SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

MICHAEL A. SIEM, ESQ.,

Petitioner/Plaintiff,

-against-

FARNEY DANIELS, PC,

Defendants/Respondents

----------X

DECISION AND ORDER
Index No. 154939/18
Motion Seq. Nos. 001 & 002

Index No. 652622/18
Motion Seq. No. 001

CAROL R. EDMEAD, J.S.C.:

In two related actions both arising from a lawyer's employment with a law firm, Petitioner/Plaintiff Michael Siem (Siem, or Petitioner) seeks to permanently stay an arbitration in Texas and to convert in the dispute between the parties into a plenary action in this court. In a petition brought pursuant to CPLR 7503 (b), and under index No. 154939/18, Siem seeks to permanently stay an arbitration brought in Texas by Respondent/Defendant Farney Daniels, PC (Farney Daniels, or Respondent) (motion seq. No. 001). Farney Daniels, the law firm that is Siem's former employer, seeks dismissal of the Petition (motion seq. No. 002 under index No. 154939/18), pursuant to CPLR 7503 (b), 7503 (c), as well as CPLR 3211 (a) (1) and CPLR 3211 (a) (5). These motions are consolidated for disposition.

Also consolidated for disposition is Farney Daniels' motion, pursuant to CPLR 3013, CPLR 3211 (a) (1), and CPLR 3211 (a) (7), to dismiss Siem's plenary action. This application is motion seq. No. 001 under index No. 652622/18. In the plenary action, Siem seeks to litigate in this court issues that Farney Daniels believes are properly before an arbitral board in Texas. The reason for the consolidation of these three motions arising from two different matters is that the plenary action is contingent on the stay of arbitration sought in the Petition. Thus, the issues

involved in resolving all three motions overlap and inform one another. Accordingly, consolidation of the three motions is the best course as a matter of judicial efficiency, as well as conceptual clarity.

BACKGROUND

I. Siem's History of Employment with Farney Daniels

Farney Daniels hired Siem in September 2013. Four documents purport to govern the relationship between the parties: (1) an offer letter (the Offer Letter); (2) a joinder letter (the Joinder Letter); (3) a stock transfer agreement that was incorporated by the Joinder Letter (the STA); and (4) a stock purchase agreement (the SPA).

A. The Offer Letter

The Offer Letter submitted by both sides (NYSCEF doc Nos. 4 and 11) is dated September 5, 2013 and it is signed by Bryan Farney (Farney), Farney Daniels' managing shareholder. "We are," the letter begins, "delighted to extend to you an offer to accept a position as a non-equity shareholder of Farney Daniels PC. Assuming that position will involve some standard shareholder-related paperwork that will be provided to you by separate letter."

As to terms, Farney states that the firm will pay Siem $300,000 annually and that he would "receive a percentage of the Firm's net profits on the Firm's ANDA litigation[1] in which you are an active participant" (*id.* at 1). The letter goes into a deeper level detail, which need not be recited at this stage, as to the formula for the sharing of those net profits. The letter goes on to state that "Farney Daniels is an employer at will, meaning that you can terminate your

[1] ANDA stands for Abbreviated New Drug Application.

employment with us at any time, with or without cause or notice, and that the Firm will have the same right" (*id.*).

Finally, the Offer Letter states: this offer is conditioned upon your providing to us as soon as possible the following: 1. A countersigned copy of this letter; 2. Certificate(s) of good standing for all state bars of which you are member; and 3. Conflicts Survey Form. Neither party appears to have submitted a countersigned Offer Letter, although nor does either party challenge the validity of the Offer Letter as an agreement between the parties.

B. The Joinder Letter

The joinder letter, in contrast to the Offer Letter, is signed by Siem and Farney. It refers to Siem as "the Purchaser" and provides that "pursuant to a Stock Purchase Agreement executed by the Purchaser, Purchaser has agreed to purchase one (1) share of the Corporation's Non-Voting Common Stock, no par value per share (the 'Shares') (sic)" (NYSCEF doc No 12 under index No. 154939/18; NYSCEF doc No. 11 under index No. 652622/18). The Joinder agreement incorporates the STA, and states that "the Shares (sic) are subject to (the STA) dated effective January 1, 2013, a copy of which is attached hereto as Exhibit A, and the corporation requires, among other things, that the Purchaser agree to be bound by the terms of the Agreement" (*id.*). As to choice of law, the Joinder Letter provides that "This joinder shall be governed by … the laws of the State of Texas without giving effect to any choice of law or conflict provision or rule that would cause the application of the laws of any jurisdiction other than the State of Texas" (*id.*, ¶ 3).

C. The STA

The STA contains an arbitration provision. It states:

> Any controversy or claim arising out of or relating to this Agreement or the breach thereof, including any claim for rescission, shall be settled by arbitration in Georgetown, Williamson County, Texas, in accordance with the Commercial Arbitration Rules of the American Arbitration Corporation as in effect from time to time; provided, however, that the Corporation or any Shareholder may pursue the remedy of specific performance of any term contained in this Agreement, or a preliminary or permanent injunction against the breach of any such term or in aid of the exercise of any power granted in this Agreement, or any combination thereof, in any court having jurisdiction thereof without resort to arbitration. The award of the arbitrators, or of the majority of them, shall be final, and judgment upon the award may be entered by any court of competent jurisdiction"

(*id.*, STA, ¶ 11.04 [underlining in original]).

While the STA is largely concerned with the mechanics of how Farney Daniels' partners take equity in the firm, some of its provisions are concerned with partners' conduct. For example, one provision, entitled "Confidentiality," states:

> "Each shareholder acknowledges and agrees that: (a) its ownership interest in the Corporation affords it access to Confidential Information regarding the Corporation and its business; (b) the dissemination or use of Confidential Information in any manner inconsistent with protecting and furthering the Corporation, its business, and its prospects would cause the Corporation great loss and irreparable harm; and (c) one of the duties of ownership in the Corporation is to prevent the dissemination or use of Confidential Information in any manner inconsistent with protecting and furthering the Corporation, its business, and its prospects. Therefore, each Shareholder agrees that it shall not for himself or on behalf of any other Person (whether as an individual, agent, servant, employee, employer, officer, director, shareholder, investor, principal, consultant or in any other capacity) directly or indirectly use or disclose to any Person any Confidential Information; provided, however, that (after reasonable measures have been taken to maintain confidentiality and after giving reasonable notice to the corporation specifying the information involved and the manner and extent of the proposed disclosure thereof) any disclosure of such information may be made to the extent required by applicable laws or judicial or regulatory process"

(*id.*, ¶ 11.01).

D. The SPA

In addition to the STA, Farney and Siem both signed the SPA, which provides that "[t]he Purchaser (Siem) hereby agrees to purchase from the Corporation and the Corporation agrees to

sell to Purchaser one (1) share of the Corporation's non-voting common stock, no par value per share ('the Shares') (sic) at a purchase price of one thousand ... dollars ($1,000) per share" (NYSCEF doc No. 12 under index No. 652622/18, NYSCEF doc No. 13 under index No. 154939/18). Both sides concede that Siem never paid $1,000 pursuant to the SPA and Farney Daniels never formally transferred the single share called for under the SPA.

II. The Texas Arbitration

The employment relationship ended On March 7, 2016. It appears that Siem took some of the business he had with Farney Daniels to his new firm.[2] Particularly, it appears that Farney Daniels was aggrieved by Siem taking with him the business of nonparty Canda Pharmaceuticals, LLC (Canda). Farney Daniels also appears to have been aggrieved by entering into a lease, prior to Siem's departure, for office space in New York for the purpose of facilitating Siem's work. Farney Daniels, believing Siem, among other things, had misused confidential information in violation of the STA, filed a Demand with the American Arbitration Association (AAA) on December 7, 2017.

The Demand makes eleven claims for relief: for (1) breach of fiduciary duties and fraud; (2) intentional interference with contract; (3) breach of implied covenant of good faith and fair dealing; (4) breach of the confidentiality section of the STA; (5) misappropriation of trade secrets under the Texas Uniform Trade Secrets Act; (6) common-law misappropriation; (7) interference with prospective economic advantage; (8) fraudulent inducement; (9) breach of contract regarding the New York office space; (10) fraud; and (11) defamation[3] (doc No. 3 652622/18 under index No. 652622/18; doc No. 3 154939/18 under index No. 154939/18).

---

[2] Siem has since joined a second subsequent firm.

[3] This claim relates to an allegation that Siem disparaged Farney Daniels' professional competency.

Initially, Siem did not challenge the arbitration as the proper forum to decide the parties dispute. Instead, Siem participated in the Texas arbitration. He was served with the Demand on December 8, 2017. Counsel for Siem and Farney Daniels both participated in choosing an arbitral panel, pursuant to AAA rules. Siem filed an Answer alleging, among other things, a counterclaim against Farney Daniels for "net profits" allegedly due to him under the offer letter, but withheld by Farney Daniels (NYSCEF doc No. 13 under index No. 652622/18, ¶¶ 208-219; NYSCEF doc No. 15 under index No. 154939/18). Siem, of course, chose to bring this claim in the Texas arbitration rather than any other forum. As the filing states, "Counter-claimant … brings this arbitration against Respondent Farney Daniels" (*id.* at ¶ 209).

On May 24, 2018, Siem's counsel in the arbitration withdrew as counsel, and requested an extension for Siem to find new counsel and to file a discovery schedule. The following day, in this court, Siem filed both index No. 154939/18 and index No. 652622/18.

III. The Filings in New York

A. Index No. 154939/18

In this Petition, Siem seeks, pursuant to CPLR 7503 (b), to permanently stay the Texas arbitration. Siem argues, in the Petition, that the STA never became operative because he "acquired essentially nothing of value by virtue of his one share" (Petition, ¶¶ 11-12). Siem additionally argues that the STA is not operative, as Farney Daniels never physically delivered the one share called for in the interlocking agreements, it never "invoked the only potential provision of the STA triggered upon resignation or termination" (*id.*, ¶ 13). Thus, as the STA is allegedly neither operative nor triggered by the circumstances presented to the arbitral panel, Siem argues that the arbitration provision in the Joinder Agreement is not triggered. In short, Siem argues that the parties did not agree to arbitrate the dispute before the arbitral panel in

Texas (*id.*, ¶¶ 22-28). On this basis, Siem asks this court to permanently stay the Texas arbitration.

In the alternative, Siem asks the Court to permanently stay the Demand, with the exception of Claim 4, which seeks damages for Siem's alleged breach of the confidentiality provision of the STA, which, in this alternative prayer for relief, Siem asks the court to stay until all other issues are litigated in New York (*id.*, ¶ 20).

B. Index No. 652622/18

Under this index No., Siem brings a plenary action. In the first cause of action, Siem seeks a declaratory judgment declaring that Siem did not breach any obligations, contractual or otherwise, to Farney Daniels (Complaint, ¶¶ 9-18). The second cause of action essentially restates the counterclaim in the arbitration, as it seeks damages for breach of the Offer Letter, and its promise of "net profits" (*id.* at 19-22). Both parties agree that the fate of the plenary action depends on the resolution of the Petition to stay arbitration. In other words, if the stay is granted, the plenary action may go forward, and if the stay is denied, the plenary action must be dismissed. It is for this reason that the court has consolidated, for disposition, the two open motions in the Petition and the single motion to dismiss in the plenary action.

IV. Petition to Stay the Arbitration Before the Arbitral Panel

Siem served the Complaint and the Petition before this court on Farney Daniels on June 5, 2018. On the same, day he filed a Request for Stay with the Arbitral Panel. By an email sent on June 7, 2018, the arbitral panel declined to the request, stating that "after review of Mr. Siem's email of June 5th regarding the filing of the petition in a court in New York, it is the position of this panel and the AAA, that the arbitration is not abated until so ordered by the Court" (doc No. 23 under index No. 154939/18; doc No. 22 under index No. 652622/18).

DISCUSSION

I. Siem's Petition Under CPLR Article 75

A. CPLR Article 75

New York's statutory framework around arbitration, embodied in CPLR Article 75, largely overlaps with and echoes the Federal Arbitration Act (the FAA). CPLR 7501, entitled "Effect of arbitration agreement," provides:

> "A written agreement to submit any controversy thereafter arising or any existing controversy 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"

Generally, the Court of Appeals has made clear that the New York Legislature, like Congress, has shown a policy preference for arbitration: "The CPLR arbitration provisions (CPLR 7501 *et seq*) evidence a legislative intent to encourage arbitration" (*Weinrott v. Carp*, 32 NY2d 190, 199 [1973]).

Siem brings his Petition to stay under CPLR 7503 (b). CPLR 7503 is entitled "Application to compel or stay arbitration; stay of action; notice of intention to arbitrate." Its subsection (b) refers to applications to stay arbitrations and provides:

> "Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502"

Siem, as alluded to above, argues that the there was no valid agreement to arbitrate the claims raised by both parties in the Texas arbitration. That is, Siem argues that the claims are

outside the scope of the arbitration clause in the Joinder Agreement. Moreover, he argues that the "agreement" was not complied with as he was not physically given a share in the firm, as called for by the STA.

Under CPLR 3211 (a) (l), a party may move for judgment dismissing a petition asserted against it on the basis that "a defense is founded upon documentary evidence." A motion to dismiss founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).[4]

In support of its motion to dismiss the petition, Farney Daniels focuses on the part of CPLR 7503 (b) which states that a party "who has not participated in the arbitration" may apply for a stay. Farney Daniels notes that Siem has participated in the arbitration. Moreover, Farney Daniels points to the part of CPLR 7503 (b) which provides that the right to bring an application to stay is "[s]ubject to the provisions of subdivision (c). Subdivision (c) provides, in relevant part, that "unless the party served [with a demand for arbitration] applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with."

It is undisputed that Siem has not complied with the 20-day requirement of CPLR 7503 (b). Moreover, Farney Daniels' submissions show that Siem participated in the arbitration for months before bringing these twin actions in New York court. Thus, Farney Daniels makes a *prima facie* showing of entitlement to dismissal of the application to stay on the basis that Siem

[4] Moreover, CPLR 3211 (a) (5) states that dismissal may where "the cause of action may not be maintained because of arbitration and award."

had participated in the arbitration and that he failed to conform to the 20-day requirement of CPLR 7503 (b).

In opposition, Siem does not argue that he has not participated in the arbitration. He does argue that the court should overlook his failure to move for a stay of the arbitration within 20 days of receiving notice of it. In support, Siem cites to *Scanomat A/S v Boies Schiller & Flexner LLP*, 54 Misc3d 1215(A) (Sup Ct, NY County, Freed, J., 2017]), a Supreme Court case that stayed an arbitration, despite the petitioner's violation of the 20-day requirement because the petitioner, in its demand for arbitration, did not include notice of the 20-day requirement of CPLR 7503 (c).[5]

Farney Daniels points out that, in *Scanomat*, the subject arbitration took place in New York. Moreover, Farney Daniels notes that Texas law and the AAA rules governing the agreement have no such rules. The court agrees that the holding in *Scanomat* does not apply to arbitrations taking place in different jurisdictions, such as Texas. Thus, Siem's delay cannot be overlooked because the 20-day requirement to apply for a stay of arbitration was not included in the Demand.

Moreover, Siem's Petition must be dismissed for the overlapping reason that, under CPLR 7503 (b), he cannot apply for a stay, as he has already participated in the arbitration by participation in selecting a panel, answering, bringing a counterclaiming, and participating in the scheduling of discovery (*see Nachamani v By Design,* LLC, 74 AD3d 478 [1st Dept 2010] [compelling arbitration based on prior participation]; *see also Matter of Infinity Ins. Co. v Daily*

[5] *Scanomat* also held that the parties had not agreed to arbitrate the dispute as the agreement between the parties carved legal fees, the subject of the dispute, from the subject arbitration agreement. This basis for ignoring the delay is not present here as there is no carve out, for example, for Farney Daniels' confidentiality claims against Siem.

Med. Equip., 2013 NY Misc LEXIS 931, *8-9 [holding that the party moving to stay arbitration was not entitled to do so, as it had participated in the arbitration my filing answer and participating in the selection of the arbitrator]).

To not enforce the formal requirements of CPLR 7503 (b) and CPLR 7503 (c) in these circumstances would undermine New York's policy preference in favor of arbitration. Moreover, the Joinder Agreement, at § 11.04, states that the arbitrator has jurisdiction over "any claim or controversy as to the arbitrability of any claim or controversy." Thus, questions over whether specific issues are arbitrable are, in the first instance, for the arbitral panel (*see Matter of Monarch Consulting v National Union Fire Ins. Co. Pittsburgh, PA*, 26 NY3d 659, 676 [2016]). As Siem has participated in the arbitration and as he has violated the 20-day requirement of CPLR 7503 (c), his Petition to stay the arbitration is denied, and Farney Daniels' motion to dismiss the petition is granted.

II. The Plenary Action

As the issues in the plenary action are properly before an arbitration panel in Texas, Farney Daniels' motion to dismiss the plenary action must be granted. As stated above, the question of arbitrability of the various issues involved in both the Texas arbitration and the plenary action should, initially, be decided by the arbitral panel (*see Matter of Monarch Consulting Inc. v National Union Fire Ins. Co. Of Pittsburgh, PA*, 26 NY3d 659, 676 [2016]).

CONCLUSION

Accordingly, it is

ORDERED that Petitioner Plaintiff Michael Siem's (Siem) Petition under index No. 154939/18 is denied, and it is further

ORDERED that Respondent/Defendant Farney Daniels, PC's (Farney Daniels) motion to dismiss the Petition is granted; and it is further

ORDERED that Farney Daniels motion to dismiss the Complaint under index No. 652622/18 is granted and the Complaint is dismissed; and it is further

ORDERED that counsel for Farney Daniels shall serve a copy of this order, along with notice entry, on all parties within 15 days of entry.

Dated: October 29, 2018

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.