Datatern, Inc. v Berkelely Research Group, LLC
2013 NY Slip Op 33685(U)
October 21, 2013
Supreme Court, New York County
Docket Number: 150284/2013
Judge: Eileen Bransten
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INDEX NO. 150284/2013
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BE FILED ELECTRONICALLY.

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

---x

DATATERN, INC.,

Petitioner,

-against-

Index No.: 150284/2013
Motion Date: 7/10/2013
Motion Seq. No.: 002

BERKELEY RESEARCH GROUP, LLC,

Respondent.

---x

The following papers, numbered 1 to 3, were read on this petition to stay arbitration and cross-motion to compel arbitration.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits	No(s). 1
Answering Affidavits - Exhibits	No(s). 2
Replying Affidavits	No(s). 3

Cross-Motion: X Yes ☐ No

FILED
JAN 23 2014
COUNTY CLERK'S OFFICE
NEW YORK

This motion is decided in accordance with the accompanying memorandum decision.

Dated: October 21, 2013

Hon. Eileen Bransten J.S.C.

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

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

2. CHECK AS APPROPRIATE: Motion Is: X 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 THREE
---X
DATATERN, INC.,

Petitioner,

-against-

BERKELEY RESEARCH GROUP, LLC,

Respondent.

---X

Index No. 150284/2013
Motion Date: 7/10/2013
Motion Seq. No.: 002

BRANSTEN, J.

This matter comes before the Court on Petitioner Datatern, Inc.'s ("Datatern") amended petition to stay arbitration and Respondent Berkeley Research Group, LLC's ("BRG") cross-motion to compel arbitration. Each motion is opposed. For the reasons that follow, Datatern's motion to stay is granted and BRG's motion to compel is denied.

I. Background

This dispute arises from a breach of contract action brought by BRG, an expert services and consulting firm, against its former client, Datatern. BRG filed a demand for arbitration before JAMS on December 10, 2012. *See* Am. Petition Ex. 1. Shortly thereafter, Datatern filed a petition in this Court to stay the arbitration.

Datatern's Amended Petition offers several objections to the arbitration. In broad strokes, Datatern contends that there is no valid arbitration agreement between the parties,

that the arbitration venue selected by BRG is "unconscionable," and that certain procedural decisions by JAMS are improper. BRG opposes Datatern's motion to stay and cross-moves to compel arbitration. Likewise, BRG seeks sanctions on the grounds that Datatern's arguments are "frivolous" and presented in "bad faith." *See* BRG's Br. at 15.

II. Analysis

A. *Datatern's Motion to Stay Arbitration*

On a motion to stay arbitration under CPLR 7503(b), "there are three threshold questions to be resolved by the courts: whether the parties made a valid agreement to arbitrate, whether if such an agreement was made it has been complied with, and whether the claim sought to be arbitrated would be barred by limitation of time had it been asserted in a court of the State." *Matter of County of Rockland (Primiano Constr. Co.)*, 51 N.Y.2d 1, 6-7 (1980). There is no dispute here as to the third question – the timeliness of BRG's claims. Datatern instead focuses on the arbitration agreement, or purported lack thereof, and whether BRG has complied with that agreement. Further, Datatern attacks certain decisions made by JAMS with respect to the arbitration.

[* 4]

1. Agreement to Arbitrate

Although Datatern contends that it never agreed to arbitrate its claims with BRG, such agreement is manifest in the text of the Engagement Letter entered into by the parties on June 13, 2012. The Engagement Letter, written by BRG, provides that the law firm McCarter & English, on behalf of Datatern, retained DRB to provide expert consulting services in a litigation. *See* Am. Petition, Ex. 2 at 1 ("Engagement Letter"). Describing the terms of BRG's engagement, the letter states: "[a] copy of BRG's Standard Commercial Terms, which Law Firm and [Datatern] accept and which is incorporated herein, is attached." *Id.* at 2. The arbitration provision is found in these Standard Commercial Terms. Specifically, the arbitration provision requires that:

> Any controversy, dispute, or claim between Client [Datatern] on the one hand and BRG and Expert on the other hand of whatever nature arising out of, in connection with, or in relation to the interpretation, performance or breach of this agreement ... shall be resolved at the request of any party to this agreement, by final and binding arbitration, administered by and in accordance with the then existing Rules of Practice and Procedure of [JAMS] ... Any such arbitration shall take place exclusively in San Francisco, California.

