

Nussdorf v BDO Seidman, LLP
2011 NY Slip Op 33891(U)
August 3, 2011
Supreme Court, New York County
Docket Number: 601359/2009
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRF

PART 48

Index Number : 601359/2009

NUSSDORF, GLENN

vs.

BDO SEIDMAN, LLOP

SEQUENCE NUMBER : 013

COMPEL / STAY ARBITRATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The

motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

"This motion is decided in accordance with the annexed decision and order of the Court."

AUG - 4 2011

Dated: 8/3/11

JEFFREY K. OING
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

-----x

GLENN NUSSDORF, STEPHEN NUSSDORF,
ARLENE NUSSDORF, and RUTH NUSSDORF,

Plaintiffs,

-against-

BDO SEIDMAN, LLP, ERIC HANANEL, LAWRENCE
COHEN, JOSEPH KLAUSNER, GRAMERCY
ADVISORS, LLC, GRAMERCY ASSET
MANAGEMENT LLC, and JAY A. JOHNSTON,

Defendants.

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Mtn Seq. No. 013 and 014

DECISION AND ORDER

JEFFREY K. OING, J.:

Motion sequence numbers 013 and 014 are consolidated for
disposition.

Defendants BDO Seidman, LLP ("BDO"), Eric Hananel, and
Joseph Klausner (Mot. Seq. No. 013), and defendant Lawrence Cohen
(Mot. Seq. No. 014) move, pursuant to CPLR 7503(a), to compel
arbitration of the professional malpractice claim asserted in
plaintiffs' second amended complaint.

Alternatively, these defendants move to stay litigation of
this claim, pursuant to CPLR 2201, pending arbitration of claims
asserted by plaintiffs in their first amended complaint.

BACKGROUND

Familiarity with the essential facts of this case, as set
forth in the transcript of the July 6, 2010 decision rendered by
the Court (JHO Ira Gammerman) is presumed. Briefly, plaintiffs

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commenced this action on May 4, 2009 to recover damages that they incurred as a result of their investment in three alleged fraudulent tax shelters: (1) the Sentinel Foreign Currency Straddle Transaction, for tax years 1999 and 2000 (the "1999 Sentinel transaction"); (2) the Helios European Style Binary Options Transactions, for tax years 2001 and 2002 (the "2001 Helios transaction"); and (3) the Gramercy Distressed Debt Transaction, for tax years 2003, 2004, 2005 and 2006 (the "2003 Gramercy transaction"). BDO and three BDO partners, Eric Hananel, Lawrence Cohen, and Joseph Klausner (collectively the "BDO defendants"), among others, allegedly promoted and marketed to plaintiffs each of these three tax shelters.

In their first amended complaint, plaintiffs asserted causes of action for (1) fraud, (2) conspiracy to commit fraud, (3) aiding and abetting fraud, (4) fraudulent inducement, (5) negligent misrepresentation, and (6) professional malpractice against the BDO defendants with respect to all three transactions.¹ In response, the BDO defendants moved (1) to

¹In their first amended complaint, plaintiffs alleged that they were fraudulently induced to invest in three tax shelters by the BDO defendants' false and misleading representations that these transactions were legitimate investments with the potential for high profits and tax savings. The complaint further alleged that the BDO defendants continued to promote and market these transactions to plaintiffs after receiving IRS warnings that these types of loss-generating schemes were considered to be improper and/or illegal. Plaintiffs alleged that, as a consequence of their participation in these transactions, they

compel arbitration of all claims relating to the 2001 Helios and 2003 Gramercy transactions, and (2) to dismiss all claims relating to the 1999 Sentinel transaction, or, alternatively, to stay such claims pending the demanded arbitration.

