

PowerTeam Servs. Holdco, LLC v Gillette
2017 NY Slip Op 30255(U)
February 7, 2017
Supreme Court, New York County
Docket Number: 653458/2016
Judge: Anil C. Singh
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 45

-----X
POWERTeam SERVICES HOLDCO, LLC,

Plaintiff,

-against-

QUENTIN GILLETTE,

Defendant.
-----X

DECISION & ORDER

Index No.
653458/2016
Motion Seq.
001, 002, 003

ANIL C. SINGH, J.:

Motion sequence numbers 001, 002 and 003 are consolidated for disposition.

Defendant Quentin Gillette (Gillette) is a former member of plaintiff PowerTeam Services Holdco, LLC (PowerTeam) and the former Chief Executive Officer of Associated Diversified Services, Inc. (ADS), a subsidiary of PowerTeam.

PowerTeam commenced this action on June 29, 2016, seeking a declaratory judgment that Gillette is required, allegedly pursuant to the terms of the "Second Amended and Restated Limited Liability Agreement," dated May 6, 2013 (the LLC Agreement), to indemnify PowerTeam for all costs, fees and damages that the company may incur resulting from a lawsuit filed in Alabama by David South, a former employee of ADS, who claims that Gillette promised him a membership interest in PowerTeam.

On or about August 11, 2016, Gillette served a demand for arbitration with the American Arbitration Association (AAA) in Morgan County, Alabama on PowerTeam seeking indemnification for his legal fees in defending this litigation, also pursuant to the LLC Agreement.

On July 26, 2016, Gillette filed motion sequence 001, by which he moves for an order, pursuant to CPLR 7503(a), compelling arbitration of PowerTeam's indemnification claim. Gillette contends that the parties agreed to arbitrate all disputes in the parties' "Severance Agreement and General Release," dated September 25, 2016 (Severance Agreement), and a separate "Settlement and Release Agreement," also dated September 25, 2015, executed by the parties together with Gillette's wife, Beth King-Gillette (Settlement Agreement).

On August 30, 2016, PowerTeam filed motion sequence 002, by which the company seeks an order, pursuant to CPLR 7503(b), staying the Alabama arbitration. Gillette has cross-moved for sanctions pursuant to 22 NYCRR § 130-1.1.

On October 21, 2016, PowerTeam filed motion sequence 003, an order to show cause to stay the arbitration. The court stayed the arbitration pending the hearing of the order to show cause.

Discussion

Pursuant to the express terms of both the Severance and the Settlement Agreements, any "claim that may arise by and between [PowerTeam, ADS and Gillette]," not limited to disputes arising out of or relating to the Severance and Settlement Agreements must be submitted to arbitration in Alabama:

"Any controversy or claim arising out of or under or relating to this Agreement or the alleged breach or threatened breach thereof, **or any other claim that may arise by and between the Parties shall**, to the fullest extent permitted by law, be solely and finally settled by binding arbitration conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA") before a single arbitrator chosen in accordance with the Commercial Arbitration Rules of the AAA. The location of the arbitration shall be in Morgan County, Alabama"

(Gillette 7/26/16 aff, exhibit B § 16 [c]; *see also* exhibit C, § 4 [c]) (emphasis added).

PowerTeam argues that the final sentence of section 16 (a) of the Severance Agreement (and the identical language of section 4 [a] of the Settlement Agreement), which states that "nothing herein supersedes or otherwise affects the Parties rights and obligations under the LLC Agreement" (*id.*), carves out an exception for disputes relating to the LLC Agreement which must be litigated in this court. However, such an interpretation would render the above-highlighted language of section 16 (c)'s broad arbitration provision superfluous. The only reasonable construction of these two provisions is that the final sentence of section 16 (a) was included to make clear that the parties preserved their substantive rights under the

LLC Agreement, such as the right to indemnification. *Pursuit Inv. Mgt., LLC v Alpha Beta Cap. Partners, L.P.* (127 AD3d 565 [1st Dept 2015]), is distinguishable on its facts. In that case, the court did not hold, as PowerTeam suggests, that a contractual dispute can only be arbitrated if that particular contract has a mandatory arbitration clause, as opposed to the situation here where a later executed contract specifically provides for arbitration of all claims between the parties.

In addition, nothing in the LLC Agreement mandates that the parties thereto must litigate all disputes over its provisions in New York courts. By its terms, section 15.16 of the LLC Agreement is a non-exclusive New York forum selection clause and is intended only to aid in securing injunctive relief.

“Injunctive Relief. The Units cannot readily be purchased or sold in the open market, and for that reason, among others, the Company and the Members will be irreparably damaged in the event this Agreement is not specifically enforced. Each of the Members therefore agrees that, in the event of a breach of any provision of this Agreement, the aggrieved party **may** elect to institute and prosecute proceedings in any court of competent jurisdiction to enforce specific performance or to enjoin the continuing breach of this Agreement. **Such remedies shall, however, be cumulative and not exclusive, and shall be in addition to any other remedy which the Company or any member may have.** Each member hereby submits to the **non-exclusive jurisdiction of the state and federal courts in New York** for the purposes of any suit, action or other proceeding arising out of, or based upon, this Agreement or the subject matter hereof”

(Hamid affirmation, exhibit D [emphasis added]).

PowerTeam’s motion for a stay of the Alabama arbitration is denied for an additional reason. An application to stay arbitration, pursuant to CPLR 7503 (b),

may only be brought by a party “who has not participated in the arbitration and who has made or been served with an application to compel arbitration . . .” Gillette’s motion to compel arbitration was filed more than one month prior to PowerTeam filing its motion for a stay of arbitration. PowerTeam’s argument that the issues in the Alabama arbitration that it seeks to stay are different from the issues in the arbitration that Gillette seeks to compel is unpersuasive. The fact that Gillette’s arbitration demand seeks only affirmative relief with respect to his claim for indemnification of his legal fees, and does not seek any type of declaratory relief in his favor regarding PowerTeam’s own indemnification claim with respect to the David South lawsuit, merely reflects that the parties have different claims against each other that would be asserted in a claimant’s demand and the respondent’s answer and counterclaim. It is undisputed that both claims arise out of the same LLC Agreement, and both claims are governed by the same mandatory arbitration provisions of the Severance and Settlement Agreements¹.

Gillette’s cross motion for costs and sanctions is denied. The court does not find that PowerTeam’s motion was “completely without merit in the law” (22 NYCRR § 130-1.1 [c]).

¹ I do, however, reject Gillette’s other contention that the two brief letters PowerTeam’s counsel sent to the AAA Case Administrator in August 2016 objecting to arbitrating its dispute with Gillette and declining to participate in the selection of an arbitrator as “premature” (*see* Gillette 9/2/16 aff, exhibits E & G), constituted a participation in the arbitration.

For the foregoing reasons, it is hereby

ORDERED that the defendant's motion (Motion Sequence 001) to compel arbitration and to dismiss or stay this action is granted; and it is further

ORDERED that plaintiff shall arbitrate its claims against defendant in the arbitration proceeding commenced by defendant in Morgan County, Alabama, entitled *Matter of Quentin Gillette v PowerTeam Services Holdco, LLC*, AAA Case No. 01-16-0003-4085; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay upon the final determination of the arbitration; and it further

ORDERED that plaintiff's motion (Motion Sequence 002) for a stay of arbitration is denied; and it is further

ORDERED that the stay issued by the court pursuant to the order to show cause in Motion Sequence 003 is vacated in light of this decision;

ORDERED that defendant's cross motion for costs and sanctions is denied.

Dated: New York, New York
February 7, 2017

ENTER:


