Lake Harbor Advisors, LLC, v Settlement Servs. Arbitration & Mediation Inc.
2018 NY Slip Op 33639(U)
August 29, 2018
Supreme Court, Nassau County
Docket Number: 602884/18
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

LAKE HARBOR ADVISORS, LLC,

Plaintiff,

- against -

SETTLEMENT SERVICES ARBITRATION AND MEDIATION INC. f/k/a SETTLEMENT SYSTEMS INC.,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 602884/18
Motion Seq. No.: 01
Motion Date: 05/24/18

The following papers have been read on this motion:

	Papers Numbered
Order to Show Cause, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits and Memorandum of Law	2
Reply Affidavit and Exhibits and Memorandum of Law	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 7503(a), for an order compelling arbitration of this matter and staying the entirety of this action. Plaintiff opposes the motion.

In support of the Order to Show Cause, counsel for defendant submits, in pertinent part, that, "[p]laintiff's Complaint ... purports to set forth a breach of contract cause of action relying upon a May 17, 2016 Agreement, ... The Complaint consisting of only eight paragraphs, and two pages, conclusorily asserts that Defendant breached the Agreement causing damages to Plaintiff. The May 17, 2016 Agreement on page 3 at paragraph 4(b) specifically provides as follows: Any dispute between the parties shall be resolved first by submitting same for mediation to [American Arbitration Association] AAA, and absent a resolution, then by a 3 member panel Arbitration

through AAA. The dispute herein, alleged in the Complaint, has not been submitted for mediation to AAA. Nor has a 3 member AAA panel addressed this dispute. Accordingly, as all disputes must be mediated and arbitrated before the AAA then the instant action must be stayed and the Plaintiff should be compelled to comply with the May 17, 2016 Agreement and submit its cause of action to the AAA." *See* Defendant's Affirmation in Support Exhibit A.

In opposition to the motion, counsel for plaintiff asserts, in pertinent part, that, "[t]his action arises out of a sale of the common stock of the Defendant by James Marthen ('Marthen') to William H. Groner ('Groner'). The sale took place on May 17, 2016, and pursuant thereto Marthen sold all of his common stock to Groner for $225,000.00 with a downpayment (*sic*) of $50,000.00 and deferred payments for $175,000.00. Groner and Marthen both executed a promissory note on behalf of the Defendant evidencing the $175,000.00 debt. Neither of these documents made any provision for mediation or arbitration of any dispute. As referenced in the Stock Purchase Agreement, and as is a common practice in such transactions, Marthen and the Defendant entered into a Consulting Agreement that provided for consulting payments of $114,400.00 per month for a term of three (3) years and that further provided for performance bonuses based upon the gross revenue of the Defendant. Pursuant to the terms of the Consulting Agreement, Marthen assigned his right to receive the consulting payments at issue to the Plaintiff and payments were made by the Defendant from the inception of the Consulting Agreement to the Plaintiff through December 2017. In January 2018 and continuing thereafter, the Defendant failed and refused to make the payments of $114,400.00 per month. As a result, this action was commenced by the filing of a Summons with Notice on March 2, 2018 seeking to recover those payments as well as the performance payments referred to. The Defendant served a Demand for Complaint on April 5, 2018 and a Complaint was served on April 25, 2018." *See* Plaintiff's Affirmation in Opposition Exhibits A-C.

Counsel for plaintiff adds that, "[t]he Defendant contends that there is a dispute (although it does not identify the dispute or otherwise deny liability for the amount sought therein) and that arbitration is dictated by the terms of the Consulting Agreement. The provision relied upon by Defendant is Article 4(b) entitled 'Termination of Services'.... Based upon the foregoing, and the legal contentions contained herein below, it is respectfully submitted that the Defendant's reliance upon the arbitration provision contained in that portion of the Consulting Agreement pertaining to a termination for cause only applies to such an issue. As the Defendant has not advised us that any purported termination for cause has ever occurred, or that the contractual requirements for such termination have been met, the arbitration provision relied upon by Defendant does not apply to this action, in which the Plaintiff seeks to recover payments that are effectively conceded to be due and remain unpaid. As a result, this action should continue as the Defendant has not met its burden of demonstrating that a broad arbitration provision encompassing any as yet undisclosed dispute exists here, or that there is any bonafide dispute subject to arbitration in any event." *See* Plaintiff's Affirmation in Opposition Exhibit C.

Counsel for plaintiff argues, "[t]he Defendant's application does not state the nature of any arbitrable dispute, as distinguished from asserting merely that there is a dispute. This is insufficient as a matter of law and requires that the application be denied upon those grounds alone. [citation omitted]. Stated differently, the mere assertion of a dispute, unsupported by facts (and here Defendant proffers none) does not establish the existence of a bonafide arbitrable issue. [citations omitted]. Thus, the application is fatally deficient and should therefore be denied upon the grounds that the Defendant has failed to set forth any dispute subject to arbitration or any facts in support of its contentions. We note that the burden of showing the existence of an arbitrable issue or dispute is upon the party seeking arbitration. [citation omitted].... Indeed, the Court of Appeals had repeatedly held that absent a clear, explicit, and unequivocal agreement to

