| **Out/Med Transcription Servs., Inc. v Breitner Transcription Servs., Inc.** |
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| 2016 NY Slip Op 30079(U) |
| January 12, 2016 |
| Supreme Court, New York County |
| Docket Number: 652548/2013 |
| Judge: Nancy M. Bannon |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: Hon. Nancy M. Bannon *Justice* PART 42

OUT/MED TRANSCRIPTION SERVICES, INC.

- v -

BREITNER TRANSCRIPTION SERVICES, INC.

INDEX NO. 652548/2013

MOTION DATE 9/16/15

MOTION SEQ. NO. 002

The following papers were read on this motion to compel arbitration and cross-motion for summary judgment.

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| Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law | No(s). 1 |
| Notice of Cross-Motion/Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law and Opposition to Motion | No(s). 2 |
| Answering Affirmation(s) — Affidavit(s) — Exhibits | No(s). 3 |

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In this action, inter alia, to recover damages for breach of contract and for an accounting, the defendant moves to dismiss the complaint on the grounds that the subject contract requires disputes between the parties to be submitted to arbitration in Massachusetts. Although denominated as a motion for summary judgment, the defendant, in effect, moves pursuant to CPLR 7503(a) to compel arbitration. The plaintiff opposes the motion and cross-moves for summary judgment on the issue of liability as to its first and third causes of action seeking damages for breach of contract and an accounting, respectively. The motion is denied and the cross-motion is granted.

The parties entered into a Sales Services Agreement in January 2010, for medical transcription services. Section 12 of the agreement provides, "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration conducted in Canton, Massachusetts, administered by the American Arbitration Association ... and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." That section further provides that "[e]ither party [] may, without waiving any remedy under this Agreement, seek from any court having jurisdiction, any interim or provisional relief that is necessary to protect the rights or property pending the establishment of the arbitral tribunal." When a dispute between the parties arose regarding the commissions allegedly owed under the agreement, the plaintiff commenced this action in July 2013. The defendant answered, asserting as one of its affirmative defenses that the agreement required submission of the parties' dispute to arbitration.

On a motion to compel arbitration, the court must resolve three threshold questions (1) whether the parties entered into a valid agreement to arbitrate; (2) if such an agreement was made, whether it was complied with; and (3) whether the claim would be barred by the relevant statute of limitations if the claim had been asserted in a court of the State. See Rockland County v Primiano Construction Co., Inc., 51 NY2d 1 (1980). However, "'like contract rights generally, a right to arbitration may be modified, waived or abandoned.' Sherrill v Grayco Bldrs., 64 NY2d 261, 272 (1985). Accordingly, a litigant may not compel arbitration when its use of the courts is 'clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration.' Flores v Lower E. Side Serv. Ctr., Inc., 4 NY3d 363, 372 (2005)." Stark v Molod Spitz DiSantis & Stark, P.C., 9 NY3d 59, 66 (2007). This is because "[t]he courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create its own unique structure combining litigation and arbitration." DeSapio v Kohlmeyer, 35 NY2d 402 (1974); see LZG Realty, LLC v H.D.W. 2005 Forest, LLC, 71 AD3d 642 (2nd Dept. 2010). When examining waiver of a right to arbitrate, "courts should consider the amount of litigation that has occurred, the length of time between the start of litigation and the arbitration request, and whether prejudice has been established." Cusimano v Schnurr, – NY3d –, 2015 NY Slip Op 09232 (Dec. 16, 2015). In particular, a party who "utilizes the tools of litigation", such as discovery, may be found to have waived arbitration. LZG Realty, LLC v H.D.W. 2005 Forest, LLC, supra at 643.

Here, while a valid agreement to arbitrate was entered into by the parties, the defendant has waived its right to arbitration based on its participation in the instant litigation. The defendant did not seek to enforce the arbitration provision of the parties' agreement until nearly two years after this action was commenced. The parties first appeared for a preliminary conference on May 29, 2014, and appeared for a status conference on March 26, 2015. In the meantime, the defendant had opposed a discovery motion filed by the plaintiff, upon which the court directed the defendant to comply with all discovery demands within 30 days or be precluded at trial. It was only after that order was issued that the defendant sought arbitration. The court finds that the defendant's conduct in this court is inconsistent with its present request for arbitration, indicative of forum shopping, and clearly prejudicial to the plaintiff.

Appellate courts have found waiver of a right to arbitrate under similar circumstances. For example, in Cusimano v Schnurr, supra, the Court of Appeals found the right to arbitrate had been waived where arbitration was sought after the action had been pending for approximately one year and only after the court expressed its view that the claims were vexatious and largely time-barred. Similarly, in Gaetano Dev. Corp. v Lee, 121, AD3d 838 (2nd Dept. 2014), the Appellate Division held that a defendant waived arbitration where he answered the complaint, asserted several affirmative defenses and a counterclaim, participated in discovery and removed the action to the Bankruptcy Court. Compare MCC Dev.Corp. v Perla, 81 AD3d 474 (1st Dept. 2011) [no delay, no discovery conducted and defendant's answer was necessary to protect his rights].

Therefore, the defendant has waived its right to arbitration and its motion is denied.

As to the cross-motion, it is well settled that the proponent of a motion for summary judgment establishes entitlement to that relief by tendering sufficient evidence to demonstrate the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). Once the movant meets this burden, it becomes incumbent upon the nonmoving party to demonstrate by admissible evidence the existence of a triable issue of fact. See CPLR 3212; Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

Here, the plaintiff established its prima facie entitlement to summary judgment on the issue of liability on its causes of action for breach of contract and for an accounting. The plaintiff's submissions, including the agreement between the parties and the affidavit of Evan J. Phillips, Vice President of the plaintiff, establishes (1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendants' breach of that contract, and (4) resulting damages from the breach. See Elisa Dreier Reporting Corp. v Global Naps Networks, Inc., 84 AD3d 122 (2nd Dept. 2011); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); JP Morgan Chase v J.H. Elec. of New York, Inc., 69 AD3d 802 (2nd Dept. 2010). Specifically, the plaintiff established that, pursuant to the January 2010 contract, the defendant was to pay, among other things, a minimum of $3,000 per month, plus 50% of any additional commissions over $3,000 on all agreements between the defendant and certain health care providers and to send monthly statements of commissions and account sales revenues. The defendant failed to provide the required statements and did not pay commissions owed from November 2012 through July 2013, which amounts to at least $30,000. Further, as the agreement provided for the sharing of commissions, the requisite relationship of trust respecting the subject matter of the controversy is established for its cause of action for an accounting. See Melapioni v Melapioni, 113 AD3d 456 (1st Dept. 2015). In opposition, the defendant submits the affidavit of its President, Owen Breitner, who addresses only the defendant's legal argument concerning the agreement to arbitrate, and nothing more. Having failed to submit any proof to dispute the plaintiff's breach of contract and accounting claims, the defendant has failed to raise a triable issue of fact to defeat the cross-motion.

The court notes that, since the plaintiff alleges that its action arose from a valid and enforceable contract, recovery under its fifth and sixth causes of action asserting the quasi-contract theories of unjust enrichment and quantum meruit is precluded. See IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132 (2009); Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); MMA Meadows at Green Tree, LLC v Millrun Apartments, LLC, 130 AD3d 529 (1st Dept. 2015). The plaintiff has not sought relief as to its second cause of action seeking damages pursuant to Labor Law § 191-c and fourth cause of action for attorney's fees in this motion.

Accordingly, and upon the foregoing papers and oral argument of the parties, it is

ORDERED that the defendant's motion to compel arbitration is denied, and it is further,

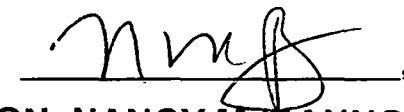
ORDERED that the plaintiff's cross-motion for summary judgment on the issue of liability on the first cause of action, alleging breach of contract, and the third cause of action, seeking an accounting,

is granted in its entirety, and the plaintiff is granted judgment in its favor on the issue of liability as to those causes of action, with damages to be determined at an inquest, and it is further,

ORDERED that the parties shall appear for a status conference on March 24, 2016, at 9:30 a.m.

This constitutes the Decision and Order of the court.

**Dated: January 12, 2016**



**, JSC**
**HON. NANCY M. BANNON**

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| 1. Check one: ..... | ☐ | CASE DISPOSED | ■ | NON-FINAL DISPOSITION | | | |
| 2. Check as appropriate: MOTION IS: | ☐ | GRANTED | ■ | DENIED | ☐ | GRANTED IN PART | ☐ OTHER |
| CROSS-MOTION IS: | ■ | GRANTED | ☐ | DENIED | ☐ | GRANTED IN PART | ☐ OTHER |