Gibbs v Holland & Knight LLP
2015 NY Slip Op 30705(U)
April 28, 2015
Supreme Court, New York County
Docket Number: 159345/2014
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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CHARLES GIBBS,

Index No.: 159345/2014

Plaintiff,

DECISION & ORDER

-against-

HOLLAND & KNIGHT LLP,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Defendant Holland & Knight LLP (H&K) moves, pursuant to CPLR 7503(a), to compel arbitration against plaintiff Charles Gibbs. Plaintiff opposes. Defendant's motion is granted for the reasons that follow.

I. Procedural History & Factual Background

The relevant facts are undisputed.

Gibbs, a trusts and estates attorney, is a former partner at H&K. Gibbs joined H&K as a "Class C Partner" on July 1, 2000, pursuant to a Class C Partner Admission Agreement (the Admission Agreement). On March 26, 2003, Gibbs executed a contract that he refers to as his "Employment Agreement." That contract, however, is titled "Amendment to Class C Partner Admission Agreement" (the Amendment), and, by its terms, was effective as of December 1, 2002. *See* Dkt. 34 at 2. The Amendment provides that it "supersedes and replaces the [Admission Agreement] in its entirety." *Id.* The Amendment then makes reference to a "Partnership Agreement", the "H&K Partnership Agreement dated January 1, 1982 as amended and revised through August 11, 2001" (the 2001 Partnership Agreement). *See id.*

The Amendment, as relevant to the issues in this action, changed two things. First, it is a contract governing Gibbs' compensation for 2002 and 2003. Second, it is an agreement to agree

on Gibbs' compensation for subsequent years. The latter topic is addressed in paragraph 3 of the Amendment:

> Subject to Paragraph 11 below, assuming satisfactory performance by [Gibbs] through 2003, and assuming the continuous full-time practice of law thereafter by [Gibbs] as a H&K partner, [Gibbs'] compensation for 2004 and thereafter shall be negotiated and agreed to by the Managing Partner and [Gibbs].

See Dkt. 34 at 4. The aforementioned paragraph 11 provides that the Amendment "may be extended on a year-to-year basis upon the mutual agreement of the parties or may be terminated by either party on [60] days advance written notice." *See id.* at 6. Paragraph 10 provides that the Amendment is governed by New York law "and the venue for resolution of any disputes between the parties shall be New York, New York." *See id.* at 5.[1]

On January 1, 2005, H&K reclassified Gibbs as a "Non-Equity Partner."[2] On January 1, 2006, Gibbs was reclassified as a "Senior Partner." Additionally, over the years, H&K's partnership agreement was amended numerous times. In addition to the 2001 Partnership Agreement, H&K amended its partnership agreement in January 2005, March 2005 (the 2005 Partnership Agreement), March 2007 (the 2007 Partnership Agreement), October 2009 (the 2009 Partnership Agreement), and, finally, in September 2012 (the 2012 Partnership Agreement). The 2012 Partnership Agreement is the effective version for the purposes of this action.[3] *See* Dkt. 21.

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[1] The Amendment does not indicate whether disputes must be litigated or arbitrated. It should be noted, however, that the Amendment's requirement that the venue for dispute resolution is Manhattan is consistent with the 2012 Partnership Agreement's requirement (discussed below) that the arbitration is to take place in Manhattan.

[2] Gibbs does not challenge H&K's entitlement to reclassify his partnership status.

[3] The 2012 Partnership Agreement, in its entirety, was only provided to the court, at its request, *in camera* after oral argument. The parties publicly e-filed pages 52-55 of the 2012 Partnership Agreement, which contains the sections at issue.

The 2012 Partnership Agreement is governed by Florida law. *See id.* at 6. Section 23.9, a merger clause, provides:

> This Agreement constitutes the entire agreement of the Partners and supersedes any prior understandings or written or oral agreements among the Partners respecting the within subject matter, all of which are deemed merged into this Agreement; provided, however, a Senior Partner or a Nonequity Partner, or an Equity Partner admitted to the Firm in connection with an amalgamation of law practices, may have a separate written agreement with the Firm, the terms of which may supplement the terms of this Agreement.

