ACE Funding Source, LLC v Superior Logistics Ohio LLC
2021 NY Slip Op 30835(U)
March 17, 2021
Supreme Court, New York County
Docket Number: 151521/2020
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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ACE FUNDING SOURCE, LLC,

Plaintiff,

- v -

SUPERIOR LOGISTICS OHIO LLC, and DAVID BURKHOLDER,

Defendants.

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INDEX NO. 151521/2020

MOTION DATE 08/11/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38

were read on this motion to/for MONEY JUDGMENT/COMPEL ARBITRATION.

Upon the foregoing documents, and after argument, the instant motion and cross-motion are decided in accordance with the following memorandum.

Background

Plaintiff commenced this action by summons and complaint filed February 11, 2020. By "Agreement for the Purchase and Sale of Future Receipts," effective December 4, 2019 (the "Agreement") (NYSCEF Doc. No. 2), plaintiff agreed to purchase rights to $447,300 worth of receivables of defendant Superior Logistics Ohio LLC ("Superior") in exchange for $315,000. Superior agreed to maintain a bank account from which plaintiff could withdraw funds to the extent of the full value of $447,300 in Superior's receivables. The Agreement also identifies individual defendant David Burkholder as a guarantor of Superior's obligations under the Agreement.

It is alleged that, despite plaintiff's payment of the $315,000 purchase price, Superior only enabled $97,500 in withdrawals, leaving a balance owing of $352,405. The amended complaint in this action seeks a judgment for said balance, asserting causes of action for breach of the Agreement, performance on the guaranty, unjust enrichment vis-à-vis plaintiff's payment of the purchase price, and conversion in respect of the $352,405 balance owing on the Agreement and viewed as being retained, or converted, by Superior.

Defendants filed an answer in this action asserting affirmative defenses of unconscionability, usury, duress and/or fraud in the inducement, failure of consideration, failure to mitigate, and other defenses (*see*, NYSCEF Doc. No. 18). One of those other defenses is that "[p]laintiff's claims . . . are barred by the express terms of the alleged agreement, which provides that any matter arising therefrom shall be subject to arbitration" (*id.*, ¶ 44). It is undisputed that the Agreement (¶ 29) permits the parties to refer any claim thereunder to arbitration before the American Arbitration Association ("AAA"). Pursuant to the arbitration claim procedure set forth in the Agreement, defendants caused the dispatch of a written notice of intent to arbitrate to plaintiff by certified mail, dated August 10, 2020 (NYSCEF Doc. No. 32). That letter requested plaintiff to withdraw this action on account of defendants' exercise of their contractual right to have the plaintiff's claim resolved in arbitration. When defendants received no response to that request, they filed a cross-motion for an order compelling arbitration of the plaintiff's claim.

Defendants' cross-motion is preceded in time by a motion by plaintiff, pursuant to CPLR 3215 (i), "for failure to comply with stipulation of settlement" (*id.*). The stipulation referred to (NYSCEF Doc. No. 30) presents as a stipulation of settlement of plaintiff's claim in this action on certain stated payment terms. Although the full amount of the claim is $352,405 – as noted in both the complaint in this action and in the stipulation – the stipulation recites a settlement

discount of that full amount for a relatively small reduction of $18,000 (thus, a settlement sum of $334,405) (*see*, NYSCEF Doc. No. 30). The terms of the stipulation require defendant to pay the sum of $2,500 on a daily basis "until the settlement balance has been paid in full" (*id.*). Further terms abound which appear similarly designed to favor plaintiff's economic position in its relationship with defendants. For example, the stipulation at paragraph 6, titled "Waiver of Plaintiff's Liability," purports to waive defendants' rights to assert claims against plaintiff regarding the subject matter of the Agreement, not just with regard to past causes of action, but also with regard to causes of action "which may arise in the future" (*id.*, ¶ 6), whereas paragraph 7 waives causes of action against defendants only as accrued until the day of execution of the stipulation (*see, id.*, ¶ 7). In addition, the stipulation at paragraph 3 places defendants in a status of breach if, as it recites, "there are funds on hold that the Defendants did not disclose to Plaintiff" (*id.*, ¶ 3). Nowhere in the stipulation is there any definition of "funds on hold," precisely stated or otherwise. Further, paragraph 8 forecloses any right of defendants "to cure any missed payments" and, upon any event of a missed daily payment – no matter how nominal in time or in amount, or inadvertent – the stipulation empowers plaintiff to immediately apply to the court "for entry of default judgment" for the entire amount of plaintiff's claim (*id.*, ¶ 9). As a final observation: while plaintiff was represented by counsel in the preparation and execution of the stipulation, defendants were not (*see*, NYSCEF Doc. No. 30 at 5 [stipulation signature page]; NYSCEF Doc. No. 33 [Affidavit of David Burkholder, sworn to August 26, 2020] ¶ 8]).

