

<b>Sobel v Appomattox Advisory Inc.</b>
2020 NY Slip Op 31534(U)
May 17, 2020
Supreme Court, New York County
Docket Number: 654469/2019
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. ANDREW BORROK PART IAS MOTION 53EFM

*Justice*

-----X

HOWARD SOBEL,

Plaintiff,

- v -

APPOMATTOX ADVISORY INC., SUSAN WEBB

Defendant.

-----X

INDEX NO. 654469/2019

MOTION DATE 09/20/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 37

were read on this motion to/for DISMISS.

Upon the foregoing documents, Appomattox Advisory, Inc. (**Appomattox**) and Susan Patterson Webb (Appomattox and Ms. Webb, collectively, the **Defendants**)'s motion to compel arbitration pursuant to CPLR § 7503 and dismiss the Complaint pursuant to CPLR §§ 3211 (a)(1) and (7) is granted and the matter is ordered to proceed to arbitration.

**The Relevant Facts and Circumstances**

Reference is made to a Discretionary Authority Asset Management Agreement (NYSCEF Doc. No. 4, the **Management Agreement**), dated March 28, 2017, by and between Appomattox and Howard Sobel, which was executed by Dr. Sobel on April 19, 2017, acknowledging his acceptance of the following:

Appomattox Advisory looks forward to the opportunity to serve you. Please confirm your acceptance of this Agreement by signing and returning this letter together with the following Items (with each acknowledged in the space indicated):

- (a) Appomattox Advisory – Standard Terms & Conditions of Discretionary Investment Advisory Services
- (b) *Appomattox Advisory, Inc. Standard Terms & Conditions (3/2017)*
- (c) Schedule A – Legal Name(s) of Client and Contact Information
- (d) Schedule B – Identification and Description Accounts and Account Assets
- (c) Schedule B – Advisory Fees – Calculation and Terms [sic]
- (d) APPOMATTOX ADVISORY, INC. – CLIENT SUITABILITY QUESTIONNAIRE (please complete as appropriate) [sic]
- (e) APPOMATTOX ADVISORY, INC. – REPRESENTATION AGREEMENT AND POWER OF ATTORNEY

(*id.* at 3 [emphasis added]).

On April 19, 2017, Dr. Sobel also separately signed to acknowledge receipt of the Standard Terms & Conditions (3/2017) (NYSCEF Doc. No. 5, the **March T&C**), which included a dispute resolution and arbitration clause as follows:

8. Dispute Resolution and Arbitration

(a) Dispute Resolution and Arbitration. ***In the event that any dispute arises between the parties hereto***, and the parties are unable to resolve such dispute within a reasonable time through negotiations and mediation efforts, such dispute shall, at the option of either party, be resolved as set forth in this Section 8.

(b) Notice of Dispute. The procedures of this Section 8 may be initiated by a written notice (“Dispute Notice”) given by one party (“Claimant”) to the other, but not before thirty (30) days have passed during which the parties have been unable to reach a resolution as described above (unless any party would be materially prejudiced by such delay). The Dispute Notice shall be accompanied by (i) a statement of the Claimant describing the dispute in reasonable detail and (ii) documentation, if any, supporting the Claimant’s position on the dispute. Within twenty (20) days after the other party’s (“Respondent”) receipt of the Dispute Notice and accompanying materials, the parties shall submit the dispute to mediation in New York City, New York, U.S.A. under the rules of the American Arbitration Association. All negotiations and mediation procedures pursuant to this Section 8(b) shall be confidential and treated as compromise and settlement negotiations and shall not be admissible in any arbitration or other proceeding.

(c) Referral to Arbitration. If the dispute is not resolved as provided in Section 8(b) within sixty (60) days after the Respondent’s receipt of the Dispute Notice, ***the dispute shall be resolved by binding arbitration in New York City, New York,***

*United States* within the sixty-day period referred to in the immediately preceding sentence, the parties shall agree on a single arbitrator in New York City, New York, United States to resolve the dispute ...

(*id.* at 1 (the **Arbitration Clause**) [emphasis added]).

On April 19, 2017, Dr. Sobel alleges that an Appomattox employee attended his office and solely presented him with the set of signature pages, without providing him with the entire terms or text of the relevant documents (NYSCEF Doc. No. 2, ¶¶ 22-23). In other words, Dr. Sobel alleges that he was unaware that the documents contained the Arbitration Clause when he signed them and that he would not have agreed to such clause if he knew it was there (*id.*, ¶¶ 26-28). Dr. Sobel also alleges that he was not provided with the full text of the documents he signed until he requested same the following year, in late 2018 (*id.*, ¶ 29). Notably, the signature pages are all dated the same date, i.e., April 19, 2017 — meaning they were all signed on that same date — and these dates of the signature pages are *after* the dates of the Management Agreement, i.e., March 28, 2017 and a signature page which Dr. Sobel signed includes part of the arbitration clause.

In sum and substance, the Complaint alleges that Appottomax and Ms. Webb, its Chief Investment Officer and controlling shareholder, failed to make suitable investments with Dr. Sobel's funds. Dr. Sobel commenced this action on August 2, 2019 and asserts the following claims against both Defendants: (i) breach of contract, (ii) negligence, (iii) gross negligence, (iv) breach of fiduciary duty, (v) unjust enrichment (NYSCEF Doc. No. 2). In response, the Defendants filed the instant motion to dismiss the Complaint and compel arbitration.

## Discussion

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Under CPLR § 3211 (a)(1), the court may dismiss a cause of action where the documentary evidence conclusively establishes a defense to the claims as a matter of law (*id.* at 88). Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

### A. Claims Against Appottomax

The Defendants argue that the Complaint should be dismissed and Dr. Sobel should be compelled to arbitrate his claims against them. In his opposition papers, Dr. Sobel argues he cannot bound by the Arbitration Clause because he was unaware of it when he signed the relevant agreements and because he was only presented with the signature pages at the time that he signed the agreements. For the reasons set forth below, Dr. Sobel's arguments are unavailing.

A motion to compel arbitration pursuant to CPLR § 7503 requires the analysis of three threshold questions: (1) whether the parties made a valid agreement to arbitrate, (2) if such an agreement was made, whether it was complied with, and (3) whether the claim sought to be arbitrated was barred by the relevant statute of limitations if asserted in court (*County of Rockland v Primiano Constr. Co.*, 51 NY2d 1, 6-7 [1980] [citations omitted]).

Courts have long held that signatories to a contract who fail to read its provisions and do not provide a valid excuse for same are nonetheless bound to the contract they signed because they are presumed to know its contents and to have assented to such terms as the contract contains (*Arnav Indus. v Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300, 304 [2001] [“a party who signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it”]; *Br. W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234 [1st Dept 1991] [affirming trial court’s dismissal of complaint on basis of forum selection clause where signer alleged she did not read the forum selection provision and that it was not brought to her attention]).

Critically, a signer’s duty to read and understand what he or she is signing is not diminished where the signer is only provided with a signature page (*Vulcan Power Co. v Munson*, 89 AD3d 494, 495, [1st Dept 2011] [declaring stockholder agreement legal and binding notwithstanding that signatories signed without reading agreement and were only presented with a signature page]). And, an arbitration clause will be enforceable even where the contract is alleged to be a product of fraud so long as the arbitration clause, itself, was not procured by “fraud, misrepresentation or overreaching” (*Prinze v Jonas*, 38 NY2d 570, 577 [1976]).

Here, the parties entered into a valid agreement to arbitrate when Dr. Sobel signed the Management Agreement, which incorporated the March T&C that was also signed by Dr. Sobel. Taking the allegations in the Complaint as true, which the court must on a motion to dismiss, even if Dr. Sobel was only presented with only the signature pages, his argument fails because this did not eliminate his duty to read and understand what he was signing and did, in fact, sign

(see *Vulcan*, 89 AD3d at 495) and the signatures pages which he did sign include a portion of the arbitration provision itself that he claims to have had no knowledge of. The fact that he chose to sign documents that he allegedly did not read – whether it was because the pages were or were not presented to him – is of no moment. He is presumed to understand what he is signing and to assume the risk of what he chooses to sign unread.

