CF Notes, LLC v Weinstein
2016 NY Slip Op 31980(U)
October 13, 2016
Supreme Court, New York County
Docket Number: 652206/2015
Judge: Saliann Scarpulla

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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CF NOTES, LLC,

Plaintiff,

-against-

GREGG WEINSTEIN,

Defendant.

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DECISION/ORDER

Index No. 652206/2015
Motion Seq. No. 001

HON. SALIANN SCARPULLA, J.:

In this action to recover on a promissory note, plaintiff CF Notes, LLC ("CF Notes") moves for summary judgment in lieu of a complaint against defendant Gregg Weinstein ("Weinstein") to recover the sum of $2,006,409, plus pre-judgment interest, costs, and attorney's fees. Weinstein cross-moves to compel CF Notes to arbitrate its claim under the Rules of the Financial Industry Regulatory Authority ("FINRA") and to stay this action pending the resolution of the arbitration.

From January to February 2015, Weinstein worked as the Global Head of Equities for Cantor Fitzgerald & Co. ("Cantor Fitzgerald"), a member of FINRA. Prior to commencing his employment, Weinstein entered into a six-year employment agreement with Cantor Fitzgerald dated December 14, 2014 ("Employment Agreement"). The Employment Agreement provided that "[d]uring the Term of Employment, [Cantor Fitzgerald] may terminate this Agreement with Employee at any time for Cause and after the first anniversary of the Start Date without Cause."

On the same date, Weinstein executed and delivered to CF Notes a "Negotiable Promissory Note and Assignment" ("the Note") under which Weinstein agreed to borrow $2 million dollars from CF Notes, an affiliate of Cantor Fitzgerald.[1] The Note provided that the loan was to be

[1] More specifically, Weinstein borrowed the principal sum of $3 million dollars, but $1 million dollars was withheld for tax purposes. CF Notes paid out $2 million dollars to Weinstein.

"forgiven . . . ratably on the first (1st) through sixth (6th) anniversaries of the Start Date, as defined in [Weinstein's] employment agreement with Cantor Fitzgerald & Co. (the 'Company'), dated December 16, 2014, provided that [Weinstein] continuously remained employed by the Company and fully complied with his obligations to Cantor Fitzgerald, L.P. from the Start Date through such date." The Note further stated that "[a]ll amounts not yet forgiven . . . shall immediately become due and payable . . . if," among other things, "[Weinstein] cease[d] to be employed by the Company . . ."

On January 5, 2015, Weinstein began working for Cantor Fitzgerald. On February 22, 2015, Cantor Fitzgerald terminated Weinstein's employment, without indicating whether it was for cause. Shortly thereafter, CF Notes demanded repayment of the $2 million loan that it made to Weinstein. According to CF Notes, as of February 22, 2015, the loan had accrued $6,409 in interest. Weinstein has made no payments on the Note.

In the current motion, CF Notes argues that it is entitled to summary judgment in lieu of complaint because the Note is an instrument for the payment of money only, and Weinstein has failed to pay the amount due under the Note. In support of its argument, CF Notes points out that the Note contains a provision under which Weinstein agreed that "any and all disputes arising under this Note are subject to litigation in the courts of the State of New York and acknowledges that this Note is an agreement for the payment of money only subject to enforcement pursuant to NY CPLR § 3213."

In opposition, Weinstein contends that the loan from CF Notes was a sign-on bonus that was advanced to him as a forgivable loan that was tied to the Employment Agreement. Weinstein asserts that Cantor Fitzgerald breached the Employment Agreement by terminating him without cause, and that his defenses to the Note are inextricably linked to the Employment Agreement and should be arbitrated before FINRA. Weinstein claims that requiring him to litigate the current action would

amount to a waiver of his right to arbitrate employment-related disputes. In addition, Weinstein argues that because CF Notes derived a direct benefit from the Employment Agreement, it is estopped from litigating its claim and must be compelled to arbitrate.

Weinstein points out that the Employment Agreement contains a provision requiring that "any disputes, differences or controversies arising at any time under this Agreement or Employee's employment shall, to the maximum extent permitted by applicable law, be governed by the Dispute Resolution Policy and Agreement." According to Weinstein, the Dispute Resolution Policy and Agreement requires "that *all* controversies be settled and finally determined according to the rules of FINRA before a panel of three (3) arbitrators in FINRA."

In reply, CF Notes contends that it cannot be compelled to arbitrate because it was never a signatory to the Employment Agreement; and at best, it only derived an indirect benefit from Weinstein's employment with Cantor Fitzgerald. CF Notes further argues that FINRA lacks jurisdiction over CF Notes, and Weinstein agreed to litigate this action in New York courts.

Discussion

It is a matter for the courts "to determine whether the parties had agreed to arbitrate" which may require "interpretation of the Financial Industry Regulatory Authority (FINRA) Code." *MF Global, Inc. v. Morgan Fuel & Heating Co., Inc.*, 71 A.D.3d 420, 420-421 (1st Dep't 2010). FINRA Rule 12200 requires parties to arbitrate a dispute if it is "[r]equired by a written agreement . . . is between a customer and a member or associated person of a member; and . . . arises in connection with the business activities of the member or the associated person." FINRA Rule 13200 (a) provides that, "a dispute *must* be arbitrated . . . if the dispute arises out of the business activities of a member or an associated person and is between or among: Members; Members and Associated Persons; or Associated Persons" (emphasis added).