See id. Article XXII of the 2012 Partnership Agreement, titled "Resolution of Disputes", provides:

> Except for injunctive relief, specific performance, or any other equitable remedy … any controversy or claim arising out of or relating to this Agreement (or breach thereof) or the Firm, which is between a Partner or Partners and the Firm, or among Partners, shall be resolved in accordance with this Article XXII.

See id. at 3.

Article XXII provides a three step process for resolving disputes: (1) negotiation [§ 22.1]; (2) mediation [§ 22.2]; and, if mediation does not resolve the parties' dispute, (3) mandatory arbitration before the International Institute for Conflict Prevention & Resolution (CPR) [§ 22.3]. *See id.* at 3-4. Section 22.3 further provides that the arbitration is governed by the Federal Arbitration Act (the FAA). *See id.* at 4.

Each year, before H&K's partners, including Gibbs, were compensated, they certified the binding nature of the then operative H&K partnership agreement. In support of its motion, H&K submitted Gibbs' certifications for 2005 through 2013. Next to the certification, Gibbs checked a box, indicating his agreement with the certification language. The 2005 certification states: "I hereby certify that I am a partner of [H&K] who is entitled to receive the benefits and exercise the rights generally provided to partners under [the 2005 Partnership Agreement]." *See* Dkt. 12.

The 2006 certification states: "I hereby acknowledge that I am a partner of [H&K] and that my relationship with [H&K] is governed by [the 2005 Partnership Agreement]." *See* Dkt. 13. The 2007, 2008, 2009, 2010, and 2011 certifications state: "I hereby acknowledge that: I am a partner of [H&K] and my relationship with [H&K] is governed by [the 2007 Partnership Agreement, as further amended by the 2009 Partnership Agreement]." *See* Dkt. 14, 15, 16, 17, & 18. The 2012 and 2013 certifications state: "I hereby acknowledge that: I am a partner of [H&K] and my relationship with [H&K] is governed by [the 2012 Partnership Agreement]." *See* Dkt. 19 & 20.

In a memorandum dated February 26, 2009 (the 2009 Memo), H&K set forth Gibbs' 2009 compensation. The 2009 Memo states:

> This Notice and [2009 Partnership Agreement] together constitute the entirety of your current compensation agreement with H&K. To the extent that any prior written or oral agreements or understandings concerning your compensation previously have not expired or been terminated, they are hereby terminated.

See Dkt. 41 at 2.

By letter dated December 16, 2013, H&K informed Gibbs that "he will be an Inactive Senior Partner for 2014 and will not be entitled to be compensated with respect to 2014." *See* Dkt. 1 at 24. Gibbs responded in a letter dated December 26, 2013, in which he took the position that based on the 2012 Partnership Agreement, the 2009 Memo, and the Amendment, he disagreed with H&K's position that H&K "does not have an agreement with [Gibbs] for the provision of legal services in 2014." *See* Dkt. 42 at 2. Gibbs argued, *inter alia*, that he was not provided with proper notice of termination of the Amendment and that "Article XXII of the Partnership Agreement provides a mechanism for the resolution of any disputes between [H&K and Gibbs." *See id.* at 2-3. Gibbs set forth the three step dispute resolution mechanism in §

22.1-3, discussed earlier, and took the position that this dispute resolution mechanism must take place in Manhattan. *See id.* at 3. In a letter dated January 9, 2014, Gibbs noted that he had not yet received a response to his December 26 letter, and reiterated the parties' obligation to follow the dispute resolution procedure in Article XXII. *See* Dkt. 22. By letter dated January 16, 2014, H&K agreed to meet with Gibbs to begin the dispute resolution procedure under Article XXII. *See* Dkt. 1 at 30. The parties then exchanged numerous further written communications, in which Gibbs continued to insist on following Article XXII. *See, e.g.*, Dkt. 25 (Gibbs' February 7, 2014 letter, in which he noted that it was "Gibbs that invoked the dispute resolution provisions of the [2012 Partnership Agreement]"). The parties continued to negotiate through the summer of 2014, but no resolution was reached.

After negotiations failed, rather than proceed to the next two steps required under Article XXII, CPR mediation and arbitration, Gibbs commenced the instant action on September 23, 2014. Gibbs asserts a single declaratory judgment cause of action, which seeks adjudication of his grievances against H&K. Contrary to the express provisions of the 2012 Partnership Agreement, and contrary to Gibbs' own admissions in his correspondence with H&K, Gibbs now claims he is not required to mediate or arbitrate before the CPR. On October 31, 2014, H&K moved to stay this action and compel arbitration.

II. Discussion

At the outset, to avoid all doubts as to the scope of this decision, the court expressly notes that it is not ruling on any legal issue with respect to the parties rights' under the various discussed contracts. All such issues, including the controversy over the alleged termination of the Amendment, must be adjudicated by the arbitrator. Additionally, it should be noted that Gibbs' opposition brief does not contain a single citation to the FAA or any federal cases. H&K,

however, correctly relies on federal law since the 2012 Partnership Agreement provides that the parties' agreement to arbitrate is governed by the FAA. It would not matter if New York (or Florida) law would compel a different result than the FAA because the 2012 Partnership Agreement expressly disclaims the applicability of state law. *See* Dkt. 25 at 4 (§ 23.3 provides that the FAA applies "to the exclusion of state laws inconsistent therewith").

Under the FAA, "[t]wo questions are relevant to determining arbitrability: '(1) whether the parties have entered into a valid agreement to arbitrate, and, if so, (2) whether the dispute at issue comes within the scope of the arbitration agreement.'" *NASDAQ OMX Group, Inc. v UBS Secs., LLC*, 770 F3d 1010, 1032-33 (2d Cir 2014), quoting *In re Am. Exp. Fin. Advisors Secs. Lit.*, 672 F3d 113, 128 (2d Cir 2011). "The first question – whether the parties have agreed to arbitrate in the first place – 'is one only a court can answer, since in the absence of any arbitration agreement at all, questions of arbitrability could hardly have been clearly and unmistakably given over to an arbitrator.'" *Padro v Citibank, N.A.*, 2015 WL 1802132, at *4 (EDNY 2015), quoting *VRG Linhas Aereas S.A. v Matlin Patterson Global Opportunities Partners II L.P.*, 717 F3d 322, 325 n.2 (2d Cir 2013) (internal quotation marks omitted). In this case, the 2012 Partnership Agreement has an arbitration clause, a clause Gibbs himself invoked multiple times in his letters. The parties clearly agreed to arbitrate.

Turning to "the second question – whether the scope of the agreement to arbitrate covers the dispute at issue – '[c]ourts presume that the parties intend courts, not arbitrators, to decide ... disputes about 'arbitrability.'" *Padro*, 2015 WL 1802132, at *4, quoting *BG Group, PLC v Republic of Argentina*, 134 SCt 1198, 1206 (2014). "Thus, unless the parties have 'clearly and unmistakably" delegated to an arbitrator the authority to resolve issues of arbitrability [*Howsam v Dean Witter Reynolds, Inc.*, 537 US 79, 83 (2002)], 'the question of whether or not a dispute is

arbitrable is [also] one for the court' [*Citigroup Global Mkts. Inc. v Abbar*, 761 F3d 268, 274 (2d Cir 2014) (internal quotation marks and citation omitted)]." *Padro*, 2015 WL 1802132, at *4. "Where courts have the authority to make this determination, the federal policy in favor of arbitration[4] 'requires that any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration.'" *Id.*, quoting *Telenor Mobile Commc'ns AS v Storm LLC*, 584 F3d 396, 406 (2d Cir 2009); *see generally BG Group*, 134 SCt at 1206-07; *First Options of Chicago, Inc. v Kaplan*, 514 US 938, 942-47 (1995). Simply put, "federal policy requires [courts] to construe arbitration clauses as broadly as possible." *See In re Am. Exp.*, 672 F3d at 128, quoting *Collins & Aikman Prods. Co. v Building Sys., Inc.*, 58 F3d 16, 19 (2d Cir 1995). Hence, courts "will compel arbitration 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *In re Am. Exp.*, 672 F3d at 128, quoting *AT & T Techs., Inc. v Commc'ns Workers of Am.*, 475 US 643, 650 (1986).

