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| Flintlock Constr. Servs., LLC v Goodwin Procter LLP |
| 2014 NY Slip Op 33020(U) |
| October 2, 2014 |
| Sup Ct, Westchester County |
| Docket Number: 64632/2013 |
| Judge: Orazio R. Bellantoni |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

FLINTLOCK CONSTRUCTION SERVICES, LLC,
ANDREW WEISS AND STEPHEN A. WEISS, JR.,

Plaintiff(s),

- against -

GOODWIN PROCTER LLP AND JERREY A. SIMES,

Defendant(s).

ORDER
Index No.: 64632/2013
Motion Date: 6/11/14

Defendants move for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing plaintiffs' complaint.

The following papers were read:

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| Defendants' Notice of Motion, Affirmation, Exhibits (9), Proposed Order | 1-12 |
| Memo of Law in Support | 13 |
| Plaintiffs' Affirmation in Opposition, Exhibits (6), Memo of Law | 14-21 |
| Defendants' Affirmation in Reply and Memo of Law | 22-23 |
| Plaintiffs' Supplemental Memo of Law, Affirmation, Exhibits (2) | 24-27 |
| Defendants' Supplemental Memo of Law | 28 |
| Defendants' Second Supplemental Memo of Law, Affirmation, Exhibits (4) | 29-34 |
| Plaintiffs' Second Supplemental Memo of Law, Affirmation, Exhibit | 35-37 |
| Defendants' Second Supplemental Memo of Law in Reply | 38 |
| Plaintiffs' letter, dated June 11, 2014 and Exhibit | 39-40 |
| Defendants' letter, dated June 13, 2014 | 41 |

By way of background, this action arises from a dispute between non-party Gretchen Weiss (Gretchen) and plaintiffs, concerning the meaning and effect of the operating agreements of Flintlock Construction Services, LLC (Flintlock Operating Agreement) and a related entity as well as a letter agreement (Agreements). The parties entered into the Agreements in or about June 2005. Flintlock and the related entity are principally engaged in the business of constructing hotels. Under the Agreements, Gretchen received an interest in Flintlock and the related entities in exchange for an investment of a certain amount of money. In or about October 2011, Gretchen filed a demand for arbitration and an amended demand for arbitration, contending that she was entitled to 25% of Flintlock's annual profits.

Plaintiffs allege that this was the first time that Gretchen had taken the position that she was entitled to 25% of the annual profits. Plaintiffs further allege that, prior to finalizing the Agreements, counsel for Gretchen, a non-party to this action, prepared a memorandum (June 9, 2005 Memo) in connection with a conversation that she had had with counsel for plaintiffs, which purportedly outlines the details of the finalized Agreements. On or about October 9, 2006, Gretchen signed a document (October 9, 2006 Memo) prepared by plaintiffs' attorneys, which purports to "set forth the understanding as to the tax treatment for 2005 of the payment of \$500,000 [] made by Gretchen Weiss; the proceeds of which were utilized to make a payment due to the settlement of [certain litigation involving plaintiffs]." Plaintiffs allege that the June 9, 2005 Memo makes clear that Gretchen was not bargaining for nor going to receive a share of the annual profits of the companies. Plaintiffs further allege that October 9, 2006 Memo represents an acknowledgment by Gretchen that she had no interest in Flintlock's annual profits. Plaintiffs also allege that defendants possessed the June 9, 2005 Memo, via Gretchen's former counsel, prior to the filing of the demand for arbitration. Plaintiffs further allege that defendants, according to Gretchen, did not disclose the June 9, 2005 Memo or its contents to her.

In May 2012, during the course of the arbitration, defendants, on behalf of Gretchen, submitted a privileged log, which indicated that certain "atty notes" from June 2005 (*i.e.*, the June 9, 2005 Memo) were being withheld on the basis of work product immunity. In July 2012, plaintiffs and Gretchen moved for summary judgment in the arbitration. The arbitration panel (Panel) denied these motions, finding that the Agreements were ambiguous.

On August 21, 2013, the Panel issued an order, finding that plaintiffs and Gretchen had waived the attorney-client privilege with respect to all communications in or prior to August 2005 concerning the negotiation, drafting and interpretation of the Agreements. The Panel's order directed all parties to exchange any such documents. On September 3, 2013, defendants produced documents in response to the Panel's order. Although defendants had previously withheld it as work product, defendants produced the June 9, 2005 Memo as well. Plaintiffs allege that, in addition to the June 9, 2005 Memo,

defendants turned over additional documents that further illustrated the fraudulent nature of Gretchen's claim.

On September 20, 2013, plaintiffs commenced the instant action with the filing of a summons and complaint.

By letter dated, September 23, 2013, Gretchen's counsel requested that the Panel rule that the discovery matters set forth in this action are discovery matters to be handled by the Panel, that the Panel has either ruled on or will rule on these discovery matters, and that plaintiffs have either sought no discovery sanctions and/or the Panel has denied any such request. On September 27, 2013, the Panel denied this request, noting, among other things, that "it is up to the courts to decide whether and to what extent they should defer to the Panel on matters relating to the discovery in this proceeding."

On October 8, 2013, the arbitration hearing began. Prior to the hearing, plaintiffs submitted a letter to the Panel, highlighting the June 9, 2005 Memo and arguing that it clearly demonstrated Gretchen's case was a fraud and requested that the Panel treat the complaint from the instant action as an addendum to their pre-hearing brief. In addition, plaintiffs allege that, during the course of the arbitration, defendants took various positions that were frivolous and directed witnesses to perjure themselves.

On November 12, 2013, defendants filed the instant motion to dismiss. On December 11, 2013, plaintiffs filed their opposition papers. On December 23, 2013, defendants filed their papers in reply.

On March 14, 2014, the Panel issued a partial final award (Decision). As a result, the Court restored the motion to the calendar in order to afford the parties an opportunity to submit supplemental papers on the significance of the Decision.

On April 1, 2014, plaintiffs filed their first supplemental papers in opposition to the instant motion. On April 9, 2014, defendants filed their first supplemental papers in support of the instant motion. On April 11, 2014, plaintiffs filed an amended complaint. On May 5, 2014, the Court authorized the parties to file supplemental papers, addressing the new allegations added in plaintiffs' amended complaint. On May 7, 2014, defendants filed their second supplemental papers in support of the instant motion. On May 27, 2014, plaintiffs filed their second supplemental papers in opposition to the instant motion. On June 3, 2014, defendants' filed their supplemental papers in reply.

Preliminarily, defendants argue that plaintiffs have submitted the issues in the instant action to the Panel and, as a result, have waived their right to have the same issues placed before this Court. Even if that were not the case, defendants contend that the issues in this action are arbitrable under the Agreements. Indeed, defendants further argue that the issue of whether the issues are arbitrable is reserved for the arbitrators to decide.

In opposition, plaintiffs argue, among other things, that they cannot be compelled to arbitrate its claims because plaintiffs and defendants do not have an arbitration agreement and have not agreed to arbitrate. Plaintiffs also argue that, even if the Panel awards plaintiffs all of their fees, plaintiffs will not be made whole and the Panel can only award fees against Gretchen, who may be judgment-proof.

In brief, plaintiffs allege that defendants, in their capacity as Gretchen's attorney in the arbitration, engaged in a pattern of misrepresentations and dishonesty, including suborning the perjury of witnesses, which caused plaintiffs to incur attorneys' fees in excess of \$1.5 million. Plaintiffs claim that this conduct gives rise to a cause of action against defendants under Judiciary Law § 487. Plaintiffs further allege that defendants, in their capacity as Gretchen's attorney in the arbitration, knowingly and repeatedly lied to the Panel about various issues salient to the arbitration and, as a result, plaintiffs incurred attorneys' fees in excess of \$1.5 million. Lastly, plaintiffs allege that defendants, in their capacity as Gretchen's attorney in the arbitration, intentionally withheld material evidence to plaintiffs' defense, which caused plaintiffs to incur attorneys' fees in excess of \$1.5 million. Thus, the measure of plaintiffs' alleged damages in this action are the attorneys' fees incurred during the Arbitration.

The Flintlock Operating Agreement provides in relevant part:

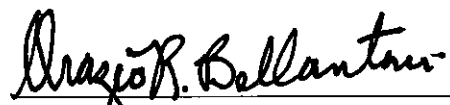
Section 8.4. Arbitration. * * * * The cost of the arbitration, including reasonable attorney's fees, shall be borne by the party against whom the decision of the arbitrators is rendered, or if the decision is rendered in part against more than one party, in proportion to the relative awards. The arbitrators shall determine the allocation of the costs of the arbitration.

Thus, the language of the Flintlock Operating Agreement unambiguously provides that plaintiffs and Gretchen contractually agreed who would bear the cost of attorneys' fees and they agreed that the arbitrators would decide the appropriate amount of the attorneys' fees. It is well established that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*see Westchester County Correction Officers Benevolent Ass'n, Inc. v County of Westchester*, 99 AD3d 998, 999 [2d Dept 2012] *lv to appeal denied*, 21 NY3d 853 [2013]). The Second Department has explained that "[a]rbitration is favored in New York State as a means of resolving disputes, and courts interfere as little as possible with agreements to arbitrate" (*see In re Miller*, 40 AD3d 861, 861 [2d Dept 2007]). By agreeing to arbitrate, a party is agreeing to waive many of the normal rights of a litigant under the procedural and substantive law of New York (*see id.* at 862). Thus, to the extent that either party is entitled to attorneys' fees is an issue that plaintiffs and Gretchen agreed to place in the hands of the

arbitrators. By suing Gretchen's attorneys for the attorneys' fees incurred in the arbitration, plaintiffs are attempting to do indirectly what they cannot do directly.

Commenting on the Decision, plaintiffs contend that they "prevailed on every contested issue in the case, and did so in spite of defendants' subornation of [Gretchen's] perjury, and their intentional deception of the Panel by making factual arguments they knew were untrue based on documents on which they claimed privilege in bad faith." If this is true, then the Panel may grant plaintiffs' application for attorneys' fees in its entirety, which would eliminate plaintiffs' alleged damages in the instant action. This uncertainty reveals plaintiffs' allegations of damages to be wholly speculative and insufficient to support the allegations to recover damages under Judiciary Law § 487, for fraud, or for a *prima facie* tort (see, e.g., *Sierra Holdings, LLC v Phillips, Weiner, Quinn, Artura & Cox*, 112 AD3d 909, 910 [2d Dept 2013]; *Citidress II Corp. v Tokayer*, 105 AD3d 798, 798 [2d Dept 2013]; *Diorio v Ossining Union Free School Dist.*, 96 AD3d 710, 712 [2d Dept 2012]). Accordingly, defendants' motion to dismiss the amended complaint pursuant to CPLR 3211 (a) (7) is granted.

Dated: October 2, 2014
White Plains, New York


HON. GRAZIO R. BELLANTONI
Justice of the Supreme Court

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