

<b>Dical Ltd. v Zag Holdings, LLC</b>
2017 NY Slip Op 30665(U)
April 4, 2017
Supreme Court, New York County
Docket Number: 653460/2016
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7

DICAL LIMITED,

Plaintiff,

-against-

ZAG HOLDINGS, LLC & CHRISTOPHER ZEYNEL,

Defendants.

Index No.: 653460/2016

**DECISION/ORDER**

Motion Sequence Nos. 01, 03

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's order to show cause, motion for summary judgment under CPLR 3213, and defendant Zag Holdings, LLC's cross-motion.

**Papers**

**Numbered**

Papers from Motion Seq. No. 03:

Plaintiff's Order to Show Cause .....	1
Defendant's Affirmation in Opposition .....	2
Defendant's Memorandum of Law in Opposition .....	3
Defendant's Notice of Cross-Motion.....	4
Plaintiff's Affirmation in Opposition.....	5

Papers from Original Motion (Seq. No. 02):

Defendant's Notice of Motion .....	6
Defendant's Memorandum of Law .....	7
Plaintiff's Affirmation in Opposition.....	8
Plaintiff's Supplemental Affirmation in Opposition.....	9
Plaintiff's Amended Memorandum of Law .....	10

Papers from Motion Seq. No. 01:

Plaintiff's Amended Notice of Motion .....	11
Plaintiff's Memorandum of Law .....	12

*Tosolini, Lamura, Rasile & Toniutti LLP*, New York (Rocco Lamura of counsel), for plaintiff.  
*Blank Rome LLP*, New York (Stephen E. Tisman of counsel), for defendant Zag Holdings, LLC.

Gerald Lebovits, J.

Motion sequences 01, in which plaintiff, Dical Limited (Dical), moves for summary judgment in lieu of complaint against defendants Zag Holdings, LLC (Zag) and Christopher Zeynel, and motion sequence 03, in which plaintiff moves to vacate the court's September 30, 2016, order in which the court granted a stay of this action, are consolidated for disposition. Zag

cross-moves to strike plaintiff's papers, the amended affirmation of Rocco Lamura, Esq., and the amended memorandum of law in opposition.<sup>1</sup>

On April 29, 2014, plaintiff and defendant Zag entered into a Membership Interest Purchase Agreement (MIPA) providing for Zag to buy Dical's 25,000 vesting units of membership interest in Zag for \$750,000, the "Purchase Price." (Plaintiff's Amended Notice of Motion, Exhibit A.) The MIPA provides that

"[o]ne Hundred Fifty Thousand Dollars (\$150,000) of the Purchase Price will be paid in cash or wire transfer pursuant to instructions provided to the Buyer from the Seller, and *the remaining Six Hundred Thousand Dollars (\$600,000) of the Purchase Price will be paid by execution and delivery of a promissory note in the form attached hereto as Exhibit A (the "Note")* . . . . This Agreement, *including all attachments hereto*, comprise the entire agreement between the Parties as to the subject matter hereof and supersede all prior agreements and understandings between the Parties relating thereto . . . . This Agreement is made and shall be construed in accordance with the internal (and not the conflict of laws) law of the State of New York. Any party to this contract shall have the right to have recourse to and shall be bound by the pre-arbitral referee procedure of the International Chamber of Commerce in accordance with its Rules for a Pre-Arbitral Referee Procedure. *All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.*" (Plaintiff's Amended Notice of Motion, Exhibit B. [Emphasis added.]

Both defendants signed the Note on the same day the parties entered into the MIPA. (Plaintiff's Amended Notice of Motion, Exhibits 1, 2.) The Note provides that

"[t]his Note is being tendered pursuant to the execution of a Membership Interest Purchase Agreement between Maker, Payee and certain affiliates of the Maker as of the date hereof (the "**Purchase Agreement**") . . . . This Note and the Purchase Agreement constitute the final, complete and exclusive statement of the terms governing the amounts due hereunder." (Plaintiff's Notice of Motion, Exhibit 2. [Emphasis added.]

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<sup>1</sup> Zag cross-moved to strike plaintiff's amended affirmation of Rocco Lamura, Esq., and amended memorandum of law in opposition because it is an "unauthorized and improper attempt to add additional facts, grounds and authorities — all of which were available to plaintiff at the time if [sic] filed its opposition to ZAG Holdings' motion for a stay — to the record on a motion which already has been decided against it." (Defendant's Notice of Cross-Motion.) Zag's cross-motion is denied. The court will consider plaintiff's papers, NYSCEF doc. # 50-54.

As required by the Note, Zag paid Dical \$200,000 on January 15, 2015. (Plaintiff's Notice of Motion.)

After Zag allegedly failed to make the second payment on September 15, 2015, Dical commenced this action by filing a motion for summary judgment in lieu of complaint, on June 29, 2016, seeking \$450,000. On August 11, 2016, Zag moved to stay the action because, defendant argues, the arbitration clause in the MIPA requires that "all disputes between [the parties] arising out of or in connection with the agreement at issue here [the MIPA], be resolved in final and binding arbitration." (Defendant's Memorandum of Law.) Zeynel did not oppose Zag's motion.

On September 30, 2016, this court heard the motion to stay this action. Counsel for plaintiff did not appear for oral argument, and by order dated September 30, 2016, the court granted Zag's motion to stay the action on two grounds: (1) "plaintiff's nonappearance at oral argument" and (2) "under CPLR 7503 & 2201 and Federal Arbitration Act § 3 because the parties agreed in their Membership Interest Purchase Agreement to have the International Chamber of Commerce arbitrate their dispute."

