International Woodfuels LLC v Herz
2015 NY Slip Op 30891(U)
May 21, 2015
Supreme Court, New York County
Docket Number: 653225/2014
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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INTERNATIONAL WOODFUELS LLC,

Petitioner,

-against-

MICHAEL HERZ,

Respondent.

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Index No.: 653225/2014

Mtn Seq. No. 001

DECISION AND JUDGMENT

JEFFREY K. OING, J.:

Relief Sought

Petitioner, International Woodfuels LLC, moves, pursuant to CPLR 7503, for a judgment staying the underlying arbitration proceeding commenced by respondent, Michael Herz, before the Judicial Arbitration and Mediation Services ("JAMS").

Background

Respondent provided consulting services to petitioner as an independent contractor in 2007 and 2008. In 2009, petitioner and respondent entered into a written employment agreement (the "2009 employment agreement") whereby, inter alia, petitioner designated him Vice President of Infrastructure (Petition, Ex. A). The 2009 employment agreement expired on December 31, 2011 (Petition, ¶ 4). Thereafter, in 2012, petitioner offered respondent a new employment agreement (the "2012 employment agreement") for a term of three years (Petition, Ex. B). Petitioner claims that respondent never signed the 2012 employment agreement. Thus, its

contention is that after the parties' 2009 employment agreement expired on December 31, 2011 respondent was an at-will employee (Petition, ¶¶ 7 and 12).

In February 2013, while continuing his work with petitioner as Vice President of Infrastructure, respondent executed a Deed of Undertaking as part of petitioner's efforts to raise capital from Ecofin Water & Power Opportunities PLC ("Ecofin") (Petition, Ex. G). The Deed of Undertaking contemplated the creation of a new company to succeed petitioner called Woodfuels International. Petitioner claims that the Deed of Undertaking provided a new employment arrangement for respondent which was contingent upon the funding of certain projects, and the establishment and incorporation of Woodfuels International (Petition, ¶ 17). According to the petition, certain events that were to take place as part of the Deed of Undertaking have not occurred (Id.).

In June 2014, petitioner informed respondent that it was terminating his employment with it. Thereafter, in August 2014, respondent filed a Demand for Arbitration before JAMS. Petitioner claims that respondent alleged in the arbitration demand that he is entitled to severance and other payments arising under the 2012 employment agreement, and that he is entitled to have the matter resolved through arbitration under an arbitration provision in the 2012 employment agreement.

Petitioner contends that respondent never signed the 2012 employment agreement, therefore it was not in effect at the time of his termination. Respondent, on the other hand, claims that he signed the 2012 proposed employment agreement, and returned it to petitioner (Herz Aff., ¶ 22). As such, he argues there is an agreement to arbitrate the instant dispute.

On September 15, 2014, petitioner's counsel wrote the following email to respondent's counsel and the assigned JAMS case manager, Alicia Jantsch ("Jantsch"):

> As a threshold matter, I note that the alleged 2012 Employment Agreement attached to Mr. Herz's Statement of Claim was not signed by either party. Consequently, it cannot serve as the basis for an enforceable arbitration provision. Please let me know if the alleged 2012 Employment Agreement was ever executed by the parties and, if so, please provide me with a copy of it. In the absence of such a signed Agreement, International Woodfuels LLC will not consent to arbitrate Mr. Herz's claims.

(Petition, Ex. H).

On October 15, 2014, Jantsch responded by email:

> JAMs has reviewed the Demand for Arbitration, accompanying documents and the subsequent correspondence from the parties. Pursuant to JAMS Employment Arbitration Rule 11(b), "[j]urisdiction and arbitrability disputes, including disputes of the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought ... shall be submitted to and ruled on by the Arbitrator.
>
> Therefore, the parties should bring these issues to the attention of the Arbitrator, once appointed.

(Petition, Ex. K).

Petitioner seeks a permanent stay of the underlying arbitration on the grounds that no arbitration agreement exists between the parties because the parties never executed the 2012 employment agreement. In support of its claim that there was never a meeting of the minds on the 2012 employment agreement, petitioner proffers several email exchanges, from September 2012 and January 2013, between respondent and Steven Mueller ("Mueller"), petitioner's founder and president, concerning respondent's salary and his "review/acceptance of [the] employment agreement" (Petition, Exs. C-F). In any event, petitioner contends that the Deed of Undertaking signed by respondent in February 2013 governed the parties employment relationship. The Deed of Undertaking does not contain an arbitration provision.

Discussion

Absent a "clear, explicit and unequivocal" written agreement to arbitrate a dispute, a party will not be compelled to arbitrate (Waldron v Goddess, 61 NY2d 181 [1984]). "[A]n arbitration clause in a written agreement is enforceable, even if the agreement is not signed, when it is evident that the parties intended to be bound by the contract" (God's Battalion of Prayer Pentecostal Church, Inc. v Miele Associates, LLP, 6 NY3d 371 [2006]). Thus, the issue here is whether the parties' conduct

evinced an intent to be bound by the 2012 employment agreement. For the reasons that follow, I find that at the time of respondent's termination in June 2014, the 2012 employment agreement governed the parties' relationship.

Petitioner's emphasis on the fact that the 2009 employment agreement expired and the 2012 employment agreement was never executed is unavailing. Attached to the petition is what petitioner contends is a true and correct copy of the 2009 employment agreement (Petition, Ex. A). The 2009 employment agreement is unsigned as well. In fact, petitioner makes no claim that the parties ever signed the 2009 employment agreement, yet there is no dispute that the 2009 employment agreement governed the parties' relationship during the term of that agreement.