Here, the 2012 Partnership Agreement provides that "any controversy or claim arising out of or relating to this Agreement ... shall be resolved [in arbitration] in accordance with this Article XXII." Every year, Gibbs acknowledged that his relationship with H&K was governed by the partnership agreement in effect for that year. Tellingly, when the subject controversy first arose in late 2013, it was Gibbs who acknowledged the requirement to follow the dispute resolution mechanism in Article XXII and demanded that H&K commence negotiations. That Gibbs now prefers litigation is to no avail. He contractually agreed to arbitrate, and has unambiguously recognized this fact, in writing, on numerous occasions.

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[4] New York also has a "long and strong public policy favoring arbitration." *See Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 (2007), quoting *Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 49 (1997).

However, even assuming *arguendo* that the Amendment, which was executed in 2003 and may have been terminated by virtue of the 2009 Memo (though the court is not so holding), at best, Gibbs has raised a doubt (albeit an implausible one)[5] as to whether the 2012 Partnership Agreement requires arbitration. As the case law makes clear, doubts must be resolved in favor of arbitration. *See Telenor*, 584 F3d at 406. Since the 2012 Partnership Agreement is susceptible to "an interpretation that covers the asserted dispute," the FAA mandates that this court compel arbitration. *See In re Am. Exp.*, 672 F3d at 128.

Nor does it matter that Gibbs did not sign the 2012 Partnership Agreement. There is no signature requirement under the FAA (nor is there one under the CPLR). *See Thomas v Pub. Storage, Inc.*, 957 FSupp2d 496, 499 (SDNY 2013) ("The FAA requires only that an arbitration agreement be in writing, not that it be signed"); *accord Thomson-CSF, S.A. v Am. Arbitration Ass'n*, 64 F3d 773, 777 (2d Cir 1995) ("In the absence of a signature, a party may be bound by an arbitration clause **if its subsequent conduct indicates that it is assuming the obligation to arbitrate**") (emphasis added); *see God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 6 NY3d 371, 374 (2006) (under the CPLR, "[t]here is no requirement that the writing be signed 'so long as there is other proof that the parties actually agreed on it'"), quoting *Crawford v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 35 NY2d 291, 299 (1974). Here, while Gibbs never signed the 2012 Partnership Agreement, he indisputably agreed to be bound by it and unequivocally expressed that understanding in the discussed letters.

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[5] The Amendment is silent when it comes to arbitration and litigation and only requires dispute resolution to occur in New York. Consequently, while the Amendment itself does not compel arbitration, the question Gibbs raises is whether a dispute under the Amendment is the sort of dispute between partners that is subject to Article XXII of the 2012 Partnership Agreement. Since it is plausible to answer that question in the affirmative, the FAA mandates arbitration of the parties' disputes that arise under the Amendment. The issue of whether the Amendment is still in force and effect is a question for the arbitrator.

This action, therefore, is stayed, and the parties are directed to resume the dispute resolution procedures under Article XXII – that is, the parties must proceed to mediation and then, if necessary, binding arbitration before the CPR in New York. Accordingly, it is

ORDERED that the motion by defendant Holland & Knight LLP to stay this action and to compel arbitration against plaintiff Charles Gibbs is granted, and the parties are directed to resolve the claims at issue in this action pursuant to the Article XXII of the 2012 Partnership Agreement; and it is further

ORDERED that the stay of this action will be lifted upon an application by either party, pursuant to CPLR Article 75, to confirm, modify, or vacate the CPR arbitration award; and it is further

ORDERED that if the parties settle their claims, they shall file a stipulation of discontinuance so this action can be marked disposed.

Dated: April 28, 2015

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH J.S.C