

**Bangladesh Channel (TBC) Inc. v Soundview
Broadcasting LLC**

2011 NY Slip Op 33616(U)

November 30, 2011

Supreme Court, Queens County

Docket Number: 12545/2011

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

THE BANGLADESH CHANNEL (TBC) INC.,
and DR. RAJEEV AMAN KHAN,

Plaintiffs,

- against -

Index No.: 12545/2011
Motion Date: 09/22/11
Motion No.: 41
Motion Seq.: 1

SOUNDVIEW BROADCASTING LLC., SHAFQUAT
CHAUDHRY and SYED M. HOSSAIN,

Defendants.

- - - - - -x

The following papers numbered 1 to 18 were read on this notice of motion for an order restraining the defendants from discontinuing, interrupting or shutting down the broadcast of THE BANGLADESH CHANNEL (TBC) at defendants' facility located at 36-01 37th Avenue, LIC, N.Y., and the cross-motion of defendant SHAFQUAT CHAUDHRY for an order staying the action and compelling arbitration pursuant to CPLR 7501 and 7503(a):

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....	1 - 6
Defendant's Notice of Cross-Motion-Memo of Law.....	7 - 11
Affirmation in Opposition to Cross-Motion	12 - 15
Defendant's Reply in Support of Cross-Motion.....	16 - 18

This is an action commenced by the plaintiffs on May 24, 2011 for a permanent injunction, breach of contract, monetary damages, unjust enrichment, fraud and punitive damages. According to the complaint, The Bangladesh Channel ("TBC") owned by plaintiff, Dr. Rajeev Aman Khan, executed an affiliation

agreement with Time Warner Cable. Pursuant to this agreement, Time Warner granted a license to TBC to distribute its programming over the Time Warner Cable System. TBC thereupon began broadcasting on Channel 575.

On October 7, 2007, TBC signed a ten year "License and Distribution Agreement" with defendant, Soundview Broadcasting, the owner of the studio facility from which plaintiff broadcasted. Pursuant to the agreement, TBC would broadcast from Soundview Studios and TBC and Soundview would share the subscription revenue collected from Time Warner on a 50/50 basis. The parties also agreed that Soundview would pay TBC the sum of \$5,000.00 per month towards the exclusive use of TV commercial time. In consideration for the \$5,000 fee, defendant was entitled to keep all revenues generated from the sale of commercial advertising. The agreement required defendants to pay \$20,000 to the plaintiff as an advance payment to cover the months of February, March, April and May 2011.

In its complaint, the plaintiffs allege that although the defendants paid the sum of \$20,000 at the time of the signing of the agreement, it failed to pay any amount after May 2011 as required by the agreement. Plaintiffs contend that Soundview is in arrears in the sum of \$180,000 for the period commencing June 2008 through May 2011 at the rate of \$5,000 per month. Plaintiff also contends that it has paid the defendant 50% of the revenue collected from Time Warner. However, Soundview has requested the sum of \$40,000 from the plaintiffs towards arrears in revenue collected from Time Warner and has allegedly threatened to prevent TBC from using its studio if payments are not made to it. As a result, the plaintiffs are seeking a permanent injunction restraining and enjoining defendants from disrupting the plaintiffs' use of the broadcasting facility. Plaintiff has also asserted causes of action for breach of contract, unjust enrichment and loss of business.

In the instant motion, plaintiff seeks a preliminary injunction alleging that they will suffer irreparable damage to their business if Soundview restricts its broadcasting ability because if they are forced to stop broadcasting they will lose their affiliation agreement with Time Warner. Thus, plaintiff contends that TBC will close if the defendants are not restrained from shutting down the programming of the plaintiff's channel. In support of the motion, Dr. Khan, states that while he is in compliance with that portion of the contract which requires him to pay Soundview 50% of the revenue received from Time Warner, Soundview has breached the agreement by not paying \$5,000 per month to plaintiffs for the right to keep all of the advertising

revenue generated by the station.

Defendant Chaudhry, the President of Soundview Broadcasting submits an affirmation in opposition to the motion and a cross-motion seeking a stay of the instant action and compelling arbitration. Chaudhry states that he executed the October 7, 2007 License and Distribution Agreement. He states that it is pursuant to this agreement that the plaintiff is seeking to recover the Commercial Time Fee of \$5,000 for the prior thirty-six months for a total of \$180,000. Counsel for Chaudhry states that this agreement contains a clause at paragraph nine which requires that all disputes concerning the Agreement be resolved by arbitration which shall be final and binding upon the parties. Specifically, paragraph nine states as follows:

"Any conflict between the parties will be resolved through the New York Arbitration Association and an arbitrator's decision will be final and binding."

Soundview contends that TBC refused to abide by the agreement in that it failed to pay 50% of the revenue it received from Time Warner. Moreover, Soundview states that it was agreed between the parties that the monthly commercial time fee of \$5,000 per month would only be owed to TBC upon the commencement of actual commercial advertising sales by Soundview. Soundview asserts that it never engaged in the sale of television commercial sales for TBC and therefore does not owe TBC any arrears for the monthly commercial time fee. Counsel also contends that plaintiffs fraudulently induced defendants to enter into the revenue sharing agreement as concerns revenues from Time Warner by misrepresenting or failing to disclose the true subscription revenues and projected subscription revenues.

In addition, counsel asserts that based upon the contractual arbitration provision, that arbitration is the stipulated venue that the parties agreed to use in order to resolve any conflicts under the agreement. Counsel also contends that as arbitration has not been sought by the plaintiff that the court has no discretion to grant the requested injunctive relief. Counsel states that pursuant to CPLR 7502(c) where there is an arbitrable dispute the Court's discretion to grant injunctive relief is limited to situations where the award to which the applicant may be entitled may be rendered ineffectual without provisional relief.

In opposition to the cross-motion, the plaintiffs claim that paragraph nine of the agreement which contains the arbitration clause requiring arbitration by the New York Arbitration

Association is null and void and incapable of being performed because there is no entity in existence known as the New York Arbitration Association. Counsel asserts that this Court cannot compel arbitration where the arbitration entity named in the agreement is nonexistent.

In reply, defendant asserts that merely because the plaintiff has been unable to locate an entity known as the "New York Arbitration Association" that the broad arbitration clause contained in the agreement is not rendered null and void. Counsel contends that the agreement contemplates that any conflicts arising under the agreement be resolved through arbitration and that an alternative arbitrator should be selected in place of the New York Arbitration Association if it is found that this entity has been misnamed in the parties agreement.

With respect to the defendants' cross-motion to compel arbitration, the court's have held that the right to compel arbitration arises only by contract and arbitrable matters are limited to those contained within the contract (see CPLR 7501, 7503 [a]; Matter of Perrin v Stempinski Realty Corp., 15 AD2d 91 1st Dept. 1961]). CPLR 7501 provides that a written agreement to submit a dispute to arbitration confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. Moreover, "a written agreement that is clear and unambiguous as a matter of law must be enforced according to the plain meaning of its terms" (Maroney v Hawkins, 50 AD3d 862 [2d Dept. 2008]). "When faced with a broad arbitration clause, which creates a presumption of arbitrability, a court merely determines whether there is "a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract" (Domansky v Little, 2 AD3d 132 [1st Dept. 2003]).

Here, it is clear that the parties agreement contained a broad arbitration clause which stated that any conflict between the parties will be resolved through arbitration. Further, it is clear that the issues raised in this action are within the subject matter of the underlying contract. Therefore, this court finds that the parties' intent was to arbitrate any dispute regarding issues arising pursuant to the agreement and as a result the instant matter must be stayed and the parties dispute must be resolved by arbitration (see In re Herrero, 168 AD2d 343 [1st Dept. 1990]). Although it appears that the parties inappropriately named a nonexistent body for the purposes of arbitration, the court is empowered pursuant to CPLR 7504 to appoint an arbitrator where the clear intent of the parties is to resolve a dispute under the contract (See Matter of Basil

Castrovinci Assoc., Inc. v District 65 Pension, 16 AD3d 493 [2d Dept. 2005]; Zandman v Nissenbaum, 53 AD2d 837 [1st Dept. 1976]).

With respect to the plaintiffs' motion for a temporary restraining order, the Courts have held that CPLR 7502(c) governs provisional remedies in arbitration cases, and provides the courts with limited power to "entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief (see H. I. G. Capital Mgmt. v Ligator, 233 AD2d 270 [1st Dept. 1966]; Dept. County Natwest Sec. Corp. USA v Jesup, Josephthal & Co., 180 AD2d 468 [1st Dept. 1992]). A party seeking relief under this provision must also make a showing of the traditional equitable criteria for the granting of temporary relief under CPLR article 63 (see Winter v. Brown, 49 AD3d 526 [2d Dept. 2008]; Matter of K.W.F. Realty Corp. v Kaufman, 16 AD3d 688 [2d Dept. 2005]). A party may obtain temporary injunctive relief only upon a demonstration of (1) irreparable injury absent the grant of such relief; (2) a likelihood of success on the merits; and (3) a balancing of the equities in that party's favor (see W.T. Grant Co. v Sroqi, 52 NY2d 496[1981]).

Here, the plaintiff's motion papers establish his entitlement to injunctive relief pursuant to CPLR 7502(c) and CPLR 6301. The plaintiff satisfied the first requirement by demonstrating that it can prove, prima facie, that the defendants failed to pay \$5,000 per month for the commercial time fee as provided in the agreement (see Invar Intern., Inc. v Zorlu Enerji Elektrik Uretim Anonim Sirketi, 86 AD3d 404 [2d Dept. 2011]; Trimboli v Irwin, 18 AD3d 866 [2d Dept. 2005]). The second element is satisfied because TBC states that it will lose its license with Time Warner if it fails to continue to broadcast under the license. The third element is satisfied because the plaintiff will be deprived of its broadcasting business, whereas the defendants are receiving their 50 per cent share of the revenues garnered from Time Warner during the pendency of the proceedings.

The right to a preliminary injunction is conditioned upon plaintiff filing an undertaking in accordance with CPLR 6312 in the amount of \$10,000. Further, if the arbitration is not commenced within 30 days of this order the preliminary injunction shall expire (see CPLR 7502(c)).

In light of the foregoing, it is hereby,

ORDERED that plaintiffs' application for injunctive relief is granted to the extent that the Court directs that the TRO shall remain in effect and directs plaintiff to post a bond in the sum of \$10,000 within thirty (30) days of the date of this order as a condition of the continued injunctive relief; and it is further,

ORDERED, that the instant action shall be stayed and the parties are directed to proceed to arbitration, and it is further

ORDERED, that unless the parties agree otherwise, the matter shall proceed to arbitration before the American Arbitration Association.

Dated: November 30, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.