

Gelwan v Youni Gems Corp.

2014 NY Slip Op 32163(U)

August 4, 2014

Supreme Court, New York County

Docket Number: 653656/13

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

LLOYD A. GELWAN,
Plaintiff,

INDEX NO. 653656/13
MOTION DATE 07-02-2013
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

-against-

**YOUNI GEMS CORPORATION, YOUNATAN AHARON,
DAVID AHARONI, and YOSSEF AHARONI,**

Defendants,

-and-

SABHARWAL & ASSOCIATES,

Nominal Defendant.

The following papers, numbered 1 to 6 were read on defendants' motion to compel arbitration:

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

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	<u>1 - 3</u>
Answering Affidavits – Exhibits _____ cross motion _____	<u>4 - 6</u>
Replying Affidavits _____	_____

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers it is ordered that defendants' motion and Motion Sequence 002, pursuant to CPLR §7503 [a], seeking to compel arbitration, directing that binding arbitration proceed before AAA (American Arbitration Association) and for costs, is granted only to the extent that the parties are directed to proceed to Arbitration before the AAA on plaintiff's first, sixth, seventh, eighth and ninth causes of action, which are severed and dismissed from this action. The parties are directed to proceed to Arbitration before the AAA on nominal defendant's first, fifth and sixth cross-claims, which are severed and dismissed from this action. The remainder of this motion and Motion Sequence 002 is denied.

All the parties to this action entered into a retainer agreement on September 28, 2005. Pursuant to the retainer agreement, plaintiff and nominal defendants were to provide legal services to the defendants in an action involving a joint venture brought against non-parties, Bassco Creations, Incorporated, Efraim Basalel, and Eliahu Basalel, all d/b/a Bassco Creations (hereinafter referred to as the "Bassco defendants"). Plaintiff and nominal defendant provided services and on July 17, 2007, obtained a judgment in favor of the defendants in the amount of \$1,097,724.73. Plaintiff and nominal defendant initiated execution proceedings and on February 13, 2008 acquired seized real estate from one of the Bassco defendants in Queens County, New York.

The Bassco defendants sought to vacate the judgment and filed appeals. A dispute arose between plaintiff and nominal defendant concerning expenses.

Defendants did not sign a retainer agreement related to appellate work, or a "Separation Agreement" prepared by plaintiff and nominal defendant related to attorney fees. On July 28, 2009, defendants retained other attorneys to represent them on appeals against the Bassco defendants. The defendants were successful on the appeals, but continued to be involved in litigation against a holdover tenant and have not obtained possession of the seized asset.

On October 22, 2013, plaintiff commenced this action asserting causes of action for breach of the retainer agreement contract derived from failure to pay on the contingent fee agreement ; for breach of contract for failure to pay on an oral appellate fee agreement; for promissory estoppel; quantum meruit; unjust enrichment; account stated; fraudulent conveyance; on an attorney's charging lien and seeking a declaratory judgment stating that defendants are obligated to pay plaintiff and nominal defendant thirty-three and one third percent (33 ⅓ %) of the value of any seized property related to a judgment obtained in the joint venture action (Mot. Seq. 001, Exh. I).

On December 17, 2013, the nominal defendant served an answer and asserted cross-claims against the defendants for breach of contract; promissory estoppel; quantum meruit; unjust enrichment; on an attorney's charging lien; and for a declaratory judgment that the defendants are obligated to pay the nominal defendants sixteen and two-thirds percent (16 ⅔%) of the value of the seized property under the contingent fee agreement with no deductions related to expenses incurred by the defendants (Mot. Seq. 002, Exh. B).

Defendants' motion pursuant to CPLR §7503[a], seeks an Order compelling arbitration, directing that binding arbitration proceed before AAA (American Arbitration Association) and for costs. Defendants "Pre-Reply Motion to Compel Arbitration," submitted under Motion Sequence 002, is derived from the nominal defendant's cross-claims asserted against them and seeks the same relief as this motion.

The September 28, 2005 retainer agreement, states that plaintiff and nominal defendants were to provide legal services to the defendants in the joint venture action. The retainer agreement at paragraph V, titled "Fees," states that attorney fees are to be paid to plaintiff and nominal defendant "...jointly a sum equivalent to a total of THIRTY-THREE-AND ONE THIRD PERCENT (33 ⅓ %) of all sums received or recovered...in addition to the Clients' payments of disbursements..."(Mot. Seq. 001, Exh. A).

Paragraph IX of the retainer agreement titled, "Dispute Resolution" states,

"In the event of a dispute regarding the subject matters of this Agreement or the payment of fees due to Gelwan and the Sabharwal Firm under the terms of the Agreement, any party shall have the right to seek to resolve such disputes in arbitration." (Mot. Seq. 001, Exh. A).

Defendants argue that arbitration of disputes was clearly provided for in the retainer agreement and that public policy favors arbitration. Defendants also argue that any defects in the language of the retainer agreement concerning the details related to

the name of the arbitrator should be construed against the plaintiff and nominal defendants as the drafters of the agreement.

Plaintiff and nominal defendant oppose Motion Sequence 001 and 002 arguing that the retainer provisions relied on by the plaintiff are too vague and the relief sought by defendants is too contradictory to compel arbitration. They argue that the retainer provisions are permissive, not mandatory, and fail to provide specifics.

Any ambiguity in a contract must be construed against the party that drafted the contract (*Uribe v. Merchants Bank of New York*, 91 N.Y.2d 336, 693 N.E. 2d 740, 670 N.Y.S. 2d 393 [1998]). "Although arbitration is favored in New York State as a means of resolving disputes, and courts interfere as little as possible with agreements to arbitrate. The agreement to arbitrate must be clear, explicit and unequivocal." (*Matter of Miller*, 40 A.D. 3d 861, 835 N.Y.S. 2d 728 [N.Y.A.D. 2nd Dept., 2007] and *Katz v. Alpert*, 68 A.D. 3d 640, 891 N.Y.S. 2d 386 [N.Y.A.D. 1st Dept., 2009]). An agreement to arbitrate that contains a single ambiguity, but is otherwise clear and unambiguous, will be enforced (*Matter of Franklin Cent. School v. Franklin Teachers Assn.*, 51 N.Y. 2d 348, 414 N.E. 2d 685, 434 N.Y.S. 2d 185 [1980]). A broad arbitration clause in a contract survives and is enforceable for the resolution of disputes (*Primex International Corp. v. Wal-Mart Stores, Inc.*, 89 N.Y. 2d 624, 679 N.E. 2d 624, 657 N.Y.S. 2d 385 [1997]).

The retainer provisions relied on by the defendants, although missing relevant provisions concerning the forum for arbitration, allows, "any party" to seek arbitration arising from disputes from the agreement, including attorney fees, without limitation. All parties clearly intended to be bound by the retainer agreement. Plaintiff and nominal defendant, as the drafters of the agreement, have not stated a basis to prevent arbitration from going forward.

Defendants seek to have this Court direct that the arbitration proceed before AAA. They claim that AAA Commercial NE Division, has provided the amount of costs for arbitration, and is an appropriate venue.

Plaintiff and nominal defendant oppose assignment of arbitration to AAA. They contend that some of their equitable claims are outside the scope of arbitration, therefore the relief sought should be denied.

An arbitration agreement that is missing relevant terms, can still be enforced, where the parties intended to be bound, if there is an objective method for supplying the missing terms (*Edelman v. Poster*, 72 A.D. 3d 182, 894 N.Y.S. 2d 398 [N.Y.A.D. 1st Dept., 2010]). Arbitration clauses as part of a contract, must be enforced, even if it results in bifurcated litigation (*Primavera Laboratories, Inc. v. Avon Products, Inc.*, 297 A.D. 2d 505, 747 N.Y.S. 2d 16 [N.Y.A.D. 1st Dept., 2002] and *PNE Media, LLC v. Cistrone*, 294 A.D. 2).

Although there is no reference to the forum for arbitration in the retainer agreement, plaintiff and nominal defendant have not stated a basis why AAA, should not

be utilized, instead they object completely to arbitration. Defendants have established that AAA is an adequate forum for resolving the disputes related to the retainer agreement. The equitable relief related to appellate work performed by plaintiff and nominal defendant was not covered as part of the retainer agreement and therefore not subject to arbitration.

Accordingly it is ORDERED and ADJUDGED that defendant's motion pursuant to CPLR §7503 [a], seeking to compel arbitration, directing that binding arbitration proceed before AAA (American Arbitration Association) and for costs, is granted, only to the extent that the parties are directed to proceed to Arbitration before the AAA on plaintiff's first cause of action for breach of contract, sixth cause of action for account stated, seventh cause of action for fraudulent conveyance, eighth cause of action on an attorney's charging lien and ninth cause of action for declaratory judgment relief, which are severed and dismissed from this action, and it is further,

ORDERED, that plaintiff's second, third, fourth and fifth causes of action remain in effect, and it is further,

ORDERED that the remainder of the relief sought in this motion is denied, and it further,

ORDERED and ADJUDGED that Motion Sequence 002, pursuant to CPLR §7503 [a], seeking to compel arbitration, directing that binding arbitration proceed before AAA (American Arbitration Association) and for costs, is granted to the extent that the parties are directed to proceed to Arbitration before the AAA on nominal defendant's first cross-claim for breach of contract, fifth cross-claim for an attorney's charging lien; and sixth cross-claim for a declaratory judgment, which are severed and dismissed from this action, and it is further,

ORDERED, that nominal defendant's second, third and fourth crossclaims remain in effect, and it is further,

ORDERED that the remainder of the relief sought in Motion Sequence 002, is denied.

ORDERED that on the remaining causes of action, defendants are directed to serve an answer, and an answer to the cross-claims asserted by the nominal defendants, and to serve and file them on the Clerk of this Court within twenty (20) days from the date of service of a copy of this Order with Notice of Entry.

ENTER:



MANUEL J. MENDEZ,

Dated: August 4, 2014

J.S.C. MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE