

**Imagine Mktg. Group, LLC, v 125North10, LLC**

2011 NY Slip Op 31948(U)

June 29, 2011

Sup Ct, NY County

Docket Number: 113806/2010

Judge: Doris Ling-Cohan

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**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY**  
**PRESENT: Hon. Doris Ling-Cohan, Justice**

**Part 36**

**IMAGINE MARKETING GROUP, LLC,**

index # 113806/2010

**Plaintiff,**

**MOTION SEQ. NO. 002**

**125NORTH10, LLC AND CORE GROUP  
MARKETING, LLC,**

**FILED**

**Defendants.**

**JUL 01 2011**

The following papers, numbered 1-9 were considered on this motion to compel arbitration and cross-motion for a default judgment:

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<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2, 3, 4</u>
Answering Affidavits — Exhibits _____	<u>7, 8, 9</u>
Replying Affidavits _____	_____
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<u>5, 6</u>

**Upon the foregoing papers, it is ordered that this motion and cross-motion** are decided as indicated below.

Plaintiff commenced this breach of contract action against defendant 125North10, LLC and defendant Core Group Marketing, LLC (defendants) for monetary damages. Plaintiff, a limited liability company formed under the laws of the State of New York, is a real estate broker, licensed by the State of New York. According to the pleadings and the within submissions, on or about November 2009, one of plaintiff's employes, Sanai Merrick (Ms. Merrick), began assisting a client, Teresa Mui (Ms. Mui), in her search for an apartment in New York City. After working with Ms. Mui for approximately seven months, on or about June 4, 2010, Ms. Merrick accompanied Ms. Mui to several "open houses", one of which was located at 125 North 10<sup>th</sup> Street, Brooklyn, New York, owned by defendant 125North10, LLC (125North10). 125North10 retained the services of defendant Core Group Marketing, Inc. (Core), a real estate broker duly formed, licensed and authorized to do business in the State of New York, to act as

their agent in relation to the sale and marketing of 125 North 10<sup>th</sup> Street apartment units. Thereafter, Ms. Mui expressed interest in purchasing apartment N2-A at 125 North 10<sup>th</sup> Street. Ms. Merrick and Ms. Mui contacted an employee of Core, Stefanie Shock (Ms. Shock), who informed them that there was already an all cash offer for the apartment with no broker involved so the developers would likely stay with that offer.

Ms. Mui had a follow up conversation with Ms. Shock about her frustration in not being able to make an offer. Plaintiff alleges that, as a result of this conversation with Ms. Shock, Ms. Mui was concerned about making an offer on unit N-5E in 125 North 10<sup>th</sup> Street because she was represented by a broker. Plaintiff states that Ms. Mui then contacted Ms. Shock directly to make an offer on unit N-5E and a parking space, which was accepted, with the total purchase price being eight hundred thirty five thousand dollars (\$835,000.00), commissions for which were paid to Core. Plaintiff further alleges that Core, acting on its own behalf and as agent for 125North10, advertised in a real estate listing service that a “co-operating broker” would receive a commission of 4% of the sale price. Plaintiff claims that, as the procuring cause of the sale, it is entitled to the 4% commission, totaling thirty three thousand four hundred dollars (\$33,400.00), plus costs and interest.

Plaintiff commenced this action claiming: (a) defendants breached the contract by failing to pay the 4% commission to plaintiff for being the co-operating broker on the sale of unit N-5E and a parking space; (b) defendants were unjustly enriched by profiting from plaintiff's efforts and services, thus plaintiff is entitled to payment in *quantum meruit*; and (c) tortious interference with the contract against Core for interfering with the contract between plaintiff and 125North10.

Defendants now move to compel arbitration. Defendants argue that they timely moved to compel arbitration by Order to Show Cause (OSC) dated January 11, 2011, prior to the January 17, 2011 deadline. In a decision dated January 20, 2011, this Court declined to sign defendants' OSC for failing

to comply with 22 NYCRR § 202-7(f) with respect to notice. Thus, defendants argue that any delay in answering in this action is *de minimis*. Defendants further argue that, should this Court decline to grant defendants' motion to compel arbitration, defendants should be provided a reasonable time to answer, as they have a reasonable excuse in failing to timely serve and file an answer. Defendants state that, had they answered, their right to compel arbitration would have been waived.

Plaintiff cross-moves for a default judgment against defendants for \$33,400.00 plus interest, costs and disbursements and opposes defendants' motion to compel arbitration. Plaintiff argues that defendants have failed to answer the summons and complaint, despite ample opportunity to do so. Plaintiff contends that defendants have failed to provide a reasonable excuse for their default. Plaintiff further argues that there is no agreement to arbitrate between plaintiff and Core or 125North10, thus, neither Core, nor 125North10 can compel arbitration.

Defendants' seek an order, pursuant to CPLR 7503(a), compelling and directing the parties to arbitrate their claims. Plaintiff opposes arbitration contending that defendants do not have the right to compel arbitration in that: (a) there is no binding arbitration agreement; (b) 125North10 is not subject to arbitration; and (c) defendants waived any right to arbitrate when they did not reserve that right by answering the complaint. Plaintiff further contends that 125North10 cannot compel arbitration by unilaterally consenting to arbitration as no agreement exists between plaintiff and 125North10.

"In deciding an application to compel arbitration pursuant to CPLR 7503(a), the court is required to first make a determination whether the parties have entered into a valid arbitration agreement and, if so, whether the issue sought to be submitted to arbitration falls within the scope of that agreement." *Koob v IDS Financial Services, Inc.*, 213 AD2d 26, 30 (1<sup>st</sup> Dep't 1995) (internal quotation marks and citations omitted). Plaintiff is correct in its assessment that there is no arbitration agreement signed between the parties. However, this is not dispositive.

In support of their motion to compel arbitration, defendants allege and proffer evidence that one or more of plaintiff's, as well as Core's, principals are members of the Real Estate Board of New York (REBNY) and are "Broker A" members as defined by the REBNY Constitution. Article II, Section 2(a), of the REBNY Constitution defines "Broker A" members, in relevant part, as:

Any individual who holds a license as a real estate broker pursuant to New York Real Property Law Article 12-A whose principal business is Real Estate Broker, Mortgage Loan Broker, Agent or Auctioneer, either in his own name or as a member of a partnership or an officer of a corporation and whose main office is in the Borough of Manhattan, City of New York..."

Defendants have proffered copies of REBNY's 2011 Diary and Manual listing principals of plaintiff and Core as members.

Plaintiff does not dispute this. Instead, plaintiff argues that 125North10 cannot compel arbitration as there is no agreement between it and plaintiff. However, defendants' pleadings make clear that 125North10 consents to arbitration. Further, the REBNY Constitution further states, in Article XIII, Section 1, in relevant part, that:

[w]henver (i) differences shall arise between Broker A, Broker B, Borough Broker, Appraiser A, Non-Resident Appraiser, Non-Resident Broker, or Management A and Management B Members of the Board, or the firm with which such members are affiliated, such membership status and affiliation being determined as of the time when such differences arose pertaining to their business relations, and (ii) any such member on his own behalf or that of his firm, provided that such member's and his firm's membership shall be current, shall demand the other member or the firm with which he is affiliated to submit the same to arbitration, then it shall be compulsory upon such member and his firm to submit to arbitration as hereinafter provided."

Defendants claim that the REBNY Constitution constitutes an agreement between Core and plaintiff, as well as other REBNY members. Defendants have shown that principals of both plaintiff, as well as Core, are Broker A members as defined by the REBNY Constitution. As such, defendants argue that Core can compel arbitration under this agreement.

Membership in a group whose organizing documents require arbitration of certain disagreements

satisfies and constitutes an agreement under CPLR 7503(a). *Willard Alexander, Inc. v Glasser*, 31 NY2d 270, 273-274 (1972).

In *State of New York v Philip Morris Inc.*, 8 NY3d 574, 581 (2007), the Court of Appeals has rearticulated the rule that, for an arbitration provision to be enforceable, it must “expressly and unequivocally encompass...the subject matter of the particular dispute.” (internal quotation marks and citations omitted). The law is clear that, as the party seeking to enforce the instant clause, Core bears the burden of proving that the dispute herein is encompassed by said clause. *Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 (1<sup>st</sup> Dep’t 2007). Here, a reading of the plain language of Article XIII, Section 1 of the REBNY Constitution makes clear that the issues in dispute in this action are unequivocally encompassed therein. As defendants have shown that principals of Core and plaintiff are Broker A members, as defined by the REBNY Constitution, defendant Core can compel arbitration.

Plaintiff’s contention, that 125North10 is not subject to arbitration, cannot prevail as 125North10 is consenting to arbitration. While there is no agreement between plaintiff and 125North10, defendants do not argue that 125North10’s unilateral consent to arbitration compels plaintiff to arbitrate the claims. Instead, defendants argue that, pursuant to the REBNY Constitution, there is an agreement between Core and plaintiff, thus Core can compel arbitration. Defendants contend that 125North10 does not object to the arbitration and is consenting to arbitrate all issues and claims herein.

Plaintiff further contends that defendants waived their right to compel arbitration by failing to answer. Plaintiff also argues that defendants waiver resulted from defendants’ own actions in agreeing to waive any objections to service of process or failure of personal jurisdiction. As stated above, defendants did not serve and file an answer in this action in an effort to avoid waiving the right to arbitrate. *Rusch Factors, Inc. v Fairview Mfg. Co., Inc.*, 34 AD2d 635, 635 (1<sup>st</sup> Dep’t 1970). Additionally,

a waiver of objections to service of process or personal jurisdiction is not akin to a waiver of the right to arbitrate. “There is a strong policy favoring arbitration.” *Isaacs v. Westchester Wood Works, Inc.*, 278 AD2d 184, 185 (1<sup>st</sup> Dep’t 2000). A party’s concession to a court’s jurisdiction in an action does not preclude the granting of a motion to compel arbitration. As such, defendants have not waived their right to compel arbitration and defendants’ motion is granted.

Plaintiff’s cross-motion for a default judgment is denied. It is well settled that New York courts favor resolution of actions on their merits rather than on default. *Picinic v Seatrain Lines, Inc.*, 117 AD2d 504, 508 (1<sup>st</sup> Dep’t 1986). Defendants have provided a reasonable excuse for the delay in serving an answer and sufficient grounds to deny plaintiff’s cross-motion to enter a default judgment.<sup>1</sup>

Accordingly, it is

ORDERED that defendants’ motion is granted to the extent that defendants seeks to compel arbitration; and it is further

ORDERED that plaintiffs shall arbitrate their claims against defendants in accordance with the REBNY Constitution; and it is further

ORDERED that plaintiff’s cross-motion for a default judgment is denied; and it is further

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<sup>1</sup> The Court notes that defendants’ seek, in the alternative, leave to file an answer in this action should the Court deny defendants’ motion to compel arbitration. Pursuant to CPLR § 3012(d) “[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default”, rather than grant a default judgment.

New York courts have repeatedly considered the length of time and reason for a delay in serving a timely answer in determining whether to grant a party leave to file a late answer. *Empire HealthChoice Assurance, Inc. v Lester*, 81 AD3d 570, 571 (1<sup>st</sup> Dep’t 2011). The Court notes that had defendants served an answer, they risked waiving their right to compel arbitration. *Rusch Factors, Inc. v Fairview Mfg. Co., Inc.*, 34 AD2d 635, 635 (1<sup>st</sup> Dep’t 1970). Further, defendants’ delay in serving the answer has not resulted in prejudice to plaintiff. *See Palmer v Aliberti*, 281 AD2d 156, 156 (1<sup>st</sup> Dep’t 2001); *Bergida v Wassen*, 186 AD2d 522, 522 (1<sup>st</sup> Dep’t 1992). Thus, this would be an appropriate case for the Court to exercise its discretion pursuant to CPLR 3012 (d) to extend defendants’ time to serve its verified answer and to compel plaintiff to accept service of such answer.

ORDERED that within 30 days of entry of this order, defendants shall serve a copy of this order with notice of entry, upon plaintiff.

Dated: 6/29/11

  
DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST

NON-FINAL DISPOSITION

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