

Gross v Tamir

2022 NY Slip Op 30777(U)

March 9, 2022

Supreme Court, New York County

Docket Number: Index No. 158459/2021

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART 12

Justice

-----X

AVROHAM GROSS,

Plaintiff,

- v -

ZAKI ISAAC B. TAMIR, TAMIR LAW GROUP,
P.C.,

Defendants.

-----X

INDEX NO. 158459/2021

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4-22 were read on this motion to compel arbitration.

In this action for breach of contract, an accounting, and unjust enrichment, defendants move pursuant to CPLR 7503 for an order compelling arbitration before a religious tribunal, dismissing this action pursuant to CPLR 3211(a)(7), and staying the action pending resolution of the arbitration. As defendants do not argue in support of their motion to dismiss, it is not considered.

Plaintiff opposes and cross moves for an order compelling the amount alleged in the complaint to be held in escrow pending this proceeding and staying defendants' demand for arbitration.

I. PERTINENT CONTENTIONS

A. Defendants (NYSCEF 4-10)

In a supporting affirmation (NYSCEF 5), defendant Tamir, principal of defendant Law Group, alleges that in 2019, plaintiff, a former non-attorney employee of Law Group, orally agreed to adjudicate the dispute between them through a rabbinical court or Beth Din, and that

on January 2, 2007, when plaintiff converted to orthodox Judaism, he agreed “to adhere to the precepts and regulations of the Jewish faith, which compel all orthodox Jews to seek redress in the first instance, in all civil matters, before a rabbinical court,” a commandment imposed on observant Jews pursuant to verses 8 to 11 of chapter 17 of the Old Testament book of Deuteronomy.

Attached to Tamir’s affirmation is a certificate of conversion on which defendants rely as evidence of plaintiff’s acceptance of “the yoke of the commandments,” which includes the aforementioned obligation to arbitrate all civil disputes among before a rabbinical court. The certificate reads, in pertinent part, as follows:

This document shall serve as evidence for [plaintiff] . . . who appeared before this court composed of the undersigned and asked to enter into the shelter of the divine presence. In our presence he accepted the yoke of the Commandments [those of the Torah and those of the rabbis] . . .

(NYSCEF 7).

Accordingly, by notice of intention to arbitrate, dated September 10, 2021, defendants demand arbitration before a rabbinical court of a dispute with plaintiff arising from his former employment with Law Group. (NYSCEF 8). The notice contains advice that unless plaintiff applies to stay the arbitration within 20 days after service of the notice, he will be precluded from objecting that a valid agreement was not made. As of September 30, 2021, plaintiff registered no objection to the notice, and thus, Tamir argues, plaintiff is precluded from claiming that there was no valid agreement to arbitrate. (*Id.*).

B. Plaintiff (NYSCEF 13-18)

In opposition, plaintiff’s counsel offers his own affirmation, made on information and belief based on conversations with plaintiff and others, and his review of the client file, the annexed exhibits, and court records. He offers emails dated September 3, 2021, and September 7,

2021, wherein he notified defendants' counsel that plaintiff would not agree to arbitrate "in the forum you raised" (NYSCEF 15), and that his firm does not practice Jewish law, that plaintiff no longer practices Judaism, and that there was never an agreement presented referencing arbitration that was noticed and signed by plaintiff.

Plaintiff argues that absent a written agreement, he cannot be compelled to arbitrate before the Beth Din, and that he repeatedly, through counsel, advised defendants in writing that he would not agree to it. In his cross motion for an order staying the arbitration, plaintiff explains his prior failure to seek a stay and asks that the amount he seeks from defendants be placed in escrow. (NYSCEF 14).

C. Defendants' reply and opposition to plaintiff's cross motion (NYSCEF 20)

Defendants reiterate their arguments set forth in their motion and deny that a written agreement to arbitrate is required where the totality of circumstances demonstrates that the parties intended to be bound by documents containing arbitration obligations. They also contend that plaintiff is judicially estopped from asserting the lack of a written arbitration agreement, as his own action against them relies on an alleged oral agreement. Moreover, they maintain that as a matter of public policy, this dispute should be arbitrated before a religious tribunal given the backlog of court cases following the COVID-19 pandemic. According to defendants, New York has no interest in adjudicating this private dispute and claim that arbitration would reduce legal fees and protect the confidentiality of private information which could damage Tamir's reputation.

In opposition to plaintiff's cross motion to compel the placing of the amount in dispute in escrow, they argue that plaintiff does not comply with the requirements of CPLR article 60. Nor, they assert, does he adequately explain why such a remedy is warranted.

Although plaintiff denies the existence of a written agreement to arbitrate, defendants observe that he does not deny the authenticity of his conversion certificate, in which he agreed to accept the obligations of his faith, including the obligation to arbitrate all civil disputes before a Beth Din. They also assert that in New York, a party's membership in or affiliation with an organization whose written rules require the arbitration of disputes between its members or affiliates may constitute an agreement to arbitrate if the party agreed to abide by such rules.

