Grozinsky v Kenwood Commons LLC
2021 NY Slip Op 30342(U)
February 3, 2021
Supreme Court, New York County
Docket Number: 650950/2020
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** ***Justice*** **PART** **IAS MOTION 35EFM**

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DAVID GROZINSKY,

Plaintiff,

- v -

KENWOOD COMMONS LLC,FRYDCO CAPITAL GROUP LLC,DELUXE BUILDING SOLUTIONS LLC,JACOB FRYDMAN

Defendant.

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INDEX NO. 650950/2020

MOTION DATE 06/03/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 31 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

ORDERED that Respondents' motion to dismiss, pursuant to CPLR Article 3211 (a)(2), (3) and (7) (Motion Seq. 002), is granted to the extent that the petition as against Respondents Frydco Capital Group LLC, Deluxe Building Solutions, LLC and Jacob Frydman is dismissed; and it is further

ORDERED that the petition as against Kenwood Commons LLC is severed and shall continue; and it is further

ORDERED that Respondents shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for all parties.

MEMORANDUM DECISION

Petitioner David Kenna Grozinsky commenced this proceeding pursuant to CPLR 7503(a) seeking an order directing Respondents Kenwood Commons LLC ("Kenwood"), Frydco Capital Group LLC ("Frydco"), Deluxe Building Solutions, LLC ("Deluxe") and Jacob Frydman ("Mr. Frydman") (collectively, the "Respondents") to arbitrate Petitioner's claim in accordance with the dispute resolution clause of Petitioner's Employment Agreement dated February 10, 2018 (the "Employment Agreement"). Respondents seek to dismiss the petition pursuant to CPLR 404(a) and 3211(a)(2), (3) and (7) (Motion Seq. 002). For the reasons below, this Court grants Respondents' motion to the extent that the petition as against Frydco, Deluxe and Mr. Frydman is dismissed.

BACKGROUND FACTS

Petitioner's Employment

On or about February 10, 2018, Petitioner entered into an agreement with Kenwood to act as the Executive Director of the Kenwood Artists in Residence Program. The Employment Agreement was signed by Petitioner and Mr. Frydman as Kenwood's "Authorized Signatory".

Among other things, the Employment Agreement provides that if Petitioner is terminated due to the discontinuance of Kenwood's business at the location of Petitioner's employment, or for any reason other than the termination of Kenwood's business, death, disability or termination for cause, Petitioner shall be entitled to continue to receive salary and medical and health benefits for a period of one year which shall be called the "Mitigation Period". During this period, however, Petitioner was required to show his efforts to find comparable employment or become self-employed (see NYSCEF doc No. 2, par. 6(a)).

Exhibit A of the Employment Agreement contains a dispute resolution clause which provides that any dispute initiated by Petitioner "will be brought and shall be fully resolved by binding arbitration brought, heard and conducted by the American Arbitration Association ("AAA") in New York, New York under its Commercial Arbitration Rules." (*Id.*, par. 10)

The Dispute

On February 13, 2019, Petitioner's employment was terminated by Kenwood without cause. Pursuant to the Employment Agreement, Petitioner continued to receive salary and health plan benefits. However, on May 10, 2019, Mr. Frydman advised Petitioner that he will no longer be paid his salary or receive medical benefits because Petitioner failed to provide documentary evidence showing his efforts to find comparable employment or become self-employed (NYSCEF doc No. 3).

The Arbitration

On November 8, 2019, Petitioner filed a Demand for Arbitration with the AAA against all the Respondents herein, claiming damages in the amount of $226,760 (NYSCEF doc No. 6). Petitioner claimed that Respondents "breached the [Employment Agreement] by terminating [Petitioner's] employment without cause and failing to pay the severance as set forth in the contract." (*Id.*) Accordingly, the AAA requested Respondents to pay their share of the filing fee (NYSCEF doc No. 7). None of the Respondents paid the fees despite AAA's repeated request. Consequently, the AAA administratively closed Petitioner's case files on February 6, 2020 (see NYSCEF doc No. 17).

This Proceeding

On February 12, 2020, Petitioner commenced this proceeding pursuant to CPLR 7503(a) seeking an order directing Respondents to proceed to arbitration in accordance with the Employment Agreement (Motion Seq. 001).[1]

In the motion before this Court (Motion Seq. 002), Respondents seek dismissal of the Petition on the ground that Petitioner lacks standing to compel arbitration because he is not an "aggrieved party" within the contemplation of CPLR 7503(a). In support, Respondents contend that Respondents have not attempted any litigation against Petitioner and Petitioner could have paid the balance of the AAA filing fees if he wished to proceed to arbitration (NYSCEF doc No. 29). Respondents also insist that dismissal of the petition is proper as Petitioner cannot compel non-signatory respondents to arbitrate (*Id.*)

DISCUSSION

CPLR 7503 provides that "[a] party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration." On an application to compel arbitration pursuant to CPLR 7503(a), the court's function is to determine whether an agreement to arbitrate and an issue referable to arbitration exists (Advisory Committee Notes; *see also Edgewater Growth Capital Partners, L.P. v. Greenstar N. Am. Holdings, Inc.*, 69 AD3d 439 [1st Dept 2010]).

Petitioner's Standing

Respondents insist that Petitioner here cannot invoke CPLR 7503(a) as he is not an "aggrieved" party within the contemplation of the statute and therefore lacks standing to commence this proceeding.

In support of their position, Respondents first advance the argument that, following the cases of *Koob v. IDS Fin. Servs., Inc.* (213 AD2d 26 [1st Dept 1995]) and *KPMG v Kirschner*

[1] This Motion is not before the Court as it is not yet been fully submitted.

(2018 NY Slip Op 32661(U) [Sup Ct 2018]), a party to an arbitration is not aggrieved until litigation by the other party is attempted. Here, Respondents have not commenced any litigation against Petitioner.

The Court disagrees and finds that Respondent's reliance on *Koob* and *KPMG* is misplaced.

In *Koob*, when petitioner-employee submitted a statement of claim to arbitrate, he simultaneously filed an order to show cause in court to enjoin his respondent-employer from commencing any action arising from his employment contract. The *Koob* court found that petitioner-employee cannot seek relief by order to show cause under CPLR 7503(a) not only because respondent-employer had not commenced any litigation of an arbitrable claim, but also because respondent-employer had yet to be served with the statement of claim and therefore had not yet "failed" to arbitrate ("[I]t requires no discussion that a party who has filed a contemporaneous statement of claim cannot possibly be aggrieved by the failure of the named respondents to proceed to arbitration. This is especially so where the governing rules provide for subsequent service upon the named respondents by the Director of Arbitration (NASD Code of Arbitration Procedure P 3725 [§ 25 (a)])").

The case of *KPMG* also does not lend support to Respondents' contention. The *KPMG* court did not find that a party to an arbitration can seek remedy under CPLR 7503(a) *only* when the other party attempts litigation. In fact, the *KPMG* court found that the remedy is also available when the non-aggrieved party "refuses to comply with an order of a relevant arbitral authority to arbitrate the dispute." More importantly, there is nothing in the *KPMG* opinion which expressly limited the applicability of CPLR 7503(a) to these two circumstances.

Indeed, if this Court were to enforce this State's "long and strong public policy favoring arbitration" (*Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39 [1997]), CPLR 7503(a)

should be interpreted as contemplating each and every situation where one party fails, neglects or refuses to arbitrate in accordance with the parties' arbitration agreement. Without ruling on the merits of Petitioner's 7503(a) application (Motion Seq. 001), this Court in fact found authority for the proposition that a party's failure to pay his portion of the filing fees with the chosen arbitral forum constitutes a failure to arbitrate justifying a court to issue an order to compel arbitration (*see Allemeier v. Zyppah, Inc.* (2018 U.S. Dist. LEXIS 224103, 2018 WL 6038340, at *4 [C.D. Cal. Sep. 21, 2018] [holding that by "repeatedly refusing to pay its portion of the filing fee," among other acts, the defendant "failed or refused to arbitrate"]; *see also Tillman v Tillman* (825 F.3d 1069 [9th Cir. 2016]["Our decision that Tillman's case may proceed does not mean that parties may refuse to arbitrate by *choosing* not to pay for arbitration. If Tillman had refused to pay for arbitration despite having the capacity to do so, the district court probably could still have sought to compel arbitration under the FAA's provision allowing such an order in the event of a party's "failure, neglect, or refusal" to arbitrate. 9 U.S.C. § 4."]).

Respondents next argue that Petitioner is not an aggrieved party under CPLR 7503(a) as he "rejected his remedy to pay the balance of the arbitration fees" (NYSCEF doc No. 29, pp. 4-5). According to Respondents, Rule R-57 of the AAA's Commercial Arbitration Rules provides that "[i]f arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that <u>one of them may advance the required payment.</u>" (emphasis in original) Thus, Respondents aver that Petitioner cannot seek remedy under CPLR 7503(a) now as "he had the opportunity to pay the balance of the fees" in order that arbitration can proceed but he refused to do so.

The Court rejects Respondents' argument. Respondents try to frame the issue as whether or not Petitioner's failure to advance Respondents' filing fees deprives Petitioner standing under

CPLR 7503(a). The Court, however, finds that the real issue is whether or not Respondents' non-payment of the filing fees in the first place entitles Petitioner relief under CPLR 7503(a).

This Court cannot accede to Respondents argument that Petitioner is not "aggrieved" as he failed to advance Respondents' share of the filing fees. This argument places the fault on Petitioner when the language of AAA's Employment/Workplace Fee Schedule (the "Schedule") is clear in that it requires "a non-refundable filing fee of $300.00 [] from the employee…unless the arbitration agreement provides that the employee pay less [and] [a] non-refundable fee of $1,900.00 [] from the employer unless the arbitration agreement provides that the employer pay more."

Indeed, Respondents' argument defeats the policy behind the Schedule. Courts have found that the Schedule reflects AAA's recognition that arbitration costs could be prohibitively expensive and could deter employees from vindicating their rights through arbitration (*see Cooper v MRM Inv. Co.*, 367 F.3d 493 [6th Cir. 2003] [The Cooper court explained that arbitration cost could be high under the old AAA rules but that "[t]he AAA has since amended its rules [] to hold employers responsible in the first instance for all expenses except a small filing fee and costs for the employee's witnesses."]). Indeed, the United States Supreme Court warned in *Green Tree Finance Corp. of Alabama v. Randolph* (531 U.S. 79 [2000]) that "the existence of large arbitration costs could preclude a litigant [] from effectively vindicating her [] statutory rights in the arbitral forum." Heeding this warning, our Court of Appeals held in *Brady v Williams Capital Group, LP* (14 NY3d 459 [2010]) that in determining enforceability of fee-splitting provisions which require employees to pay half of arbitration costs, courts should be mindful of the "strong policy requiring the invalidation of such agreements when they contain terms that could preclude a litigant from vindicating his/her statutory rights in the arbitral forum." Here, the AAA Schedule itself caps the

filing fees payable by the employee. Respondents' efforts to alter the Schedule's payment mechanism simply runs counter to the pronouncements made in *Green Tree* and *Brady*.

Finally, Respondents cannot rely on the case of *Asesd, LLC v Vanguard Constr. & Dev. Co., Inc.* (79 AD 3d 418 [1st Dept 2010]) as that case did not involve a CPLR 7503 (a) proceeding (*see* Index No. 601437/2009; NYSCEF doc No. 1). More importantly, *Asesd* did not involve an arbitration between an employer and an employee and therefore did not implicate the policy of safeguarding the right of an employee to vindicate his rights in an arbitral forum. Asesd was a developer in that case and the parties were arbitrating under the Construction Industry Rules of the AAA which allowed one party to advance fees due from the other party. In fact, in *Asesd*, the AAA expressly requested Asesd "to cover this deposit to avoid any possible interruption in the progress of this case." This is not the case here as there was no such request from the AAA. Moreover, the fees subject of the dispute in *Asesd* represented the arbitrators' compensation and CPLR provides for court intervention on arbitration fees only as part of the award confirmation process under CPLR 7513.[2] The fees at issue here are filing fees, the payment of which is clearly provided for under the Schedule.

The Non-Signatory Respondents

In their motion to dismiss, Respondents also argue that this Court should not permit Petitioner to compel Respondents Mr. Frydman, Frydco and Deluxe (the "Non-Signatory Respondents") to arbitrate as they are not signatories to the Employment Agreement. As to Mr. Frydman, he maintains that he signed the Employment Agreement in his corporate capacity as agent for Kenwood and that act in no way obligates him to arbitrate in his individual capacity.

[2] Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including attorney's fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. The court, on application, may reduce or disallow any fee or expense it finds excessive or allocate it as justice requires.

Petitioner opposes and contends that the Non-Signatory Respondents have a sufficient relationship to the Employment Agreement. In support, Petitioner argues that "[a]ll the Respondents here [] share employees, offices and phone numbers, and [Mr.] Frydman is the CEO, COO and President of them." Petitioner further alleges that "each of [the Respondents] is an alter ego for the other, and all are under the control and ownership of [Mr.] Frydman" (NYSCEF doc No. 30, p. 7).

The issue of whether a party is bound by an arbitration provision in an agreement it did not execute is a threshold issue for the court, not the arbitrator, to decide. (*Matter of KPMG LLP v Kirschner, 182 AD3d 484* [1st Dept 2020], citing *Matter of 215-219 W. 28th St. Mazal Owner LLC v Citiscape Bldrs. Group Inc.*, 177 AD3d 482 [1st Dept 2019]).

Here, Petitioner imputes an intent to arbitrate to Non-Signatory Respondents under the theories of alter-ego and estoppel.

Alter-Ego Theory

Petitioner bears a heavy burden to show that Non-Signatory Respondents are mere alter-egos of Kenwood. The Court of Appeals in the case of *TNS Holdings Inc. v MKI Sec. Corp.* (92 NY2d 336 [1998]) held as follows:

> "Other courts have created an "alter ego" exception, compelling the "alter egos" of a signatory to arbitrate. Akin to piercing the corporate veil to "prevent fraud or to achieve equity", this exception applies as well in determining whether a non-signatory to an arbitration agreement should be bound by it. Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences. Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance." (citations omitted)

This Court finds that Petitioner did not meet his burden of showing that Non-Signatory Respondents may be compelled to arbitrate under the alter-ego theory. While Petitioner alleges

that Respondent entities are all under the control and ownership of Mr. Frydman, "[i]nterrelatedness, standing alone, is not enough to subject a non-signatory to arbitration" (*Oxbow Calcining USA Inc. v American Indus. Partners,* 96 AD3d at 649 [1st Dept 2012], *citing World Bus. Ctr., Inc. v Euro-American Lodging Corp.*, 309 AD2d 166 [1st Dept 2003]). Moreover, Petitioner failed to show that even if Mr. Frydman dominated Kenwood, that control resulted in some fraud or wrong mandating disregard of the corporate form in this case. This Court also cannot make an inference of abuse as to Frydco and Deluxe as they were formed for legal purposes or are engaged in legitimate business (see *TNS,* 92 NY2d 336).

Theory of Estoppel

This Court also finds that Petitioner has not met his "heavy burden" (*Matter of Rural Media Group, Inc. v Yraola*, 137 AD3d 489 [1st Dept 2016]) under the theory of estoppel.

"[A] non-signatory may be compelled to arbitrate where [it] knowingly exploits' the benefits of an agreement containing an arbitration clause" (*Matter of KPMG LLP v Kirschner, 182 AD3d 484* [1st Dept 2020], citing *Matter of Belzberg v Verus Invs. Holdings Inc.*, 21 NY3d 626 [2013]). The Court of Appeals explained that benefits are merely indirect "where the non-signatory exploits the contractual relation of the parties, but not the agreement itself."

Here, Petitioner alleges that Non-Signatory Respondents benefited from the Employment Agreement as they were expressly included in the Indemnification and Non-Disparagement clauses thereof. The Court, however, finds that this benefit is indirect as the inclusion of Non-Signatory Respondents in these clauses arose from or was simply incident to their relationship with Kenwood. Moreover, Respondents are correct that direct benefits must be real and tangible (*see Kramer Levin Naftalis & Frankel LLP v Cornell,* 2016 NY Slip Op 32863[U], *10, [Sup Ct 2016], *affd* 148 AD3d 430 [1st Dept 2017] ["Courts have limited the application of the direct

benefits doctrine to situations in which a non-signatory has obtained a real and tangible benefit from the relevant agreement by either taking affirmative steps to exploit a benefit from a contract by bringing an action of their own based upon the language of the contract or through the enjoyment of monetary benefits of a contract by taking over performance thereunder.”]). Here, Petitioner failed to show that Non-Signatory Respondents have received any real or tangible benefit from the Employment Agreement.

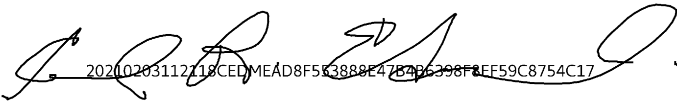
CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that Respondents’ motion to dismiss, pursuant to CPLR Article 3211 (a)(2), (3) and (7) (Motion Seq. 002), is granted to the extent that the petition as against Respondents Frydco Capital Group LLC, Deluxe Building Solutions, LLC and Jacob Frydman is dismissed; and it is further

ORDERED that the petition as to Respondent Kenwood Commons LLC is severed and shall continue; and it is further

ORDERED that Respondents shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for all parties.



2/3/2021			CAROL R. EDMEAD, J.S.C.		
DATE					
CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART		☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT		☐ REFERENCE