**Government Empls. Ins. Co. v Technology Ins. Co., Inc.**

2015 NY Slip Op 31851(U)

October 2, 2015

Supreme Court, New York County

Docket Number: 652068/2015

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioner,

Index No. 652068/2015

-against-

**DECISION/ORDER**

TECHNOLOGY INSURANCE COMPANY, INC.

Respondent,

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**HON. CYNTHIA KERN, J.S.C.**

**Recitation, as required by CPLR 2219(a), of the papers considered in the review of this** motion for : ______________________

| Papers | Numbered |
|---|---|
| Notice of Motion and Affidavits Annexed.................................. | 1 |
| Affidavits in Opposition.................................................. | 2 |
| Replying Affidavits.......................................................... | 3 |
| Exhibits................................................................................ | 4 |

Petitioner Government Employees Insurance Company ("GEICO") brings the instant petition for an Order pursuant to CPLR § 7503(b) permanently staying the special arbitration (the "Special Arbitration") proceeding demanded by respondent Technology Insurance Company, Inc. ("Technology Insurance") against petitioner in Arbitration Forums, Inc. ("Arbitration Forums") on March 10, 2015. For the reason set forth below, the petition is denied.

The relevant facts are as follows. On or about March 9, 2012, petitioner issued a policy of automobile insurance to its insureds, Christie Rosato and Pedro Rosato, providing coverage in the amount of $100,000 for injury to one person, $300,000 for injury to more than one person and $100,000 for property damage. On or about March 12, 2012, petitioner's insureds vehicle was involved in an accident at the automatic car wash B&J Car Wash ("B&J") located in

Westchester County, New York (the "accident"). B&J's employee Humberto Zuirto ("Zurito") was allegedly injured in the accident. Respondent Technology Insurance was the workers' compensation carrier for B&J and paid workers' compensation benefits on behalf of Zurita in the amount of $199,926.99. Thereafter, on March 10, 2015, respondent electronically filed a demand for special arbitration in Arbitration Forums seeking to resolve respondent's workers' compensation subrogation claims against petitioner.

On or about June 4, 2015, petitioner filed the instant petition to stay the arbitration demanded by respondent on the ground that respondent may not proceed to intercompany arbitration, through Arbitration Forums, against the petitioner as there has never been an agreement to arbitrate such claims between petitioner and respondent. Respondent opposes the petition on the ground that as a signatory to Arbitration Forums' Special Arbitration Agreement, petitioner agreed to arbitrate the respondent's workers' compensation subrogation claim. Additionally, respondent contends that the petition is untimely and petitioner waived any right to bring the instant petition by participating in the Special Arbitration.

As an initial matter, respondent's claim that the petition is untimely is without merit. Pursuant to CPLR § 7503(c), "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded." "The validity of the 20-day limitation depends on compliance with the requirements of CPLR § 7503(c)." *Government Employees Ins. Co. v. Castillo-Gomez*, 34 A.D.3d 477, 478 (2nd Dept 2006). CPLR § 7503(c) provides that a demand for arbitration or a notice of intention to arbitrate must be served "in the same manner as a summons or by registered or certified mail, return receipt requested." Thus, if another means of service is used

to serve the demand for arbitration or notice of intent to arbitrate, the opponent is not bound by the 20-day time limit for an application to stay arbitration, and such party may make an application for a stay at a later time prior to participation in the arbitration. *State Farm Mutual Ins. Co. v. Szwec*, 36 A.D.2d 863 (2nd Dept 1971).

In the present case, respondent failed to comply with the service requirements of CPLR § 7503(c) and, as such, petitioner is not bound by the 20-day time limit. Respondent did not serve the demand for arbitration in the same manner as a summons or by registered or certified mail, return receipt requested. Rather, respondent filed the demand for arbitration electronically. Thus, respondent is deprived of CPLR § 7502(c)'s preclusive effect and the instant petition is timely.

To the extent respondent contends that it is entitled to invoke CPLR § 7502(c)'s 20-day time limit as it served petitioner pursuant to the manner of service agreed upon under the party's agreement to arbitrate, such contention is without merit. In support of this contention, respondent relies on *Weilwood Fabrics Int., Inc. v. Zerbi*, 90 A.D.2d 453 (1st Dept 1982), *Thermasol, Ltd. v. Dreiske*, 78 A.D.2d 838 (1st Dept 1980), and *New York Merchants Protective Co., Inc. v. Backyard Party Tent Rental, Inc.*, 34 Misc.3d 55 (App. Term 2nd 2011). However, respondent's reliance on these cases is misplaced as these cases holdings are not on point. These cases do not stand for the proposition that parties may agree to an alternative method of service in order to invoke CPLR § 7502(c)'s time-limit. Rather, these cases stand for the proposition that if the parties contractually agreed to service of an arbitration demand by mail or electronically, such service, regardless of its effect on extending the time for a motion for a stay, is valid for the purpose of giving notice of the arbitration. Thus, the fact that the parties may

have agreed to electronic service of the arbitration demand, such fact has no bearing on respondent's right to invoke the preclusive effect of CPLR § 7502(c)'s 20-day time-limit.

Additionally, contrary to respondent's contention, petitioner did not waive its right to bring the instant petition by participating in the Special Proceeding. CPLR § 7503(b) provides in relevant part that an application to stay arbitration may only be brought by a party "who has not participated in the arbitration." Thus, when parties to an arbitration, including parties who never executed an agreement to arbitrate, participate in the arbitration, they waive their right to a judicial determination of the arbitrability of the claim. *See, e.g., Natter of North Riv. Ins. Co. (Morgan)*, 291 A.D.2d 230, 233 (1st Dept 2002). There is no bright line rule of what constitutes participation. On the one hand, clear cases of participation are presented when a party engages in the selection of the arbitrators. *See, e.g.. Matter of Boston Old Colony Ins. Co. (Martin)*, 34 A.D.2d 776 (1st Dept 1970). On the other hand, a request for an extension of time to select arbitrators may not be considered as a voluntary submission of the dispute to arbitration. *See Matter of Dana Realty Corp. (Consolidated Elec. Const. Co.)*, 21 A.D.2d 769, 771 (1st Dept 1964). Generally, as long as a party's actions are consistent with the right to litigate arbitrability, there is no waiver. *See Kidder, Peabody & Co. v. Marvin*, 161 Misc.2d 12 16 (N.Y. Sup. Ct., N.Y. Co. 1994).

In the present case, the court finds that there was no waiver by reason of petitioner's participation in the Special Arbitration as its actions in the arbitration are consistent with the right to litigate the issue of arbitrability in this matter. Petitioner never engaged in the selection of arbitrators in the Special Arbitration. Rather, prior to making the instant petition, petitioner only appeared in the arbitration to request an adjournment. Such request is insufficient to

constitute active participation by petitioner in the arbitration. Further, although petitioner has submitted an answer, such act also does not constitute a waiver of its right to bring the instant petition as such answer was submitted only after this petition was made.[1] Thus, petitioner has not participated in the Special Arbitration and can maintain the instant petition.

The court now turns to the merits of the petition. CPLR § 7503(b) provides, in relevant part, that a party may move to stay an arbitration "on the ground that a valid agreement was not made or has not been complied with." "A party will not be compelled to arbitrate, and thus surrender the right to litigate a dispute in court, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes." *Matter of State Farm Mut. Auto. Ins. Co. v. Torcivia*, 277 A.D.2d 321 (2nd Dept 2000). In addition, an agreement to arbitrate must be "express, direct, and unequivocal as to the issues or disputes to be submitted to arbitration." *Gangel v. DeGroot*, 41 N.Y.2d 840, 841 (1977).

Here, the petition to permanently stay the Special Arbitration demanded by respondent in the Arbitration Forum is denied as there exists an express and unequivocal agreement between the parties to arbitrate respondent's workers' compensation subrogation claim. Both petitioner and respondent are signatories to the Arbitration Forum's Special Arbitration Agreement. The Special Arbitration Agreement provides, in relevant part, that: "Upon settlement of a claim or suit, signatory companies must submit any unresolved disputes to Arbitration Forums, Incorporated (herein after referred to as AF) where: . . . (c) a workers compensation carrier or a self-insured seeks to recover reimbursement of workers' compensation benefits from an alleged tortfeasor." As respondent seeks to recover reimbursement of workers' compensation benefits from petitioner as an insurer of the alleged tortfeasor, there clearly exists an agreement to

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arbitrate respondent's claims and the petition to permanently stay the Special Arbitration must be denied.

To the extent petitioner contends that respondent's claim falls under the "Exclusions" to the Special Arbitration Agreement, such contention is without merit. The Special Arbitration Agreement's "Article Second" entitled "Exclusions" provides as follows:

> No company shall be required, without its written consent, to arbitrate any claim or suit if:
> (a) 'A company is not a signatory company nor has given written consent
> (b) It creates any cause of action or liabilities that do not currently exist in law or equity; or
> (c) Its policy is written on a retrospective or experience-rated basis; or
> (d) Any payment which such signatory company may be required to make under this Agreement is or may be in excess of its policy limits. However, a company may agree to accept an award not to exceed policy limits; or
> (e) It has asserted a denial of coverage to the party or parties seeking coverage under the policy for the claim or suit otherwise subject to arbitration; or
> (f) Under the casualty insurance coverage, by the terms of the policy contract, settlement can be made only with the insured's consent.

Here, petitioner contends that subsection (d) is applicable to the instant Special Arbitration as respondent has sought recovery in excess of petitioner's policy limits. However, such contention is unavailing as respondent has stated in its opposition papers that it is willing to limit its recovery to the $100,000 policy limits. Thus, respondent's initial demand for an award that exceeds petitioner's policy limits is not a proper ground to permanently stay the Special Arbitration. Moreover, petitioner has failed to demonstrate that any of the other exclusions are applicable to the instant dispute between petitioner and respondent.

Accordingly, the petition to permanently stay the Special Arbitration is denied in its entirety. This constitutes the decision and order of the court.

Dated: 10/2/15

Enter: ______________________
J.S.C.

CYNTHIA S. KERN
J.S.C.