On October 7, 2016, plaintiff filed an order to show cause to vacate the court's September 30, 2016, order and requesting the court reschedule oral argument on motion seq. 02 — the motion to stay the action. (Plaintiff's Order to Show Cause.) The court held oral argument on November 9, 2016. The court found that plaintiff's counsel had "provided a justification" for the nonappearance at the earlier oral argument of September 30. (Tr at 4, lines 18-22, November 9, 2016.) Because plaintiff has satisfactorily explained its nonappearance at oral argument on September 30, 2016, the court vacates its September 30, 2016, order.

Zag's motion to stay the action under CPLR 7503 and 2201 and Federal Arbitration Act § 3 is granted. CPLR 7501 provides that

"[a] written agreement to submit any controversy thereafter arising . . . to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute."

CPLR 7503 (a) provides that "[w]here there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate." In New York, "[p]arties to a contract may agree, if they will, that any and all controversies growing out of [the contract] in any way shall be submitted to arbitration," and "[i]f they do, the courts . . . will give effect to their intention." (*Matter of River Brand Rice Mills, Inc. v Latrobe Brewing Co.*, 305 NY 36, 41 [1953].) Neither party questions the MIPA's validity. The court will therefore give effect to the parties' intent based on their agreement.

FAA § 2 provides that “[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable . . .” As the U.S. Supreme Court found in *American Exp. Co. v Italian Colors Restaurant* (133 S Ct 2304, 2309 [2013] quoting *Dean Witter Reynolds, Inc. v Byrd*, 470 US 213, 221 [1985]), FAA § 2 reflects the principle that arbitration is a matter of contract and that “courts must ‘rigorously enforce’ arbitration agreements according to their terms . . .”

FAA § 3 provides that

“[i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . .” ([Emphasis added].)

As mentioned above, when the parties signed the MIPA, they agreed that “[a]ll disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.” (Plaintiff’s Amended Notice of Motion, Exhibit B [emphasis added].) On the face of the agreement, the Note appears to be an attachment and arises out of and is connected to the contract. (Plaintiff’s Amended Notice of Motion, Exhibit B.) MIPA provides that “the remaining Six Hundred Thousand Dollars (\$600,000) of the Purchase Price will be paid by execution and delivery of a promissory note in the form attached hereto as Exhibit A (the “Note”).” (Plaintiff’s Amended Notice of Motion, Exhibit B [emphasis added].) MIPA further provides that the MIPA “including all attachments hereto, comprise the entire agreement between the Parties . . .” (*Id.* [emphasis added].) In addition to the Note being mentioned in the MIPA, the Note was attached to the MIPA, making it part of the agreement, and was signed the same day the MIPA was signed. (Defendant’s Memorandum of Law.) Therefore, the Note was part of the MIPA and was to be covered by the arbitration clause of the MIPA. Because parties can agree to settle disputes through arbitration and courts must “‘rigorously enforce’ arbitration agreements according to their terms” defendant’s motion to stay the action is granted. (*See* FAA § 2; *American Exp. Co.*, 133 S Ct at 2309.)

Plaintiff argues that Zag has waived its right to arbitration by seeking an order, in London, from the High Court of Justice, Queen’s Bench Division. (Plaintiff’s Amended Memorandum of Law.) This court disagrees. Zag sought the order from the High court of Justice because it believed that Mr. Gonnelli, a beneficial owner of Dical, was “engaged in serious acts of misconduct.” (Defendant’s Notice of Motion.) The London order required defendant to “carry out a reasonable search to locate all documents (including electronic documents such as e-mails) . . . and disclose and permit [Zag] to inspect those documents within its control . . . [including] [d]ocuments identifying the beneficial owners of the Respondent for the period October 2006 to date. . .” (Defendant’s Notice of Motion, Exhibit 3.) Plaintiff acknowledges that Zag has not

“filed any civil or criminal actions or investigations against Dical in England and Wales and there are no pending civil or criminal actions against Dical in England and Wales.” (Plaintiff’s Amended Memorandum of Law.)

But “[n]ot every foray into the courthouse effects a waiver of the right to arbitrate. Where claims are entirely separate, though arising from a common agreement, no waiver of arbitration may be implied from the fact that resort has been made to the courts on other claims.” (*Sherrill v Grayco Builders, Inc.* (64 NY2d 261, 273 [1985].) That Zag sought the London order does not mean that it waived the MIPA’s arbitration clause.

This matter is stayed and shall proceed to arbitration pursuant to the MIPA.

Accordingly, it is

ORDERED that plaintiff’s motion to vacate the court’s September 30, 2016, order is granted, and the court’s order is vacated. Upon vacatur, the court adheres to its original decision, namely, that the matter is stayed and shall proceed to arbitration pursuant to the Membership Interest Purchase Agreement; and it is further

ORDERED that defendant Zag’s cross-motion is denied; and it is further

ORDERED that plaintiff’s motion for summary judgment in lieu of complaint is denied without prejudice and plaintiff may refile it if the stay is lifted; and it is further

ORDERED that defendant shall serve a copy of this decision and order with notice of entry on all parties and on the County Clerk’s Office, which is directed to enter judgment accordingly.

Dated: April 4, 2017



J.S.C.

**HON. GERALD LEBOVITS**  
J.S.C.