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| Ace Ina Intl. Holdings, Ltd. v New York Life Intl., LLC |
| 2012 NY Slip Op 33363(U) |
| July 10, 2012 |
| Supreme Court, New York County |
| Docket Number: 651851/2011 |
| Judge: Shirley Werner Kornreich |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH
Justice J.S.C.

PART 54

Ace DNA International Holdings, Ltd
- v -
New York Life Intl, LLC

INDEX NO. 651851/2011
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

| PAPERS NUMBERED |
|-----------------|
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Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision/order.

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

Dated: 7/10/12

SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
ACE INA INTERNATIONAL HOLDINGS, LTD.,

Plaintiff,

-against-

Index No.: 651851/2011
DECISION and ORDER

NEW YORK LIFE INTERNATIONAL, LLC,

Defendant.

-----X
KORNREICH, SHIRLEY WERNER, J.:

This action arises from plaintiff Ace Ina International Holdings, Ltd. (Ace)'s purchase of defendant New York Life International, LLC (New York Life)'s Korean subsidiary. The parties' dispute whether certain post-closing adjustments to the purchase price made by Ace fall within alternative dispute resolution (ADR) procedures contained in the parties' Amended and Restated Share Purchase Agreement (SPA). Ace seeks to enjoin New York Life from invoking the ADR procedures and, also, seeks a declaration that New York Life cannot make certain specified adjustments to the purchase price. New York Life now moves, on order to show cause, to compel arbitration under the ADR procedures and to dismiss the complaint. Ace opposes.

I. Background

According to the allegations in the complaint, Ace and New York Life entered into the SPA on January 28, 2011, (Complaint, Exh. A), in which the latter agreed to sell to Ace all issued and outstanding shares of its subsidiary in Hong Kong (Tiger Hong Kong) and its subsidiary in Korea (Tiger Korea). The purchase price, subject to adjustment, was US\$424,714,650, with US\$350,000,000 allocated to Tiger Hong Kong and US\$74,714,650 allocated to Tiger Korea. The price was based, in part, on the value of the subsidiaries as shown on their balance sheets prepared by New York Life as of

June 30, 2010. The parties included a price adjustment mechanism in the SPA to account for changes in value between June 30, 2010, and the closing. Depending on the adjustments (if any), Ace (buyer) would pay for any increase in value and New York Life (seller) for any decrease. Complaint, ¶2; SPA, §2.3.2(iii).

The SPA specified that within sixty days of the closing, Ace would deliver closing statements for both subsidiaries reflecting its calculation of their statutory capital and adjusted shareholders' equity. If New York Life disagreed, then it was obligated to deliver a Notice of Disagreement "specifying the nature of such disagreement and Seller's proposed adjustments" within thirty days [§2.3.2(ii)], or be bound by the closing statements originally delivered by Ace. In the event of a timely delivered Notice of Disagreement, the parties had another thirty days to negotiate in good faith. If the parties failed to resolve their dispute after thirty days, they agreed to submit "all unresolved Proposed Adjustments to Deloitte and Touche or another internationally recognized independent public accounting firm . . . [whose] determination of such Proposed Adjustments shall be final, binding and non-appealable." §2.3.2(iii).

Edward S. Best, Ace's lead counsel in the transaction, explains in an affidavit:

3. Ace's purchase of [Tiger Korea] began as part of an auction process commenced by [New York Life] in the spring of 2010. On July 14, 2010, after a short introductory diligence period, ACE submitted a non-binding bid for, *inter alia*, [Tiger Korea]. ACE's bid was accepted to proceed to round 2 of the auction. ACE then submitted a second bid on or about September 12, 2010. . . . In that bid, ACE introduced the concept of a dollar for dollar purchase price adjustment to the extent [Tiger Korea]'s shareholders' equity at closing differed from [Tiger Korea]'s book value at June 30, 2010 as reflected in a balance sheet that had previously been delivered by [New York Life] to ACE as part of the discussion process.

