

Alayev v Hardoon

2020 NY Slip Op 30139(U)

January 21, 2020

Supreme Court, New York County

Docket Number: 156170/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

SION ALAYEV

Plaintiff,

- v -

JEFFREY HARDOON,

Defendant.

-----X

INDEX NO. 156170/2019
MOTION DATE 10/04/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12, 29 were read on this motion to/for COMPEL ARBITRATION.

Petitioner Sion Alayev moves for an order (i) compelling arbitration with respondent Jeffrey Hardoon pursuant to Article 75 of the CPLR, (ii) awarding costs, disbursements, expenses, and attorneys' fees incurred in bringing this Verified Petition, and (iii) either (a) staying this action in lieu of dismissal if arbitration is compelled or, if the request to compel arbitration is denied (b) converting this special proceeding into a plenary action. For the reasons set forth on the record (1/21/2020) and as set forth below, the petition to compel arbitration is granted as set forth below, and the request for costs and attorneys' fees is denied.

The Relevant Facts and Circumstances

Reference is made to a certain Purchase Agreement (the Agreement), dated July 15, 2018, by and between 344 Restaurant Group LLC (334 LLC), Jeffrey Hardoon (the sole member of 334 LLC), and Sion Alayev (NYSCEF Doc. No. 3). Pursuant to section 1.1 of the Agreement, Mr. Alayev agreed to purchase from 334 LLC and Mr. Hardoon all rights, title, and interest in the

restaurant known as the Promenade Bar and Grill, located at 344 Third Avenue, New York, New York 10010 (*id.*). Section 14.11 of the Agreement provides, in relevant part:

If either Party breaches this Agreement, or if there is any dispute of any kind between the Parties relating to this Agreement or the Restaurant that they are not able to resolve amicably themselves, they must submit their claims to a mutually agreed upon arbitrator. (*Id.*)

On May 13, 2019, Mr. Alayev commenced an action in New York County Supreme Court captioned, *The Shake and Burger Bar, Inc. and Sion Alayev v. 344 Restaurant Group LLC and Jeffrey Hardoon*, Index No. 652862/2019 (the **First Action**). The complaint from the First Action asserted claims for (1) breach of contract, (2) breach of the April 2018 agreement, (3) promissory estoppel, (4) breach of fiduciary duty, (5) breach of the implied covenant of good faith and fair dealing, (6) conversion, (7) unjust enrichment, and (8) violation of RPAPL § 853 (NYSCEF Doc. No. 31). The First Action was discontinued without prejudice on June 9, 2019 without any motion practice, discovery or other court action having taken place (NYSCEF Doc. No. 32).

On June 11, 2019, after the First Action was discontinued, Mr. Alayev served Mr. Hardoon with a Demand to Arbitrate pursuant to sections 14.1 and 14.11 of the Agreement (Petition, ¶ 9; NYSCEF Doc. No. 4). By email, dated of even date therewith, counsel for Mr. Hardoon responded: “Client rejects your demand to arbitrate categorically” (Petition, ¶ 10; NYSCEF Doc. No. 4). On June 19, 2019, Mr. Alayev served Mr. Hardoon with another Demand to Arbitrate pursuant to CPLR § 7503 (c) and § 14.11 of the Agreement (Petition, ¶ 11; NYSCEF Doc. No. 6). On June 20, 2019, Mr. Alayev filed this Verified Petition to (i) compel arbitration, (ii)

recover costs and attorney fees incurred in bringing the Petition, and (iii) stay this action in lieu of dismissal.

Discussion

A contractual provision for arbitration may be waived or abandoned and such waiver may be evidenced by the pursuit of judicial relief rather than arbitration (*Esquire Indus., Inc. v E. Bay Textiles, Inc.*, 68 AD2d 845, 845-846 [1st Dept 1979]). A party's commencement of an action at law involving the same claim as that in arbitration may constitute a waiver of that party's rights to seek arbitration (*id.*). However, as the Court of Appeals has noted, "not every foray into the courthouse effects a waiver of the right to arbitrate" (*Sherrill v Grayco Bldrs.*, 64 NY2d 621, 273 [1985]). Rather, courts must consider the amount of litigation that has occurred, the length of time between the start of litigation and the arbitration requests, and whether prejudice has been established (*Cusimano v Schnurr*, 26 NY3d 391, 400 [2015]). Typically, waiver cannot be established in the absence of prejudice (*id.*). Such prejudice may be substantive prejudice or prejudice due to excessive cost and time delay (*id.* at 401). Neither prejudice is established here. Moreover, the amount of litigation in the First Action was virtually nonexistence, and only a month passed between the start of litigation and arbitration request. Under such circumstances, waiver cannot be established. There are no alternative grounds to prevent arbitration. Notwithstanding the hyper-technical point that the notice while sent to Mr. Haroon directly as required by the notice provision set forth in the Agreement did not indicate that it was sent to the seller and not Mr. Haroon personally (i.e., which specification was not required by the notice provision itself), the demand to arbitration unquestionably complied with the notice provision

set forth in the Agreement (NYSCEF Doc. No. 16, § 14.1). And, following our colloquy, counsel for the respondent withdrew his objection to arbitration.

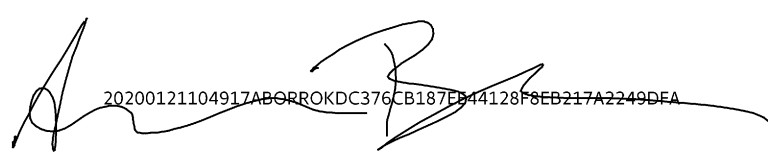
Accordingly, it is

ORDERED that petitioner’s motion to compel arbitration is granted; and it is further

ORDERED that respondent Jeffrey Hardoon and Sion Alayev shall arbitrate their claims in accordance with the parties’ contract; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration.



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1/21/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE