Milman v Thrane
2018 NY Slip Op 32287(U)
September 17, 2018
Supreme Court, New York County
Docket Number: 653708/2018
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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SERGE MILMAN, Index No.: 653708/2018

Plaintiff, **DECISION & ORDER**

-against-

ROLF THRANE, GERARD DEMARCO, and JIM CREW,

Defendants.

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JENNIFER G. SCHECTER, J.:

Plaintiff Serge Milman moves for reargument of the portion of the court's order dated August 15, 2018 that stayed this action because his claims are subject to a mandatory contractual arbitration clause (*see* Dkt. 17 [8/15/18 Tr.]).[1] Because nothing was overlooked or misapprehended (*see* CPLR 2221[d][2]), reargument is denied.

This case concerns the alleged wrongful removal of plaintiff as a manager and member of The Alldyn Group, LLC (the Company) and the events precipitating his removal. The Company is a New York LLC that is governed by an operating agreement dated October 10, 2017 (Dkt. 11 [the Operating Agreement]). Section 11.14 of the Operating Agreement provides that:

> ***Any dispute*** between or among any of the Class A Members ... ***relating to*** a Class A Member's ***withdrawing*** from the Company or terminating his services for the Company ***for any reason***, which cannot be resolved among the Class A Members (acting as the Executive Board of Managers or otherwise) after good-faith negotiation over a period of at least 15 business days, ***shall be*** referred to an independent legal expert selected and agreed upon by all parties, who shall act ***as sole arbiter*** to decide and settle the

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

> dispute, and ***whose determination shall be conclusive and binding*** upon the Class A Members and the Company (Dkt. 11 at 24-25 [emphasis added]).[2]

While § 11.14 does not require the Company's members to arbitrate any dispute arising under the Operating Agreement, it does require arbitration of all disputes "relating to" a member's removal.[3] Thus, the court held that the question of whether plaintiff was properly removed must be decided by an arbitrator. Section 11.14, however, does not–as it could have–merely limit arbitration to the sole question of whether removal was proper. Rather, it requires arbitration of all disputes "relating to" the removal. It is well settled

[2] As an initial matter, plaintiff appears to take issue with the court supposedly having *sua sponte* ordered arbitration (*see* Dkt. 21 at 9). While defendants did not move to compel arbitration, their principal defense to plaintiff's motion seeking an injunction prohibiting his removal was that § 11.14 mandates the issue be deiced by an arbitrator, not the court. Moreover, defendants expressly argued that all of plaintiff's claims are subject to arbitration (*see* Dkt. 9 at 6). Thus, while technically a motion to compel arbitration was not before the court, the arbitrability of the parties' disputes was squarely presented and was necessarily decided since it impacted whether the court had the authority to rule on the propriety of plaintiff's removal. It would have made no sense to further delay proceedings related to the parties' dispute and cause them to incur additional expense by waiting for yet another motion to address the very issues that were already before the court. Moreover, since plaintiff now contends that arbitrability is for the court to decide (Dkt. 21 at 20-22; *see Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 45 [1997]), and since the arbitrability of plaintiff's claims are clear, plaintiff may not relitigate the court's arbitrability ruling before the arbitrator. Indeed, even if arbitrability was an issue for the arbitrator, plaintiff waived the right to arbitrate the question of arbitrability (*N.Y. Overnight Partners, L.P. v Gordon*, 88 NY2d 716, 719 n 2 [1996] [party who submits arbitrable issue to the court waives right to arbitrate that issue]; *see Skyline Steel, LLC v PilePro LLC*, 139 AD3d 646, 647 [1st Dept 2016] [question of whether party waives right to arbitrate is for the court to decide]). Hence, as discussed herein, there is no question as to the scope of the arbitration – it is to include all of the claims in this case.

[3] Plaintiff erroneously argues that § 11.14 "refers only to decisions or actions by the Class A Member to withdraw or terminate his services - not actions by others to involuntarily remove him and terminate his services" (Dkt. 36 at 8). Section 6.9, however, makes clear that a member's ouster is considered an "Involuntary Withdrawal" (*see* Dkt. 11 at 20), and § 11.14 broadly requires arbitration regarding the circumstances of a member's "***withdrawing*** from the Company ... ***for any reason***" regardless of whether the withdrawal was voluntary or not (*see id.* at 24 [emphasis added]). Accordingly, § 11.14 covers the circumstances surrounding plaintiff's removal.

that "relating to" signifies intent to be bound by a broad arbitration provision that covers all disputes that have any bearing on the subject matter (*see State v Philip Morris Inc.*, 30 AD3d 26, 31 [1st Dept 2006] ["The terms 'arising out of,' and most particularly '***relating to***,' certainly evince a broad arbitration clause. While plaintiffs correctly note that the arbitration clause does not encompass the entire (contract), it does not lessen the clear intent of the parties as embodied in § XI(c) that any matter arising out of, or relating to, the subject matter of the Independent Auditor's calculations and determinations is a proper subject of arbitration"] [emphasis added], *affd* 8 NY3d 574, 580 [2007] [***the expansive words "any" and "relating to"*** made explicit that all claims having a connection with the auditor's calculations and determinations were arbitrable] [emphasis added]).

All of plaintiff's causes of action contained in the complaint unmistakably "relate to" his withdrawal/removal.[4] Plaintiff seeks recovery of his capital account and distribution of his share of a fee owed by one of the Company's clients.[5] Under § 6.9 of

[4] While a claim to inspect the Company's books and records is not subject to arbitration, the complaint does not plead such a cause of action. Though plaintiff's (underlying) injunction motion sought books and records access, which the court granted (*see* Dkt. 8 at 3), aside from ensuring compliance with the court's order--a topic that will be addressed during the upcoming conference--plaintiff's continued right to books and records access depends on his status as a member and (consequently) on the outcome of the parties' arbitration.

[5] It is now undisputed that plaintiff's claims are direct (*see* Dkt. 36 at 5). Some of the causes of action were drafted in a manner that made it seem as if derivative claims were also being asserted (*see* Complaint ¶¶ 63 ["Thrane and DeMarco, as fiduciaries, were obliged at all times to act in the best interests of the Company"], 65 ["They have taken Company funds and opportunities for their own use and benefit, and, upon information and belief, have diverted Company funds into new accounts"]). Plaintiff would lose standing to assert derivative claims if he ceased being a member (*see Rubinstein v Catacosinos*, 91 AD2d 445, 446 [1st Dept 1983] ["It

the Operating Agreement, upon removal for cause, plaintiff forfeits the right to his capital account (*see* Dkt. 11 at 20) and under § 4.1, only members are entitled to distributions (*see id.* at 10). Thus, if plaintiff was properly removed for cause, he has no claims. Even if he was not properly removed, because plaintiff himself alleges that his removal was motivated by a desire to wrongfully deprive him of his capital account and of his share of the subject client fee (*see* Dkt. 21 at 7), his claim to such money is certainly "related to" his removal. Thus, all of plaintiff's claims are subject to arbitration under § 11.14.

Accordingly, it is

ORDERED that plaintiff's motion for reargument is denied; and it is further

ORDERED that the parties shall be prepared to discuses the logistics of the arbitration and the sufficiency of plaintiff's books and records access during the conference scheduled for September 18, 2018.

Dated: September 17, 2018

ENTER:

Jennifer G. Schecter, J.S.C.

is settled law that a plaintiff stockholder in a stockholder's derivative action loses his right to continue to prosecute the action if he ceases to be a stockholder."], *affd* 60 NY2d 890 [1983]). That is why the court also indicated during oral argument that the arbitrator's decision on whether plaintiff is still a member is a threshold standing issue. In any event, now that plaintiff has unequivocally disclaimed the intent to assert derivative claims, the court's standing ruling is academic.