On July 6, 2010, JHO Gammerman granted the BDO defendants' motion to compel arbitration of the 2001 Helios and 2003 Gramercy claims based on the finding that BDO and plaintiffs had executed consulting agreements containing mandatory arbitration provisions prior to entering into these transactions. The Court also granted the BDO defendants' motion to dismiss all claims relating to the 1999 Sentinel transaction by finding that these claims were time-barred. The Court, however, granted plaintiffs leave to replead their professional malpractice claim, and to provide them the opportunity to provide factual support for their assertion that the applicable statute of limitations was tolled under the continuous representation doctrine.

In their second amended complaint, plaintiffs have repleaded their professional malpractice claim to include allegations regarding BDO's alleged continuous representation of plaintiffs with respect to the 1999 Sentinel transaction.

faced collection actions by the IRS and state taxing authorities seeking tens of millions of dollars in back taxes, penalties and interest.

The BDO defendants now move to compel arbitration of this malpractice claim, or, alternatively, to stay litigation of this claim pending arbitration of the 2001 Helios and 2003 Gramercy claims.

In support of their motion, the BDO defendants argue that their continuing professional services, which plaintiffs now allege constitute continuous representation, were provided pursuant to four Tax Services Agreements executed by the parties in January 2005, December 2005, February 2007, and January 2008. Each of the agreements contains a broad arbitration clause identifying the Federal Arbitration Act ("FAA") as the governing law. Defendants argue that because their alleged continuing professional services relate to matters covered under these Tax Services Agreements plaintiffs' malpractice claim falls within the scope of the agreements' arbitration clauses.

Alternatively, defendants argue that plaintiffs' malpractice claim is inextricably interwoven with the 2001 Helios and 2003 Gramercy claims; therefore, litigation of this claim should be stayed pending the arbitration. The BDO defendants additionally argue that, given the substantial overlap among claims asserted with respect to all three transactions, the arbitration of the 2001 Helios and 2003 Gramercy claims might well dispose of this malpractice claim.

In opposition, plaintiffs argue that the motion to compel arbitration should be denied because, by their terms, the four Tax Services Agreements provided tax preparation services to plaintiffs only for the 2004 through 2007 fiscal years; therefore, any continuing professional services that BDO rendered with respect to the 1999 Sentinel transaction are not covered by these agreements and, thus, not subject to arbitration. Plaintiffs additionally argue that the arbitration provisions contained in the February 2007 and January 2008 Tax Services Agreements are unenforceable, as neither of these agreements was signed by plaintiffs or their representative.

Plaintiffs argue that defendants' alternative argument, namely, to stay this litigation pending arbitration, also should be denied as defendants have not established that arbitration of the 2001 Helios and 2003 Gramercy claims will likely dispose of plaintiffs' 1999 Sentinel malpractice claim.

DISCUSSION

In considering a motion to compel arbitration under the FAA, a court must determine "(1) whether there exists a valid agreement to arbitrate at all under the contract in question ... and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement" (National Union Fire Ins. Co. of Pittsburgh, PA v Belco Petroleum Corp., 88 F3d 129, 135 [2nd Cir 1996]).

Here, each of the four Tax Services Agreements contains a broad arbitration clause providing that,

[i]f any dispute, controversy, or claim arises in connection with the performance or breach of this agreement and cannot be resolved by facilitated negotiations (or the parties agree to waive that process) then such dispute, controversy or claim shall be settled by arbitration. ... The proceeding shall be governed by the provisions of the Federal Arbitration Act ("FAA") or, if a court of competent jurisdiction determines the FAA inapplicable, by the laws of the state in which the proceeding is to take place.

(Samowitz Affirm., Ex. D, Attachment A; Ex. E, Attachment A; Ex. F, Attachment A; Ex. G, Attachment A). Although plaintiffs dispute whether the arbitration provisions contained in the unsigned February 2007 and January 2008 Tax Services Agreements are unenforceable, plaintiffs have not challenged the validity of the arbitration clauses contained in the January 2005 and December 2005 Tax Services Agreements.

Where, as here, the subject agreements contain a broad arbitration clause, "there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it" (Louis Dreyfus Negoce S.A. v Blystad Shipping & Trading Inc., 252 F3d 218, 225 [2nd Cir] [internal quotation marks and citations omitted], cert denied 534 US 1020 [2001]). "If the allegations underlying the claims touch matters covered by the parties' [contracts], then

those claims must be arbitrated, whatever the legal labels attached to them" (Oldroyd v Elmira Sav. Bank, FSB, 134 F3d 72, 77 [2nd Cir 1998] [internal quotation marks and citations omitted]). In determining arbitrability, the "focus [is] on the factual allegations in the complaint rather than the legal causes of action asserted" (Id. [internal quotation marks and citations omitted]).

Nevertheless, the obligation to arbitrate remains a creature of contract, and "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (AT & T Technologies, Inc. v Communications Workers of America, 475 US 643, 648 [1986] [internal quotation marks and citations omitted]). "[E]ven with a broad form clause, if the claims present 'no questions in respect of the parties' rights and obligations under [the agreements],' they are outside the purview of the arbitration clause and are not arbitrable" (In re Bethlehem Steel Corp., 390 BR 784, 790 [Bankr SD NY 2008], quoting Collins & Aikman Prods. Co. v Bldg. Sys., Inc., 58 F3d 16, 23 [2nd Cir 1995]). Generally, it is for the courts to determine "whether parties have agreed to submit a particular dispute to arbitration" (Granite Rock Co. v Intl. Bhd. of Teamsters, ___ US ___, 130 S Ct 2847, 2855 [2010] [internal quotation marks and citations omitted]).

The BDO defendants argue that the arbitration clauses contained in the four Tax Services Agreements cover plaintiffs' professional malpractice claim because the continuing nature of the professional services that BDO provided with respect to the 1999 Sentinel transaction were all rendered pursuant to an "additional services" provision contained in these agreements. Defendants argue that, pursuant to this provision, BDO was engaged to provide any "additional services" that plaintiffs requested "in connection with tax planning and consulting" (see Samowitz Affirm., Ex. D at 3; Ex. E at 3; Ex. F at 3; Ex. G at 4). Defendants note that the 2007 and 2008 Tax Services Agreements expressly identify, as examples of such "additional services": "[r]esponding to federal, state or local tax notices including fees, penalties, and interest determinations from taxing jurisdictions"; "[t]ax planning and consulting"; and, "[e]valuation of reportable transactions" (Id., Ex. F, Attachment B; Ex. G, Attachment B). Defendants also contend that such "additional services" were not limited to the fiscal year in which the agreements were executed, but included services that were "requested" for any and all years, including 1999.

Defendants argue that in the second amended complaint, plaintiffs specifically allege that they "requested" additional services related to the 1999 Sentinel transaction, and that BDO had "represent[ed] Plaintiffs in connection with the IRS audits

and provide[d] continued tax advice and consulting with respect to the transactions and the opinions and advice BDO gave in connection with those transactions" (Defendants Memorandum of Law at 12, citing Second Amended Complaint ¶ 10). Defendants argue that these factual allegations, regarding BDO's "tax advice," "consulting," and representation in "audits," place plaintiffs' professional malpractice claim squarely within the matters covered by the Tax Services Agreements, and compel arbitration of this claim.

Plaintiffs contend that arbitration of their malpractice claim is not warranted, as the Tax Services Agreements relate only to services provided with respect to plaintiffs' tax returns for the tax years 2004 through 2007, and thus do not cover the 1999 Sentinel malpractice claim, which relates only to plaintiffs' tax returns for the tax years 1999 and 2000. Plaintiffs additionally argue that provision for "additional services" is not applicable to plaintiffs, as this provision applies only to services requested by the "Companies" or "Company," as that term has been defined in the agreements.

The record reflects that the four Tax Services Agreements at issue were entered into by BDO Seidman and Quality King Distributors, Inc. & Affiliates, the Nussdorf family-owned business. Under the terms of these agreements, BDO was engaged to provide tax preparation services to Quality King Distributors,

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Inc. & Affiliates (thereafter referred to in the January 2005 and December 2005 agreements as the "Companies," and in the February 2007 and January 2008 agreements as the "Company"), as well as to the "principals" of the Companies/Company, for their respective fiscal years.

