding them costs, disbursements, and attorney fees related to this proceeding. Respondent opposes the petition and, by notice of cross-motion dated May 28, 2010, moves pursuant to CPLR 3211(a)(1), (5), and (7) for an order dismissing the petition and denying petitioners' application to stay arbitration permanently, and directing the parties to proceed to arbitration forthwith and designating the American Arbitration Association (AAA) as the arbitral forum. Petitioners oppose the cross-motion.

On or about September 14, 2007, petitioners moved to compel the arbitration of respondent's claims against petitioners based on the arbitration clause in the parties' retention agreement. (Petition dated Apr. 19, 2010 [Pet.], Exh. 2; Affirmation in Opposition of Matthew

Dollinger, Esq., dated May 29, 2010 [Dollinger Aff., Exh. A). By decision and order dated April 14, 2008, another justice of this court granted petitioner's motion and dismissed respondent's complaint. (*Id.*, Exh. 4). Respondent appealed the April 2008 decision, and by decision and order dated February 26, 2009, the Appellate Division, First Department, affirmed. (*Id.*, Exh. 5). That same day, notice of entry of the decision was served on respondent, and by decision and order dated June 30, 2009, respondent's motion for leave to appeal to the Court of Appeals was denied. (*Id.*, Exhs. 6, 7).

On March 31, 2010, respondent sent to Bryan Cave an AAA "Submission to Dispute Resolution" form. (*Id.*, Exh. 8; Dollinger Aff.). By letter dated June 24, 2010, respondent served petitioners with a Notice of Intention to Arbitrate. (Affirmation of Scott H. Kaiser, Esq., dated July 2, 2010, Exh. 1).

Petitioners argue that the arbitration sought by respondent should be permanently stayed as the pertinent statutes of limitations have expired. (Petitioners' Memo. of Law, dated Apr. 19, 2010 [Pet. Memo.]). Respondent maintains that, having previously moved to compel arbitration, petitioners are barred by CPLR 7503(b) from moving to stay it. (Respondent's Memo. of Law, dated May 28, 2010 [Resp.'s Memo.]). In reply, petitioners deny that they are barred from seeking a stay as respondent's claims did not become time-barred until after the motion to compel was filed, thus precluding any knowing waiver of their right to a stay. (Petitioners' Reply Memo. of Law, dated July 2, 2010).

Pursuant to CPLR 7503(b), "a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or

that the claim sought to be arbitrated is barred by limitation.”

Here, having previously moved to compel arbitration, petitioners are barred by CPLR 7503(b) from now moving to stay it. (5 NY Jur 2d, Arbitration and Award § 123 [2010]). However, there remains an issue as to whether a party may nonetheless move to stay an arbitration it had previously moved to compel where, following the filing of the motion to compel, its opponent’s claims became time-barred.

Petitioners rely on *Marillo v Shearson Hayden Stone, Inc.*, 159 AD2d 1012 (4th Dept 1990), where the defendant’s motion to compel arbitration was granted, neither party commenced the arbitration and nothing happened until the plaintiff moved to compel it 10 years later. Finding that the plaintiff’s claim was time-barred, the court reversed the lower court’s order compelling the arbitration. However, as plaintiff had moved only to compel arbitration and as neither party made a motion to stay the arbitration, the court did not address CPLR 7503(b).

Petitioners also rely on *Matter of Finkelstein*, 17 AD2d 137 (1st Dept 1962), *lv denied* 12 NY2d 646 (1963), where the respondent moved to compel arbitration and, when neither party commenced the arbitration until the petitioner served its demand for arbitration six years later, moved for a stay on the ground that the petitioner’s claim had become time-barred. While the court found that the respondent had not waived its right to seek a stay, it relied on the former statutory provision in effect at the time, Civil Practice Act 1458-a which, in contrast to CPLR 7503(b), does not prohibit a party who had earlier moved to compel arbitration from thereafter moving to stay it. (See *Matter of Cohen*, 17 AD2d 279 [1st Dept 1962], *mod* 28 AD2d 1099 [1967] [quoting text of Civil Practice Act 1458-a]).

SCM Corp. v Fisher Park Lane Co., 40 NY2d 788 (1976), is not on point as there, no

motion to compel arbitration had been made. Rather, the party that had moved for a stay had previously only demanded arbitration and thus, CPLR 7503(b) was not applicable. And, as a stay was not sought in *Matter of Oriskany Cent. School Dist.*, 206 AD2d 896 (4th Dept 1994), *aff'd* 85 NY2d 995 (1995), CPLR 7503(b) was not discussed.

Although addressed by neither party, *Hartsdale Fire Dist. v Eastland Constr., Inc.*, 65 AD3d 1345 (2d Dept 2009), *lv denied* 14 NY3d 701 (2010), most closely addresses the issue. There, the petitioner's motion to compel arbitration was granted and the petitioner participated in preparing for the arbitration. Immediately before the arbitration commenced, however, the petitioner moved to stay it, asserting that the respondent had failed to serve it with a timely notice of claim, which was a condition precedent to maintaining the action against it. The court denied the stay, finding that the petitioner was estopped from seeking it given the inconsistency with its position in moving to compel, and rejected the dissenting judge's argument that because the facts relevant to the nonwaivable notice of claim defense had not arisen by the time the petitioner moved to compel arbitration, the stay should have been granted. Consequently, while CPLR 7503(b) was not addressed, the assertion that a party with a meritorious, nonwaivable, and recently arisen defense should not be estopped from moving to stay arbitration based on its having moved to compel and participated in preparing for the arbitration was rejected.

To the extent that *Hartsdale Fire* addresses the issue raised here, it binds me, and absent any authority clearly supporting petitioners' argument, they are precluded by CPLR 7503(b) from moving to stay the arbitration.

While petitioners complain that they are being denied an opportunity to obtain a dismissal based on the time-bar, they are precluded only from moving for a stay of arbitration and will be

able to challenge the timeliness of respondent's claims at the arbitration.

As no other ground has been raised on which a stay may granted here, respondent's cross-motion to, in effect, compel arbitration is granted to the extent reflected below.

IV. CONCLUSION

Accordingly, it is hereby

ADJUDGED, that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondent; it is further

ORDERED, that respondent's cross-motion is granted; it is further

ADJUDGED, that the parties are directed to proceed forthwith to arbitration; and it is further

ORDERED, that petitioners, within 10 days, serve a copy of this decision and judgment on the arbitral tribunal.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: October 25, 2010
New York, New York
OCT 25 2010

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the County Clerk's Office, Room 1000, 100 Nassau Street, New York, NY 10038. (212) 312-1200