

Russo v Time Moving & Stor., Inc.

2011 NY Slip Op 33155(U)

November 30, 2011

Supreme Court, Nassau County

Docket Number: 010035-11

Judge: Timothy S. Driscoll

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**MICHAEL RUSSO, INDIVIDUALLY and
T.J. RUSSO CONSULTANTS,**

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiffs,

**Index No:010035-11
Motion Seq. No: 1
Submission Date: 10/5/11**

- against -

**TIME MOVING AND STORAGE, INC.,
KEVIN GILGAN, JAMES DOWSE, INDIVIDUALLY,
and EVIDENCE SECURE, INC.,**

Defendants.

-----x

The following papers have been read on the motion:

- Re-Notice of Motion, Notice of Motion, Affirmation in Support and Exhibit....x**
- Memorandum of Law in Support.....x**
- Affidavit in Opposition, Affirmation in Opposition and Exhibits.....x**
- Reply Affirmation and Exhibits.....x**

This matter is before the Court for decision on the motion filed by Defendants Time Moving and Storage, Inc. ("Time Moving"), Kevin Gilgan ("Gilgan"), James Dowse ("Dowse") and Evidence Secure, Inc. ("ESI") (collectively "Defendants") on August 19, 2011 and submitted on October 5, 2011. For the reasons set forth below, the Court denies Defendants' motion to dismiss any portions of the Verified Complaint, but concludes that all of the issues raised in the Complaint should be the subject of arbitration, stays the above-captioned action in its entirety, and directs the parties to arbitrate all issues raised in the Complaint.

BACKGROUND

A. Relief Sought

Defendants move, pursuant to CPLR §§ 3016(b), 3211(a)(3) and (7), and 7503(a), for an Order, 1) dismissing the Verified Complaint (“Complaint”), except as to issues arising out of the stockholders’ agreement which is subject to arbitration; 2) with respect to issues arising out of the stockholders’ agreement, staying this action (“Instant Action”) and compelling arbitration; and 3) awarding costs and disbursements.

Plaintiffs Michael Russo, individually (“Russo”) and T.J. Russo Consultants, Inc. (“TJ, Inc.”) oppose the motion.

B. The Parties’ History

The Complaint (Ex. A to Graifman Aff. in Supp.) alleges that on or about December 9, 2005, Time Moving entered into an agreement with ESI identified as a “contract for goods and services” (Ex. A to Compl.), hereinafter referred to as the “TM-ESI Goods & Services Agreement.” On or about December 9, 2005, Russo entered into an agreement with Joseph P. Tuscano, and Defendants Gilgan and ESI, identified as a “stockholders agreement” (*id.* at Ex. B), hereinafter referred to as the “ESI Stockholders Agreement.”

The Complaint contains four (4) causes of action: 1) fraud by Defendants based on their alleged misrepresentations to Plaintiffs regarding the formation of ESI, 2) Defendants’ breach of the contractual agreements annexed as Exhibits A and B to the Complaint, 3) fraud by Defendants in their failure to comply with the contractual agreements which includes but is not limited to fraudulent billing and alteration of business documents, and 4) a claim based on Defendants’ alleged failure to maintain the secure facility at which evidence relevant to pending litigation is stored for Plaintiffs’ customers, which includes Plaintiffs’ request that the Defendants be required to post and establish a fund.

Paragraphs 21 and 23 of the Complaint, which are set forth as part of the Second Cause of Action, allege as follows:

That the specific contractual arrangement attached hereto as EXHIBIT “A” and “B” should and must be read together as constituting a portion of the contracts between the defendants, jointly and severally, and the plaintiffs.

That the defendants have jointly and severally breached their obligations which exist through the contracts.

Paragraph 17 of the ESI Stockholders Agreement, titled "Arbitration," provides as follows:

In the event of any dispute among the parties which shall pertain to this Agreement, including the failure to reach a unanimous decision on any business issue, the same shall be settled by arbitration in New York City in accordance with the rules then obtaining of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof.

In his Affidavit in Opposition, Russo provides background regarding the parties, the type of work in which they are involved, the circumstances under which the two relevant Agreements were entered into and the alleged misrepresentations by the Defendants. He affirms that "[t]he agreements between the parties must be looked upon as all parts of the underlying relationship herein" (Russo Aff. in Opp. at ¶ 12). Russo submits that the Agreements are not subject to arbitration, arguing that the Arbitration Provision relates only to issues concerning the ESI Stockholders Agreement among Russo, Toscano and Gilgan, and that the allegations in the Complaint concern separate issues.

In reply, counsel for Defendants affirms that arbitration has begun, and provides a copy of the Demand for Arbitration, as well as Russo and Toscano's Answers to that Demand (Graifman Reply Aff. at Exs. A, B and C). He submits that the relationship among the parties is governed by contract, notes that Plaintiffs have alleged that the two Agreements must be read together, and reiterates Defendants' position that this matter should be referred to arbitration.

C. The Parties' Positions

Defendants submit that 1) the first and third causes of action, sounding in fraud, fail to plead the fraud with adequate particularity; 2) the third cause of action is not viable because the allegedly fraudulent acts occurred after the agreements were entered into; 3) the fraud claims are not viable as they are merely a restatement of a breach of contract claim; 4) Plaintiffs' request for the establishment of a fund is not a viable cause of action, but rather a proposed remedy that is premature as there has been no determination as to Defendants' liability; 5) Plaintiffs lack standing given that neither Plaintiff was a party to the TM/ESI Goods & Services Agreement, and Plaintiffs may not assert damages allegedly suffered by their customers; and 6) the Instant Action should be stayed and arbitration compelled regarding the ESI Stockholders Agreement in light of the broad Arbitration Provision.

Plaintiffs contend that this is not an action concerning the actions of the stockholders, but rather an action concerning the breach of contract and fraudulent acts of the Defendants. Thus, Plaintiffs argue, the issues raised in the Complaint should not be the subject of arbitration.

RULING OF THE COURT

Generally, it is for the courts to make the initial determination whether a particular dispute is arbitrable, that is whether the parties have agreed to arbitrate the particular dispute. *Nationwide General Insurance Company v. Investors Insurance Company of America*, 37 N.Y.2d 91, 95 (1975) quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570-71 (1960). The ultimate disposition of the merits, however, is reserved for the arbitrator and the courts are expressly prohibited from considering whether the claim regarding which arbitration is sought is tenable, or otherwise passing on the merits of the dispute. *Nationwide General*, 37 N.Y.2d at 95, citing CPLR § 7501.

With regard to the scope of an arbitration clause, a broad arbitration clause should be given the full effect of its wording in order to implement the intention of the parties. *Weinrott v. Carp*, 32 N.Y.2d 190 (1973). A court may exclude a substantive issue from issues that are submitted to an arbitrator only if the arbitration clause itself specifically enumerates the subjects intended to be put beyond the arbitrator's reach. *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299 (1984).

Arbitration is favored in New York State as a means of resolving disputes, and courts should interfere as little as possible with agreements to arbitrate. *Shah v. Monpat Construction*, 65 A.D.3d 541, 543 (2d Dept. 2009). The Court must determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement. *Sisters of Saint John the Baptist v. Geraghty*, 67 N.Y.2d 997, 999 (1986). The Court's inquiry ends, however, when the requisite relationship is established between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate. *Id.*

In *Vitals986, Inc. v. Healthwave, Inc.*, 15 A.D.3d 571 (2d Dept. 2005), plaintiffs appealed from the trial court's order that granted the branches of defendant's motion seeking to stay the action and compel arbitration. *Id.* There was no dispute that the parties had entered into a license which contained a broad arbitration clause. The license contained a confidentiality

provision, and also incorporated by reference a prior confidentiality agreement executed by the parties which did not contain an arbitration clause. *Id.* In light of the fact that the complaint alleged that the defendant, after executing the license, misappropriated plaintiff's confidential information, the claims were deemed to bear a reasonable relationship to the subject matter of the license and, therefore, were subject to its arbitration clause. *Id.* at 572, citing, *inter alia*, *Nationwide General, supra*, at 91. In addition, while there were factual issues as to whether the license was subsequently cancelled by mutual oral agreement and superseded by a new agreement excluding an arbitration clause, those issues were properly determined by the arbitrator. *Id.* Thus, the Second Department affirmed the trial court's order directing the parties to proceed to arbitration and staying the action. *Id.*

In light of Plaintiffs' allegations that "the specific contractual arrangement attached hereto as EXHIBIT "A" and "B" should and must be read together as constituting a portion of the contracts between the defendants, jointly and severally, and the plaintiffs," the Court concludes that the allegations regarding Defendants' breach of, and fraud regarding, the TM-ESI Goods & Services Agreement bears a reasonable relationship to the subject matter of the ESI Stockholders Agreement, which contains a broad arbitration provision. Accordingly, the Court concludes that all issues raised in the Complaint should be the subject of arbitration.

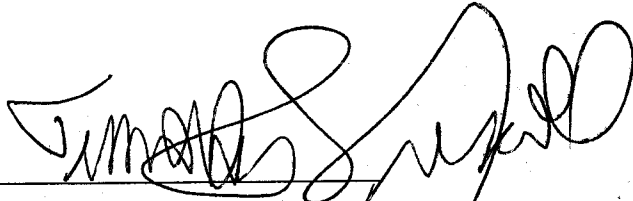
In light of the foregoing, the Court denies Defendants' motion to dismiss any portion of the Complaint, but concludes that all of the issues raised in the Complaint should be referred to arbitration, grants a stay of the Instant Action in its entirety, and directs the parties to arbitrate all issues raised in the Complaint.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
November 30, 2011



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

ENTERED
DEC 05 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE