

PricewaterhouseCoopers LLP v Lewis
2020 NY Slip Op 33343(U)
October 8, 2020
Supreme Court, New York County
Docket Number: 654520/2019
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY****PRESENT: HON. CAROL R. EDMOND****PART****IAS MOTION 35EFM***Justice*

-----X

PRICEWATERHOUSECOOPERS LLP

INDEX NO. 654520/2019**MOTION DATE** 01/13/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

DAVID LEWIS,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 43, 44, 45, 49, 52

were read on this motion to/for

INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents, it is

ORDERED that Petitioner PricewaterhouseCoopers LLP's motion pursuant to Article 75 of the CPLR to compel Respondent David B. Lewis to arbitrate (motion seq. 001) is granted and Respondent is enjoined from pursuing the Missouri litigation as against Petitioner PricewaterhouseCoopers LLP only, pending resolution of the arbitration; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this order along with Notice of Entry on Respondent within twenty (20) days.

MEMORANDUM DECISION

Petitioner PricewaterhouseCoopers LLP (Petitioner) seeks, by Order to Show Cause, an order pursuant to Article 75 of the CPLR compelling arbitration and enjoining its former partner David B. Lewis (Respondent), as well as his agents and attorneys, from prosecuting or otherwise continuing an action commenced in Missouri State Court, entitled *David B. Lewis and Tara W. Lewis, as trustee of the David B. Lewis Irrevocable Insurance Trust v Minnesota Life Insurance Company d/b/a Securian Financial and PricewaterhouseCoopers LLP* (No. 19-SL-CC02080) ("the Missouri Court Action") (motion seq. 001).

Petitioner also seeks to enjoin Respondent, his agents, and attorneys from commencing, prosecuting or otherwise continuing, in any court or forum other than as expressly provided in the Partnership Agreement, any suit, action or proceeding with respect to the claims asserted against Petitioner in the Missouri Court Action.

Finally, Petitioner requests an award of reasonable attorney's fees incurred in bringing this special proceeding.

BACKGROUND FACTS

Petitioner is a Delaware limited liability partnership which provides, among other things, audit, tax and consulting services. Petitioner was formed on July 1, 1998, by the merger of Price Waterhouse LLP ("Price Waterhouse") and Coopers & Lybrand L.L.P. ("Coopers & Lybrand"), with its principal and executive offices located in New York City.

Respondent was employed by Price Waterhouse from 1977 to 1985 in St. Louis, Missouri. He was admitted to partnership within Price Waterhouse in 1985. Upon the merger of Price Waterhouse and Coopers & Lybrand on July 1, 1998, Respondent became a partner of Petitioner with the firm's consulting line of service.

Effective October 1, 2002, Respondent, along with partners from Petitioner's consulting services, withdrew from Petitioner in connection with the acquisition of its consulting practice by the International Business Machines Corporation (IBM).

Petitioner maintains that when Respondent became a partner, he entered into the "PwC Partners and Principals Agreement" dated July 1, 1998 (the "1998 Partnership Agreement") (NYSCEF Doc. No. 24), which was amended by vote of the partners of the firm on April 1, 2001 (the "Partnership Agreement") (NYSCEF Doc. No. 26). The Partnership Agreement sets forth and governs the rights and obligations of each of the respondents along with other consulting practice partners.

Section 12.1 (a) of the Partnership Agreement provides as follows:

"Any claim or controversy (including without limitation a claim or controversy involving a Former Individual) arising out of the provisions of this Agreement, the interpretation thereof or the practice, business or affairs of the Firm shall be settled by arbitration conducted by the American Arbitration Association ("AAA") in in the City of New York in accordance with the Commercial Arbitration Rules of the AAA then in effect. The Supreme Court of the State of New York, New York County, shall have jurisdiction over any proceedings related to any arbitration under this Agreement and judgment on any award rendered in such arbitration may be entered in that court having jurisdiction. Neither AAA, nor the arbitrators shall have authority to conduct hearings or receive proof, except in the City of New York."

In addition, Section 12.1 (b) of the Partnership Agreement provides that:

"Without prejudice to the requirement for arbitration, each Individual agrees that the Firm may seek provisional relief from a court of competent jurisdiction (in each case whether such Individual is at the time such relief is sought an Individual or a Former Individual): (i) in aid of such arbitration or to prevent any award sought from being rendered ineffectual; or (ii) to protect information Information (as defined by Section 13.5)."

On May 21, 2019, Respondent and Respondent's wife, Tara Lewis, as trustee of the David B. Lewis Irrevocable Trust (the Trust), commenced an action against petitioner in the Circuit Court of the County of St. Louis, 21st Judicial Circuit, State of Missouri, entitled *David*

B. Lewis and Tara W. Lewis, as trustee of the David B. Lewis Irrevocable Insurance Trust v Minnesota Life Insurance Company d/b/a Securian Financial and PricewaterhouseCoopers LLP (No. 19-SL-CC02080) (the "Missouri Court Action"). In addition to Petitioner, Respondent named as a defendant Minnesota Life Insurance Company, the issuer and administrator of a life insurance plan in which Respondent participated as a partner. In that action, Respondent and Respondent's wife allege that shortly prior to the time in 2002 in which IBM acquired the consulting practice, Petitioner either made certain false representations or failed to make certain disclosures to Respondent and consulting practice partners, regarding their continued participation in the partner life insurance plan.

Respondent alleges that when he was informed in 2002 that the part of the company in which he was employed was to be acquired by IBM, he was repeatedly reassured by Petitioner that he, as well as the other partners in the consulting practice, would continue to be covered by the favorable terms and provisions of Petitioner's life insurance plan which had been issued by Minnesota Life. He maintains that he was told that the coverage would not cease after he left but rather would continue without material change during his new employment with IBM as if he had remained a partner.

Respondent contends that he was unaware that substantial unfavorable changes were made in the rates and coverage of the life insurance plan, which caused Petitioner and the irrevocable trust that held the plan as an asset for his beneficiaries to incur approximately \$147,000 in additional premiums and to lose \$3,000,000 in future benefits. The Missouri Court Action is presently pending.

DISCUSSION

Article 75 of the CPLR governs the process by which agreements to arbitrate may be enforced. CPLR 7502 (a) provides:

“The proceeding shall be brought in the court and county specified in the agreement. If the name of the county is not specified, proceedings to stay or bar arbitration shall be brought in the county where the party seeking arbitration resides or is doing business, and other proceedings affecting arbitration are to be brought in the county where at least one of the parties resides or is doing business or where the arbitration was held or is pending.”

CPLR 7503 (a) provides:

“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 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.”

Petitioner contends that because Respondent's claims against it involve representations allegedly made by it to Respondent in connection with his status as a partner of and withdrawal from the firm, the claims arise out of the practice, business or affairs, and therefore fall within the broad arbitration provision set forth in Partnership Agreement.

Petitioner further contends that section 12.1 (a) of the Partnership Agreement expressly confers on this court jurisdiction over proceedings related to any such arbitration, and that section 12.1 (b) explicitly provides that Petitioner may seek provisional relief from a court of competent jurisdiction in aid of such arbitration. Petitioner argues that accordingly, such claims are subject to mandatory arbitration conducted by the American Arbitration Association in the City of New York. Petitioner argues that Respondent's complaint in the Missouri Court Action

emphasizes Respondent's status as an active partner of the firm at the time he entered into the partner life insurance policy.

Additionally, petitioner contends that pursuant to the Federal Arbitration Act (FAA), there is a general presumption that the threshold issue of arbitrability should be determined by a court. Petitioner argues that where an action is brought outside New York, in violation of an agreement to arbitrate in New York, a New York court may enjoin the violating party from proceeding with that foreign action.

In opposition, Respondent argues that he does not recall ever receiving the 2001 Partnership Agreement, or the prior agreement in 1998. As a result, Respondent maintains that he does not recall reading its arbitration provision. Respondent contends that there is therefore no evidence of an offer and acceptance of the arbitration agreement.

Respondent further contends that, even if Petitioner were to come forward with persuasive evidence that it entered into an arbitration agreement, as a matter of New York policy, proceedings commenced in another State should not be enjoined absent a clear demonstration of necessity. He maintains that considerations of judicial economy weigh against compelling him and the Trust to pursue differing aspects of their dispute with Petitioner in New York and Missouri.

