Wolf v Wahba
2016 NY Slip Op 31918(U)
October 12, 2016
Supreme Court, Kings County
Docket Number: 500661/2016
Judge: Lawrence Knipel

At an IAS Term, Commercial 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of October, 2016

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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RAQUEL WOLF, AS EXECUTRIX OF THE ESTATE OF HIRSCH WOLF,

Plaintiff,

- against -

Index No. 500661/16

SOL WAHBA, MICHAEL WAHBA, AND SIGULA 1145 BROADWAY LLC,

Defendants.

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The following papers numbered 1 to 9 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 2, 3, 4
Opposing Affidavits (Affirmations)	5, 6
Reply Affidavits (Affirmations)	7
Affidavit (Affirmation)	
Other Papers Memorandums of Law	8, 9

In this action to recover damages for fraudulent inducement, breach of fiduciary duty and unjust enrichment, defendants move to compel arbitration of all claims raised in the complaint and to stay the action pending the outcome of the arbitration.

In her complaint, plaintiff alleges she is the widow of Hirsch Wolf, a co-owner of Richmond Properties LLC, whose sole asset was property located at 1145 Broadway, New York, New York, a five-story commercial use loft between West 26th and 27th Streets. Plaintiff alleges she was fraudulently induced by defendants to sell her interest for $2.75 million, and then discovered that defendants sold the property for $8.9 million thus purportedly defrauding her of $1.611 million. The complaint alleges that Hirsch Wolf and Sol Wahba were co-owners of Richmond Properties LLC. Sol Wahba owned 51% of the LLC and Hirsch Wolf owned 49%. The rights and obligations of the parties were governed by an Operating Agreement dated March 7, 2000. Hirsch Wolf died in 2011. In 2014 discussions were held regarding the sale of the interest in the property of the Estate of Hirsch Wolf to Sol or Michael Wahba, Sol's son. The Estate and the Wahbas agreed on a sale price of $2.5 million and entered into a Membership Interest Purchase Agreement on December 31, 2014. In 2015, the Estate discovered that the real property sold for $8.9 million. Sol and Michael Wahba, it is alleged, breached the Operating Agreement by failing to disclose the agreement to sell to plaintiff, thus, it is averred, breaching their fiduciary duty and committing fraud.

Article 26 section 26.2 provided that "should any matter of controversy or dispute arise concerning the performance, interpretation and/or application of this Agreement or other agreements between any of the parties" they should be resolved in one of two enumerated Jewish tribunals (batei din) "whose verdict or ruling shall be final and absolute and enforceable in any court of competent jurisdiction." Section 12.4 provides that an ownership interest of any member may be transferred to any member of the immediate family of a deceased member. Section 23.1 provided that the Operating Agreement "shall be binding and shall inure to the benefit of the Members and their respective successors and assigns."

In this motion, defendants seek to compel arbitration, arguing that Section 26.2 showed the parties' clear desire and intention to deal with all issues in the 2000 Operating agreement and any other agreement in a Beth Din. In a supporting affidavit, Sol Wahba stated that it was important to him and, he believes, to Hirsch Wolf, to resolve any disputes in accordance with Orthodox Jewish law and tradition, in a Beth Din. Sol asks this court to honor his wishes and those of Hirsch Wolf as set forth in the Operating Agreement, and to compel arbitration. Plaintiff's commencement of this litigation in court is "against the wishes and express agreement between" of Sol and Hirsch, and in defiance of Jewish law. Michael Wahba submits a supporting affidavit, in which he states that he consents on his behalf and his entity Sigula "to deal with the instant dispute in a Beth Din in accordance with Jewish law and as both Sol and Hirsch agreed in the Operating Agreement."

In opposition, counsel for plaintiff argues that this action should be governed by the Membership Interest Purchase Agreement dated December 31, 2014, which provides that any proceeding shall be brought only in federal or state court. According to plaintiff, the 2014 agreement "supersedes the earlier agreement's arbitration provision." In addition, it is urged, neither Hirsch Wolf nor the Estate of Hirsch Wolf ever agreed to arbitrate with Michael Wahba or Sigula 1145 Broadway LLC (Sigula).

In reply, defendants argue that all the facts purportedly supporting plaintiff's claims occurred before the Membership Agreement went into effect, when the only agreement in existence was the Operating Agreement. Even if the Membership Agreement was in existence, the causes of action in the complaint do not arise out of that agreement, but only from purported breaches of the Operating Agreement. Furthermore, Michael Wahba explicitly consented to arbitration in a Beth Din on behalf of himself and Sigula.

Plaintiff is surely correct in arguing that the 2014 Membership Agreement is later in time than the 2000 Operating Agreement and therefore, in certain sense, superceded it. If this case involved a dispute among the parties arising from the Membership Agreement surely the 2014 agreement would control. But plaintiff does not allege that defendants breached any provision of the 2014 agreement, or that the alleged breach of the 2014 agreement forms the basis for any of her claims. Rather, her claim is based solely on the purported breach of the provisions in the 2000

agreement, as she herself cites in her complaint, and it is those provisions that form the basis for the purported fraud and breach of fiduciary duty. To use the 2000 agreement as the source of her claims and then ignore its embrace of arbitration and invoke the forum selection clauses of the irrelevant 2014 agreement borders on being disingenuous. Plaintiff has succeeded to the interests of her husband pursuant to the 2000 agreement, which provided it is binding on, and inures to the benefit of, successors and assignees of the signatories thereof. As one who is standing in the shoes of a signatory to an agreement under which her purported claims have validity, plaintiff should have, and probably does have, a moral obligation to arbitrate before a Beth Din.

However, the analysis does not end there. Under the precedents of this State, parties may not be compelled to arbitrate unless the evidence establishes a clear, explicit and unequivocal agreement to arbitrate (see *Matter of Waldron [Goddess*], 61 NY2d 181 [1984]; *Schubtex, Inc. v Allen Snyder*, Inc., 49 NY2d 1 [1979]; *Jalas v Halperin*, 85 AD3d 1178 [2d Dept. 2011]). "Although no particular wording is required to constitute a valid, binding arbitration agreement, the language used must be clear, explicit and unequivocal" (*Blizzard Cooling, Inc. v Park Developers & Builders, Inc.*, 134 AD3d 867 [2d Dept. 2015]). Here, the record shows no agreement to arbitrate signed by plaintiff.

Accordingly, the motion to compel arbitration is denied.

The foregoing constitutes the decision and order of this court.

E N T E R,

J. S. C.

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