The "additional services" provision contained in these Tax Services Agreements expressly provides, in pertinent part, that "[t]his letter serves as approval to engage BDO to perform additional services, as may be requested by the Compan[y/ies]" during that fiscal year, "in connection with tax planning and consultation" (Samowitz Affirm., Ex. D at 3; Ex. E at 3; Ex. F at 3; Ex. G at 4 [emphasis added]). The agreement further states that any "[e]xpenses incurred in connection with performance of additional professional services will also be billed to the Compan[y/ies]" (Id. [emphasis added]). There is no provision engaging BDO to perform additional services requested by the "principals" of the Company or Companies.

In their memorandum of law, defendants acknowledge that "Companies," or "Company," is a defined term as used in these agreements. Nevertheless, defendants contend that this provision applies to plaintiffs because the agreements define "Companies" or "Company" as Quality King Distributors, Inc. & Affiliates, and "Affiliates include various trusts and entities for Arlene Nussdorf, Glenn Nussdorf, Ruth Nussdorf and Stephen Nussdorf --

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the Plaintiffs in this action" (Defendants Memorandum of Law at 11, n 7).

Not only do defendants provide no support for this assertion, but each of the Tax Services Agreements includes a list that identifies those specific affiliates entitled to tax services as one of the "Companies," or "Company," under the respective agreement. Neither the trusts, nor the individual plaintiffs, are included on any of these lists. Rather, plaintiffs are named on a second list, also included in each agreement, which identifies those individuals and entities entitled to receive tax preparation services as a "principal" of the "Companies" or "Company."

The Tax Services Agreements make clear that the term "Companies" or "Company" does not include these "principals." Because the "additional services" provision, by its terms, covers only services "as may be requested by the Compan[y/ies]," any continuing professional services that the BDO defendants provided at the request of plaintiffs fall outside the scope of these agreements. Thus, as the continuing professional services that were rendered to plaintiffs with respect to the 1999 Sentinel transaction are not covered by these Tax Services Agreements, arbitration of the 1999 Sentinel malpractice cannot be compelled, and the BDO defendants' motion to compel arbitration of this claim is denied.

Defendants alternative motion to stay litigation of plaintiffs' malpractice claim pending arbitration of the claims relating to the 2001 Helios and 2003 Gramercy transactions is also denied.

Generally, "[w]here arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where ... the determination of issues in arbitration may well dispose of nonarbitrable matters (Cohen v Ark Asset Holdings, 268 AD2d 285, 286 [1st Dept 2000]).

Here, defendants have not demonstrated that plaintiffs' remaining malpractice claim, which arises out of the 1999 Sentinel transaction, is inextricably interwoven with the arbitrable claims arising out of the later 2001 Helios and 2003 Gramercy transactions. Nor have defendants made clear how the determination of issues pertaining to the 2001 Helios and 2003 Gramercy transactions might dispose of this claim. While there may be numerous factual similarities and legal overlap among these three transactions, the underlying facts giving rise to their respective claims are sufficiently distinct.

Accordingly, it is

ORDERED that the motions by defendants BDO Seidman, LLP, Eric Hananel, and Joseph Klausner (Mot. Seq. No. 013) and defendant Lawrence Cohen (Mot. Seq. No. 014) to compel

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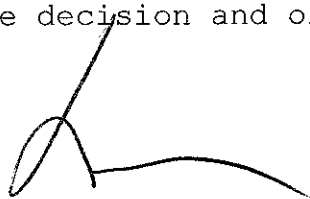
arbitration pursuant to CPLR 7503(a), or, alternatively, to stay litigation of plaintiffs' claim, pursuant to CPLR 2201, are denied; and it is further

ORDERED that counsel are directed to contact Part 48 at 646-386-3265 to schedule a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

8/3/11



HON. JEFFREY K. OING, J.S.C.