Jennings v Karpowicz
2011 NY Slip Op 32395(U)
July 22, 2011
Sup Ct, Nassau County
Docket Number: 13397/10
Judge: F. Dana Winslow
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

HELEN JENNINGS,

Plaintiff,

-against-

KEVIN KARPOWICZ,

Defendant.

MOTION SEQ. NO.: 001
MOTION DATE: 5/5/11

INDEX NO.: 13397/10

The following papers having been read on the motion (numbered 1-3):

Notice of Motion..1
Notice of Cross Motion...2
Affirmation in Opposition...3

Motion by plaintiff pursuant to CPLR 3212 for summary judgment in her favor, and cross-motion by defendant pursuant to CPLR 7503(a) to compel arbitration, are determined as follows.

BACKGROUND

This dispute arises from defendant's alleged breach of a Settlement Agreement, entered into in May 1996, pursuant to which defendant was obligated, *inter alia*, to pay one-third of the property taxes and other costs associated with commercial property known as 97 and 99 Hillside Avenue, New Hyde Park, and 270-01 and 270-03 Hillside Avenue, Queens, New York. The subject property, which contains various stores and apartments, is family owned by plaintiff, defendant, and non-party Gloria Karpowicz, who each own a one-third interest as tenants in common.[1]

The Agreement was executed in settlement of an accounting proceeding brought in Surrogate's Court, Nassau County, involving plaintiff's accounting of the estate of her

[1]Defendant Kevin Karpowicz is plaintiff's nephew. Gloria Karpowicz is plaintiff's sister-in-law.

[* 2]

father, Samuel Karpowicz, who had owned the entire parcel. In that proceeding, defendant and now deceased Eugene Karpowicz (Gloria's husband) filed objections. The Agreement provides, *inter alia*, that the three signatories would own the subject property as tenants in common. In ¶7, they agreed, *inter alia*,

> "that the total real estate taxes (New York City and Nassau), assessments, and all other expenses not covered herein, that are common to the entire subject premises shall be shared equally by Helen Jennings, Eugene Karpowicz and Kevin Karpowicz until such time as New York City allocates the assessed value or determines assessed values for the individual units. Thereafter, the taxes shall be paid in proportion to their actual allocations."

¶ 9 provides, in pertinent part, that

> "Each party shall punctually pay his separate share of all taxes, insurance and common charges."

According to plaintiff, defendant breached the Settlement Agreement beginning in or about 2007 by refusing to pay his one-third share of New York City taxes and other related charges on the property, whereafter the unpaid balance continued to increase. Plaintiff alleges that as of January 4, 2010, the amount of accumulated unpaid taxes due and owing totaled $48,860.65 -- $30,368.07 which defendant had failed to pay, plus the current amount due and owing. Although plaintiff notified defendant as early as September 26, 2008 of the amount of his share of the taxes owed, plaintiff alleges that defendant refused to pay, and a tax lien in the amount of $47,118.97 was placed on the property. In April, 2010, plaintiff received notice from the New York City Department of Finance informing her that unless the unpaid amount was paid/resolved by May 7, 2010, the debt would be sold to a private collection agency. In order to avoid a sale of the tax lien, plaintiff, the title owner of the subject property, paid off the balance due and owing.[2]

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[2]Plaintiff tendered the sum of $40,022.53 by personal check on May 7, 2010. She alleges that $7,050 was paid on behalf of defendant by his cousin, non-party Regina Cacciatore. Defendant maintains that said amount was paid by defendant and sent to Regina Cacciatore.

Defendant counters that notwithstanding the fact that he had worked out a repayment plan with the Department of Finance with respect to the taxes owed, plaintiff, of her own volition, decided to pay the totality of the taxes owed instead of using the $7,050.00 as the first installment of the repayment of the outstanding debt. Further, defendant cross- moves to compel arbitration based upon ¶ 18 of the Agreement, which states as follows:

> "If any dispute or disagreement shall arise in connection with either an interpretation of this agreement or the performance or non-performance thereof, or if a disagreement arises as to common elements not covered by this agreement, and if such dispute or disagreement is not settled in writing within fifteen (15) days after it arises, then any party shall have the right to have such dispute or disagreement settled by arbitration. Such arbitration shall be made by the American Arbitration Association, New York, New York and such arbitrator is authorized to award the costs of the American Arbitration Association arbitrator as part of the determination. (American Arbitration Association, 140 W. 51st St., New York, NY - (212) 484-4000)."

In opposition to defendant's cross-motion, plaintiff argues that defendant has waived any purported right to arbitration by not raising it in his answer and by not raising the issue of arbitration until seven months after service of the summons and complaint on July 20, 2010 and after plaintiff moved for summary judgment. Moreover, plaintiff contends that the arbitration provision does not contain compulsory arbitration language. Rather, the language simply gives the parties the right/choice to either arbitrate or litigate a dispute.

ANALYSIS

The proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute at issue. *Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers Ltd.*, 44 AD3d 581, 583 [1st Dept. 2003]. A party cannot be compelled to submit to arbitration unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute. *Gerling Global Reins. Corp. v Home Ins. Co.*, 302 AD2d 118, 123 [1st Dept. 2002], *lv denied* 99 NY2d 511 [2003]. As

[* 4]

noted by the Court of Appeals in *Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007], courts have "repeatedly recognized New York's long and strong public policy favoring arbitration. Like contract rights, generally, however, a right to arbitration may be modified, waived or abandoned. *Waldman v Mosdos Bobov, Inc.*, 72 AD3d 983 [2010], *lv to appeal den.*, 15 NY3d 715 [2010]; *Fein v General Elec. Co.*, 40 AD3d 807 [2nd Dept. 2007]. Once waived, the right to arbitrate cannot be regained. *Sherill v Grayco Bldrs.*, 64 NY2d 261, 274 [1985]. It has been observed "[t]hat the courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration." *Sherill v Grayco Bldrs., supra* at p. 274.

