

Friedman v Markowits
2017 NY Slip Op 32688(U)
February 23, 2017
Supreme Court, Nassau County
Docket Number: 601153-15
Judge: Timothy S. Driscoll
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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
**BARRY FRIEDMAN, individually as a 90.1%
membership interest holder and derivatively on behalf
of PARKSHORE HOME HEALTHCARE, LLC,
and RENAISSANCE HHA, LLC,**

**TRIAL/IAS PART: 12
NASSAU COUNTY**

Plaintiff,

Index No: 601153-15

Motion Seq. No. 9

-against-

Submission Date: 2/2/17

ALEXANDER MARKOWITS,

Defendant,

and

**PARKSHORE HOME HEALTHCARE, LLC and
RENAISSANCE HHA, LLC,**

Nominal Defendant.

-----X
The following papers have been read on this motion:

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affirmation in Opposition and Exhibits.....X**
- Memorandum of Law in Opposition.....X**
- Reply Affirmation in Support and Exhibits.....X**
- Reply Memorandum of Law in Further Support.....X**

This matter is before the Court for decision on the motion filed by Defendant Alexander Markowits (“Markowits”) and Nominal Defendants Parkshore and Renaissance (collectively “Company”) (“Defendants”) on December 2, 2016 and submitted on February 2, 2017. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to this Court's inherent powers to oversee and enforce stipulations of settlement in a still-pending action, dismissing this action in accordance with the settlement arrived at between the parties pursuant to CPLR § 2014, and enforcing the settlement entered into by the parties.

Plaintiff Barry Friedman ("Friedman" or "Plaintiff"), individually as a 90.1% membership interest holder and derivatively on behalf of Parkshore Home Healthcare, LLC ("Parkshore") and Renaissance HHA, LLC ("Renaissance") (collectively "Company") opposes the motion.

BACKGROUND

B. The Parties' History

As noted in the Court's prior decisions ("Prior Decisions") regarding the above-captioned action ("Instant Action"), Plaintiff commenced the Instant Action, derivatively on behalf of Parkshore and Renaissance, seeking damages for alleged breaches of fiduciary duty by Markowits, as managing member of the Company, and seeking access to confidential and proprietary Company records. On March 16, 2010, Friedman and Markowits entered into a series of agreements providing Markowits with the right to acquire up to 100% of Friedman's membership interest. Plaintiff contends that Markowits does not own the Company because he has defaulted in making certain payments under the agreements controlling the purchase and sale of the Company. Markowits contends that he could not have defaulted because Friedman was already in material breach of the agreements for failing to disclose several pending investigations by various State-related entities for Medicaid fraud, among other matters. The Court incorporates its Prior Decisions by reference as if set forth in full herein. Those Prior Decisions contain extensive detail regarding the Instant Action, as well as a related pending action in Kings County Supreme Court ("Kings County Action").

In support of the motion, Markowits affirms that over this past summer, a Rabbinic adviser to and representative of Friedman initiated contact with a Rabbinic adviser to and representative of Markowits. Markowits affirms that he was aware that Friedman uses Rabbinic advisors and agents in the course of his business dealings. In support of that assertion,

Markowits provides excerpts from a transcript of Friedman's October 6, 2016 deposition (Ex. 9 to Markowits Aff. in Supp.) in which Friedman testified that he commenced the Instant Action only after seeking and obtaining permission to do so from a rabbinical court.

Markowits affirms that Friedman entered into an agreement with an individual named Aron Fried ("Fried"). In his affirmation dated September 6, 2010 (Ex. 1 to Markowits Aff. in Supp.), submitted in an action filed by Fried against Defendants in Kings County Supreme Court ("Fried Litigation"), Fried explained that the agreement ("Fried Agreement") (Exs. 2 (original in Hebrew) and 3 (English translation) to Markowits Aff. in Supp.) was negotiated through Rabbi Simcha Roth ("Rabbi Roth"), whom Friedman authorized to draft and complete the Fried Agreement. The Fried Agreement related to Fried's interest in Parkshore and Renaissance. Markowits affirms that the Fried Litigation is taking place not in a secular court, but before a Jewish religious court ("Bet Din") and provides copies of the Bet Din arbitration agreements that Friedman signed on behalf of himself and Parkshore (Exs. 6 and 7 to Markowits Aff. in Supp.). Markowits affirms that it was the non-disclosure of this Bet Din litigation with Fried that precipitated Markowits' dispute with Friedman.

Markowits affirms that, similarly, when he and Friedman entered into the agreement pursuant to which Markowits purchased Parkshore and Renaissance from Friedman, Friedman insisted on an agreement that any dispute "relating directly or indirectly" to Friedman's sale of the Company to Markowits (Markowits Aff. in Supp. at ¶ 11) would be referred not to a secular court, but to a Bet Din affiliated with Rabbi Chaim Kohn ("Rabbi Kohn"). In support, Markowits provides a copy of the May 19, 2011 agreement between Friedman and Markowits (Ex. 8 to Markowits Aff. in Supp.). Markowits submits that Friedman's use of rabbis in business dealings, including his dealings with Markowits, is "well established" (Markowits Aff. in Supp. at ¶ 12). Markowits submits that Friedman has acknowledged that Markowits also follows this practice and, specifically that Rabbi Kraus, who resides in England, is a rabbi whose advice and counsel Markowits often seeks. That is the reason, Markowits contends, that Friedman directed his prior rabbinic emissary, Rabbi Diestch, to contact Rabbi Kraus regarding the rabbinical court's permission for Friedman to commence the Instant Action. More recently, Friedman elected to have Rabbi Bunker, rather than Rabbi Dietsch, act as Friedman's agent in contacting Rabbi Kraus.

Markowits affirms that after Friedman asked Rabbi Bunker to contact Rabbi Kraus, Rabbi Bunker and Rabbi Kraus discussed whether a resolution of the Instant Action could be reached. Rabbi Bunker, who resides in Israel, traveled to England to meet with Rabbi Kraus. That meeting took place on September 5, 2016, and Markowits and Friedman participated in the meeting via speaker phone with their respective rabbis. The rabbis, during a negotiation conducted in Yiddish, which Markowits and Friedman both speak, reached an agreement on behalf of Markowits and Friedman. Markowits affirms that Rabbi Bunker insisted on writing the agreement up by himself, in Hebrew, and Rabbi Bunker and Rabbi Kraus each signed the agreement (Ex. 10 to Markowits Aff. in Supp.). Markowits provides an English translation of the agreement (Ex. 11 to Markowits Aff. in Supp.).

Markowits affirms that Friedman, at his deposition, testified that he understood the contents of the Hebrew agreement, and provided his translation of the agreement (Ex. 9 to Markowits Aff. in Supp. at pp. 26-27). Markowits affirms that while Exhibit 11 is not a certified translation of the parties' agreement, Friedman's translation of that agreement is "materially identical" to Exhibit 11 to his affirmation in support. The agreement refers to Markowits as Reb Sender Chaim Markowits and to Friedman as Reb Baruch Friedman which, Markowits affirms, is a utilization of the parties' Hebrew names.

Markowits affirms that the agreement settles the dispute between Friedman and Markowits, both as it relates to the Instant Action and the related action between the parties pending in Kings County Supreme Court, save the "ministerial tabulation of an accountant" (Markowits Aff. in Supp. at ¶ 23). Markowits affirms that the agreement also provides that the issue of interest is to be referred to a Rabbinic decisor, to be selected for adjudication pursuant to principles of Jewish law. The reason for that is that, as Friedman confirmed in his testimony (transcript at p. 28), interest payments are forbidden under Jewish law while a division of profits, pursuant to an agreement called an "Iska" (Markowits Aff. in Supp. at ¶ 24) may be permitted. Markowits affirms that although the parties reached an agreement with the assistance of the rabbis, Friedman subsequently stated that Rabbi Bunker had proceeded on his own, without Friedman's authority, and that Friedman would not abide by the agreement.

Markowits submits that Friedman's deposition testimony, including his concession that Rabbi Bunker wrote up the agreement and that Friedman participated in the meeting, supports

the conclusion that the parties reached an enforceable agreement settling their disputes. Markowits also contends that Friedman's testimony that he does not recall whether he heard a conversation relating to signatures (transcript at p. 30) is not worthy of belief. Markowits affirms that after Friedman stated that he would not abide by the agreement, Markowits attempted to reach an agreement with Friedman, to no avail. Markowits also affirms that, in view of a recent decision of the Appellate Division, Second Department, determining that the arbitration agreement that Friedman and Markowits executed remains enforceable, he and Friedman are discussing dates to appear at the Bais Din.

In opposition, Friedman submits that the Court should deny the motion because the Appellate Decision, Second Department has held that all of the claims addressed by the settlement agreement allegedly reached by the parties in September 2016 ("Purported 2016 Settlement"), which were initially raised in the related Kings County Action, are arbitrable issues which will be decided by a Beth Din in February 2017. Markowits provides the November 23, 2016 decision of the Appellate Decision, Second Department in *Sara Markowits et al. v. Barry Friedman et al.*, 144 A.D.3d 993 (2d Dept. 2016) ("Appellate Decision") (Ex. A to Friedman Aff. in Opp.). In the Appellate Decision, the Second Department affirmed the order of Kings County Supreme Court Judge Martin Solomon *inter alia* granting the branch of the defendants' motion which was to stay all remaining proceedings in the action and compel arbitration. *Id.* at 996. Friedman submits that the Second Department, in the Appellate Decision, rejected Markowits' argument that the Instant Action is duplicative of the arbitrable claims before the Beth Din when it held as follows:

Finally, we reject the plaintiffs' contention that Barry Friedman waived his right to arbitrate by commencing an action against Markowits in Nassau County during the pendency of this appeal [citations omitted]. The majority of the Nassau County action is asserted derivatively on behalf of the companies, and the only cause of action asserted by Friedman personally did not involve an arbitrable issue [citations omitted].

144 A.D.3d at 997-998.

Friedman affirms that the claims that will be determined by the Beth Din, commencing in February 2017, include Markowits' allegation that Friedman fraudulently induced Markowits to execute the Sales Agreements by failing to disclose 1) an action against Friedman by a former

Company employee, and 2) a settlement agreement between the Company and a government agency. Friedman affirms that he has asserted counterclaims in the Kings County Action seeking, *inter alia*, recovery of the sums that Markowits owes Friedman under the Sales Agreements. Friedman affirms that, pursuant to the Appellate Decision, those counterclaims will also be determined by the Beth Din.

Friedman also submits that denial of the motion is also warranted because the Purported 2016 Settlement is not a final and enforceable agreement. Rather, Friedman contends, it is “a **proposed** framework that Markowits and his attorneys have continued to negotiate, while continuing to litigate their claims and pursuing discovery in both this derivative action and the Kings County Action” (Friedman Aff. in Opp. at ¶ 3; bold in original). Friedman contends that Markowits’ conduct since September 2016 contradicts his assertion that the Purported 2016 Settlement is a final and enforceable agreement resolving this action

Friedman submits that the Purported 2016 Settlement only makes reference to amounts due from Markowits to Friedman under the sales agreements, and makes no reference to any derivative claim damages to the Company resulting from Markowits’ mismanagement of the Company. Friedman submits that counsel for Markowits recognizes that the Purported 2016 Settlement is inapplicable to the Instant Action, as evidenced by his email to counsel for Plaintiff dated October 31, 2016 (Ex. B to Friedman Aff. in Opp.) in which he asked Plaintiff’s counsel whether he had reviewed the proposed settlement, and suggested that they “sit down, with parties, to work out any issues with language and execute the agreement.” Friedman submits that this email supports the conclusion that settlement negotiations in the Instant Action were still ongoing as of October 31, 2016.

Friedman affirms, further, that following the Appellate Decision, counsel for Markowits outlined the arbitrable claims in a letter to the Beth Din administrator (Ex. E to Friedman Aff. in Opp.). That letter included the following:

In an astounding display of audacity, [Friedman] - through his attorneys - insists that the claims he filed in Nassau have nothing to do with the matters that are to be adjudicated in Bais Din. More astounding is that Friedman had his representative and Rav (Rabbi Bunker) from Israel travel to London and meet with Rabbi Kraus (Markowits’ Rabbi who resides in London). They negotiated and signed a “Hescim” while Friedman and Markowits were on the phone. That “hescim” resolved the entire matter in a full shalom

Realizing that the settlement would not give him what he wanted, and prepared to continue litigating in Court, Barry Friedman now claims he never authorized the settlement. A copy of the signed agreement is attached hereto.

Friedman submits that this letter did not suggest to the arbitrator that this Court is the proper forum in which to resolve the issue of the enforceability of the purported settlement agreement of the parties. Thus, consistent with the Appellate Decision and Markowits' letter to the Beth Din administrator, the Purported 2016 Settlement is irrelevant to the Instant Action, and should not be considered by the Court. Friedman also outlines deposition testimony of Friedman and conduct of Markowits which, he submits, support the conclusion that the parties did not view the Purported 2016 Settlement as a final and enforceable agreement (*see* Friedman Aff. in Opp. at ¶¶ 15-16).

In reply, counsel for Markowits provides transcripts of proceedings before the Court in the Instant Action on July 21, 2015 and June 9, 2016 (Exs. 1 and 2 to Gartner Reply Aff.). Those transcripts include the following statements by the Court:

July 21, 2015 (Ex. 1 to Gartner Reply Aff. at p. 4)

On the question of whether the matter should be sent to arbitration, I am persuaded by Mr. Kasschau's argument that to the extent there was an arbitration provision that controlled here, Mr. Friedman's choice to avail himself of these courts essentially obviates his ability to claim that the matter should be arbitrated.

June 9, 2016 (Ex. 2 to Gartner Reply Aff. at pp. 15-16)

It's all the more reason why this should be one stop shopping. It is exactly the issues that were brought to the court's attention by Mr. Goldberg, by Mr. Scharf and of course the lawyers here today. You are preaching to the choir. The cases have got to be, in my view, they have to be in one spot, but I don't know that view is correct until I get a motion that asks me to rule that way, and I don't know if that one spot is here or Kings County....

The Parties' Positions

Defendants submit that the Purported 2016 Settlement, which Friedman authorized Rabbi Bunker to negotiate on his behalf, is an enforceable agreement between the parties. Defendants contend, further, that the provision in the Purported 2016 Settlement directing that the Rabbis would determine certain issues does not affect the enforceability of the parties' agreement.

Plaintiff opposes the motion submitting *inter alia* that the Purported 2016 Settlement 1) is unrelated to the Instant derivative Action because it refers only to Friedman's personal damages from Markowits' failure to fully pay him under the Settlement Agreement, and does not purport to compensate the Company for any damages resulting from Markowits' allegedly improper conduct; 2) Markowits' own conduct since the Purported 2016 Settlement was allegedly executed, including his attorney's October 31, 2016 email, belies his assertion that the Purported 2016 Settlement relates to the Instant Action; and 3) the Second Department, in the Appellate Decision, expressly stated that the Instant derivative Action is separate and distinct and, therefore, not subject to arbitration.

In reply, Defendants submit *inter alia* that 1) the Purported 2016 Settlement globally settled all disputes between Friedman and Markowits, including Friedman's derivative claims; and 2) the Court, having declined to consolidate the Nassau and Kings County actions, "has relinquished jurisdiction over, and is not concerned with, whatever is going on in Kings County" (Ds' Reply Memo. of Law at p. 16).

RULING OF THE COURT

A. Enforcement of Stipulations

CPLR § 2104, titled "Stipulations," provides as follows:

An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

Absent the formalities required by statute, a stipulation of settlement is not enforceable. *De Well Container Shipping Corp. v. Guo*, 126 A.D.3d 846, 847 (2d Dept. 2015) citing CPLR § 2104; *Matter of Hicks v. Schoetz*, 261 A.D.2d 944 (4th Dept. 1999). Pursuant to CPLR § 2104, an agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or reduced to the form of an order and entered. *De Well Container Shipping Corp. v. Guo*, 126 A.D.3d at 847, quoting CPLR § 2104. The stipulation must be definite and complete, *De Well Container Shipping Corp. v. Guo*, 126 A.D.3d at 847 quoting *Town of*

Warwick v. Black Bear Campgrounds, 95 A.D.3d 1002, 1003 (2d Dept. 2012), and all material terms must be included, *De Well Container Shipping Corp. v. Guo*, 126 A.D.3d at 847 citing *Bonnette v. Long Is. Coll. Hosp.*, 3 N.Y.3d 281, 283 (2004).

B. Application of these Principles to the Instant Action

The Court denies the motion based on its conclusion that 1) the Appellate Decision reflects the Second Department’s determination that the arbitration agreement that was the subject of the Appellate Decision did not compel arbitration of the issues in the Instant Action; and 2) the Purported 2016 Settlement does not constitute an agreement between the parties to arbitrate the issues in the Instant Action because it is not definite and complete, and does not include all material terms regarding the issues in the Instant Action, including any reference to the derivative claims asserted.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Certification Conference on March 16, 2017 at 10:30 a.m.

ENTER

DATED: Mineola, NY

February 23, 2017

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

MAR 01 2017

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**