

<b>Kothari v Brink's U.S.</b>
2020 NY Slip Op 32378(U)
July 17, 2020
Supreme Court, New York County
Docket Number: 655968/2019
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14**

*Justice*

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MITESH KOTHARI, individually and as Managing Member of SAUMIL DIAM USA, LLC, INFINITE DIAMONDS & JEWELLERY INC, GOLD & DIAMOND CENTER INC., GOODMARK JEWELRY CORP, BEAUTIFUL DIAMONDS & JEWELLERY INC., SHREE SWAMI CORP., NEW YORK DIAMONDS & JEWELRY INC.

Plaintiffs,

- v -

BRINK'S U.S., BRINK'S GLOBAL SERVICES USA, INC., BRINK'S INCORPORATED,

Defendant.

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INDEX NO. 655968/2019  
MOTION DATE N/A  
MOTION SEQ. NO. 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48

were read on this motion to/for STAY.

The motion by defendants to stay this action pending arbitration is granted.

**Background**

Plaintiffs commenced this action seeking recovery based on defendants' withholding of shipments of diamonds to plaintiffs and the purported failure to provide proofs of delivery. Defendants claim that the shipments mentioned in the complaint fell under a contract with non-party. They claim that this shipment (of cut and polished diamonds from Mumbai) was withheld because there was an outstanding balance owed to defendants. Defendants assert that they declined to complete delivery until the debt is satisfied.

Defendants contend that any disputes about these shipments must be resolved in mandatory arbitration. They also claim that the Court should dismiss certain causes of action in the event the Court declines to stay pending arbitration.

In opposition, plaintiffs maintain that although they were an intended beneficiary of the shipping contract (that contained the arbitration clause), they were not a party to it and cannot be compelled to arbitrate. Plaintiffs insist that arbitration cannot be forced upon a party that did not unequivocally agree to that form of dispute resolution. They emphasize that they were a consignee rather than a shipper and so they were not a party to the shipping contract. Plaintiffs insist that the unsigned, undated, contract cannot compel arbitration. They point to a notation in the contract which suggests it was revised in October 2018 (even though the contract was purportedly entered into in March 2018) and that there are multiple versions of the contract.

In reply, defendants emphasize that plaintiffs agreed to the terms of the contract. Defendants contend that plaintiffs assented to the terms of the contract via digital signature in March 2018 and that they had done multiple contracts with defendants dating back to 2015.

### **Discussion**

“It is settled that a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. The agreement must be clear, explicit and unequivocal and must not depend upon implication or subtlety” (*Waldron v Goddess*, 61 NY2d 181, 183-84, 473 NYS2d 136 [1984]).

Here, defendants submitted the affidavit of its IT manager who claims that every customer must agree to defendants’ standard contract and that plaintiffs digitally signed on

March 13, 2018 (NYSCEF Doc. No. 10 ¶ 4). He then points to a screenshot that purportedly shows that plaintiffs' principal (Mr. Kothari) signed the contract on March 13, 2018 (*id.* ¶ 5).

Mr. Kothari's affidavit in opposition does not directly dispute that he assented to these terms and conditions on March 13, 2018 or directly state that movant's submission is a falsified "record." Rather, he states that he does "not concede that I, or anyone acting as agent for any of the plaintiffs, executed, electronically, or otherwise, any Brink's Connect Transportation Contract" (NYSCEF Doc. No. 26, ¶ 6).

Unfortunately, that vague denial is not enough to rebut the evidence showing Mr. Kothari's name on the screenshot provided by defendants. Defendants also attach an affidavit from the IT manager in reply that allegedly shows four contracts signed by Mr. Kothari (including the contract at issue here) dating back to 2015 (NYSCEF Doc. No. 47, ¶ 4). The Court cannot simply ignore specific and direct evidence that Mr. Kothari signed the terms and conditions (which indisputably contains an arbitration clause) without specific denials of that evidence.

This is not a case where plaintiffs deny knowledge about who defendants are or claim they have nothing to do with the diamonds at issue. In fact, plaintiffs are suing based on the very contract they claim they never signed. Plaintiffs claim that they were a "consignee" of the contract and not a party to it (NYSCEF Doc. No. 40 at 8) and then later insist they have standing to sue under the contract because they were an intended beneficiary (*id.* at 14). Plaintiffs cannot have it both ways; they cannot simultaneously seek recovery based on a breach of contract and then claim they are not bound by the provisions of the contract that they don't like.

Summary

The Court recognizes that arbitration cannot be foisted on a party that did not agree to arbitrate. Here, plaintiffs failed to sufficiently rebut defendants' evidence showing that they digitally agreed to defendants' terms and conditions, which contained an arbitration clause and where there is no question that the scope of the arbitration clause covers the instant dispute.

Accordingly, it is hereby

ORDERED that defendants' motion to compel arbitration and to stay this action is granted; and it is further

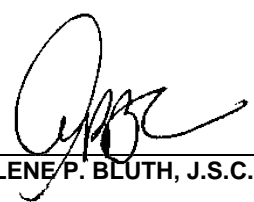
ORDERED that plaintiffs shall arbitrate its claims against defendants in accordance with the contract at issue; and it is further

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.

Next Conference: January 12, 2021 at 10 a.m. If the arbitration has not been completed, then the parties may request an adjournment.

7/17/2020  
DATE

  
ARLENE P. BLUTH, J.S.C.

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