A litigant may not compel arbitration when his use of the courts is found to be inconsistent with a subsequent claim that the parties were obligated to settle their dispute by arbitration. *Flores v Lower East Side Service Center, Inc.*, 4 NY3d 363, 371 [2005]. A defendant who utilizes the tools of litigation, or participates in litigation such as engaging in the discovery process or participating in litigation for an unreasonable period without asserting the right to arbitrate, may lose the right to compel arbitration. *LZG Realty, LLC v H.D.W. 2005 Forest, LLC*, 71 AD3d 643, 643 [2nd Dept. 2010]. The issue of waiver is fact specific. Since, however, arbitration is favored as a method of resolving disputes, generally the crucial question is whether the degree of participation manifests an affirmative acceptance of litigation. *Byrnes v Castaldi*, 72 AD3d 718, 719 [2nd Dept. 2010].

Under the particular circumstances of this case, the Court finds that defendant has waived his right to arbitrate. It is clear, given the broad language of the arbitration clause herein, that the parties' dispute is, in fact, an arbitral claim. While every foray into the courthouse does not effect a waiver of the right to arbitrate, and service of an answer which includes an affirmative defense that the dispute should be submitted to arbitration does not constitute participation in litigation to such an extent as to manifest a clear intent to litigate rather than arbitrate the dispute, (*Sherill v Grayco Bldrs., supra* at p. 273), here defendant served an answer wherein he asserted eleven affirmative defenses–without including the defense of arbitration. Although the parties agreed that either party had the right/choice to arbitrate any dispute that arose from the agreement, it is significant that the Agreement does not provide that arbitration is the exclusive remedy for resolving disputes. It was not until after the action was commenced, and only in response to plaintiff's motion for summary judgment, that defendant sought to compel arbitration

without having mentioned this defense or requesting arbitration during the entire period during which the dispute was ongoing.

Pursuant to CPLR 3211(e), any objection or defense based on a ground set forth in CPLR 3211(a)(1), (3), (4), (5) or (6) must be raised in an answer or in a motion made before the answer is due, or it is waived. *Wells Bank Minnesota, Minn., N.A. v Mastropaolo*, 42 AD3d 239, 241 [2nd Dept. 2007].

Here, the eighty-seven year old plaintiff has spent time and resources in trying to convince defendant to comply with his contractual obligations, and in pursuing her claim in the judicial forum. She should not be prejudiced by defendant's failure to move to compel arbitration, to raise the affirmative defense in his answer, or to otherwise notify plaintiff, at any point prior to responding to plaintiff's motion for summary judgment, that he believed that plaintiff's claim was subject to arbitration.

Even when viewed in the light most favorable to defendant (*Pearson v Dix McBride, LLC,* 63 AD3d 895 [2nd Dept. 2009]), defendant's submissions are insufficient to raise a triable issue of fact with respect to defendant's failure to pay his proportional share of the taxes and related charges on the property at issue. Defendant has not denied the fact that he has failed to meet his financial obligations under the Settlement Agreement or that money is due and owing plaintiff, who assumed those obligations when defendant defaulted.

Defendant's self-serving generalized assertions are insufficient to defeat plaintiff's motion, where, as here, plaintiff has established entitlement to judgment in her favor. On a motion for summary judgment, the movant has the initial burden of proving entitlement to summary judgment through the proffer of admissible evidence eliminating all material issues of fact. *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]. Once such proof has been offered, the burden shifts to the opposing party who, in order to defeat the motion, must proffer evidence in admissible form and show facts sufficient to require a trial of any issue of fact. *Hyman v Queens County Bancorp, Inc.* 3 NY3d 743, 744 [2004]. Defendant has failed to meet this burden.

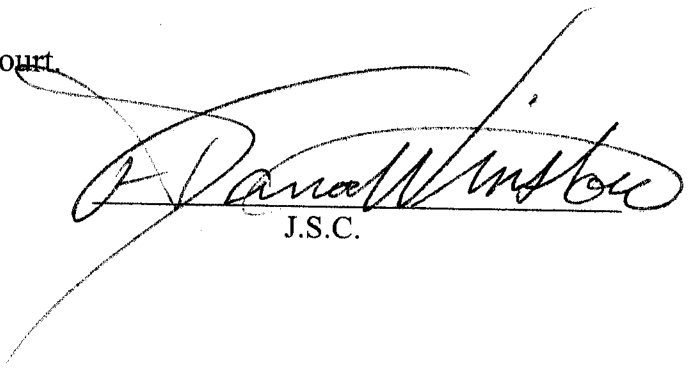
Based upon the foregoing, it is

ORDERED, that the motion pursuant to CPLR 3212 by plaintiff against defendant Kevin Karpowicz is **granted**. Plaintiff shall file a Note of Issue setting the matter down for a hearing to determine the amounts presently due and owing plaintiff including reasonable attorneys' fees and litigation costs pursuant to ¶17 of the Settlement Agreement. It is further

ORDERED, that the cross-motion pursuant to CPLR 7503(a) by defendant Kevin Karpowicz to compel arbitration and to stay this action is **denied.**

This constitutes the Order of the Court.

Dated: 7/22/11



J.S.C.

ENTERED
AUG 30 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE