

Sasson v Reisz

2021 NY Slip Op 30871(U)

March 12, 2021

Supreme Court, Kings County

Docket Number: 509667/2020

Judge: Carl J. Landicino

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, On the 12th day of March, 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
JOEY SASSON AND DAVID HESKIEL,

Index No. 509667/2020

Plaintiffs,

- against

DECISION AND ORDER

PAUL REISZ, SOLOMON WEBER, AND ALL WAYS FORWARDING, INTL. INC.,

MOTION SEQUENCE #1

Defendants.

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

	<u>Papers Numbered (NYSCEF)¹</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	4-10
Opposing Affidavits (Affirmations).....	12-19
Reply Affidavits (Affirmations)	21

Upon the foregoing papers and oral argument the Court finds as follows:

This is a breach of contract and declaratory judgment action concerning commissions. Defendants Paul Reisz (Reisz), Solomon Weber (Weber) and All Ways Forwarding Intl. Inc. (All Ways) (collectively, defendants) move (motion sequence #1) for an order, dismissing the complaint of plaintiffs, Joey Sasson (Sasson) and David Heskiel (Heskiel) (collectively, plaintiffs), pursuant to CPLR 3211 (a) (1) and (a) (7), or, alternatively, staying this action and compelling arbitration pursuant to CPLR 2201 and 7503 (a).² Plaintiffs oppose the motion.

¹ New York State Courts Electronic Filing Document Numbers.

² Plaintiffs filed a notice of discontinuance without prejudice on September 9, 2020 as to defendants Reisz and Weber (collectively, the Dismissed Defendants).

Factual Background and Procedural History

Plaintiffs commenced the present action on June 10, 2020 regarding an Independent Sales Representative Agreement (the Agreement) which the parties signed on February 19, 2013 but was effective as of January 2, 2013 (*see* NYSCEF Doc No. 6). Pursuant to the Agreement, plaintiffs were to refer warehouse and shipping clients to defendant All Ways on an exclusive basis. In return, All Ways was to pay the Plaintiffs commissions on the revenue these referrals generated. The Agreement required All Ways to provide plaintiffs with detailed monthly reports setting forth the commissions earned. Generally, Plaintiffs allege that All Ways largely ignored these obligations and has withheld hundreds of thousands of dollars in commissions.

Plaintiffs, before filing this action, had considered arbitration, Beis Din Tzedek in Brooklyn (hereafter BDT) and requested that it arbitrate the parties' dispute. BDT sent the parties an arbitration notice on May 19, 2020, the parties and BDT corresponded via e-mail, and BDT proposed that arbitration be conducted on June 4, 2020 via Zoom. Plaintiffs agreed to the arbitration proposal, except that defendant Weber, as President and CEO of All Ways, apparently emailed plaintiffs and BDT on May 24, 2020 and advised them that more time was needed to determine whether the arbitration should take place in Los Angeles, California. All Ways had still not committed to participating in arbitration by June 10, 2020, and plaintiffs, as evidenced by this application, then commenced this action. Mr. Weber, on July 19, 2020, apparently sent BDT an email stating that All Ways was willing to proceed with arbitration in Los Angeles. Plaintiffs responded on August 17, 2020 by offering to discontinue this action if defendants would agree to arbitrate before the American Arbitration Association (AAA). Defendants countered by asking whether plaintiffs would agree to use a Beis Din for arbitration. Plaintiffs insisted on arbitration before the AAA and on September 9, 2020, plaintiffs filed a notice of discontinuance without prejudice as to defendants Reisz and Weber individually (*see* n 2).

Arguments

Defendants maintain that the signed Agreement, in clear and unambiguous words, supports dismissal of the action. Defendants contend that since the Agreement is signed by defendants Reisz and Weber in their corporate capacities they cannot be sued personally.³ Second, they highlight that the Agreement specifically mandates that disputes be heard before “an arbitrator agreed to by both parties.” Alternatively, defendants propose that the action be stayed and arbitration compelled in accordance with paragraph 16 of Agreement, which therein provides that:

“This agreement shall be governed by, and in accordance with, the laws of the State of NY, any issues between the parties that might arise should be decided by an arbitrator agreed to by both parties or otherwise in the jurisdiction of the Federal court of the NY Southern district.”

Plaintiffs, in opposition, each submit a nearly identical affidavit, acknowledge that they were presented with the Agreement, concede that they signed it and acknowledge that they did not have counsel review it (*see* NYSCEF Doc Nos. 15 and 19, Sasson Affidavit and Heskiel Affidavit ¶¶ 4-5). They claim that they understood the Arbitration Clause to mean that either party could bring the claim “via a mutually acceptable arbitrator or file suit in Court in New York” and maintain that they would have never signed the Agreement if it had contained a clause requiring them to first attempt to arbitrate the matter before turning to the courts (*id.* at ¶ 6). Plaintiffs further aver that they were unaware when they signed the Agreement that in the event the parties could not reach agreement on an arbitrator, such dispute could not be heard in Federal Court because of the lack of subject matter jurisdiction (*id.* at ¶ 7).

Plaintiffs propose that paragraph 16 of the Agreement is clear that the claimant is free to choose either a mutually agreed arbitrator or the Federal District Court for the Southern District of New York (SDNY). They argue that, as the defendants drafted the Agreement, the defendants were mistaken in

³ As indicated, Plaintiffs have discontinued the actions as against Reisz and Weber personally.

providing for resolution before the SDNY given the lack of subject matter jurisdiction. They further contend that the Agreement should be construed that the parties intended any dispute be litigated in the appropriate New York Court that has subject matter jurisdiction and where venue would be appropriate. Plaintiffs further claim that they have attempted to find a mutually agreeable arbitrator, however, defendants have attempted to stall and therefore the Agreement's arbitration clause, paragraph 16 should be disregarded. Plaintiffs highlight "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono v Shearson Lehman Hutton, Inc.*, 514 US 52, 62 [1995]; *Demetrio v. Stewart Tit. Ins. Co.*, 124 AD3d 824, 826 [2d Dept 2015], *lv denied* 25 NY3d 906 [2015]).

Discussion

On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove his or her claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss.

Kinnear v. Cefoli, 184 AD3d 628, 123 N.Y.S.3d 509, 510 [2d Dept 2020].

Pursuant to CPLR §3013, "[s]tatements in a pleading should be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense" Furthermore, "[a]lthough on a motion to dismiss plaintiff's allegations are presumed to be true and accorded every favorable inference, conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y. 3d 358, 373, 892 N.Y.S.2d 272, 278 [2009].

Where evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one. A motion to dismiss based on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law.

Feggins v. Marks, 171 AD3d 1014, 1015-6, 99 N.Y.S.3d 45, 47 [2d Dept 2019]

As reflected in the Agreement, plaintiffs are limited to bringing any “issues” before (a) “an arbitrator agreed to by both parties” or (b) the SDNY. However, the parties cannot confer subject-matter jurisdiction upon the SDNY. “Thus, the consent of the parties is irrelevant.” *Insurance Corp. of Ireland, Ltd. v Compagnie des Bauxites de Guinee*, 456 US 694, 702 [1982]). The statutory federal court subject-matter jurisdiction provisions are contained in 28 USC § 1331 (federal-question) and 28 USC § 1332 (diversity of citizenship). See *Arbaugh v Y & H Corp.*, 546 US 500, 501 [2006]. Here, there is no federal question. Further, as reflected in the complaint, there is no diversity of citizenship. Opposing parties share citizenship in the same state. This is not disputed.

CPLR 7503 (a), entitled “Application to compel arbitration; stay of action, provides that:

“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.”

In relation to motions pursuant to CPLR 7503 (a) the court must first determine whether the parties entered into a valid arbitration agreement. See *Degraw Const. Grp., Inc. v McGowan Builders, Inc.*, 152 AD3d 567, 569, 58 N.Y.S.3d 152, 154 [2d Dept 2017]. The next inquiry is whether the issue sought to be submitted to arbitration is within the scope of the agreement. See *Revis v. Schwartz*, 192 AD3d 127 [2d Dept 2020]. “It is well settled that on a motion to compel or stay arbitration, the court must determine, among other things, whether the parties made a valid agreement to arbitrate, and if so, whether the agreement has

been complied with.” *Dazco Heating & A.C. Corp. v. C.B.C. Indus.*, 225 AD2d 578, 578 [2d Dept 1996], citing *Matter of Smith Barney, Harris Uphzam & Co. v Luckie*, 85 NY2d 193, 202 [1995], *rearg denied* 85 NY2d 1033 [1995], *cert denied sub nom Manhard v Merrill Lynch, Pierce, Fenner & Smith*, 516 US 811 [1995].

Turning to the merits of the motion, the Court finds that the arbitration clause is not mandatory and is accordingly unenforceable. The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay. See *Matter of Merchants Preferred Ins. Co. v Waldo*, 125 AD3d 864, 865 [2d Dept 2015]. If an arbitration clause is unclear or contradictory, then it is unenforceable. See *Dean v. Harvestime Tabernacle United Pentecostal Church Int'l*, 79 AD3d 793, 794, 913 N.Y.S.2d 707, 708 [2d Dept 2010]; *Spataro v. Hirschhorn*, 40 AD3d 1070, 1071, 837 N.Y.S.2d 258, 259 [2d Dept 2007]. In the instant matter, the movants have not shown that the arbitration clause is mandatory. The arbitration clause only provides that arbitration will take place if it is “agreed to by both parties.” In contract interpretation, an agreement to agree is unenforceable. See *Total Telcom Grp. Corp. v. Kendal on Hudson*, 157 AD3d 746, 747, 68 N.Y.S.3d 491, 492 [2d Dept 2018]; *New York Mil. Acad. v. NewOpen Grp.*, 142 AD3d 489, 490, 36 N.Y.S.3d 199, 201 [2d Dept 2016].

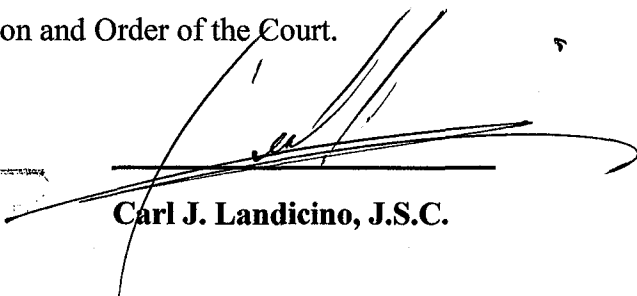
Based on the foregoing, it is hereby ORDERED as follows:

The Defendants’ motion (motion sequence #1):

- (1) To dismiss the action as against the individual Defendants is denied as academic.
- (2) To compel arbitration is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

FILED

MAR 17 2021

KINGS COUNTY CLERK'S OFFICE