4. In order to accomplish this, the parties agreed in the SPA [share purchase agreement] that ACE would create a proposed "Korea Closing Statement." . . . [t]hat . . . would contain ACE's calculation of the "Adjusted Korean Shareholders' Equity." . . . The "Adjusted Korean Shareholders' Equity" was required

to be done “substantially in the form” of Section 2.3.2 of the Seller Disclosure Schedule [Exh. C] prepared by [New York Life] . . .

Best Affid., Exh. B (9/12/10 bid).

Best explained the phrase “substantially in the form” of Section 2.3.2 of the Seller Disclosure Schedule” as, “starting with [New York Life]’s U.S. GAAP shareholders’ equity as of June 30, 2010, and then adding or subtracting the listed items in order to arrive at the Adjusted Korea Shareholders’ Equity.” Best Aff. ¶5. According to Best, although the SPA provided that New York Life had the right to disagree with ACE’s proposed adjustments,

It was never the parties’ intent that [New York Life] could disagree with its own financial statements, including its March 31, 2010 audited financial statements, and propose changes to its own financial statements that ACE had not challenged. Nor do I believe the language supports that idea. In fact, we used the word ”disagreements” in its ordinary sense, to mean disagreements between [New York Life] and ACE, not [New York Life] disagreeing with itself, *i.e.*, its own prior financial statements. Indeed, there is no mirror provision in the SPA for ACE to disagree with New York Life’s proposed adjustments and to state its rationale for doing so. To the contrary, we relied on [New York Life]’s March 31, 2010 audited balance sheet and the Korea specific shareholders’ equity number calculated from the June 30, 2010 balance sheet . . . in setting the purchase price of [Tiger Korea].

Id. at ¶6.

Best averred that the arbitration clause included in the SPA was intended to be narrow, covering only disagreements as to ACE’s proposed adjustments. *Id.* at ¶7. He makes the point that under New York Life’s theory, it could make changes to its financial statements that formed the basis of the deal, even if ACE made no proposed adjustments. *Id.* at ¶9. However, he argues, the SPA contained Representations and Warranties by New York Life as to the completeness and accuracy of financial statements delivered to Ace. Thus, Section 3,1,7 of the SPA provided:

Seller [New York Life] has delivered to Buyer [Ace] a true and complete copy of the Financial Statements. The Financial Statements have been prepared from and are consistent in all material respects with the books and records of each Company . . . and were prepared in accordance with Applicable GAAP consistently applied (except

as disclosed in the notes thereto). Subject to Section 3.2.8, the Financial Statements fairly present, in all material respects, the financial position of each Company as of the dates thereof and the results of operations and cash flows of such Company for the periods then ended, subject, in the case of unaudited statements, to normal year-end-audit adjustments (which will not be material in the aggregate) and the absence of notes thereto. . . .

The closing for Tiger Korea took place on January 31, 2011. The closing statement timely delivered by Ace reflected adjustments in shareholders' equity that resulted in a deduction of \$20,878,163 from the purchase price paid by Ace. \$9.1 Million of that adjustment was calculated by Ace "relative to the June 30 Reference Balance Sheet" that New York Life had prepared (Bucket I Adjustments). Complaint, ¶13.

New York Life delivered a timely Notice of Disagreement in which it disputed the Bucket I Adjustments and included its own Proposed Adjustments (Bucket II Adjustments), which reflected changes to the balance sheet prepared as of June 30, 2010 and adjustments reflected in the March 31, 2010 audited balance sheet prepared by New York Life.¹ New York Life explained these Proposed Adjustments as necessary to correct errors in Generally Accepted Accounting Principles (GAAP) that it had identified in historical financial statements. Under the Bucket II Adjustments, the purchase price for Tiger Korea increased by \$17,676,864. The parties negotiated but failed to resolve their dispute. ¶¶14-17.