Discussion

If there is one thing that is certain from the outset, it is the Agreement's clear and unambiguous arbitration clause (¶ 29), which provides:

> **ARBITRATION:** IF BUYER, SELLER OR ANY GUARANTOR REQUESTS, THE OTHER PARTIES AGREE TO ARBITRATE ALL DISPUTES AND CLAIMS

> ARISING OUT OF OR RELATING TO THIS AGREEMENT. IF BUYER, SELLER OR ANY GUARANTOR SEEKS TO HAVE A DISPUTE SETTLED BY ARBITRATION, THAT PARTY MUST FIRST SEND TO ALL OTHER PARTIES, BY CERTIFIED MAIL, A WRITTEN NOTICE OF INTENT TO ARBITRATE. IF BUYER, SELLER OR ANY GUARANTOR DO NOT REACH AN AGREEMENT TO RESOLVE THE CLAIM WITHIN 30 DAYS AFTER THE NOTICE IS RECEIVED, BUYER, SELLER OR ANY GUARANTOR MAY COMMENCE AN ARBITRATION PROCEEDING WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") OR NATIONAL ARBITRATION FORUM ("NAF"). BUYER WILL PROMPTLY REIMBURSE SELLER OR THE GUARANTOR ANY ARBITRATION FILING FEE, HOWEVER, IN THE EVENT THAT BOTH SELLER AND THE GUARANTOR MUST PAY FILING FEES, BUYER WILL ONLY REIMBURSE SELLER'S ARBITRATION FILING FEE AND, EXCEPT AS PROVIDED IN THE NEXT SENTENCE, BUYER WILL PAY ALL ADMINISTRATION AND ARBITRATOR FEES. . . .

(NYSCEF Doc. No. 2 ¶ 29.)

Another thing certain from the outset is that, ordinarily, the Federal Arbitration Act mandates the enforcement of arbitration clauses just like the one quoted above from the parties' Agreement (*see*, 9 USC § 2 [covering arbitration provisions contained in contracts "evidencing a transaction involving interstate commerce"]); *Moses H. Cone Memorial Hosp. v Mercury Constr. Corp.*, 460 US 1 [1983]; *Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247 [2005]). Absent any other extrinsic factor, the FAA definitely applies to the Agreement's above-quoted arbitration clause seeing as the Agreement is of a commercial nature and the parties have taken that commerce across state lines by virtue of their separate locations – plaintiff in Jericho, New York; and defendants in Lancaster, Ohio (*see*, Agreement [NYSCEF Doc. No. 2] at 1). Absent any other considerations, arbitration of disputes, when agreed to as in this case, "is to be advanced by rigorous judicial enforcement of arbitration agreements and by resolution of any ambiguities as to the scope of the arbitration clause itself . . . in favor of arbitration" (*Smith Barney, Harris Upham & Co., Inc. v Luckie*, 85 NY2d 193, 201 [internal quotation marks and citations omitted], *rearg denied* 85 NY2d 1033, *cert denied sub nom Manhard v Merrill*

Lynch, Pierce, Fenner & Smith, Inc., 516 US 811 [1995]). Defendants' cross-motion in this matter, seeking an order compelling arbitration of the within dispute pursuant to the Agreement, requires this court, under any ordinary circumstances, to answer three questions prerequisite to compelling arbitration: "(1) whether the parties made a valid agreement to arbitrate; (2) if so, whether the agreement has been complied with; and (3) whether the claim sought to be arbitrated would be time-barred if it were asserted in State Court" (*id.*, at 201-202). No one has raised any statute of limitations issues in this case; nor does the court perceive of any at this time.[1] Thus, absent any other considerations, this dispute ought to be in arbitration. This is especially so in light of another provision in the Agreement (¶ 30), which allows defendants to opt out of arbitration through the following notice procedure:

> **RIGHT TO OPT OUT OF ARBITRATION:** SELLER AND GUARANTOR(S) MAY OPT OUT OF THIS CLAUSE. TO OPT OUT OF THIS ARBITRATION CLAUSE, SELLER AND EACH GUARANTOR MUST SEND FUNDER A NOTICE THAT THE SELLER AND EACH GUARANTOR DOES NOT WANT THIS CLAUSE TO APPLY TO THIS AGREEMENT. FOR ANY OPT OUT TO BE EFFECTIVE, SELLER AND EACH GUARANTOR MUST SEND AN OPT OUT NOTICE TO THE FOLLOWING ADDRESS BY REGISTERED MAIL, WITHIN 14 DAYS AFTER THE DATE OF THIS AGREEMENT: BUYER – ARBITRATION OPT OUT, ACE FUNDING SOURCE LLC, 366 NORTH BROADWAY, JERICHO, NY 11753, ATTENTION: LEGAL DEPARTMENT.

