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

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JOSEPH CAMMARATA and ERIK COHEN,

Petitioners.

-against-

INFOEXCHANGE, INC.,

Respondent.

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Index No. 650221/2013
Motion Date: 4/29/13
Motion Seq. No.: 001, 002

BRANSTEN, J.

Petitioners, Joseph Cammarata and Erik Cohen ("Cammarata" and "Cohen" and collectively "Petitioners") bring the instant motion to stay arbitration. Respondent, InfoExchange, Inc. ("InfoEx") opposes Petitioners' motion and cross-moves to compel arbitration. For the reasons that follow, Petitioners' motion to stay arbitration is granted, and Respondent's cross motion to compel arbitration is denied.

I. Background[1]

InfoEx is a Delaware corporation that develops financial services business methods, technologies, and data systems designed to monitor computerized trading data. Cammarata was one of the founding stockholders at InfoEx and held various positions for the company, including President. Respondent claims that both parties exchanged an executive employment agreement ("Employment Agreement") in April 2007. This Agreement states that any controversy or claim that arose out of Cammarata's

[1] The facts described in this section are drawn from the Respondent's Amended Answer and unless otherwise noted, are not disputed. However, the Court notes that Respondent's Amended Answer violates CPLR 3014, as it was submitted without numbered paragraphs, as is required by CPLR 3014. Therefore, while the facts described in this section are drawn from the Amended Answer, the Court cannot cite to specific paragraphs.

relationship with InfoEx, not including alleged violations of covenants contained in the Confidentiality, Non-Compete, and the Non-Disparagement Clauses, must be resolved in arbitration.

Cammarata and Cohen, InfoEx's Chief Technology Officer, launched a new company called "Liquid Claims." Respondent alleges that Petitioners stole InfoEx's "Optimal Returns" business for their company's benefit. Thus, InfoEx claims that Cammarata and Cohen repudiated the terms of their employment contract.

Cammarata alleges that he is not bound by the Agreement to arbitrate because he never signed it, nor did he sign any other agreement with InfoEx. Cammarata resigned in July 2011. Conversely, Cohen signed an Employment Agreement. However, Cohen argues that, according to Section 11 of his Agreement, the claims alleged against him fall into the sections of the contract that are expressly excluded from arbitration.

On December 28, 2012, InfoEx served notices to arbitrate pursuant to CPLR 7503 on Cohen, Cammarata, and another InfoEx employee, Luis Davila ("Davila"). Cammarata and Cohen filed a petition to stay arbitration on January 22, 2013.[2] Davila has conceded his obligation to arbitrate.

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[2] Respondent claims the petition was filed in an untimely manner, outside the 20-day permissible period within which to object to arbitration after receiving notice to arbitrate. CPLR 7503(c). This 20-day period begins when the notice to arbitrate is received. *Id.* Respondent, however, offers no evidence of when the notice was received. Accordingly, the Court cannot rule whether the petition was filed in a timely manner.

II. Discussion

A. *Standard of Law*

CPLR 7503(a) states that parties have a right to compel arbitration "where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation." Parties have the right to stay arbitration "on the ground that a valid Agreement was not made or has not been complied with..." CPLR § 7503(b). The determination of whether there is a clear, unequivocal and extant agreement to arbitrate is to be made by the court and not the arbitrators. *Fiveco, Inc., v. Haber,* 11 N.Y.3d 140, 144 (2008). This is especially true where there are limitations to the arbitration clause, as here, where specific claims that are excluded from arbitration. *Zachariou v. Manios*, 68 A.D.3d 539, 891 (1st Dep't 2009). Additionally, if ambiguity is deemed to exist in the arbitration clause, this is properly construed against the drafter. *Greenfield v. Phillips Records, Inc.*, 23 A.D.3d 214 (1st Dep't 2005).

B. *Petitioner Cammarata's Arguments*

Cammarata argues that he is not bound by any of the terms of the Agreement because he failed to sign the Employment Agreement. (Petitioners' Memorandum in Support of Petition at page 2). Thus, the threshold issue to be decided is whether Cammarata consented to the Agreement without signing it. There is no evidence provided by either party that indicates that Cammarata agreed to any of the terms of the contract. In *God's Battalion of Prayer Pentecostal Church v. Miele Associates, LLP,* 6

N.Y.3d 371 (2006), the parties operated under the terms of the agreement even though the church never signed the agreement. The court relied on whether the parties had made any demonstration of being bound by the arbitration clause. *Miele,* 6 N.Y.3d 371, 374. In Cammarata's affidavit, he explained that he affirmatively decided to withhold his signature from the document because he disagreed with the clauses that concern other employment opportunities. (Affidavit of Joseph Cammarata ("Cammarata Aff.") ¶12). According to Cammarata, Respondent never demanded that he sign the Agreement. (Cammarata Aff. ¶13).

As Respondent argues, there is a considerable amount of New York case law supporting the argument that a signature from both parties may not be necessary to enforce an arbitration clause. Indeed, "there is no requirement that the writing be signed so long as there is other proof that the parties actually agreed on it." *Crawford v. Merrill Lynch, Pierce, Fenner & Smith,* 35 N.Y.2d 291, 297 (1974). In a similar case, two partners of an entity filed a petition to stay arbitration over a dispute. One of the partners had not signed the agreement he made with the company. The court held that although the agreement does not have to be signed for the parties to be bound, "there must be sufficient proof that the parties actually agreed to arbitrate." *Neiman v. Backer*, 167 A.D.2d 403, 404 (2nd Dep't 1990).

Petitioners distinguish *Miele* to argue that the facts before the Court differ from those provided in the aforementioned case law. In *Miele*, God's Battalion of Prayer Pentecostal Church ("The Church") came to an agreement with the architecture firm,

Miele Associates, LLP, ("Miele") to renovate and expand the Church's facilities. Miele's subcontractor did not perform to the Church's satisfaction. The Church sued Miele for breach of contract and architectural malpractice. Miele moved to compel arbitration pursuant to the clause that stipulated "all claims, disputes and other matters in question arising out of, or relating to, this Agreement or the breach thereof shall be decided by arbitration." *Id.* at 373. The Church countered by claiming this clause was invalid because both parties did not sign the contract. *Id.* However, the Court of Appeals ruled that the arbitration clause in the *Miele* agreement was to be enforced because both parties intended to be bound by it. *Id.* The Court ruled that the Church could not disclaim "part of the contract while alleging breach of the rest." *Id.* The Church and Miele operated under every provision of the contract, yet the Church only refused to follow the arbitration clause.

Conversely here, Cammarata disclaimed every part of the contract and did not allege breach of any of its other components. Moreover, InfoEx presents no evidence that Cammarata manifested a "clear, explicit and unequivocal" agreement to arbitrate. *In the Matter of Waldron,* 61 N.Y.2d 181, 183 (1984). The case before this Court can be distinguished from *Miele* because Cammarata does not rely on the Agreement to support this claim. The moving party in *Miele* relied on its contract with the architecture firm in order to file its lawsuit. The Church relied on the Agreement to sue Miele for breaching the Agreement that contained the arbitration clause they wished to prove unenforceable.

Furthermore, while it is undisputed that Cammarata carried out his proper duties as an InfoEx employee, this fact does not prove that he consented to the unsigned Employment Agreement. The issue here is whether Cammarata indicated intent to be bound by the Agreement. His work at InfoEx does not bear on his consent to the specific provisions of the Agreement.

For the foregoing reasons, Petitioner Cammarata's request to stay arbitration is granted, and Respondent's cross-motion is denied.

C. *Petitioner Cohen's Arguments*

Unlike Cammarata, Cohen signed his employment agreement. Therefore, the next issue is whether the arbitration provision in Cohen's signed Employment Agreement applies to the claims that InfoEx intends to bring against Cohen. A party is able to stay arbitration if the agreement to arbitrate is not "express, direct, and unequivocal as to the issues or disputes to be submitted to arbitration." *State Farm Mutual Auto. Ins. Co. v. Juma,* 44 A.D.3d 963 (1st Dep't 2007). The Agreement is unambiguous in explaining which types of disputes are appropriate for arbitration. Section 11 of Cohen's signed employment Agreement states that: "Both parties agree that the exclusive venue for any action, demand, claim, or counterclaim relating to the terms and provisions of Sections 5,6,7 and 8 of this Agreement, or to the breach shall be in the state or federal courts..." (Notice of Petition, Ex. 2 at p. 8). Section 12(j) of the Agreement stipulates that only claims that fall outside of these sections can be settled in arbitration. *Id.* at 10. The

Respondent includes in its memorandum of law alleged violations by Petitioners of its own Confidentiality Clause (Section 5), Non-Compete Clause (Section 7), and the Non-Disparagement Clause (Section 8). (Respondent's Amended Answer at page 4). Having alleged only claims expressly falling under Section 11, Respondent's alleged grievances fall outside the scope of the arbitration provision.

Respondent argues that since its desired remedy is legal and not equitable, its claims are not affected by Sections 5-8. Yet, nowhere in any section is there language that says legal remedies fall outside of Sections 5-8. The contract clearly states that state and federal courts have the exclusive jurisdiction to hear any dispute arising under Sections 5-8, no matter the remedy requested.

Furthermore, InfoEx does not deny that its claims fall outside Sections 5-8, but contends instead that the Agreement's choice of law provision is a "boilerplate choice of law clause." Accordingly, InfoEx contends that the choice of law provision cannot trump the Agreement's broad arbitration provision, which provides that any controversy arising out of the Agreement shall be resolved in arbitration. However, again, there is nothing in the Agreement to support InfoEx's reading. InfoEx chooses to ignore the language of choice of law provision and attempts to create an ambiguity that is not present. A party will not be compelled to arbitrate absent evidence affirmatively establishing the parties expressly agreed to arbitrate. *In the Matter of Waldron*, 61 N.Y.2d 181, 181 (1997). InfoEx fails to prove that both parties agreed that the arbitration clause trumped the

choice of law provision. The claims that Respondent wishes to carry out fall within Sections 5-8 of the Agreement and thus fall outside the scope of the arbitration provision.

III. Conclusion

Accordingly, it is

ORDERED that Petitioners Joseph Cammarata and Erik Cohen's motion to stay arbitration is granted and that Respondent InfoExchange's cross motion to compel arbitration is denied.

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on August 20, 2013, at 10 AM.

Dated: New York, New York
July 25, 2013

ENTER

Hon. Eileen Bransten