

**CA2, LLC v A2, LLC**

2013 NY Slip Op 30259(U)

January 31, 2013

Supreme Court, New York County

Docket Number: 102011/2012

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

CA2, LLC and CARLOS FERREYROS,  
Plaintiffs,

Index No.: 102011/2012

Motion Date: 01/29/13

- v -

Motion Seq. No.: 002

A2, LLC d/b/a WEARETHENATION.COM, ARIEL  
EROLES, and ALEJANDRO MELGUIZO,

Motion Cal. No.: \_\_\_\_\_

Defendants.

The following papers, numbered 1 to 4 were read on this motion for summary judgment dismissing the complaint and for sanctions and cross motion to convert this plenary action to a special proceeding, modify the court's order of September 12, 2012 granting preliminary injunction to plaintiffs, directing plaintiffs to deposit \$1,000 with the court in lieu of a surety bond; directing plaintiffs to commence arbitration within thirty days and for sanctions against defendants.

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

Notice of Motion/Order to Show Cause -Affidavits -Exhibits  
Notice of Cross Motion/Answering Affidavits - Exhibits  
Replying Affidavits - Exhibits

**FILED**

PAPERS NUMBERED

1

2

3

FEB 05 2013

Cross-Motion:  Yes  No

NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the court shall deny in its entirety the motion of defendants for summary judgment dismissing the complaint and for an order awarding sanctions against the plaintiffs. The court shall grant the cross motion of plaintiffs to the extent that they seek an order compelling plaintiffs to commence an arbitration and modifying the court's prior order dated September 19, 2012 to allow plaintiffs to deposit a certified check in the amount of one thousand dollars (\$1,000.00)

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

[\* 2]  
in lieu of filing a surety bond as the undertaking pursuant to CPLR 6313( c). The cross motion is otherwise denied.

Both parties agree that the Release Agreement, which contains a mandatory arbitration clause, is valid, even though neither side brought such provision to this court's attention on plaintiff's original show cause order for a preliminary injunction. As the issues set forth in the complaint are arbitrable, arbitration must be compelled. Glickenhau & Co v Taylor, 163 AD2d 59, 60 (1<sup>st</sup> Dept 1990).

However, the court disagrees with defendants' argument that the law commands that the plenary action must be dismissed in light of the parties' agreement to arbitrate. Contrary to defendants' argument, "[t]he mere existence of an arbitration clause in a contract would not authorize the dismissal of the action. Only an 'arbitration and award' would warrant such a dismissal." Ogoe v New York Hospital, 99 AD2d 968, 969 (1<sup>st</sup> Dept 1984). Island Cash Register v Data Term Sys, 244 AD2d 117 (1<sup>st</sup> Dept 1998) is not to the contrary since the facts of that case, in which the plaintiff failed to make its demand for arbitration within the time specified in the contract, are not present here, and the defendants make no argument about the timeliness of any demand. In fact, the defendants at bar themselves served a

"Notice of Intention to Arbitrate" on July 16, 2012,<sup>1</sup> two months after service of their verified answer

Though the court finds a lack of diligence on the part of both parties with respect to their supporting and opposing papers on plaintiffs' prior show cause order, which never referenced the mandatory arbitration provision, such does not constitute misconduct or frivolous intent, a necessary predicate for an award of sanctions. It was not until the motion was fully submitted and argued on April 12, 2012, that defendants first asserted the arbitration clause as an affirmative defense in their verified answer dated May 24, 201. Nor did the parties endeavor to bring such affirmative defense to this court's attention, which they could have done on consent while the show cause order was sub judice.

Contrary to defendants' argument, "[t]he mere existence of an arbitration clause in a contract would not authorize the dismissal of the action. Only an 'arbitration and award' would warrant such a dismissal." Ogoe v New York Hospital, 99 AD2d 968, 969 (1<sup>st</sup> Dept 1984). Island Cash Register v Data Term Sys, 244 AD2d 117 (1<sup>st</sup> Dept 1998) is not to the contrary since the facts of that case, in which the plaintiff failed to make its demand for arbitration within the time specified in the contract,

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<sup>1</sup>On argument, defense counsel stated that the Notice of Intention to Arbitrate appended to his papers were incorrectly dated July 16, 2011.

are not present here, and the defendants makes no such argument. In fact, the defendants at bar themselves served a "Notice of Intention to Arbitrate" on July 16, 2012,<sup>2</sup> two months after service of their answer.

Glickenhaus, supra, also stands for the proposition that while the plenary action may not be dismissed at this juncture, it ought to be stayed pending an award. Therefore, conversion of the action to a special proceeding is not necessary.

Finally, plaintiffs may deposit a certified check in the amount of one thousand dollars (\$1,000.00) with the court in lieu of an undertaking to comply with CPLR 6312(b). See Bankers Trust Co v Nagler, 38 Mis2d 574, aff'd 23 AD2d 645 (1<sup>st</sup> Dept 1965).

Accordingly, it is hereby

ORDERED that the motion of defendants for summary judgment and for sanctions is denied; and it is further

ORDERED that the cross motion of plaintiffs to the extent that it seeks an Order modifying the Order dated September 19, 2012 is granted as follows: "plaintiffs shall deposit a certified check in the amount of one thousand dollars (\$1,000.00) payable to the New York County Clerk's Office in lieu of the undertaking and such provisional relief is conditioned upon plaintiffs, if it is finally determined that the plaintiffs are

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<sup>2</sup>On argument, defense counsel stated that the Notice of Intention to Arbitrate appended to his papers were incorrectly dated July 16, 2011.

\* 5]  
not entitled to an injunction (having not prevailed in the arbitration award), paying to the defendants all damages and costs which may be sustained by reason of this injunction"; and it is further

ORDERED that the cross motion of plaintiffs is otherwise denied; and it is further

ORDERED that the herein action is stayed pending the settlement of this controversy by arbitration in accord with section 7(b) of the Release Agreement dated November 10, 2011.

Dated: January 31, 2013

ENTER:

~~Debra A. James~~  
**DEBRA A. JAMES** J.S.C.

**FILED**

FEB 05 2013

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COUNTY CLERK'S OFFICE