(NYSCEF Doc. No. 2 ¶ 30.) It is undisputed that defendants never opted out of arbitration pursuant to said opt-out procedure. Much to the contrary: they demanded arbitration (*see*, NYSCEF Doc. No. 32).

Plaintiff, of course, premises its litigation in this matter on the stipulation of settlement which it submits (NYSCEF Doc. No. 30), and which the court made some preliminary observations about earlier on in this writing. Plaintiff is now asking this court to grant it

[1] This action was commenced February 11, 2020; the Agreement was executed (as effective) December 4, 2019; and the stipulation relied upon by plaintiff was executed February 18, 2020.

judgment for the full sum of its asserted claim plus an attorneys' fee component which raises the demanded principal to $437,381.25, plus interest thereon from February 20, 2020 (*see*, Notice of Motion [NYSCEF Doc. No. 19] at 1). However, defendants have raised material issues which would bear relevance on the question of whether the stipulation is, in fact, enforceable. Distinct of what the court perceived hereinabove concerning stipulation terms (both express and vague) which seem to favor the plaintiff's overall economic position, defendant David Burkholder attests to the following facts which are consistent with affirmative defenses alleged in the verified answer in this action:

> Neither I nor Superior were represented by counsel in this action before or on the date that the Stipulation of Settlement was allegedly "entered into," February 14, 2020, or the date it was "agreed to and executed," February 25, 2020, or the date it was filed with the Court, February 25, 2020.
>
> I had numerous communications with Gabriel Askarinam of Ace and Ariel Bouskila, Esq., Ace's attorney, prior to signing the Stipulation of Settlement. They demanded that I sign the Stipulation of Settlement or Ace would freeze Superior's bank accounts and the marshal would seize my personal assets and Superior's corporate assets. Ace's threatened acts would have resulted in the destruction of Superior's business.
>
> To induce me to sign the Settlement Stipulation, Mr. Askarinam and Mr. Bouskila misrepresented that Ace would compel other MCAs to refrain from freezing or seizing Superior's assets and that Ace would enter into a larger refinancing arrangement with Superior that would eliminate the other MCA loans.
>
> Prior to the signing of the Stipulation of Settlement, neither Mr. Askarinam nor Mr. Bouskila informed me that Superior and I were entitled to arbitration under the Agreement or that the Stipulation of Settlement would interfere with right of Superior and me to arbitrate the Agreement.

(Affidavit of David Burkholder, sworn to August 26, 2020 [NYSCEF Doc. No. 33] ¶¶ 8-11.)

The issues of fact raised by defendant Burkholder in his affidavit submitted in opposition to plaintiff's motion for judgment (CPLR 3215 [i]) cannot be ignored by this court. While it is true that stipulations of parties are, under ordinary circumstances, entitled to enforcement, a party to a stipulation is equally entitled to demonstrate that factors underlying the negotiation and

execution of a stipulation warrant an order relieving the party from its terms (*see, In re Frutiger's Estate,* 29 NY2d 143 [1971]; *Campbell v Bussing*, 274 AD 893 [2d Dept 1948]).

Given the strong public policy favoring arbitration in cases where arbitration has been explicitly agreed to (*see, supra*), as the parties did here in the Agreement (NYSCE Doc. No. 2 ¶¶ 29-30), this court finds it inappropriate to summarily determine at this stage that the parties' arbitration agreement should be cast aside, in the midst of defendant Burkholder's attestations, bearing direct relevance on the legal integrity of the stipulation that purports to do away with defendants' right to proceed to arbitration under the Agreement.

By the same token, the issues raised in the instant motion practice make an immediate grant of the cross-motion to compel arbitration impossible at this particular time. It, therefore, appears that plaintiff's motion and defendants' cross-motion cannot be finally determined at this time without affording the parties a fair opportunity to engage in discovery focused on ascertaining the circumstances underlying the preparation, negotiation, and execution of the stipulation, including but not limited to, an exploration of the matters found in defendant Burkholder's sworn affidavit in this matter.

Accordingly, it is

ORDERED that plaintiff's motion for judgment is denied; and it is further

ORDERED that defendants' cross-motion to compel arbitration is granted to the extent that this action is stayed pending discovery directed at the circumstances and terms of the stipulation of settlement filed herein as NYSCEF Document Number 30; and it is further

ORDERED that a status conference will occur in this matter, via videoconferencing to be arranged by the court for May 13, 2021, at 11:00 a.m.

This will constitute the decision and order of the court.

ENTER:

3/17/2021
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE