Strulovitch Family, LLC v F.I. ASSOCIATES
2020 NY Slip Op 31623(U)
April 30, 2020
Supreme Court, Kings County
Docket Number: 504658/2019
Judge: Loren Baily-Schiffman
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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 30 day of April, 2020.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

THE STRULOVITCH FAMILY, LLC,
Plaintiff,
- against -
F.I. ASSOCIATES,
Defendant.

Index No.: 504658/2019

Motion Seq. # 5

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	PAPERS NUMBERED
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Affidavit in Opposition to Motion	2
Memorandum of Law in Opposition	3

Upon the foregoing papers F.I. Associates ("Landlord") moves this Court for an Order (1) Striking The Strulovitch Famliy, LLC's ("Tenant") American Arbitration Association ("AAA") Complaint, Case Number 01-19-0004-0889; (2) finding Tenant waived any right to arbitration; (3) granting Landlord attorney fees and cost pursuant to CPLR § 8303(a); and (4) requiring Tenant to bring its arrears current with fourteen (14) days.

Background

This is a commercial landlord tenant matter originally brought in the New York City Civil Court, Kings County under a L&T Index number. Tenant owns and operates a kosher, wholesale supermarket and was assigned a lease after a previous tenant went bankrupt. It is undisputed that Landlord is a New Jersey entity, Tenant is a New York entity and the premises in question is commercial real estate. The controversy in question arises from Tenant's use of a forklift in the

premises and damage the forklift allegedly caused. Incident to the forklift issue are potential arrears owed to Landlord for rent and previously arbitrated common area maintenance (CAM) payments. On March 4, 2019, Tenant commenced this action by filing a Summons in this Court.

On March 5, 2019, Tenant moved—by Order to Show Cause—for a preliminary injunction restraining Landlord from maintaining the case in Civil Court and effectively transferred the case to this Court, among other things. On March 29, 2019, before Tenant as plaintiff in this action served its Complaint, Landlord filed a cross-motion (Motion Sequence #2) which Tenant properly opposed. On April 18, 2019, Tenant e-filed its Complaint. On June 26, 2019, Tenant filed a motion for a default judgment (Motion Sequence #3), which was denied by this Court. On July 23, 2019, Landlord filed a subsequent cross-motion (Motion Sequence #4), which Tenant also properly opposed. On May 20, 2019, July 26, 2019, September 12, 2019, October 10, 2019 and November 14, 2019, this Court issued Orders in this matter. Additionally, the parties have appeared before this Court on several occasions for motion practice and conferences in this matter. On November 19, 2019, Tenant filed a Demand for Arbitration and Complaint with AAA. The lease between the parties contains an arbitration agreement which states, "In any case where this Lease provides for submission of a dispute or matter to arbitration, the same shall be settled by arbitration in New York City before one arbitrator in accordance with the procedural rules then obtaining of the American Arbitration Association or any successor thereto." This Decision and Order will exclusively address Landlord's above referenced motion (Motion Sequence #5) and will not discuss the other motions and cross-motions pending before this Court.

Discussion

Both New York and Federal law have strong polices favoring arbitration. ***See, Stark v. Molod Spitz DeSantis & Stark, P.C., 9 N.Y.3d 59, 66 (2007) and AT&T Mobility LLC v. Concepcion, 563, U.S. 331, 339 (2011).*** "Not every foray into the courthouse effects a waiver of the right to arbitrate." ***Sherrill v. Gayco Bldrs, 64 N.Y. 261, 273 (1985).*** "Like contract rights generally, a right to arbitration may be modified, waived or abandoned." ***Id at 272.*** In cases where the Federal Arbitration Act ("FAA") governs, "when addressing waiver, courts should consider the amount of litigation that has occurred, the length of time between the start of the litigation and the arbitration request, and whether prejudice has been established." ***Cusimano v. Shnurr, 26 N.Y.3d 391, 400 (2015).*** "[T]here were two types of prejudice: substantive prejudice and prejudice due to excessive cost and time delay," both of which need to be established for a court to determine that arbitration was waived. ***Id at 401 (internal quotations omitted).*** Ultimately, "[t]here is no bright-line rule, however, for determining when a party has waived its right to arbitration: the determination of waiver depends on the particular facts of each case." ***PPG Industries, Inc. v. Webster Auto Parts, Inc. 128 F.3d 103, 107-8 (2d Cir. 1997).***

Tenant opposes this motion on the ground that it is procedurally improper, as it requests the relief of "[s]triking Plaintiff's American Arbitration Association Complaint." Tenant maintains "[p]rocedurally, no such motion exists. Rather, Landlord should have sought a stay of the arbitration under CPLR Article 75." Memorandum of Law in Opposition p. 2. While Tenant is technically correct, Landlord's motion clearly falls within the purview of CPLR § 7503(b) which states "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*." (Emphasis added). The relief Landlord intended to request is clear and the Court will not reject Landlord's motion simply because Landlord's papers use the wrong phrase.

