

Glauber v G & G Quality Clothing, Inc.

2014 NY Slip Op 33743(U)

March 24, 2014

Supreme Court, Kings County

Docket Number: 24318/2012

Judge: Martin M. Solomon

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 38 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the *24* day of March 2014.

PRESENT:
HON. MARTIN M. SOLOMON,

Justice.

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CHANANYA GLAUBER,

Plaintiff,

Index No.: 24318/2012
DECISION & ORDER

- against -

G & G QUALITY CLOTHING, INC., AHRON GLAUBER,
BARUCH GLAUBER AND YOHAN GLAUBER,

Defendant.

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Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed	1
Notice of Cross-Motion and Affidavits Annexed	2
Reply	3, 4

Upon the foregoing cited papers, the Decision/Order on plaintiff and defendant's cross motion is as follows:

Plaintiff moves to enjoin defendants from terminating plaintiff's health insurance policy. Defendant cross moves to have the matter submitted to a beth din.

This action has a substantial background history. Initially, G&G Quality Clothing, Inc. (hereinafter G&G) commenced an action (Index No. 26821/09) to enforce the terms of the 1998 shareholder agreement and compel the shareholder, Chananya Glauber (hereinafter Chananya), to submit to a beth din. By stipulation dated October 7, 2010 the parties agreed to submit their disputes to a beth din. Ultimately, by decision and order dated January 19, 2012 this court confirmed the award of this beth din.

In March of 2012 G&G filed a petition in the bankruptcy court. On April 25, 2012, the parties in this action allegedly entered into two agreements. The settlement agreement resolved claims in a bankruptcy proceeding under docket number 12-41845 and two separate state court actions bearing index numbers 26821/2009 and 6138/2012. Pursuant to the payment terms of the Settlement Agreement, plaintiff was to receive the sum of \$3,600,000.00 in installments. The second agreement, also dated April 25, 2012, denoted as the severance agreement, sets forth additional, supplementary terms to the settlement, including the one at issue herein that Chananya "will receive full health insurance, until the time all obligations in the agreement that was signed...April 25.'12...are paid off".

In this action plaintiff, Chananya, seeks damages for breach and specific performance of the severance agreement. In the instant motion Chananya moves for a preliminary injunction restraining defendants from terminating Chananya's health insurance coverage. Defendants cross move to have the matter submitted to binding arbitration at a beth din.

The severance contract, entitled on the document "Contract of Agreement" was written in Hebrew and translated to English and reads pertinent part:

1. The parties signed an agreement 3 Iyar 5772 [calendar date: April 25. '12]; and at this time they signed another agreement, in addition to the aforementioned agreement...
3. Party B (Chananya Glauber) will receive full health insurance, until the time all obligations in the agreement that was signed on 3 Iyar 5772 [calendar date: April 25. '12] are paid off... (Matter in parenthesis added).

All of the above was entered into through effective binding procedures and effective manners, and in manners that does not constitute a simple assurance; and under the conditions knows as Bnei Gad and Bnei Reuven.

While the severance agreement makes reference to the settlement agreement in regard to paragraph 3, the two agreements are severable. There is no reason that the two agreements may not be separately performed or enforced

On November 14, 2012, plaintiff received a letter from defendants entitled "Notice of Termination of Insurance Eligibility for Cobra Election." The letter stated, "You are receiving this notice because your employment with G&G Quality Clothing, Inc. ("G&G") has terminated. Accordingly, all of your health insurance coverages will terminate effective December 31, 2012."

Thereafter, plaintiff commenced this action on December 24, 2012. The complaint asserts two causes of action. The First Cause of Action is for anticipatory breach of contract by reason of the letter dated November 14, 2012. The Second Cause of Action is for specific performance based upon defendants' failure to remit the installment payments.

On December 24, 2012, plaintiff simultaneously filed an Order to Show Cause enjoining defendant G&G Quality Clothing, Inc. from terminating his health insurance coverage as well as a preliminary injunction until the return date. The Court granted the preliminary injunction and scheduled the return date of the application for March 5, 2013. Due to a family tragedy,¹ plaintiff missed the March 5, 2013 hearing date and this matter was marked off the calendar.

On June 6, 2014, plaintiff once again filed an Order to Show Cause seeking the same relief. This application was granted and initially set for a hearing on June 25, 2013. However, it was adjourned several times until March 13, 2014. This Order to Show Cause contains a TRO enjoining defendant G&G Quality Clothing, Inc. from terminating plaintiff's health insurance coverage until the return of the motion and was continued pending determination.

Defendants served an answer alleging two separate counterclaims. Thereafter, defendants served an amended answer alleging three separate counterclaims. Both answers allege multiple affirmative defenses.

The First Counterclaim alleges that both agreements are subject to binding arbitration either standing alone or by virtue of the arbitration provision of the stockholders agreement. The counterclaim also alleges that the "Contract of Agreement" is not a binding agreement in that it was not signed by defendants.

The Second Counterclaim was for specific performance against plaintiff in that plaintiff failed to execute and deliver certain documents in connection with a mortgage.

The Third Counterclaim is for an offset of damages in the total amount of \$123,066.53.

By way of further procedural background, this action was initially assigned to Justice Larry Martin, but was reassigned to Justice Martin M. Solomon by Order dated December 18,

¹Nachman Glauber, plaintiff's son, and his wife were killed on March 3, 2013 by a hit and run driver. Plaintiff's unborn grandchild was born alive, but subsequently passed away.

2013 upon application of plaintiff. The basis of the application was that this action is related to the prior actions which were pending before said Justice and, in effect, seeks enforcement of the agreements, or one of the agreements, which settled and resolved the prior action. Thereafter, defendants moved to renew and reargue the December 18, 2013 decision, as well as applied for stay of proceedings from the Appellate Division, Second Department pending an appeal. The motion to renew and reargue was denied on January 31, 2014 and the application for a stay was denied by the Appellate Division on February 28, 2014.

Turning first to the cross motion, at the outset it must be noted that defendants' rights to stay an action and compel arbitration does not remain absolute regardless of the degree of their participation in a lawsuit and may be forfeited prior to trial. *DeSapio v. Kohlmeyer*, 35 N.Y.2d 402, 405 (1974). Therefore, the Court must determine defendants' level of participation to determine if they affirmatively accepted the judicial forum together with its advantages, thereby rendering their claim that arbitration is the only satisfactory forum null and void. *See generally, DeSapio v. Kohlmeyer*, 35 N.Y.2d 402, 405.

Defendants' argument that this matter must be referred to arbitration is without merit. The Settlement Agreement, which is not at issue in the instant action, stipulates that jurisdiction shall be either the United States Bankruptcy Court for the Eastern District of New York, the United States District Court for the Eastern District of New York, or Supreme Court, County of Kings.

Next, any arbitration provision contained within the Shareholders Agreement is contrary to the express jurisdictional provision in the subsequent Settlement Agreement dated April 25, 2012. An agreement to arbitrate a dispute can be modified, waived or abandoned like any other contractual right (*Sherrill v Grayco Bldrs.*, 64 N.Y.2d 261, 272 [1985]), either by a subsequent agreement for consideration or by the parties' actions (*Matter of Zimmerman*, 236 N.Y. 15 [1923]). Thus, for this Court to retain jurisdiction of this matter would not violate religious law since this dispute "can be decided solely upon the application of neutral principles of law, without reference to any religious principles or doctrine." *Kapsalis v. Greek Orthodox Archdiocese of North & South America*, 276 A.D.2d 595 (2d Dept. 2000) and *see, First Presbyterian Church of Schenectady v. United Presbyterian Church in U.S.* 62 N.Y.2d 110 (1984).

Defendants' have affirmatively invoked the advantages of the judicial form by reason of their counterclaims and their procedural history in this matter thereby waiving any purported right to arbitration. Specifically, defendants by reason of the second and third counterclaims

have demanded specific performance and an offset of damages. *DeSapio v. Kohlmeyer*, 35 N.Y.2d 402, 406 (1974) and *C.I. Planning v. Novick*, 112 A.D.2d 854, 856 (1st Dept. 1985). The cross-motion seeking an order referring this matter to arbitration was not served until eleven months after the service of the summons and verified complaint and plaintiff's Order to Show Cause. This delay coupled with the foregoing actions, demonstrates defendants' intent to accept the judicial process. *C.I. Planning, supra*.

Most importantly, the Contract of Agreement, the "severance agreement" at issue in the instant action, does not provide for arbitration before a beth din or otherwise. The provision in the Shareholder agreement to submit to a beth din was satisfied and, as previously noted, this court confirmed the award of that beth din by decision and order dated January 19, 2012.

Turning to the motion, plaintiff seeks to restrain defendants from terminating plaintiff's health insurance coverage.

"[T]o prevail on a motion for a preliminary injunction, the movant must demonstrate by clear and convincing evidence (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor" (*Matter of 1650 Realty Assoc., LLC v. Golden Touch Mgt., Inc.*, 101 A.D.3d 1016, 1017-1018, 956 N.Y.S.2d 178; see CPLR 6301; *84-85 Gardens Owners Corp. v. 84-12 35th Ave. Apt. Corp.*, 91 A.D.3d 702, 702, 937 N.Y.S.2d 107; *Ying Fung Moy v. Hoho Umeki*, 10 A.D.3d 604, 781 N.Y.S.2d 684). "The decision whether to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court" (*84-85 Gardens Owners Corp. v. 84-12 35th Ave. Apt. Corp.*, 91 A.D.3d at 702, 937 N.Y.S.2d 107; see *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1072, 1073, 857 N.Y.S.2d 648; *Ruiz v. Meloney*, 26 A.D.3d 485, 486, 810 N.Y.S.2d 216). (*Butt v. Malik*, 106 A.D.3d 849, 965 N.Y.S.2d 540, 2013 N.Y. Slip Op. 03445 (2d Dept., 2013)).

In the instant matter, paragraph 3 of the Contract of Agreement states, "Party B [Chananya] will receive full health insurance, until time that all obligations in the agreement that was signed on 3 Iyar 5772 [calendar date: April 25, '12] are paid off."

As noted, in his affidavit Ahron Glauber denies signing this agreement. The papers however, include sworn statements from Chananya, his lawyer Mr. Hersko, and defendant Baruch Glauber that assert that they witnessed Ahron sign it. It is also worth noting that there is

nothing in the submissions from Yonah Glauber, an officer and director of G&G, that disputes his or Ahron's signature on this agreement

It is axiomatic that it is not the quantity of evidence but its quality that must be weighed by a finder of fact. Nevertheless, the court finds a reasonable likelihood that Chananya will prevail on the merits.

The irreparable injury that may arise from cancellation of health care coverage is self evident. Gaps in coverage can result in conditions that pre-exist any replacement policy and for which coverage can not be obtained at any reasonable cost.

Finally, the equities clearly weigh in favor of the movant. Under the settlement agreement there are \$2,250,000.00 in future payments from the current date through May 6, 2019. (The sworn statement of Chananya is dated December 21, 2012 and could not take into account of the payment of \$350,000.00 due on April 11, 2013.) In any case, there are substantial funds due plaintiff which defendants have available to set off any costs for the health insurance coverage in the event they are successful in defense of the action.

Finally, the court must note that the severance contract cannot be interpreted, as a matter of law, to obligate defendants to keep plaintiff, a non-employee, on a group policy in violation of law or contractual terms with the health insurance carrier. However, the language "until the time that all obligations in the agreement that was signed on 3 Iyar 5772 [calendar date: April 25, '12] are paid off" negates the interpretation that defendants were only obligated to maintain COBRA payments for a period of 18 months. Therefore, in the event defendants are unable to retain Chananya's health insurance coverage on their current plan, defendants are obligated to pay the cost of another health insurance policy with the same coverage afforded prior to the execution of the Settlement Agreement.

Based upon the foregoing, it is hereby

ORDERED, that the preliminary injunction directing defendants to provide plaintiff with health coverage with the same coverage as in effect on November 14, 2012 until such time as the contractual obligations under the Settlement Agreement are performed is continued pending the conclusion of this action and a final determination; and it is further

ORDERED, that defendants shall provide plaintiff with health insurance with the same coverage as in effect on November 14, 2012 at their expense pursuant to the Severance Agreement pending the conclusion of this action and a final determination; and it is further


ORDERED, that the portion defendants' cross-motion to refer this matter to arbitration is denied in all respects; and it is further

ORDERED, that the portion of defendants' cross-motion with respect to the validity of the Contract of Agreement is denied without prejudice with leave to renew upon the completion of discovery; and it is further

ORDERED, that all parties shall appear for a Preliminary Conference in the Intake Part on May 19, 2014 at 9:30 A.M.

This constitutes the decision and order of the Court.

Dated: March 24, 2014



Hon. Martin M. Solomon
J.S.C.