D. Plaintiff's reply to defendants' opposition to his cross motion (NYSCEF 21)

According to plaintiff, his emailed objections to the arbitration "satisf[y] the spirit of the law," and he maintains that defendants' position is inconsistent with justice and due process. In any event, he observes that defendants' position is illogical as it would require that every case brought by and against Jews be litigated before a Beth Din, and that to deny him relief would allow defendants to take advantage of him by virtue of Tamir's knowledge of the law.

II. ANALYSIS

Research reveals that a reviewing court may consider an untimely application for a stay of arbitration where "its basis is that the parties *never agreed to arbitrate*, as distinct from situations in which there is an arbitration agreement which is nevertheless claimed to be invalid or unenforceable because its conditions have not been complied with." (*Matter of Matarasso*, 56 NY2d 264, 266 [1982] [emphasis in original]; see also *Matter of Fiveco Inc. v Haber*, 11 NY3d 140, 143-144 [2008]). In *Matarasso*, the Court held that the rule "barring judicial intrusion into the arbitral process operates only when an agreement to arbitrate exists." The Court relied on the statutory language referencing the "parties" to the agreement, and observed that "[g]iven the ease with which a broader class of persons could have been included within the statute's ambit, we cannot impute to the Legislature an intent to bind persons to the arbitral process by their mere

inaction for 20 days where no agreement to arbitrate has ever been made.” (56 NY2d at 267). Moreover, agreements to arbitrate must be in writing, must be “clear, explicit and unequivocal,” and “must not depend upon implication or subtlety.” (*Bd. of Managers of 825 W. End Condo. v Grunstein*, 192 AD3d 500, 500 [1st Dept 2021]; *Matter of Alliance Masonry Corp. [Corning Hosp.]*, 178 AD3d 1346, 1347 [3d Dept 2019] [citations omitted], *lv denied* 36 NY2d 901 [1975], quoting *Matter of Waldron [Goddess]*, 61 NY2d 181, 183–184 [1984]).

Although defendants contend that a requirement that orthodox Jews arbitrate their disputes before a rabbinical court is incorporated by reference into plaintiff’s certificate of conversion, no such reference appears therein, and a finding that it is so implied would require an interpretation of the certificate, thereby impermissibly entangling me in a matter of religious doctrine. Even if an agreement to arbitrate is implicitly incorporated into the certificate, and even though it need not be signed, defendants must nonetheless offer “other proof that the parties actually agreed on it.” (*Crawford v Merrill Lynch, Pierce, Fenner & Smith*, 35 NY2d 291, 299 [1974] [internal quotation marks deleted] [absence of written contract containing arbitration agreement insufficient in itself to deny motion to compel arbitration, as documentary evidence offered that established that parties bound to arbitrate dispute between them]).

Here, the sole document alleged to contain an arbitration obligation is a biblical provision, and defendants offer no authority for the proposition that such a provision constitutes sufficient documentary evidence of plaintiff’s agreement to arbitrate and they fail to recognize that the resolution of that issue would risk an impermissible entanglement of the court in a matter of religious doctrine. Thus, defendants do not demonstrate that the totality of the circumstances clearly, explicitly, and unequivocally prove that plaintiff agreed to be bound by that particular provision. Rather, defendants’ argument impermissibly depends solely on implication and

subtlety.

Defendants cite *Greenberg v Greenberg*, 238 AD2d 420 (2d Dept 1997), wherein it was found in a matrimonial matter that a spouse's submission to the Jewish faith sufficed to compel arbitration before the Beth Din. By contrast, in *Jacob v Shulamith School for Girls*, the Court was presented with an employment dispute and it rejected the defendant's argument that the case should have been heard by a Beth Din given its status as an orthodox school and the plaintiff's status as an orthodox Jew. Rather, the Court observed, the controversy was resolvable by application of neutral principles of law without reference to religious doctrine. (40 Misc 3d 140, *1 [App Term, 9th and 10th Jud Dists 2013]). Here too, there is no contention that the controversy between the parties cannot be resolved without resort to religious doctrine.

And another matrimonial case, *Avitzur v Avitzur*, 58 NY2d 108 (1983), is distinguishable as there, each party each signed a Jewish marriage contract containing a clear, explicit, and unequivocal promise to appear before the Beth Din. Here, by contrast, defendants rely on a conversion certificate executed over a decade earlier that contains no explicit promise to arbitrate disputes before a religious tribunal. Consequently, defendants do not sufficiently demonstrate that plaintiff agreed to arbitrate the dispute and plaintiff's failure to seek a stay within the statutory period is not preclusive.

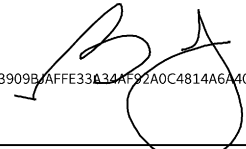
Additionally, there is no legal basis offered for plaintiff's cross motion for an order directing the placement of funds in escrow by defendants.

In light of the foregoing, the parties' remaining arguments need not be addressed or are without merit. Accordingly, it is hereby

ORDERED, that defendants' motion is denied in its entirety; and it is further

ORDERED, plaintiff's cross motion is denied.

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BARBARA JAFFE, J.S.C.

3/9/2022

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