National Union Fire Ins. v Priority Bus. Servs.

2012 NY Slip Op 33827(U)

March 16, 2012

Supreme Court, New York County

Docket Number: 651960/2011

Judge: Shirley Werner Kornreich

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 651960/2011
NATIONAL UNION FIRE INSURANCE
vs.
PRIORITY BUSINESS SERVICES,
SEQUENCE NUMBER : 001
COMPEL OR STAY ARBITRATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 2, 46

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

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

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

Dated: 3/16/12

651960/11

JUSTICE SHIRLEY WERNER KORNREICH, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

----------x

In the Matter of the Arbitration between
NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA, on
behalf of itself and each of the related
insurers that provided coverage to
Respondents,

Petitioner,

-against-

Index No.: 651960/11
Decision, Order & Judgment

PRIORITY BUSINESS SERVICES, INC.,
f/k/a INLAND VALLEY STAFFING
SERVICES, f/k/a MAINTENANCE MATCH,
INC., d/b/a PRIORITY STAFFING,

Respondent.

U N F I L E D J U D G M E N T
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

----------x

Kornreich, J.:

Motion Sequence Nos. 001 and 002 are consolidated for disposition and are disposed in accordance with the following decision and order.

Petitioner National Union Fire Insurance Company of Pittsburgh, PA (National Union) moves to compel arbitration of a dispute with respondent Priority Business Services, Inc. (Priority), and for the appointment of an arbitrator. Respondent Priority moves to dismiss the petition, pursuant to CPLR 404, 3211 (a) (5) and (7), and 327 (a).

Background

National Union is an insurance company incorporated in Pennsylvania, with its principal place of business in New York (Petition, ¶ 5). Priority is incorporated in Arizona, with its principal place of business in California (, ¶ 6). National Union issued workers' compensation and

01 651960

employer's liability insurance to Priority (the Program). Priority renewed the policies during four annual periods from November 26, 2004 through November 26, 2008 (the Program Period), and National Union issued six insurance policies to Priority during that period (*id.*, ¶¶ 9-10). The parties also entered into Payment Agreements, including the November 26, 2004 Payment Agreement (2004 Payment Agreement), the 2004 Addendum to the 2004 Payment Agreement (2004 Addendum), the 2006 Addendum to the 2004 Payment Agreement (2006 Addendum), the November 26, 2007 Payment Agreement (2007 Payment Agreement), as well as additional addenda and schedules in 2006, 2007, and 2008 (*id.*, ¶ 11). The 2004 Payment Agreement, the 2007 Payment Agreement (collectively, the Payment Agreements), and each of the schedules and addenda were signed by Priority (*id.*, ¶ 12).

The Payment Agreements contain broad arbitration clauses, directing the arbitration of any disputed items regarding Priority's payment obligation as well as "any other unresolved dispute arising out of this Agreement" (Exhibits 1 and 2 to Affidavit of Jackie A. Lu in Support of Petition, 2004 and 2007 Payment Agreements, at 8). The Payment Agreements set forth the method of choosing arbitrators, provided that the arbitration is governed by the United States Arbitration Act, Title 9 USC ¶ 1 et al., and stated that the majority decision of any two of three arbitrators, when filed, would be binding and final. The agreements further stated that if a party refused to appoint an arbitrator within 30 days after written notice, either party may make an application to a Justice of the Supreme Court of the State of New York, County of New York and the court will appoint the additional arbitrator or arbitrators (*id.* at 8-9). Further, the Payment Agreements provided that the arbitrators "will have exclusive jurisdiction over the entire matter in dispute, including any question as to its arbitrability" (*id.* at 9). In the 2004 Addendum and the 2006 Addendum, the parties further

agreed that "any action or proceeding concerning arbitrability, including motions to compel or to stay arbitration, may be brought only in a court of competent jurisdiction in the City, County, and State of New York" (Exhibit 1 to Lu Aff., 2004 Addendum to 2004 Payment Agreement, at section 5; 2006 Addendum to 2004 Payment Agreement, section 6, at 2).