And, significantly, in this regard, as discussed above, the signature pages executed by Dr. Sobel contain explicit references to the Arbitration Clause. The Management Agreement expressly incorporates seven additional agreements, including the March T&C. Significantly, the signature page for the March T&C *contains subclauses (e) through (j) of the Arbitration Clause* which provide, in part, that:

(e) ***Effect of Arbitration Determination. Any resolution reached through mediation and any award arising out of arbitration (i) shall be binding and conclusive upon the parties ...***

(g) ***Applicable Law. The laws of the State of New York, without regard to its conflict of law principles, shall apply to any mediation, arbitration, or litigation arising under this Section 8 ...***

(i) ***Temporary Injunction. A request by a party to a court for Interim measures necessary to preserve a party's rights and remedies for resolution pursuant to this Section 8 shall not be deemed a waiver of the obligation to mediate or of the agreement to arbitrate.***

(NYSCEF Doc. No. 5, at 2, ¶ 8).

Thus, even if he did not read the remainder of the agreements, this sufficiently puts Dr. Sobel on notice of the Arbitration Clause contained therein. In opposition, Dr. Sobel does not provide any excuse for his failure to read the signature pages, or the relevant agreements when they were

signed. Under these circumstances, Dr. Sobel's execution of the Management Agreement and the March T&C binds him to the Arbitration Clause (*see Pimpinello v Swift & Co.*, 253 NY 159, 162-163 [1930] [contract binding on signer who could read instrument or failed to procure it to be read]).

Under these circumstances, to determine whether an arbitration clause bars an action, the court need only look to the contract language to assess whether the parties have a clear and unequivocal agreement to exclusively use arbitration (*Thomas Crimmins Contr. Co. v New York*, 74 NY2d 166, 171 [1989]). Here, the Arbitration Clause is clear and unequivocal as it applies to "any dispute [that] arises between the parties hereto," and that if the dispute is not resolved by mediation under paragraph 8 (b), "the dispute shall be resolved by binding arbitration in New York City" (NYSCEF Doc. No. 5, ¶ 8 [a], [b], [c]).

Further, there was compliance with the Arbitration Clause because the parties attempted to resolve the dispute in 2019 and Dr. Sobel subsequently rejected the Defendants' proposal to mediate made in June 2019 (NYSCEF Doc. No. 16, ¶ 24). It is also undisputed that the claims to be arbitrated are not barred by any statute of limitation such that the branch of the Defendants' motion to compel arbitration is granted and the Complaint is dismissed as against Appomattox in favor of arbitration.

### **B. Claims Against Ms. Webb**

To the extent that Dr. Sobel also asserts claims against Ms. Webb, it would be inappropriate for the court to address the balance of Defendants' arguments with respect to Ms. Webb as the

merits of these claims are for the arbitrator, not the court (*Cheng v Oxford Health Plans, Inc.*, 15 AD3d 207 [1<sup>st</sup> Dept 2005] [court cannot consider merits of arbitrable claims]). Inasmuch as Dr. Sobel does argue that his claims against Ms. Webb should not be dismissed on the merits, he raises no objection in his opposition papers to the Defendants' argument that such claims should be resolved at arbitration, and, as with the claims against Appotomax, the claims as to Ms. Webb are also subject to the Arbitration Clause (*see Huntsman Intl. LLC v Albemarle Corp.*, 163 AD3d 420, 421 [1st Dept 2018] [defendant officers of the defendant corporation entitled to enforce arbitration provision though officers did not sign agreement in their individual capacities]). Accordingly, the branch of the motion to compel arbitration and dismiss the Complaint as to Ms. Webb is granted.

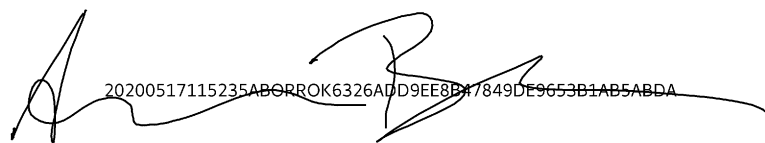
Accordingly, it is

ORDERED that the Defendants' motion to compel arbitration and dismiss the Complaint is granted; and it is further

ORDERED that Dr. Sobel shall arbitrate his claims against the Defendants in accordance with the Arbitration Clause; and it is further

ORDERED that any party may bring a motion to affirm, modify or vacate any portion of the arbitration award before this court as needed.

5/17/2020

  
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**ANDREW BORROK, J.S.C.**

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CASE DISPOSED  
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 SETTLE ORDER  
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NON-FINAL DISPOSITION  
 GRANTED IN PART  OTHER  
 SUBMIT ORDER  
 FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: