

Savino v Krantz

2011 NY Slip Op 30469(U)

February 28, 2011

Supreme Court, Richmond County

Docket Number: 102487/10

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 102487/10
Motion No.: 1**

MICHAEL A. SAVINO, M.D.

Plaintiff

against

**RONALD S. KRANTZ, M.D.,
JEFFREY A. LESSING, M.D.,
and TODT HILL UROLOGIC GROUP, P.C.**

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of the following order to show cause and cross motion

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits and Notice of Cross Motion	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on the Order to Show Cause and the Cross Motion is as follows:

The defendant Jeffrey A. Lessing, M.D. moves by an order to show cause to compel arbitration pursuant to both a shareholders agreement and an employment agreement. The order to show cause is granted to the extent that the duties and obligations of the plaintiff under the shareholders agreement and the employment agreement may be arbitrated with two exceptions. This court stays arbitration determinations that would result in a declaratory judgment as defined by statute, and stays the defendants' cause of action based upon the plaintiff enticing employees away from their employer. The cross motion by the plaintiff Michael A. Savino, M.D. to stay arbitration is denied in the entirety.

Facts

The parties to this action entered into both a shareholders agreement and an employment

agreement, with each specified as being effective as of July 1, 1998. By the shareholder agreement, Jeffrey A. Lessing, M.D. (“Dr. Lessing”) and Ronald S. Krantz, M.D. (“Dr. Krantz”) allowed Michael A. Savino, M.D. (“Dr. Savino”) to acquire shares in and to join the Todt Hill Urologic Group, PC (“the Group”). By the employment agreement, the Group engaged Dr. Savino to work as a physician.

The plaintiff asserts he submitted a letter of resignation to the Group on May 9, 2010 to be contractually effective nine months after receipt by the Group. The plaintiff alleges that on August 20, 2010, the Group accepted the resignation and unilaterally accelerated the process, immediately terminating Dr. Savino’s employment by preventing him from entering into the offices of the Group. The plaintiff alleges he has been deprived of money owed by the defendants following his termination.

The defendant alleges that the plaintiff improperly notified the Group of the actual date of termination of services; solicited patients to leave the care of the Group; utilized the services of other employees of the Group for his own individual purposes; removed documents and other items belonging to the Group; enticed other employees of the Group away from their employment and into Dr. Savino’s employment; and diverted and scheduled patient care in such a way as to deprive the Group of revenues. In addition, the defendant alleges that the plaintiff deprived the Group of a refund of malpractice insurance premiums; refused to relinquish insurance policies; and concealed potential professional liability contrary to agreement.

The shareholders agreement provides for specific procedures and compensation in the event of termination of employment of a shareholder. This agreement states that “[e]ach Shareholder shall be employed by the Corporation upon such terms and conditions as are contained within the employment agreement executed simultaneously herewith by such parties.” The shareholders agreement requires that “[a]ll disputes [emphasis added] concerning the Parties rights and obligations hereunder shall be determined by an independent arbitrator selected in accordance with the rules of the American Arbitration Association and the decision of the arbitrator shall be

final and binding on both Parties.”

The employment agreement requires that “[a]ll disputes [emphasis added] concerning the Corporation’s and Physician’s rights and obligations under this Agreement shall be determined by an independent arbitrator selected in accordance with the rules of the American Arbitration Association and the decision of the arbitrator shall be final and binding on both Parties.” The employment agreement also requires that “all medical financial and/or other records of services rendered are the property of the Corporation.” According to the employment agreement, Dr. Savino was permitted to engage in outside businesses or professional activities with the permission of the Group, but “if such additional business or activity infringes on the Corporation’s income or reputation, or if such other business or activity may cause liability to the Corporation, then, Physician shall not be permitted to engage in such outside business or activity without prior written consent of the Corporation.”

Procedural History

Demand for arbitration among the parties was made on January 3, 2011 by Dr. Lessing in an order to show cause. The order to show cause to compel arbitration was served upon the plaintiff on January 6, 2011. Cross motion to stay arbitration and opposition to the order to show cause was served upon the defendants on January 17, 2011.

Discussion

The New York Civil Practice Law and Rules (CPLR) § 7501 states “[a] written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.”

The arbitration process is one that is created by contract.¹ The interpretation of a contract is generally within the province of state law.² This action is not an exception. As regards an action to stay or to compel arbitration in New York State, “[t]here are three threshold issues to be resolved ... whether the parties made a valid agreement to arbitrate, whether if such an agreement was made it has been complied with, and whether the claim sought to be arbitrated would be barred by limitation of time had it been asserted in a court of the state.”³ Arbitration may be compelled when “there is no substantial question whether a valid agreement was made or complied with, and the claim is not barred by limitation [of time].”⁴ Public policy favors giving effect to valid arbitration agreements.⁵

An arbitration agreement is effective if there is “clear, explicit and unequivocal” intent to be bound by it.⁶ It is the court that determines whether a valid arbitration agreement exists, and not the arbitrator.⁷ The subject matter of the dispute must fall within the scope of that which may be arbitrated according to the arbitration contract.⁸ The court must also determine if there are applicable time limitations.⁹ Having determined that a valid arbitration agreement exists for the subject matter to be arbitrated, “[t]he court does not consider whether the claim with respect to

¹*Matter of County of Rockland v Primiano Construction Co., Inc.*, 51 NY 2d 1, 9 [1980].

²*Smith Barney, Harris Upham & Co. v Luckie*, 85 NY 2d 193, 205 [1995]; *certiorari denied by Kahn v Smith Barney, Harris Upham & Co.*, 525 US 874 [1998].

³*Matter of County of Rockland v Primiano Construction Co., Inc.*, 51 NY 2d at 6.

⁴CPLR §§ 7503 (a) and 7502 (b).

⁵*Weinrott v Carp*, 32 NY 2d 190, 196 [1973].

⁶*God’s Battalion of Prayer Pentecostal Church v. Miele Assoc.*, 6 NY 3d 371, 374 [2006]; *quoting Waldron v. Goddess*, 61 NY 2d 181, 183 [1984].

⁷*Matter of County of Rockland v Primiano Construction Co., Inc.*, 51 NY 2d at 7.

⁸*Bd. of Educ. v. Watertown Educ. Assn.*, 93 NY 2d 132, 138 [1999].

⁹*Smith Barney, Harris Upham & Co. v Luckie*, at 202.

which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.”¹⁰ In specifying that all disputes concerning rights and obligations are to be arbitrated, the arbitration agreement is meant to be broadly applicable.

The Order to Show Cause compelling arbitration is granted.

Here, the defendant, Dr. Lessing, moves to compel all parties to arbitration. The defendant asserts that the plaintiff improperly notified the Group of the actual date of the termination of his services, thus preventing the Group from optimizing services during the time the plaintiff established a separate practice. By contract, the date of termination should have been nine months from May 9, 2010. The defendant alleges that Dr. Savino was effectively engaged in his own private practice during the time prior to his effective termination on August 20, 2010. The defendant states the plaintiff solicited the Group’s patients to leave the care of the Group; removed documents and other items belonging to the Group; diverted patients away from the Group; scheduled patient care in order to deprive the Group of revenues; deprived the Group of a refund of malpractice insurance premiums; utilized the services of employees of the Group for his own individual purposes; and refused to relinquish insurance policies. The defendant alleges the plaintiff concealed potential professional liability contrary to the requirements of the employment agreement.

The plaintiff argues that the arbitration agreements contained within the shareholders agreement and the employment agreement refer respectively to the separate agreements and that each arbitration agreement should be interpreted narrowly. The plaintiff submits an affidavit in which he details what he considered to be the limits of that which may be arbitrated. The plaintiff asserts that “fiduciary duties,” a “duty of loyalty,” and certain other claims asserted by the defendants against the plaintiff are outside the scope of the arbitration agreements. The plaintiff states that punitive damages, declaratory judgments, fiduciary duties, duties of loyalty, faithless servant doctrines, unfair competition and tortious interference fall outside of the scope

¹⁰CPLR § 7501.

of the arbitration agreements.

The wording in both the shareholders agreement and the employment agreement defining the scope of the arbitration agreements states “[a]ll disputes [emphasis added] concerning the [p]arties rights and obligations” are to be decided by arbitration. Specifying “all disputes” defines both the agreements as having broad, as opposed to narrow applicability.¹¹ Thus, both arbitration agreements are meant to be broadly applicable.

It is left to the arbitrator to interpret the substantive portions of the agreement.¹² The plaintiff asserts that the defendants must establish the clauses of the employment and shareholders agreements that were violated, how the plaintiff violated the clauses and the remedies sought. Evaluating these is the function of the arbitrator and is deferred to the arbitration process. The alleged derelictions of the parties, and any actions by the plaintiff that infringe upon the income or reputation of the Group, are disputes of the rights and obligations of the respective parties, and are for the arbitrator to decide.

The plaintiff is opposed to an assessment of punitive damages in the arbitration process. When there is a broad arbitration agreement, punitive damages may be assessed by an arbitrator.¹³ Consequently, the broad arbitration agreements here, may permit punitive damages, but do not mandate them.

The defendant states a cause of action and asserts a claim by alleging that the plaintiff enticed some of the Group’s other employees away from their employment with the Group. Anciently, and in other jurisdictions, enticing away or harboring another’s employee was

¹¹*Smith Barney Shearson, Inc. v. Sacharow*, 91 NY 2d 39, 44 [1997].

¹²*Nyack Bd. of Education v. Nyack Teachers Assoc.*, 55 NY 2d 959 [1952].

¹³*Smith Barney Shearson, Inc. v. Sacharow*, 91 NY 2d at 43 - 44.

considered actionable in itself.¹⁴ However, venerable opinion is that enticing employees is not a recognized cause of action in New York State.¹⁵ Consequently, the allegation that the plaintiff enticed the employees of the Group away from the Group's employment should not be weighed by the arbitrator except in so far as such enticement may have represented impermissible engagement in outside business or professional activities and also infringed on the Group's income or reputation.

The cross motion to stay arbitration and to compel litigation under labor law is denied.

The plaintiff opposes arbitration and requests a stay of arbitration. "[A] party who has not participated in the arbitration and 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 [of time]."¹⁶ In the absence of a showing that an arbitration agreement has not been complied with or that enforcement would be prohibited within a state court by a pertinent statute of limitations, a stay of arbitration is inapplicable.¹⁷ Here, there is no substantial question that a valid agreement exists as to determining rights and obligations under the agreement. Further, no time bar is asserted. The plaintiff himself concedes that certain claims might be covered by the arbitration agreement and these claims seem to be for breach of the employment contract.

Arbitration may be precluded if it would be against law or public policy, or if the subject matter of the arbitration were beyond the scope of the agreement to arbitrate.¹⁸ The plaintiff

¹⁴See for example, *Milburne v Byrne*, 17 F. Cas. 283, 284 [Circuit Ct. District of Columbia 1805].

¹⁵*Rogers v. Evarts*, 17 NYS 264, 266 - 267 [Supr. Ct. Spec. Term Broome Cty. 1891].

¹⁶CPLR § 7503 (b).

¹⁷*Da Silva v. Savo*, 35 AD 3d 647, 647 - 648 [2d Dept 2006].

¹⁸*Maross Constr., Inc. v. New York Regional Transp. Authority*, 66 NY 2d 341, 345 [1985].

himself does not assert that the overall arbitration agreement is contrary to law or public policy. The plaintiff does assert that at least some of the matters to be arbitrated are beyond the scope of the arbitration agreements. This can be resolved by limiting arbitration to a determination of the rights and obligations of the respective parties. The enticement of employees away from current employment is excluded from arbitration as a matter of public policy and law.

The plaintiff would request the arbitrator to issue a “declaratory judgment” denying employee severance payments. A declaratory judgment is a legal recourse rendered by a Supreme Court based upon CPLR § 3001.¹⁹ Consequently, the arbitrator should not issue a declaratory judgment, but may arbitrate the issue of employee severance pay.

The plaintiff argues that without express agreements to arbitrate matters, that matters are not subject to arbitration.²⁰ In opposing arbitration under the shareholders and employment agreements, the plaintiff states “[t]he parties did not put anything in writing with regard to the arbitration of disputes arising about rights and obligations under any other body of law.” Here, the arbitrator will determine those disputes that arise from the rights and obligations under the shareholders and employee agreements. A broad agreement to arbitrate is found within each of the agreements. Here, the arbitration agreements meet the standard of being “grounded in agreement of the parties.”²¹ Where the parties have agreed to arbitrate, “a subsequently resistant party will be deemed to have relinquished the right to litigate disputes in the courts and may be compelled, instead, to submit to arbitration.”²²

¹⁹CPLR 3001; *Trudeau v. South Colonie Cent. School Dist.*, 73 NY 2d 736, 737 [1988].

²⁰*Bowmer v. Bowmer*, 50 NY 2d 288, 293 - 294 [1980]; *Marlene Industries, Corp. v. Carnac Textiles, Inc.*, 45 NY 2d 327, 333 [1978], partly superceded by *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F. 3d 92, 99 - 100 [2d Circuit 2002]; *Gangel v. DeGroot, PVBA*, 41 NY 2d 840, 841 [1977]; *R.H. Macy & Co. v. National Sleep Products, Inc.*, 39 NY 2d 268, 270 [1976].

²¹*County of Sullivan v. Edward L. Nezelek, Inc.*, 42 NY 2d 123, 128 [1977].

²²*Maross Constr., Inc. v. New York Regional Transp. Authority*, 66 NY 2d at 345.

The plaintiff alleges that he has been deprived of money owed by the defendants following his termination, and implies that issues concerning wages may not be arbitrated. It has been long held that those disputes involving wages may be arbitrated if they are subject to an effective arbitration agreement.²³ The plaintiff further states he may act against Dr. Lessing and Dr. Krantz to collect wages owed by the Group. The plaintiff argues that by acting against Dr. Lessing and Dr. Krantz, the arbitration agreements with the Group are circumvented or superceded. Here, the shareholders agreement is demonstrably between Dr. Savino individually, and Dr. Lessing, Dr. Krantz and the Group collectively as the other parties. The employment agreement is between Dr. Savino as one party and the Group as another. Both agreements have cognizable arbitration agreements contained within them. Thus, a dispute with Dr. Lessing and Dr. Krantz may be arbitrated in so far as it pertains to determining the rights and obligations of the parties as shareholders.

In general, personal individual liability for the acts of a professional corporation is limited to negligence or malpractice.²⁴ The plaintiff seeks to impute liability of the ten largest shareholders for the wages of an employee to Dr. Lessing and Dr. Krantz.²⁵ However, in order to do so, the plaintiff must provide notice to the shareholders seeking a contribution for unpaid wages, and the plaintiff does not provide proofs that the required notice was provided.²⁶ Further, the action against the individuals is to be “commenced within ninety days after the return of an execution unsatisfied by the corporation upon a judgment recovered against it for such services.”²⁷ Here,

²³*Matter of Schreiber v. SK-Sea Transp. Corp.*, 9 NY 3d 331, 335 - 336 [2007] *in which the principle of arbitration of wages was upheld; see also Lane v. Endicott Johnson Corp.*, 299 NY 725 [1949].

²⁴*We'Re Assocs. Co. v. Cohen, Stracher & Bloom, P.C.*, 103 AD 2d 130, 134 [2d Dept 1984]; *affirmed by We'Re Assocs. Co. v Cohen*, 65 NY 2d 148 [1985].

²⁵New York Business Corporation Law § 630 (a).

²⁶*Id.*

²⁷*Id.*

there has been no return of an unsatisfied execution by the corporation. Simply, any action against Dr. Lessing and Dr. Krantz for wages claimed, but not recovered from the Group is not justiciable at this time. The plaintiff states he is interested in resolving all issues in one forum, and that the inclusion of Dr. Lessing and Dr. Krantz mandates litigation and not arbitration. However, this is disingenuous in the face of the plaintiff's inability to join Dr. Lessing or Dr. Krantz at this time and upon the grounds the plaintiff proposes.

Thus, it is the arbitrator's duty to interpret the parties' respective rights and obligations under the shareholders and employment agreements, and also whether the individual activities of the plaintiff infringed upon the earnings of the Group. The arbitrator should not consider the narrow issue of whether the plaintiff enticed employees away from the Group. The arbitrator should not issue a declaratory judgment based upon CPLR 3001. Should the outcome of arbitration be incorrect or improperly prejudiced, then the remedy may be to vacate or modify the arbitrator's decision through another action.²⁸

Accordingly, it is hereby

ORDERED, that the motion by order to show cause is granted in so far as plaintiff Michael A. Savino, M.D., and the defendants Ronald S. Krantz, M.D., Jeffrey A. Lessing, M.D., and Todt Hill Urologic Group, P.C. be compelled to arbitrate all disputes regarding the rights and obligations of the parties in so far as pertains to the shareholders agreement; and it is further

ORDERED, that the motion by order to show cause is granted in so far as plaintiff Michael A. Savino, M.D., and the defendant Todt Hill Urologic Group, P.C. be compelled to arbitrate all disputes regarding the rights and obligations of the parties in so far as pertains to the employment agreement and to any infringement upon the income or reputation of the Todt Hill Urologic Group, P.C., including severance pay; and it is further

²⁸CPLR § 7511 (b) and (c).

ORDERED, that the motion by order to show cause is denied in so far as the arbitration process shall not consider the claim based upon the cause of action that employees of Todt Hill Urologic Group, PC. were enticed away from employment by the plaintiff except in so far as enticement may have represented impermissible engagement in outside business or professional activities which infringed on the Group's income or reputation.; and it is further

ORDERED, that the motion by order to show cause is denied in so far as the arbitrator shall not issue any declaratory judgment based upon New York Civil Practice Law and Rules § 3001; and it is further

ORDERED, that arbitration shall be conducted by an independent arbitrator selected in accordance with the rules of the American Arbitration Association, pursuant to the duly executed agreements among the parties; and it is further

ORDERED, that the cross motion by the plaintiff Michael A Savino, M.D. to stay arbitration and to compel litigation is denied in the entirety.

ENTER,

DATED: February 28, 2011

Joseph J. Maltese
Justice of the Supreme Court