On April 4, 2011, upon Priority's alleged default under the Payment Agreements, National Union served it with a Demand for Arbitration (Exhibit 6 to Lu Aff.). On May 27, 2011, Priority responded, asserting that it had no obligation to arbitrate the payment obligation dispute, and that any obligations it owed National Union pursuant to the Payment Agreements were released as part of a certain Settlement Agreement and General Release, between, among others, National Union and certain of Priority's principals (Exhibit 9 to Lu Aff.). The Settlement Agreement and General Release, dated June 30, 2008, related to a lawsuit filed by National Union in California State Court against John Porrello, Rosemary Polenski, and other former employees of Headway Corporate Resources, for conversion and fraud, regarding an alleged embezzlement scheme involving those defendants, which had been submitted to arbitration in California (Petition, ¶ 35).

National Union seeks an order compelling Priority to arbitrate the parties' dispute under the Payment Agreements. It contends that the arbitration provision in the Payment Agreements and the addenda establish that the parties agreed to arbitrate, and the underlying dispute falls within the scope of the arbitration clause. National Union urges that the Payment Agreements evidenced transactions involving interstate commerce, and, therefore, the Federal Arbitration Act (FAA) applies. It asserts that the Payment Agreements contained clear, broad, unambiguous, and valid arbitration clauses, requiring the arbitration of any payment dispute and "[a]ny other unresolved dispute," and that the underlying dispute falls within the scope of this broad clause. It argues that it

did not release Priority from its obligations under the Payment Agreements based on the Settlement and General Release, because the Headway litigation was completely unrelated to this dispute and the language contained therein did not release this dispute. National Union urges that this court appoint an arbitrator for Priority as the parties' agreed in the Payment Agreements.

Priority argues that the arbitration clause contained in the Payment Agreements is unenforceable under California Insurance Code (Ca Ins. Code) § 11658. It contends that National Union failed to submit the Payment Agreements for approval with the California Workers' Compensation Insurance Review Board (WCIRB), as allegedly required by section 11658, violating the statute and thereby violating public policy. Consequently, Priority contends that the Payment Agreements, including the arbitration and consent to jurisdiction provisions contained therein, are invalid (Respondent's Memorandum in Support, at 10). Alternatively, it asserts that the Settlement and General Release terminated the Payment Agreements, and, thus, there is no basis to arbitrate. It urges that the settlement agreement required any issues with respect thereto to be resolved by arbitration in California, which Priority has commenced by demand for arbitration dated July 26, 2011 (Exhibit F to Notice of Motion to Dismiss). Finally, Priority urges that this court should decline jurisdiction over National Union's petition on the basis of forum non conveniens.

Discussion

The petition is granted, and the parties are directed to arbitrate their dispute in accordance with the arbitration provision in the Payment Agreements. The motion to dismiss is denied.

First, this court must determine if the parties made a valid agreement to arbitrate their disputes. There is a strong federal policy encouraging arbitration (*Preston v Ferrer*, 552 US 346, 349 [2008]). Federal law applies on a petition to compel arbitration whenever interstate commerce

is involved (*Gerling Global Reins. Corp. v Home Ins. Co.*, 302 AD2d 118, 125 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]). The Payment Agreements relate to insurance. The business of insurance is commerce within the meaning of the "Commerce Clause," and it affects interstate commerce (*see United States Dept. of the Treasury v Fabe*, 508 US 491, 499-500 [1993]; *Gerling Global Reins. Corp. v Home Ins. Co.*, 302 AD2d at 125). Consequently, the Federal Arbitration Act (FAA, 9 USC ¶ 1 *et seq.*) applies to this petition and motion.

Priority's contention that the FAA cannot preempt California Insurance Code § 11658 pursuant to the McCarran-Ferguson Insurance Regulation Act (15 USC § 1012 [b]), is unpersuasive. Under the McCarran-Ferguson Act, insurance regulatory powers are delegated to the states, and federal statutes, such as the FAA, cannot preempt state insurance regulation. The party challenging arbitration, however, has to show that application of the FAA would invalidate, impair or supersede a state law enacted for the purpose of regulating insurance (*see* 15 USC § 1012 [b]; *see also S.E.C. v Waltzer & Assoc.*, 122 F3d 1057, * 2-3 [2d Cir 1997]). Here, Priority would need to show an inherent and direct conflict between California Insurance Code § 11658 and arbitration as a dispute resolution mechanism (*see Preston v Ferrer*, 552 US at 356). Priority cannot make such a showing. Section 11658, which provides that workers' compensation policies or endorsements shall not be issued unless the insurer files a copy of the form or endorsement with WCIRB and 30 days have expired without objection from the commissioner thereof, does not prohibit arbitration in insurance disputes in California. In fact, this section does not even address arbitration. Priority's defense is that the Payment Agreements are unenforceable because they were not filed and approved under Section 11658. This goes to the merits of the underlying contract dispute, and the California insurance laws are not impaired by the agreement to arbitrate. Priority fails to show how

application of the FAA would invalidate, impair or supersede this filing requirement (*see Grove Lumber & Bldg. Supply Inc. v Argonaut Ins. Co.*, 2008 WL 2705169, *7 [CD Cal 2008] [FAA does not invalidate, impair or supersede California Insurance Code § 11658, which does not address arbitration or provide a procedural framework for dispute resolution]; *St. Paul Fire and Marine Ins. Co. v Courtney Enters., Inc.*, 270 F3d 621, 625 [8th Cir 2001]). Therefore, resolution of the issue of arbitrability by the arbitration panel will not violate the McCarran-Ferguson Act.

The clear and broad language in the arbitration provision in the Payment Agreements unquestionably establishes that the parties agreed to arbitrate their disputes. They agreed "[a]ny disputed items not resolved within 60 days after our response to Your written particulars must immediately be submitted to arbitration," and "[a]ny other unresolved dispute arising out of this Agreement must be submitted to arbitration" (Exhibits 1 and 2 to Lu Aff. at 8). Priority signed and agreed to this provision in both the 2004 Payment Agreement and the 2007 Payment Agreement, which were reaffirmed when it also signed the various addenda. Hence, the court finds that the parties agreed to arbitrate (*see Matter of Argonaut Ins. Co. v Grove Lumber & Bldg. Supply Inc.*, 2008 NY Slip Op 32530[U], *5, 2008 WL 4360423, 2008 NY Misc LEXIS 9418, *4 [Sup Ct, NY County 2008] [Ramos, J.]; *Monarch Consulting, Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, Index No. 102187/11, Transcript at 20 [Sup Ct, NY County 2011] [Oing, J.] [annexed to January 19, 2012 letter from counsel to National Union]).

With respect to the scope of the arbitrable issues here, the arbitration clause is broad. It provides that the arbitrators "will have exclusive jurisdiction over the entire matter in dispute, including any question as to its arbitrability" (Exhibits 1 and 2 to Lu Aff. at 9). This broad clause comprehensively includes Priority's challenge to the validity of the Payment Agreements, and the

arbitration provision within, under public policy and California insurance law. It contains a clear and unmistakable manifestation of the parties' intent to provide the arbitrators with the authority to decide whether the agreement to arbitrate is enforceable (*Rent-A-Center, West, Inc. v Jackson*, __ US __, 130 S Ct 2772, 2778-2779 [2010]).

Priority challenges the validity of the Payment Agreements as a whole. Contrary to Priority's assertions in oral argument (Transcript of Oral Argument, December 8, 2011, at 19; *see also* Respondent's Reply Memorandum, at 11 n9), it clearly argues in its memorandum in support, that "[t]he Payment Agreements, and the arbitration provision contained in them, violate California Insurance Code Section 11658 and are thus unenforceable as violating public policy" (Respondent's Memorandum of Law in Support at 10). Similarly, in its reply memorandum, Priority states, in its argument heading, that "California and New York Caselaw Holds That The Payment Agreements Are Part Of The Insurance Program And As Such Are Required To Be Reviewed By The WCIRB" (Respondent's Reply Memorandum at 2; *see also* December 8, 2011 Tr. at 18). This challenge concerns the validity of the entire contract, rather than just the arbitration provision, which issue must be decided by the arbitration panel (*see Rent-A-Center, West, Inc. v Jackson*, 130 S Ct at 2779 [U.S. Supreme Court determines that party's challenge to entire agreement, including the clause delegating to the arbitrator the exclusive right to determine enforceability of agreement, as unconscionable, was not a challenge specific to the delegation provision and would not be considered by the Court]; *Buckeye Check Cashing, Inc. v Cardegna*, 546 US 440, 445-446 [2006] [a challenge to validity of contract as a whole, not specifically to arbitration clause, must go to arbitrator]; *Prima Paint Corp. v Flood & Conklin Mfg. Co.*, 388 US 395, 402-404 [1967]). Its contention that the issue is whether the arbitration provision properly belongs within a Payment

Agreement, which was actually a policy that was not approved by the California Insurance Commissioner, still challenges the entire Payment Agreement, not just the arbitration provision. Priority fails to argue that there was some type of fraud, fraudulent inducement, unconscionability, duress, or other challenge to whether the agreement to arbitrate was legally binding as a contract, that is, a challenge to the making of the agreement to arbitrate itself. Only that type of challenge is relevant to a court's determination of whether the arbitration agreement is enforceable (*see Rent-A-Center, West, Inc. v Jackson*, 130 S Ct at 2778; *Buckeye Check Cashing, Inc. v Cardegna*, 546 US at 445-446; *Prima Paint Corp. v Flood & Conklin Mfg. Co.*, 388 US at 402-404).

Priority's reliance upon a new provision of the California Insurance Code § 11658.5, which was signed into law on October 7, 2011, is misplaced. That statute explicitly states that it is to be "appl[ied] to workers' compensation policies issued or renewed on or after July 1, 2012" (Exhibit A to Respondent's Supplemental Memorandum in Support, Cal. Ins. Code § 11658.5 [e]). The California legislature specifically provided that the statute was prospective only. For this reason, it will not be applied retroactively by this court, particularly since such application would violate contract principles.

Finally, Priority's argument that the Settlement and General Release executed by National Union, Headway Corporate Resources, Inc., Headway Corporate Staffing Services of California One, LLC, and John Porrello, Rosemary Polenski, Julia Marchena, and Patricia Brewster, bars National Union's claims here, is rejected. That release settled an action entitled *National Union Fire Ins. Co. of Pittsburgh, PA v John Porrello, et al*, in the Orange County Superior Court (Case No. 07CC07684) (Headway Action), which was stayed, and a binding arbitration regarding the same matter before JAMS in Orange County, California (Exhibit A to Notice of Motion to

Dismiss). Under the broad arbitration clause here, the issue of release is for the arbitrators to determine. Nonetheless, the court notes that Priority is not a party to the settlement and release, and there is no mention of the Payment Agreements or the Program therein. It appears that the Settlement and General Release does not apply to the controversy at issue here.

In light of the determination that the parties' dispute must be submitted to arbitration in accordance with their agreement, the branch of Priority's motion seeking dismissal on forum non conveniens grounds is denied as moot. Accordingly, it is

ORDERED that the motion to dismiss is denied; and it is further

ADJUDGED that the petition to compel arbitration is granted with costs and disbursements to petitioner, and the respondent Priority Business Services, Inc. is directed to choose an arbitrator in accordance with the parties' 2004 Payment Agreement and 2007 Payment Agreement, and it is further

ADJUDGED that the parties' shall proceed to arbitration forthwith and petitioner's counsel shall serve a copy of this judgment upon the arbitral tribunal; and it is further

ADJUDGED that Petitioner National Union Fire Insurance Company of Pittsburgh, PA, shall recover from respondent, having an address at 27 Bookline, Aliso, CA 92656, costs and disbursements in the amount of $ as taxed by the Clerk, and that petitioner shall have execution therefor.

Dated: March 16, 2012

ENTER:

J.S.C.

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF System.