Tenant also opposes staying arbitration on the basis that the FAA governs the lease agreement in question. In the present case, Landlord is an out of state, New Jersey-based entity and the subject premises is in New York. Moreover, this case involves commercial real estate, which the Court of Appeals has held has a substantial effect on interstate commerce. ***Id at 399.*** Accordingly, the Court finds that the lease involves interstate commerce and is governed by the FAA. ***See, Cusimano, Supra and Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995),*** (holding that the language of the FAA is the functional equivalent to affecting interstate commerce). However, a party can be found to have waived an arbitration agreement, even if the arbitration agreement is controlled by the FAA. ***See Cusiman, Supra.***

Finally, Tenant opposes staying arbitration on the ground that it did not waive the arbitration agreement of the lease. Specifically, Tenant argues that it only ever brought this action before this Court to stay an eviction proceeding and never sought to adjudicate any other issue. Tenant further contends that "the CAM dispute is not mentioned at all, nor did the complaint seek a determination of which party is responsible to make repairs." Memorandum of Law in Opposition p. 11. Tenant's contentions are unavailing.

In the instant case, Landlord has proven that it would suffer prejudice if it was forced to arbitrate this matter. As stated previously, this case was brought before this Court in March 2019 and arbitration was not demanded until November 2019—upwards of nine months later. Previous to this, Tenant opposed cross-motions, filed a Complaint and made its own motion,

before this Court. In terms of substantive prejudice, on September 12, 2019, the Court denied Tenant's motion for declaratory judgment, and only months after that did Tenant demand the case be arbitrated. Finally, the CAM dispute was addressed by the Court in conferences held previous to the demand for arbitration. Indeed, on September 12, 2019, this Court even ordered "P[laintiff] is directed to promptly relinquish Common Area Maintenance responsibilities to [Defendant]" and "Parties to attempt to reconcile arrear accounts prior to Oct. 10, 2019 scheduled conference date." Included in the arrears mentioned were the CAM charges Tenant now seeks to arbitrate. At this stage, Tenant's action in pursuing this case in this Court is inconsistent with its attempt to force this matter to arbitration, or the CAM charges issue involved in it. Under these circumstances, forcing Landlord to arbitrate this case would be prejudicial. Accordingly, the branch of Landlord's motion sounding in staying arbitration is granted.

Turning now to the branch of the motion requesting attorney's fees, in its Notice of Motion Landlord cites CPLR § 8303(a) as authority to grant attorney's fees for Tenant filing a frivolous claim. It appears that Landlord intended to cite CPLR § 8303-a, entitled "Costs upon frivolous claims and counterclaims in actions to recover damages for personal injury, injury to property or wrongful death," as opposed to CPLR § 8303(a). Under CPLR § 8303-a, "it is not enough that the action be meritless; it must be brought or continued in bad faith." ***McGill v. Parker, 179 A.D.2d 98, 111 (1st Dep't 1992).*** "What is required, in effect, is a showing that the plaintiff and counsel knew or should have known that the action lacked merit." ***Id.*** In the instant case, Landlord has failed to prove that Tenant or its counsel demanded arbitration in bad faith. As stated previously, the lease in question contains an arbitration clause, which

Tenant could reasonably believe was not waived. ***See, PPG Industries, Inc., Supra*** (holding that waiver of arbitration agreements depends on the particular facts of each case). Accordingly, the branch of the motion requesting the award of attorney's fees is denied.

Turning now to the branch of the motion requesting arrears be brought current, whether Tenant owes Landlord arrears and, if so, the amount of arrears Tenant owes are disputed facts that cannot be determined at this stage of litigation. The branch of the motion addressing arrears, is, accordingly, denied. It is HEREBY:

ORDERED that F.I. Associates' motion is GRANTED staying arbitration in this matter; and it is further

ORDERED that F.I. Associates' motion for the award of attorney's fees is DENIED; and it is further

ORDERED that F.I. Associates' motion to bring arrears current is DENIED

This is the Decision and Order of the Court.

ENTER

LOREN BAILY-SCHIFFMAN
JSC