

<b>Singh v Thiyakaraajakkurukkal</b>
2014 NY Slip Op 33832(U)
April 30, 2014
Supreme Court, Nassau County
Docket Number: 601281-13
Judge: Vito M. DeStefano
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SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**  
Justice

TRIAL/IAS, PART 14  
NASSAU COUNTY

**DALBARA SINGH, individually and as a shareholder  
of MOHTHI TRANSPORTATION, INC., suing in the  
right of MOHTHI TRANSPORTATION, INC.,**

**Decision and Order**

**Plaintiffs,**

**MOTION SUBMITTED:**

**February 5, 2014**

**MOTION SEQUENCE: 04**

**INDEX NO.: 601281-13**

**-against-**

**MOHANAROOBAN THIYAKARAAJAKKURUKKAL  
and MOHTHI TRANSPORTATION, INC.,**

**Defendants.**

**The following papers and the attachments and exhibits thereto have been read on this  
motion:**

<b>Notice of Motion</b>	<b>1</b>
<b>Affirmation in Opposition</b>	<b>2</b>
<b>Affirmation in Reply</b>	<b>3</b>

In this action for, *inter alia*, breach of contract, fraud in the inducement, and breach of fiduciary duty, the Defendants Mohanarooban Thiyakarajakkurukkal and Mohthi Transportation, Inc. move for an order pursuant to CPLR 7503(a) “staying these proceedings pending the arbitration of plaintiff’s claims on the ground that all of the claims alleged in the complaint are subject to arbitration”.

**Factual Background**

On March 7, 2013, Dalbara Singh (“Plaintiff”) and Mohanarooban Thiyakarajakkurukkal (“Defendant”) executed a Shareholder’s Agreement for Mohthi Transportation, Inc.

("Company"), a trucking company.<sup>1</sup> The Shareholder's Agreement demonstrates that the Plaintiff and Defendant each hold 100 shares of the Company's 200 shares of outstanding stock. Notably, the Shareholder's Agreement contains an "Entire Agreement" provision which states that "This [Shareholder's] Agreement contains the entire agreement of the parties and no provision may be waived, altered or amended, in whole or in part, unless such waiver, alteration or amendment is in writing and signed by all the parties" (Ex. "A" to Affirmation in Opposition at ¶ 21). Plaintiff and Defendant are the only two shareholders of the Company (Ex. "A" to Motion in Support of Preliminary Injunction).

Defendant claims that at about the same time the Shareholder's Agreement was executed, the parties executed an Agreement for Sale of Shares ("Subscription Agreement") which contained, *inter alia*, the following "entire agreement" and arbitration provisions:

This document contains the entire agreement of the parties relating to Dalbara Singh's acquisition of the Corporation's common stock, and supersedes any and all prior agreements or understandings.

This agreement is governed by New York law, and any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in State of New York in accordance with the rules of the American Arbitration Association then in effect, and judgment upon the award rendered may be entered in any court having jurisdiction thereof (Ex. "A" to Motion at ¶¶ 10, 11).

The Subscription Agreement annexed to the motion papers is not executed.<sup>2</sup>

### Procedural History

On May 20, 2013, Plaintiff commenced the instant action, both individually and on behalf of the Company, asserting the following causes of action: breach of the Shareholder's Agreement, fraud in the inducement, unjust enrichment, breach of fiduciary duty, conversion, fraudulent conveyance, alter ego, constructive trust, temporary restraining order ("TRO") and preliminary injunction. Importantly, the complaint did not contain any claim for breach of the

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<sup>1</sup> Although the Shareholder's Agreement was executed and notarized on March 7, 2013, the first paragraph of the Shareholder's Agreement states "This agreement is made on February \_\_\_\_ 2013".

<sup>2</sup> The Subscription Agreement did not contain the signature of either Mohthi Transportation or Singh and read as follows: "Agreement made February \_\_\_\_, 2013" and "This agreement shall be effective upon execution and delivery by all parties, except that the transfer of the Shares shall be effective as of the opening of business on \_\_\_\_\_, 2013" (Ex. "A" to Motion).

Subscription Agreement or any other claim expressly relating to the Subscription Agreement.

On May 31, 2013, Plaintiff moved, by order to show cause, for a TRO and preliminary injunction. On June 26, 2013, the Plaintiff moved for the appointment of a temporary receiver pursuant to CPLR 6401(a). In a decision and order dated August 1, 2013, this court denied both of the Plaintiffs' motions.

On July 22, 2013, the Defendants moved, by order to show cause, to stay the action and compel arbitration pursuant to CPLR 7503(a). The court declined to sign the order to show cause on the grounds that the "putative movant has failed to provide a signed copy of the subscription agreement upon which the relief sought is based. In any event, it appears that breach of the shareholders agreement and not the subscription agreement is the subject of plaintiff's complaint."

On August 19, 2013, Defendants made the instant application to stay the action and compel arbitration.

For the reasons that follow, the motion is denied.

### **The Parties' Contentions**

In support of their application to compel arbitration, defense counsel submits his affirmation, the unexecuted Subscription Agreement, the pleadings, and a copy of his Rule 24 letter requesting a pre-motion conference. Counsel asks that his letter be "incorporated" to the motion "by reference and made a part hereof. It sets forth the facts and circumstances surrounding the existence of the arbitration agreement, why the copy annexed to defendants' motion is not signed and why thin [sic] plaintiffs' complaint fall squarely within the arbitration clause" (Affirmation in Support at ¶ 14).<sup>3</sup>

In support of their motion to compel arbitration, the Defendants argue that the action

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<sup>3</sup> In essence, the letter states: "The [Subscription Agreement], containing the arbitration agreement does exist and the shareholders agreement was the last exhibit to the foregoing and by signing the shareholders agreement, the parties intended to be bound by both the [Subscription Agreement], containing the shareholders agreement" (Ex. "D" to Motion).

The letter also makes allegations to support the existence of the Subscription Agreement. The allegations are supported by confusingly numerous references to exhibits and affidavits to prior motions in this action. However, the Defendants have failed to provide the exhibits referenced and filed with the prior motions, yet relied upon in the instant motion. It is the responsibility of the moving party to assemble complete papers which provide a proper foundation for the relief requested.

“involves issues plaintiff Singh agreed to and is required to arbitrate”. Defendants also point out that, in paragraph “4” of the Subscription Agreement, “Singh agreed that the parties shareholder agreement is incorporated by reference making the issues at bar inextricably entwined with the parties subscription agreement” (Affirmation in Support at ¶¶ 9, 16).

In opposition to the motion, the Plaintiffs contend that they have commenced the action alleging breach of the Shareholders Agreement, that the Shareholders Agreement does not have an arbitration clause, that the Defendants motion to compel arbitration is based upon the Subscription Agreement - which is “not the subject of this case”, and that the arbitration clause in the Subscription Agreement “cannot compel the parties to arbitrate this dispute, which is based upon the Shareholders’s Agreement” (Affirmation in Opposition at ¶¶ 3-4).

### The Court’s Determination

The Defendants fail to satisfy the heavy burden of demonstrating that arbitration should be compelled pursuant to CPLR Article 75. “[A] party will not be compelled to arbitrate . . . absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. The agreement must be clear, explicit and unequivocal” (*Matter of Waldron*, 61 NY2d 181, 183 [1984] [internal quotation marks and citations omitted]).<sup>4</sup> An arbitration clause in an unsigned agreement may nevertheless be enforceable but only “when it is evident that the parties intended to be bound by the contract” (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Associate, LLP*, 6 NY3d 371, 373 [2006]).

Here, the Defendants rely on a mandatory arbitration clause set forth in the Subscription Agreement. It is undisputed that the Subscription Agreement annexed to the motion papers was never executed by either party.<sup>5</sup> More importantly, the Subscription Agreement is not the basis

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<sup>4</sup> The reasoning behind such a strict requirement is that by agreeing to arbitrate a party waives many of his normal rights under the procedural and substantive law of the State, and “it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent” (*Marlene Industries Corp. [Carnac Textiles]*, 45 NY2d 327, 333-334 [1978] [citations omitted]).

<sup>5</sup> The court notes that the absence of a party's signature on a contract does not necessarily vitiate the enforceability of its arbitration clause. Assuming *arguendo* the evidence demonstrated that the parties operated under the terms of the Subscription Agreement containing the arbitration clause, *and the action was predicated upon the Subscription Agreement*, the arbitration clause would likely be enforceable despite the fact that it was unsigned (*see Matter of Chapnick v Cohen*, 203 AD2d 362 [2d Dept 1994] [emphasis added]; *see also God's Battalion of Prayer Pentecostal Church v Miele Associates, LLP*, 6 NY3d at 374, *supra* [the Court of Appeals held that the arbitration clause of a standard form of contract between two parties was enforceable notwithstanding the fact that neither party had actually signed the contract so long as it was evident that the parties intended to be bound by its terms]; *Flores v*

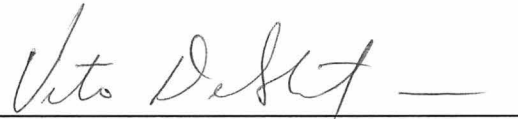
of the Plaintiffs' claims in the complaint. Rather, it is the Shareholder's Agreement, which undisputably does not contain an arbitration provision, which is the subject of the Plaintiffs' complaint and the causes of action therein.

### Conclusion

Based on the foregoing, it is hereby

Ordered that the motion of the Defendants to stay the action and compel arbitration is denied.

DATE: April 30, 2014



Hon. Vito M. DeStefano, J.S.C.

**ENTERED**

**MAY 07 2014**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

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*Lower East Side Service Center, Inc.*, 4 NY3d 363, 370 [2005] ["for an unsigned contract containing an arbitration provision to be enforceable, there must be "objective evidence evident from the totality of circumstances that the parties intended to be bound by documents containing arbitration obligations]).