In addition, the record demonstrates that with the exception of a few additions, including a salary increase, the terms of the 2012 employment agreement was virtually the same as the 2009 employment agreement. Petitioner does not dispute this fact. Nonetheless, petitioner relies on the email exchanges between respondent and Mueller to demonstrate that the parties were not operating pursuant to the 2012 employment agreement. That reliance is misplaced. Although the email exchanges contemplated changes to respondent's salary, his salary did not change in

accordance with those emails. Instead, petitioner paid respondent the $190,000 salary contemplated by the 2012 employment agreement (Herz Aff., Ex. A). As such, the parties' conduct and how they viewed their employment relationship all are referable to the 2012 employment agreement, which evinces an intent to be bound by that agreement.

On the other hand, petitioner posits that the Deed of Undertaking, signed by respondent on February 4, 2013, governed the parties' employment relationship. In fact, petitioner's payroll records show that once respondent signed the Deed of Undertaking his salary changed to reflect the agreed upon salary in the Deed of Undertaking of $142,500 per annum (Mueller Aff., Ex. M). Thus, under these circumstances, petitioner argues that given it does not contain an arbitration provision, the arbitration proceeding must be permanently stayed.

Petitioner's argument is unavailing. The Deed of Undertaking provides, in relevant part:

> **WHEREAS**, on the date of this Deed of Undertaking, the Investor is considering committing funds to a new company (WoodFuels International, "WFI") to support the development of current projects developed and documented by [petitioner] ... Initial funding from Investor will take the form of a $5mln Loan Note to [petitioner] (the "Loan Note"), convertible into WFI, to provide funds for the development of the first Project ... by [petitioner] and/or WFI to the stage of final investment decisions including the raising of senior debt ("Full Funding").

* * *

This Undertaking is conditional on the provision of the Loan Note by Investor.

The distribution of the Loan Note funds is conditional, *inter alia*, on the execution of this and similar Deeds of Undertaking by certain employees of [petitioner] ....

WHEREAS, as above, the employment of certain individuals is crucial to the success of the Projects and is a condition of the funding of the Investor and/or any other investment funds managed by Ecofin. Accordingly, [respondent] will be required to be employed by WFI, once it is incorporated, based on the principle terms and conditions as set out herein.

IT IS AGREED as follows:

Employment Terms and Conditions

1. Once WFI has been established (no later than commencement of Full Funding), [petitioner] will release [respondent] from employment and any other arrangement that might impinge on [respondent's] ability to work full-time for WFI, and [respondent] will enter into an employment contract with WFI on the following terms as provided for in this Deed of Undertaking. Ahead of WFI being formed [respondent] will work exclusively on the Projects on the terms laid out herein, as if WFI had already been formed and [respondent] were employed by WFI.

[Petitioner] and [respondent] agree that neither party has any claim against the other under [respondent's] existing employment arrangements and will not have any claim against the other party when [respondent's] existing employment arrangement is terminated which will be shortly after WFI is formed.

(Petition, Ex. G).

Although the Deed of Undertaking outlines respondent's duties that he was to assume upon signing the document as well as a

change in his annual salary, the basis for the Deed of Undertaking was the contemplated formation of WFI, an event which, according to the petition, did not occur (Petition, ¶ 17). Therefore, respondent's employment arrangement with petitioner, as governed by the 2012 employment agreement, was to continue until WFI was formed. This result is compelled given the absence of a merger clause in the Deed of Undertaking. In addition, the Deed of Undertaking provided that respondent's existing employment arrangement with petitioner would terminate "shortly after WFI is formed." As such, the Deed of Undertaking governed only the obligations and duties contained therein that had ripened, and had no effect as of yet on the parties' employment relationship vis-a-vis the 2012 employment agreement. Thus, according to the provisions of the Deed of Undertaking and the petition itself, respondent's employment arrangement with petitioner at the time of his termination was not governed by the Deed of Undertaking.

As for the 2012 employment agreement, it contains an arbitration clause in which the parties agreed that "any legally actionable dispute" would be resolved "by binding arbitration before a single arbitrator experienced in employment law"(Petition, Ex. B, § 14). Further, the "arbitration will be conducted in accordance with the rules applicable to employment

disputes of Judicial Arbitration and Mediation Services or such other arbitration service as we agree upon, and the law of New York" (Id.). In addition, the parties agreed that this:

> promise to arbitrate covers any disputes that the Employer may have against the Executive, or that the Executive may have against the Employer and/or its related entities and/or employees, arising out of or relating to this Agreement, the employment relationship or termination of employment, including any claims concerning the validity, interpretation, effect or violation of this Agreement.

(Id.).

According to Rule 11(b) of the JAMS Employment Arbitration Rules, disputes concerning "the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought ... shall be submitted to the Arbitrator." Thus, under the parties' arbitration agreement, which incorporates by reference the JAMS rules applicable to employment disputes, the JAMS Arbitrator will determine whether respondent's claims fall within the purview of the 2012 employment agreement so as to subject them to arbitration (see Gibson v Seabury Transportation Advisor LLC, 91 AD3d 465 [1st Dept 2012]; Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's, 66 AD3d 495 [1st Dept 2009]).

Accordingly, it is hereby

ADJUDGED that the petition to stay the subject arbitration is denied in all respects and the petition is dismissed, without costs and disbursements to respondent; and it is further

ADJUDGED that the parties shall proceed to arbitration forthwith and respondent's counsel shall serve a copy of this judgment upon the arbitral tribunal.

This memorandum opinion constitutes the decision and judgment of this Court.

Dated: 5/21/15

HON. JEFFREY K. OING, J.S.C.