Id.

This provision is a valid agreement to arbitrate. While Datatern is correct that a party cannot be compelled to arbitrate a dispute absent an agreement to do so, *see Cheng-*

Canindin v. Renaissance Hotel Assoc., 50 Cal.App.4th 676, 683 (Cal. Ct. App. 1996),[1] here Datatern entered into such an agreement. Indeed, the arbitration provision expressly applies to claims arising out of the Standard Commercial Terms, which were incorporated into the Engagement Letter.

Datatern's argument that this arbitration provision is "unconscionable" lacks merit. Datatern bases its unconscionability argument on the assertion that California "is an extremely inconvenient forum" for Datatern. (Am. Petition ¶ 28.) To the extent that it is the case, Datatern should not have entered into an agreement providing for arbitration in California. Both Datatern and BRG are sophisticated corporate entities, and there has been no showing that the instant arbitration provision was executed in a manner different from an ordinary business transaction. *See, e.g., Cotchett, Pitre & Mccarthy v. Univ. Paragon Grp.*, 187 Cal.App.4th 1405, 1420-21 (Cal. Ct. App. 2010) (rejecting unconscionability argument where contract provision in question was entered into by sophisticated corporate entities; "This was a private businesss transaction between equally matched parties, pure and simple."). The Court cannot rewrite the arbitration provision now based on Datatern's ex post disagreement with the agreed-upon terms.

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[1] The instant arbitration clause provides the "[a]greement shall be interpreted and controlled by the laws of the state of California." (Am. Petition Ex. 3 at 2.) Thus, the Court will consider California law in its interpretation of the arbitration clause herein. However, the Court also will consider New York law where appropriate to its determination of the elements and scope of a CPLR 7503(b) action.

Moreover, Datatern's attempt to disown the arbitration provision on behalf of BRG fails. Datatern contends that the Engagement Letter is not a binding agreement because the BRG signatory was an attorney and thus lacked the authority to bind the corporation. However, BRG demonstrates that Adam Tenenbaum, BRG's signatory, was authorized by BRG to execute the agreement. BRG submits BRG's Operating Agreement, which grants BRG's Chairman the ability to designate "managers" to assist him in the "right, power or authority to act for or bind" BRG. *See* Affidavit of Marvin Tenenbaum Ex. 1. BRG's Chairman appointed Adam Tenanbaum as such a "manager." *Id.* Ex. 2. Thus, BRG has demonstrated Adam Tenenbaum's authority to execute the Engagement Letter on behalf of the corporation.

Accordingly, BRG has demonstrated a valid and enforceable agreement to arbitrate.

2. <u>Compliance with Arbitration Agreement</u>

The next threshold question is whether Petitioner has complied with the arbitration agreement. Datatern first contends that several procedural decisions made by JAMS are improper. In particular, Datatern objects to JAMS' appointment of an arbitrator and a JAMS policy requiring each party to pay a pro-rata share of JAMS' fees and expenses. Both arguments fail.

This Court's review of a CPLR 7503(b) motion is very limited and focuses only on the three threshold questions outlined above. *See, e.g., Cooper v. Bruckner*, 21 A.D.3d 758, 759 (1st Dep't 2005) ("Thus, on a motion to compel or stay arbitration, the court's role is that of gatekeeper, limited to deciding only three threshold questions: whether the parties made a valid agreement; if so, whether the parties complied with the agreement; and whether the claim sought to be arbitrated is barred by the statute of limitations.") Here, the pertinent inquiry hinges on the second threshold question – whether Petitioner has complied with the arbitration clause. This assessment "calls for a judicial determination as to whether there is any preliminary requirement or condition precedent to arbitration to be complied with and, if so, whether there has been compliance with such requirement or condition precedent." *County of Rockland*, 51 N.Y.2d at 7.

JAMS procedures and its compliance therewith are neither preliminary requirements or conditions precedent to the arbitration under the arbitration clause agreed to by the parties. Moreover, the parties agreed in the arbitration provision that the arbitration would be "administered by and in accordance with the then existing Rules of Practice and Procedure of [JAMS]." Datatern does not contend that JAMS violated its then existing Rules; instead, it merely expresses disagreement with those rules. Such disagreement does not establish BRG's failure to comply with any condition precedent or

preliminary requirement to arbitration. Accordingly, Datatern's arguments fail on this ground.

However, putting aside Datatern's meritless arguments about JAMS procedures, Datatern raises a valid point regarding the locale of the arbitration. The arbitration provision states that "[a]ny such arbitration shall take place exclusively in San Francisco, California." (Am. Petition Ex. 3 at 2.) Notwithstanding this contractual provision, BRG states that it chose to commence the arbitration in New York for the convenience of Datatern, a New York corporation. *See* BRG Br. at 4. Regardless of BRG's motives, commencement of the arbitration in New York is contrary to the parties' arbitration agreement. Accordingly, Datatern's motion to stay arbitration may be granted on this ground. *See Matter of United Serv. Auto. Ass'n v. Bertan*, 10 A.D.3d 542, 543 (1st Dep't 2004) (denying motion to compel arbitration where petitioner attempted to commence arbitration is a locale other than that provided for in the parties' agreement). However, Datatern's motion to stay the arbitration is granted without prejudice to BRG's ability to transfer or recommence the JAMS arbitration in San Francisco, California, as provided in the parties' agreement.

III. Conclusion

The Court concludes that the arbitration provision in the Standard Commercial Terms, as accepted by the parties and incorporated in the Engagement Letter, is valid and enforceable. However, the commencement of the JAMS arbitration in New York, New York does not comply with this arbitration clause. For this reason, Datatern's motion to stay arbitration is granted and BRG's motion to compel arbitration is denied. However, both the denial of BRG's motion to compel and the granting of Datatern's motion to amend are without prejudice to the recommencement or transfer of the JAMS arbitration to San Francisco, California.

Further, although many of Datatern's arguments lacked merit, the Court cannot conclude that its petition was frivolous, particularly given its success on the locale issue. Therefore, BRG's motion for sanctions is denied.

The Court considered the remainder of the parties' arguments and found them to be without merit.

(*Order follows on next page.*)

[* 10]

Accordingly, it is

ORDERED and ADJUDGED that Datatern's petition to stay the arbitration is granted without prejudice to the to the recommencement or transfer of the JAMS arbitration to San Francisco, California; and it is further

ORDERED and ADJUDGED that BRG's cross-motion to compel arbitration is denied without prejudice to the to the recommencement or transfer of the JAMS arbitration to San Francisco, California; and it is further

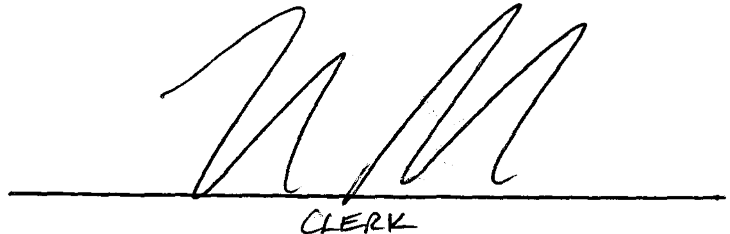
ORDERED and ADJUDGED that BRG's motion for sanctions is denied.

This constitutes the Decision, Order and Judgment of the Court.

Dated: New York, New York
October 21, 2013

ENTER

Hon. Eileen Bransten



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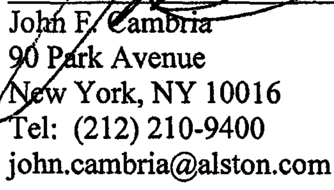

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Judgment

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