"Arbitration is a matter of contract, grounded in agreement of the parties. As a consequence, notwithstanding the public policy favoring arbitration, nonsignatories are generally not subject to arbitration agreements." *Matter of Belzberg v. Verus Invs. Holdings Inc.*, 21 N.Y.3d 626, 630 (2013) (internal quotation marks and citations omitted).

Except under limited circumstances, nonsignatories to an agreement are "not subject to arbitration agreements." *Id.* A nonsignatory party to an agreement containing an arbitration clause may be so bound, however, based on the ordinary principles of contract and agency including: "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." *Thomson-CSF, S.A. v American Arbitration Assn.*, 64 F.3d 773, 776 (2d Cir. 1995); *see TNS Holdings v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 (1998).

Under the principles of estoppel, a nonsignatory may be compelled to arbitrate where he or she "knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement." *Matter of Belzberg*, 21 N.Y.3d at 631 (internal quotations omitted). In determining whether a nonsignatory receives a direct benefit, "[t]he guiding principle is whether the benefit gained by the nonsignatory is one that can be traced directly to the agreement containing an arbitration clause." *Id.* at 633.

Here, CF Notes derives a direct benefit from the Employment Agreement, and therefore must be compelled to arbitrate it claim against Weinstein. Both CF Notes' ability to make the loan and its ability to collect depend on the Employment Agreement. Without the Employment Agreement and the related promise of a sign-on bonus, Weinstein would not have entered into the Note and without Cantor Fitzgerald's termination of the Employment Agreement, CF Notes would not have been able to bring this action.

CF Notes' contention that it merely derived an indirect benefit from the employment relationship between Cantor Fitzgerald and Weinstein is belied by the Note itself, which provided

that Weinstein's loan was to be "forgiven . . . ratably on the first (1st) through sixth (6th) anniversaries of the Start Date, as defined in [Weinstein's] employment agreement with Cantor Fitzgerald & Co. . . . provided that [Weinstein] continuously remained employed by [Cantor Fitzgerald] and fully complied with his obligations." In this way, CF Notes relied on the Employment Agreement in determining what portion of the loan had not been forgiven and was subject to collection.

Because CF Notes' ability to collect on the unforgiven portion of the loan "can be traced directly to the agreement containing the arbitration clause," CF Notes is compelled to arbitrate. *Matter of Belzberg*, 21 N.Y.3d at 633; *BGC Notes, LLC v. Gordon*, 142 A.D.3d 435, 438 (1st Dep't 2016); *Merrill Lynch Intl. Fin., Inc. v. Donaldson*, 27 Misc. 3d 391, 397 (Sup. Ct., New York County 2010) (compelling nonsignatory to arbitrate pursuant to an arbitration provision contained in an employment agreement, where nonsignatory financed a loan that served as part of the compensation offered to the employee and where the loan was conditioned upon continued employment with employer FINRA member); *Merrill Lynch Intl. Fin., Inc. v. Gutkin*, Index No. 601176/2009 (Sup. Ct. New York County 2009); *Carvant Fin. LLC v. Autoguard Advantage Corp.*, 958 F. Supp. 2d 390, 397 (E.D.N.Y. 2013).[2]

Moreover, "FINRA's arbitration requirement cannot be avoided simply by having an affiliate of [Cantor Fitzgerald] . . . fund the employment agreement." *Donaldson*, 27 Misc. 3d. at 397; *see also Gutkin*, Index No. 601176/2009 at 3 ("to permit [employer] to avoid compulsory

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[2] CF Notes argues that *Donaldson* and *Gutkin* are factually distinguishable, because both cases hinged on allegations that the defendants were misled to into executing promissory notes that required them to litigate with a lender that was a non-FINRA member. This contention is without merit, because, in both cases, the court found that the lender's identity was irrelevant. *Donaldson*, 27 Misc.3d at 395 ("[r]egardless of the identity of the lender named on the instrument, or the circumstances of the alleged execution by Donaldson, arbitration is required"); *Gutkin*, Index No. 601176/2009 at 3-4.

FINRA arbitration by simply inserting a non-FINRA member in its place would be a clear violation of public policy"). Furthermore, CF Notes' contention that FINRA may not hear the instant dispute because it lacks jurisdiction over CF Notes is also meritless. *BGC Notes, LLC*, 142 A.D.3d at 438. As CF Notes knowingly derived a direct benefit from the Employment Agreement, it must arbitrate its dispute against Weinstein in FINRA arbitration.

For the foregoing reasons, CF Notes' motion for summary judgment in lieu of a complaint is denied, and Weinstein's cross-motion to compel CF Notes to arbitrate its claim against Weinstein under FINRA rules and to stay this action pending the resolution of such arbitration is granted.

In accordance with the foregoing, it is

ORDERED that plaintiff CF Notes, LLC's motion for summary judgment in lieu of a complaint is denied; and it is further

ORDERED that defendant Gregg Weinstein's cross-motion to compel arbitration and to stay this action is granted; and it is further

ORDERED that plaintiff CF Notes, LLC shall arbitrate its claims against defendant Gregg Weinstein in accordance with the terms of the Employment Agreement dated December 16, 2014 between Cantor Fitzgerald & Co. and Gregg Weinstein; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application to vacate or modify this stay, or to confirm or disaffirm the arbitration award upon the final determination of the arbitration.

This constitutes the decision and order of this Court.

DATE: 10/13/16

SALIANN SCARPULLA, JSC