

Miller v Katzen

2010 NY Slip Op 33809(U)

April 22, 2010

Sup Ct, NY County

Docket Number: 603066/09

Judge: Ira Gammerman

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

Index Number : 603066/2009

MILLER , KEITH

vs.

KATZEN, BRUCE

SEQUENCE NUMBER : 001

DISMISS ACTION

PART _____

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied in accordance*
with the accompanying memo decision.

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

RECEIVED
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 NYS SUPREME COURT - CIVIL

IRG

IRA GAMMERMAN

Dated: 4/22/10

IRG
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 27

----- X
KEITH MILLER, LAURENCE MILLER, ROBERT
COPE, and BREAKOUT TRADING, LLC,

Plaintiffs,

Index No. 603066/09
PC No. 23264

-against-

BRUCE KATZEN, PHILIPPE LIEBERMAN,
KLUGER, KAPLAN, SILVERMAN, KATZEN &
LEVINE, P.L., KLUGER, PERETZ, KAPLAN &
BERLIN, P.L., and BRUCE A. KATZEN, P.A.,

Defendants.

----- X

IRA GAMMERMANN, J.H.O.:

Plaintiffs' complaint alleges legal malpractice and seeks recovery of legal fees¹. The action arises out of defendants' prior representation of plaintiffs in an ongoing bankruptcy proceeding.² Defendants move to dismiss pursuant to CPLR 3211, or, in the alternative, to stay the action and compel arbitration pursuant to CPLR Article 75.

Background:

From 2003 to 2009, the parties entered into five retainer agreements pursuant to various different transactions, with each new agreement replacing and superceding the previous one. The fifth and final agreement contains an "Addendum" that sets out the parties' rights and obligations in the event of a dispute, addressing jurisdiction, venue, mediation and arbitration. Paragraph 17

¹ The specific allegation of malpractice are set forth in the complaint, and are not pertinent to this motion

² *In re MarketXT*, Case No. 04-12078 (Bankr SD NY).

of the Addendum provides that the parties' agreement shall be governed by Florida law.

Paragraph 18 states that, "[e]ach party hereto submits to the exclusive jurisdiction of the State courts of the State of Florida to enforce the dispute resolution procedures enumerated below and to confirm any award from the American Arbitration Association." As concerns the dispute resolution procedures, paragraph 19 (a) requires that "[a]ny dispute between the Firm [the defendants] or the Clients [the plaintiffs] shall first be submitted to mediation by written notice to the other party or parties prior to taking any further adversarial action against the other."

Paragraph 19 (b) provides that if any dispute relating to the retainer agreement or the legal services rendered in connection therewith is not resolved within 90 days after the initiation of the mediation process, "the mediation process shall terminate and the dispute shall be resolved exclusively by mandatory binding arbitration . . . conducted exclusively in Miami-Dade County in a proceeding conducted before and in accordance with the rules of the AAA."

Sometime after the parties entered into this final agreement, defendants submitted a bill for approximately \$50,000 that plaintiffs refused to pay. Defendants demanded payment by letter and advised that legal proceedings would be initiated if the outstanding balance remained unpaid; attached to the letter was a draft complaint that defendants purportedly intended to file in the event that the bill was not paid. Plaintiffs responded by initiating the instant action, after which defendants gave formal notice instituting mediation.

Defendants argue that the complaint must be dismissed as the parties contractually agreed to the exclusive jurisdiction of Florida state courts, and that in any event, the parties' agreement contains a binding mediation and arbitration clause so that even if jurisdiction in the Florida state courts is not exclusive, the present action must be stayed in favor of mandatory arbitration

proceedings before the American Arbitration Association. Plaintiffs argue that defendants waived arbitration by previously threatening plaintiffs with legal action and attaching a draft complaint to the letter threatening such action.

Discussion:

As required by the parties' agreement, Florida law governs this dispute. Both New York and Florida courts recognize the enforceability of mandatory forum selection clauses, *Boss v American Express Fin. Advisors*, 6 NY3d 242 (2006); *Golden Palm Hospitality, Inc. v Stearns Bank Natl. Assn.*, 874 So2d 1231 (Fla 5th DCA 2004). It is well-settled that "[a]s a general principle, a trial court must honor a mandatory forum selection clause in a contract in the absence of a showing that the clause is unreasonable or unjust [citation omitted]," *Aqua Sun Mgt., Inc. v Divi Time Ltd.*, 797 So2d 24 (Fla 5th DCA 2001).

Here, the parties' agreement vests exclusive jurisdiction in Florida state courts only with respect to "any action to enforce the dispute resolution procedures" enumerated in the agreement. In bringing the instant action, plaintiffs are not seeking to enforce the dispute resolution procedures, and thus, it would appear that a New York court does have jurisdiction to hear plaintiffs' malpractice action.

However, while jurisdiction to hear the claims may exist, the parties' agreement mandates mediation and arbitration of "any dispute arising from or related to . . . any and all legal services rendered" by defendants to plaintiffs, and therefore I am dismissing the present action in favor of the alternative dispute resolution procedures set forth in the agreement.³

³ I would normally stay an action when directing arbitration, not dismiss it. However, here, the mandatory forum selection clause in the parties' agreement vests jurisdiction to enforce any arbitration award exclusively in the Florida state courts.

Plaintiffs' contention that defendants waived arbitration is not persuasive. Waiver is "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right," *Raymond James Fin. Servs., Inc. v Saldukas*, 896 So2d 707 (Fla 2005). Florida courts have "long held that a party's contract rights [to enforce an arbitration clause] may be waived by actually participating in a lawsuit or taking action inconsistent with that right," *id.*, citing *Klosters Rederi A/S v Arison Shipping Co.*, 280 So2d 678 (Fla 1973). However, statements or threats by a party that it would start litigation or initiate legal action do not constitute such a waiver, *Executive Life Ins. Co. v John Hammer & Assocs., Inc.*, 569 So2d 855 (Fla 2d DCA 1990) (statements do not constitute action inconsistent with the right to arbitrate). Moreover, "[a]ll doubts regarding waiver should be construed in favor of arbitration rather than against it," *Marine Env'tl. Partners, Inc. v Johnson*, 863 So2d 423 (Fla 4th DCA 2003).

The cases cited by plaintiffs in support of their waiver argument are distinguishable, *see e.g. Raymond James*, 896 So2d 707, *supra* (waiver where party refused to arbitrate, repeatedly asserted no right of arbitration existed, and threatened suit to enjoin any arbitration proceeding); *Shoma Dev. Corp. v Rodriguez*, 730 So2d 838 (Fla 3d DCA 1999) (waiver where defendant actively participated in litigation for seven months); *Mike Bradford & Co. v Gulf States Steel Co.*, 184 So2d 911 (Fla 3d DCA 1966) (waiver where defendant, knowing of arbitration right, answered complaint without raising arbitration issue, brought counterclaims on the same contract, and allowed action to proceed for five months and a jury to be impaneled).

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed, and the parties are directed to proceed to mediation and arbitration in Florida, pursuant to the terms set

forth in their agreement; and it is further

ORDERED that the Clerk of Court is directed to enter judgment accordingly.

Dated: 4/22/10

ENTER:



J.H.O.

IRA GAMMERMANN