II. Discussion

A. Motion to Compel Arbitration

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration any

¹

The April 28, 2011 Notice of Disagreement from New York Life includes twelve (12) proposed equity adjustments, three (3) of which appear to be reductions based on corrections of errors identified in the Tiger Korea balance sheet. Best Affid., Exh. C.

dispute which he has not agreed so to submit.” *United Steel Workers of America v Warrior & Gulf Navigation Co.*, 363 US 574, 582 (1960); *see also County of Sullivan v Edward L. Nezeleck, Inc.*, 42 NY2d 123, 128 (1977) (noting fundamental principle that arbitration is grounded in agreement of parties). The FAA controls arbitration provisions in State court actions involving interstate commerce, and it is FAA policy that private arbitration agreements are to be enforced according to their terms. *See Dean Witter Reynolds, Inc. v Byrd*, 470 US 213, 219 (1985). Moreover, “[w]here there is no substantial question whether a valid agreement [to arbitrate] was made . . . the court shall direct the parties to arbitrate.” CPLR 7503(a). The burden of showing that the dispute is arbitrable is upon the party seeking arbitration. *Layton Blumenthal Inc v Jack Wasserman Co.*, 280 AD 135 (1st Dept 1952).

New York Life has met its burden. The arbitration clause negotiated by the parties and included in the SPA explicitly refers to both disputed adjustments proposed by ACE and adjustments proposed by New York Life in its Notice of Disagreement. The clause provides that ACE would prepare the subsidiaries’ closing statements, including the calculated adjusted shareholders’ equity. New York Life could then disagree with the proposed adjustments *and* propose its own adjustments, or do nothing and accept ACE’s calculations. The parties agreed to negotiate in the event of a dispute and to submit “all unresolved Proposed Adjustments” to an “independent public accounting firm.” §2.3.2(iii).

Contrary to ACE’s argument, they did not limit the proposed adjustments to be decided by an outside accountant, to the disputed ones proposed by ACE. ACE’s argument would render the phrase “all unresolved Proposed Adjustments” meaningless. *See Brooke Grp. v JCH Syndicate* 488, 87 NY2d 530, 533 (1996) (“when interpreting a contract, the entire contract must be considered so as to give each part meaning”); *County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 (1994) (contract

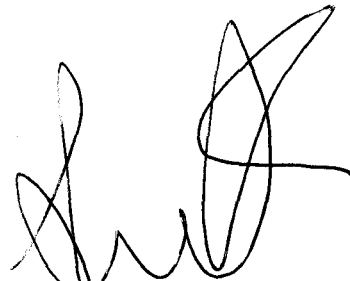
should not be interpreted so that provision is rendered meaningless). ACE also argues that the adjustments proposed by New York Life are not arbitrable because they do not concern changes in equity value between the signing and closing dates or analysis of accounting information on which the purchase price had been based. Rather, ACE asserts that New York Life's proposed "adjustments" are actually alterations of the financial statements on which ACE based its decision to enter the transaction in the first place and are not arbitrable. ACE's argument goes to the merit of New York Life's proposed adjustments. Whether New York Life may base adjustments to Korea Tiger's closing equity value on alterations or corrections of historical financial statements is an issue for the arbitrator to determine in resolving the disputed proposed adjustments.

Furthermore, New York Life seeks to have *all* of the proposed adjustments in its Notice of Disagreement decided by an independent accountant, including those proposed by ACE. The phrase "all unresolved Proposed Adjustments" is inclusive. There is no basis for construing that language as including only proposed adjustments to which New York Life is entitled. Accordingly, it is hereby

ORDERED that the motion by defendant New York Life International, LLC, to compel arbitration of the Causes of Action in the Complaint to Deloitte and Touche or another internationally recognized independent public accounting firm, as shall be agreed upon by the parties in writing, for a binding, final and non-appealable resolution, and to dismiss the Complaint with prejudice, is granted, and the Clerk shall enter judgment accordingly.

Dated: July 10, 2012

Enter,



J.S.C.