The Appellate Division, First Department, has held that the court decides “certain threshold issues before compelling or staying an arbitration” and that “[t]he merits of a controversy are reserved for the arbitrator whose factual findings, interpretation of the arbitration agreement and judgment concerning remedies are binding on the court.” (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Benjamin*, 1 AD3d 39, 43 [1st Dept 2003] [internal quotations and citations omitted]).

Furthermore, the Appellate Division, First Department, has held that

“New York public policy favors enforcement of contracts for arbitration. Thus, on a motion to compel or stay arbitration, the court's role is that of gatekeeper, limited to deciding only three threshold questions: whether the parties made a valid agreement; if so, whether the parties complied with the agreement; and whether the claim sought to be arbitrated is barred by the statute of limitations.”

(*Cooper v Bruckner*, 21 AD3d 758, 758-759 [1st Dept 2005] [citations omitted]).

Here, an examination of the record demonstrates that Respondent was bound by the Partnership Agreement which includes a specific arbitration clause.

First, Arielle Gradman (Gradman), Petitioner's secretary, states in an affidavit dated September 17, 2019 (NYSCEF Doc. No. 20), that prior to the merger in July 1998, Respondent, as a partner of Price Waterhouse, was a signatory of a Price Waterhouse partnership agreement. The “ACKNOWLEDGMENT” page (NYSCEF Doc. No 21), which lists members' names, includes that of Respondent. It states:

“The undersigned acknowledge that they have executed an Agreement, dated as of July 1, 1979 (the “Agreement”) that the Agreement sets forth their rights and obligations as principals in the firm of Price Waterhouse (the “Firm”); and that their respective interests in the Firm are subject to all of the outstanding obligations of the Firm, including those obligations of the Firm arising before the date on which they became-principals of the Firm.”

Gradman states that on or about June 16, 1998, Price Waterhouse partners were presented by email with documents to vote on the proposed merger with Coopers & Lybrand, including the proposed partnership agreement, a copy of which was attached to the email along with a ballot for approval of the agreement. Gradman states that the ballot was provided to the Price Waterhouse partners and included authorizations to permit the new partnership agreement to be signed on behalf of each partner by James Schiro, Price Waterhouse's then Chairman, rather than requiring that 1,100 Price Waterhouse partners sign individually (Gradman Aff. ¶ 4).

Petitioner also submits a “Partner Forum- Announcement/Topic” dated June 30, 1998, from James J. Schiro (NYSCEF Doc No. 23) regarding “Firm Governance and Partnership Matters.” The announcement advised Price Waterhouse partners that Cravath, Swaine & Moore, which Gradman states was the law firm engaged to oversee the voting process, had reported that more than the required two-thirds quorum of such partners had voted to approve both the Merger and the new partnership agreement.

The initial 1998 partnership agreement provided that “[t]his Agreement and the policies adopted in accordance with its provisions shall be binding upon the parties hereto including all Individuals and shall govern the practice and business of the Firm.” (NYSCEF doc No. 24, 1998 Partnership Agreement § 2.2).

Gradman states that in March of 2001, the partners and principals voted to amend the 1998 partnership agreement. Gradman states that on March 30, 2001, Samuel A. DiPiazza, Jr., who at that time was the firm’s Senior Partner, sent an e-mail to all partners and principals that the amended partnership agreement had been approved. (NYSCEF doc No. 20, Gradman Aff. ¶¶ 8-9). The Agreement provides that “this Partners and Principals Agreement is the amended and restated Partners and Principals Agreement of PricewaterhouseCoopers LLP,” and that “[t]his Agreement and the policies adopted in accordance with its provisions shall be binding upon the parties hereto including all Individuals and shall govern the practice and business of the Firm.” (NYSCEF Doc No. 26, Partnership Agreement § 2.2).

Section 12.1 (a) of the Partnership Agreement provides that “[a]ny claim or controversy (including without limitation a claim of controversy involving a Former Individual) arising out of the provisions of this Agreement, the interpretation thereof or the practice, business or affairs of the Firm shall be settled by arbitration conducted by the American Arbitration Association in

in the City of New York in accordance with the Commercial Arbitration Rules of the AAA then in effect. ”

Section 13.7, which discusses “Execution” of the Agreement, states:

“Each Partner and Principal shall execute a counterpart of, or an undertaking to be bound by, this Agreement, as amended from time to time. Such execution may be by electronic transmission. Such counterpart, or undertaking to be bound by this Agreement, shall be filed in the Executive Office of the Firm. Notwithstanding the foregoing, a Partner or Principal shall be deemed a party to and bound by this Agreement from and after his or her admission to the Firm, whether or not such Individual has executed this Agreement or such undertaking. Partnership agreements, other documentation and governmental filings in connection with the Firm's practice and business may be executed on behalf of Partners and Principals by the Senior Partner or the Senior Partner's designee at the direction of the Board of Partners and Principals.”

While Respondent contends that he does not recall receiving the 2001 Partnership Agreement from Petitioner and was not party to the terms of such Agreement, Petitioner submits a copy of Respondent’s written and executed withdrawal agreement from the partnership, dated September 27, 2002 (NYSCEF Doc. No. 27), which references his knowledge of the Partnership Agreement as follows:

“WHEREAS, subject to the provisions of this Agreement, immediately prior to the closing of the transactions contemplated by the Purchase Agreement (the "Closing"), the Withdrawing Partier, a party to the PricewaterhouseCoopers LLP Partners and Principals Agreement, dated as of April 1, 2001, as amended (the "Partnership Agreement") and a member of the Partnership, shall execute this Agreement, redeem his Partnership interest in and voluntarily withdraw (the "Withdrawal) from the Partnership as of the Effective Date as defined in the Redemption Agreement (defined hereafter) (the "Closing Date") and shall receive the consideration described In Section 2 (s) of this Agreement.”

"The law is settled that whether a controversy is properly subject to arbitration is initially one for the courts to determine. The proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute at issue." (*Eiseman Levine Lehrhaupt & Kakoyiannis, PC v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007] [citations omitted]).

Here, the affidavit of Gradman, the documents submitted by Petitioner, as well as Respondent's acknowledgement in the withdrawal agreement that he is a member of the Partnership and "a party of the PricewaterhouseCoopers LLP Partners and Principals Agreement" as amended April 1, 2001, all refute his argument that he was not aware that he was bound by the terms of the Agreement. Furthermore, Respondent fails to present any documentation demonstrating that he specifically raised any objections to provisions of the Partnership Agreement while serving as a partner. Therefore, Petitioner has met its burden of demonstrating that Respondent was a party to the Partnership Agreement and its provisions, which includes an arbitration provision.

The Appellate Division, First Department, has held that "based on the principles of comity, this Court has enjoined litigation in other states pending New York actions under CPLR 7503." (*See Matter of Gramercy Advisors LLC v J.A. Green Dev. Corp.*, 134 AD3d 652, 653 [1st Dept 2015]; *see also County Glass & Metal Installers, Inc. v Pavarini McGovern, LLC*, 65 AD3d 940, 940 [1st Dept 2009] "[w]here arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where, as here, the determination of issues in arbitration may well dispose of nonarbitrable matters," *quoting Cohen v Ark Asset Holdings*, 268 AD2d 285, 286 [1st Dept 2000]).

Pursuant to CPLR 7503 (a) and the case law cited above, an aggrieved party may seek to compel arbitration and enjoin pending proceedings in other states. Therefore, as a valid arbitration provision exists between the parties, this court orders that the arbitration be compelled to take place in New York, and the part of the Missouri action as against Petitioner only is enjoined until the completion of the arbitration.

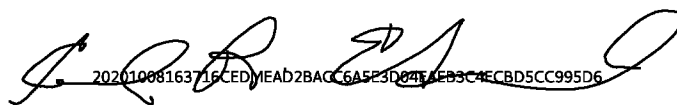
CONCLUSION

Accordingly, it is

ORDERED that Petitioner PricewaterhouseCoopers LLP's motion pursuant to Article 75 of the CPLR to compel Respondent David B. Lewis to arbitrate (motion seq. 001) is granted and Respondent is enjoined from pursuing the Missouri litigation as against Petitioner PricewaterhouseCoopers LLP only, pending resolution of the arbitration; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

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10/8/2020

DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:

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CASE DISPOSED

☒

GRANTED

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DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

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SUBMIT ORDER

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FIDUCIARY APPOINTMENT

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REFERENCE