arbitrate, a party may not be compelled to do so and thereby surrender its right to resort to the Courts. [citations omitted]. Moreover, an arbitration clause must be read conservatively if it is subject to an equivocal reading. [citation omitted]. Judged by these legal standards, the application to compel arbitration should be denied as the contractual provision relied upon by the Defendant is limited in scope and merely applies to any perceived dispute regarding any putative termination for cause of the Plaintiff, and not 'claims or disputes' as would ordinarily be covered by a standard broad arbitration provision. [citations omitted].... Here, ..., the Consulting Agreement applies only to any dispute regarding any as yet unannounced termination for cause of the Plaintiff, and not to claims of alleged breach of contract and non payment of monies owed. Moreover, it scarcely requires comment to observe that since the Defendant drafted the Consulting Agreement, that any ambiguity must be construed against it and in favor of the Plaintiff as promisee.... Here, the arbitration provision upon which counsel relies is literally buried in a provision and an article that only governs terminations for cause and not to any other issues or claims. Inconsistently, the provision where one would expect to find an arbitration provision (if the parties had actually agreed to same) entitled 'Governing Law' does not contain any provisions for arbitration or mediation but instead for a waiver of jury trial in court litigation as envisioned by the provision. In this light, at a minimum, an ambiguity is presented which must be construed against the Defendant and in favor of the Plaintiff. (*sic*) Such that the Plaintiff may not be directed to forego its right to rely upon the Courts and their protective safeguards. Moreover, any other interpretation or result would be totally contrary to all general principles of contract law. It is well settled that where, as here, there are apparently conflicting provisions, that the Court has a duty to reconcile them so as to give effect to all of the provisions of the contract. [citation omitted].... In the case at bar, the inconsistencies between the cited provisions can be reconciled by properly concluding that the arbitration provision only applies to any alleged termination for cause and not to the non payment of the amounts encompassed by the Complaint that are demonstrably due."

CPLR § 7503(a) states as follows:

> Application to compel or stay arbitration; stay of action; notice of intention to arbitrate
> (a) Application to compel arbitration; stay of action. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where 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. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

The Court finds that the only written agreement between the parties, with respect to arbitration, is contained in Paragraph 4(b) of the subject Consulting Agreement, which reads,

> "4. **Termination of Services** ... (b) Termination by the Company. The Company may terminate Advisor's retention at any time with Cause. For purpose of this Agreement, ***'Cause'*** shall mean: (i) Marthen, on behalf of Advisor, engaging in fraud, willful misconduct or dishonesty that has caused, or is reasonably expected to cause, material damage to the Company or its business reputation; (ii) Marthen's conviction of, or entering a plea of guilty or nolo-contendere to, a crime which reflects adversely on the Company or materially impairs his ability to perform his duties hereunder on behalf of Advisor; or (iii) any breach by Advisor of any of its material obligations hereunder, and the continuance of such breach for more than ten (10) business days after the Company notifies Advisor in writing that Advisor has breached or is breaching such obligations, which notice shall specify in reasonable detail the manner in which the Company believes Advisor has breached or is breaching such obligations; provided that a breach of any of Advisor's material obligations hereunder that is caused by Marthen's Disability shall not entitle the Company to terminate Advisor's retention for Cause. Any dispute between the parties shall be resolved first by submitting same for mediation to AAA, and absent a resolution, then by a 3 member panel Arbitration through AAA." *See* Defendant's Affirmation in Support Exhibit A.

The Court notes that plaintiff filed its Summons with Notice on March 2, 2018. Said Summons with Notice indicated that, "[t]he nature of this action is to recover monetary damages for breach of contract and for an accounting and such additional damages as may be found thereon based upon the breach by defendant of a Consulting Agreement dated May 17, 2016." Defendant now contends that James Marthen was terminated for cause and advised of said termination for cause in a letter sent to him on March 15, 2018, almost two (2) weeks after the instant lawsuit was already commenced with the filing of the Summons with Notice.

The Court finds that plaintiff filing the instant action for a breach of contract claim (prior to defendant allegedly terminated James Marthen for cause) did not trigger the provision of Paragraph 4(b) of the subject Consulting Agreement. Instead, the Court finds the controlling provision of the subject Consulting Agreement to be Paragraph 9(b)(ii) which reads, "**General Provisions** ... (b) Governing Law; Waiver of Jury Trial.... (ii) Waiver of Jury Trial. EACH PARTY HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT SUCH PARTY MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION, DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR THE BREACH, TERMINATION OR VALIDITY OF THIS AGREEMENT, AFTER CONSULTATION WITH THEIR ATTORNEYS." *See* Defendant's Affirmation in Support Exhibit A.

Furthermore, the Court agrees with the arguments made by counsel for plaintiff in the opposition to the instant motion.

Consequently, based upon the above, defendant's motion, pursuant to CPLR § 7503(a), for an order compelling arbitration of this matter and staying the entirety of this action, is hereby **DENIED**. And it is further

ORDERED that the temporary stay issued in the Order to Show Cause is hereby **lifted**. And it is further

ORDERED that the parties shall appear for a Preliminary Conference on October 15, 2018, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
August 29, 2018

ENTERED
AUG 30 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE