

Doar Litig. Consulting, LLC v U.S. Elecs., Inc.

2011 NY Slip Op 30329(U)

January 31, 2011

Sup Ct, Nassau County

Docket Number: 20396-09

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
DOAR LITIGATION CONSULTING, LLC,

TRIAL/IAS PART: 20
NASSAU COUNTY

Plaintiff,

Index No: 20396-09
Motion Seq. No: 2
Submission Date: 12/18/10

-against-

U.S. ELECTRONICS, INC.,

Defendant.

-----X

Papers Read on this Motion:

- Order to Show Cause, Affirmation in Support and Exhibits.....X
- Plaintiff's Memorandum of Law in Support.....X
- Affirmation in Opposition and Exhibits.....X
- Defendant's Memorandum of Law in Opposition.....X
- Reply Affirmation in Support.....X

This matter is before the court on the Order to Show Cause filed by Plaintiff Doar Litigation Consulting, LLP ("DOAR" or "Plaintiff") on November 22, 2010 and submitted December 8, 2010, following oral argument before the Court. For the reasons set forth below, the Court denies DOAR's Order to Show Cause in its entirety.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order compelling the deposition of Adam Rowland, Esq. ("Rowland") and Kevin O'Brien, Esq. ("O'Brien") of the law firm Dechert LLP ("Dechert") in connection with the pending arbitration ("Arbitration") between the parties.

Defendant U.S. Electronics, Inc. ("USE" or "Defendant") opposes Plaintiff's application.

B. The Parties' History

The parties' history is set forth in detail in the Court's prior decision dated January 5, 2010 ("Prior Decision") and accordingly will not be set forth again here. The Court incorporates that Prior Decision herein by reference.

In the Prior Decision, the Court granted Defendant's application to stay the instant action, and directed the parties to proceed to arbitration. In so ruling, the Court held as follows:

The arbitration clause dictates that the parties must proceed to arbitration, particularly when that clause is viewed through the prism of the parties' history as set forth in the motion papers. This action is predicated upon USE's purported failure to remunerate DOAR for its continued maintenance of the database, which was the subject of the 2007 Agreement. Thus, the instant dispute necessarily relates to the 2007 Agreement, which is clearly governed by the above-cited arbitration clause. Moreover, the validity and/or effect of the Notice that DOAR issued, which purportedly terminated the 2007 Agreement, is also clearly within the province of the arbitrator. Accordingly, the Court grants the Defendant's application, stays the instant action, and directs the parties to proceed to arbitration.

Prior Decision at p. 5

In his Affirmation in Support of the instant motion, Plaintiff's counsel affirms as follows:

The Arbitration directed by the Court in the Prior Decision is now pending. The contract ("Contract") that is the subject of the Arbitration was a three-party contract, pursuant to which DOAR was to provide litigation services as needed, and as directed by Dechert, as USE's attorney, in connection with litigation between USE and Sirius Satellite Radio. Shortly after DOAR began performing services under the Contract, Dechert asked DOAR to provide further services for USE and Dechert in connection with a then-pending arbitration referred to as the "Wistron" matter (Solomon Aff. at ¶ 3). After receiving assurances from Rowland and O'Brien that USE authorized Dechert to engage DOAR for the Wistron Matter, DOAR commenced work on the Wistron Matter.

The evidence presented in the Arbitration establishes that DOAR performed extensive work in the Wistron Matter. Two principal issues in the Arbitration are 1) USE's alleged refusal to pay DOAR for services it rendered on USE's behalf in the Wistron Matter, and 2) ownership of the database in that Matter which, according to the Contract, is owned by DOAR. USE takes the position that it never authorized DOAR to perform any work on the Wistron Matter and,

because there is no written agreement, it is not obligated to compensate DOAR for the services it provided. DOAR takes the position that the work it performed on the Wistron Matter is controlled by the terms of the Contract.

DOAR submits that Rowland had the authority to engage DOAR, and did engage DOAR, on the same terms and conditions set forth in the Contract. During the Arbitration, DOAR subpoenaed Dechert, requested documents relating to Dechert's communications with USE regarding DOAR's engagement and the scope of work performed, and requested that Rowland or O'Brien testify. By letter dated August 26, 2010, counsel for DOAR asked the Arbitrator to issue a subpoena ("Subpoena") to compel Dechert to appear and be examined, and USE opposed that request. By decision and order dated September 7, 2010 ("Arbitrator's Decision"), the Arbitrator denied DOAR's request (Ex. B to Solomon Aff.). In her Decision, the Arbitrator concluded that "the communications involved creating and using these databases affected commerce and, therefore, this Arbitration is covered by the FAA [Federal Arbitration Act]. Accordingly, the issuance of a prehearing subpoena is barred by [*Life Receivable Trust v. Syndicate 102 at Lloyds of London*, 549 F.3d 210 (2d Cir. 2008)] and DOAR's request for the issuance of a prehearing subpoena is denied" (Arbitrator's Decision at p. 2).

In his Affirmation in Opposition, counsel for USE affirms as follows:

Following DOAR's request for the Subpoena, the Arbitrator requested and received briefs from counsel for the parties on the appropriateness of the requested Subpoena. Counsel for DOAR argued in a letter to the Arbitrator dated September 1, 2010 (Ex. G to Mazer Aff.) that the Federal Arbitration Act ("FAA") was inapplicable because the underlying matter did not affect interstate commerce. DOAR contended that the case involves two New York-based entities, and that the work was performed in New York and to be used in New York. USE responded by providing the Arbitrator with documentary evidence, obtained from DOAR's document production, reflecting that a significant amount of work was performed out-of-state. See letter dated September 2, 2010, Ex. H to Mazer Aff. Moreover, USE noted, the database at issue was accessible over the internet, "undeniably a means of interstate commerce" (Mazer Aff. at ¶ 14).

In addition, prior to the Arbitrator's Decision, Dechert provided DOAR with approximately eight thousand (8,000) pages of emails and other documents, along with a

detailed privilege log. This documentation provides DOAR with evidence reflecting Dechert's involvement in the underlying transactions, and obviates the need for further discovery.

USE notes, further, that the Arbitrator received extensive briefing on USE's motion for summary judgment and DOAR's cross motion for summary judgment, which the Arbitrator denied. Thus, DOAR cannot now claim that they have insufficient evidence to present their case to the Arbitrator and there is no basis for relief pursuant to CPLR § 3012(c), assuming, *arguendo*, that provision is applicable.

USE also disputes DOAR's suggestion that USE's objection to the Subpoena stems from USE's concern that Dechert will not support USE's position, noting that Rowland and O'Brien are on USE's witness list (Ex. J to Mazer Aff.). Moreover, DOAR, albeit belatedly, provided its witness list (Ex. L to Mazer Aff.) which also includes Rowland and O'Brien. As it is anticipated that Rowland and O'Brien will testify at the Arbitration hearing, there is no need for the requested deposition.

C. The Parties' Positions

Plaintiff submits that, pursuant to CPLR § 3012(c), the Court should authorize the requested discovery in aid of the Arbitration. Plaintiff argues, *inter alia*, that 1) Dechert's testimony is "absolutely necessary" (P's Memorandum of Law at p. 4) to contest USE's claim that it never authorized Dechert to engage DOAR in the Wistron Matter; 2) the testimony sought is unavailable from any other source; and 3) the sole basis for the Arbitrator's denial of Plaintiff's application was her belief that she lacked the authority to compel the requested testimony.

Defendant opposes Plaintiff's application. Defendant contends, first, that this is DOAR's third attempt to obtain the Court's ruling on a matter that is properly resolved in the Arbitration. Defendant notes that the Arbitrator has ruled on numerous discovery issues, including whether she would order the deposition sought by Plaintiff in this application.

Defendant also argues that the Court does not have jurisdiction to entertain what is, in effect, an interlocutory appeal of the Arbitrator's discovery ruling. Even if the Court does have jurisdiction to entertain this application, depositions of non-parties in arbitrations are not permitted, absent extraordinary circumstances which are not present here given that 1) DOAR

has already received extensive documentary discovery from Dechert; and 2) DOAR may subpoena Rowland and O'Brien at the Arbitrating hearing.

RULING OF THE COURT

The FAA makes enforceable a written arbitration provision in a contract that “evidenc[es] a transaction involving commerce.” The phrase “involving commerce” is the functional equivalent of “affecting commerce.” *Carlton Hobbs Real Estate, LLC v. Sweeney & Conroy, Inc.*, 41 A.D.3d 214, 215 (1st Dept.), quoting 9 U.S.C.S. § 2; *Matter of Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 252 (2005).

Courts do not have jurisdiction to review interlocutory arbitration decisions, and may only intervene after there has been a final determination at the conclusion of the arbitration proceeding. *Local 100, Transport Workers Union of America v. AFL-CIO*, 237 A.D.2d 606, 607 (2d Dept. 1997), citing *Mobil Oil Indonesia v. Asamera Oil*, 43 N.Y.2d 276, 281-282 (1977), *reh. den.*, 43 N.Y.2d 846 (1978); CPLR §§ 7501, 7511. In *Local 100, supra*, the Second Department reversed the trial court’s determination that the arbitrator was without power to direct the parties to adhere to a prearranged arbitration schedule, concluding that the trial court lacked the statutory authority to vacate that “interlocutory procedural ruling.” *Id.*

A court should only order disclosure to aid in arbitration pursuant to CPLR § 3102(c) if extraordinary circumstances exist. *Travelers Indemnity v. United Diagnostic Imaging*, 73 A.D.3d 791, 791-792 (2d Dept. 2010), quoting *De Sapio v. Kohlmeyer*, 35 N.Y.2d 402, 406 (1974). That relief is sparingly granted. *Id.* at 792, quoting *De Sapio, supra*, at 406. The test for ordering disclosure to aid in arbitration is justified only where that relief is absolutely necessary for the protection of the rights of a party to the arbitration. *Id.*, quoting *Hendler & Murray v. Lambert*, 147 A.D.2d 442, 443 (2d Dept. 1989) (internal quotation marks omitted).

The Court declines to review the decision by the Arbitrator to deny DOAR’s application for the Subpoena, which the Court views as an interlocutory procedural ruling over which the Court has no statutory authority. Moreover, even assuming, *arguendo*, that the Court had the authority to review that determination, the Court would deny DOAR’s application for the Subpoena based on its conclusion that there are no extraordinary circumstances warranting the issuance of the Subpoena in light of the fact that 1) numerous documents have been exchanged

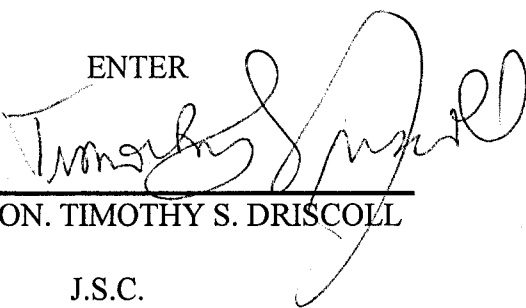
in the context of the Arbitration; and 2) DOAR may, and apparently intends to, call Rowland and O'Brien as witnesses at the Arbitration hearing.

In light of the foregoing, the Court denies DOAR's Order to Show Cause in its entirety.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
January 31, 2011

ENTER


HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
FEB 02 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE