

Ironmen Holdings, LLC v Nieporte

2024 NY Slip Op 33743(U)

October 7, 2024

Supreme Court, New York County

Docket Number: Index No. 651621/2024

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NANCY M. BANNON PART 61M

Justice

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IRONMEN HOLDINGS, LLC, BRAMSHILL INVESTMENTS, LLC, ARTHUR R. DEGAETANO, STEPHEN SELVER, HIHO INVESTMENTS, LLC, and C.P.M. HOLDINGS TRUST,

Plaintiffs,

- v -

WILLIAM V. NIEPORTE,

Defendant,

and

JAMS, INC. d/b/a JAMS ADR SERVICES,

Nominal Defendant.

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INDEX NO. 651621/2024
MOTION DATE 06/25/2024,
07/08/2024
MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 86, 89

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 87, 88, 90, 91, 93, 94, 95

were read on this motion to/for DISMISSAL.

In this action arising from a dispute over the selection of an arbitrator to preside over a pending arbitration captioned Nieporte, William v. DeGaetano, Art, et al., JAMS No. 5425000618 (the "Arbitration"), the plaintiffs seek a judgment declaring that: (1) the arbitration agreement in the parties' underlying contracts requires them to arbitrate before Mark Segall, who previously served as their mutually selected mediator; and (2) the defendant breached the agreement by seeking a different arbitrator.

The plaintiffs now move (MOT SEQ 001) by order to show cause, pursuant to CPLR 6301, to preliminarily enjoin the Arbitration from further proceeding in a manner contrary to the parties' arbitration agreement, *i.e.*, without the appointment of the parties' mutually selected mediator as the arbitrator. The defendant opposes the motion. By orders dated April 3, 2024,

and April 29, 2024, the court granted the plaintiffs' request for a TRO enjoining the Arbitration from further proceeding pending a decision on the plaintiffs' motion. In addition, the defendant moves (MOT SEQ 002) to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7). The plaintiffs oppose the motion. The defendant's motion is granted and the plaintiffs' motion is denied.

The identical dispute resolution clauses in the parties' underlying contracts provide in pertinent part:

If a dispute arises out of or relates to this Agreement or the breach thereof . . . the parties agree first to try in good faith to settle the dispute by mediation administered by JAMS/Endispute. The parties shall select any mutually acceptable panel member from the list of mediators at JAMS/Endispute. . . . Any dispute which cannot be resolved between and among the Members by mediation as described above, shall be settled by binding arbitration . . . before the mediator selected pursuant to this Section utilizing the commercial dispute resolution rules of JAMS/Endispute.

As alleged in the complaint, the defendant commenced a mediation with JAMS pursuant to the above dispute resolution provision in August 2022. The mediation took place in August 2023, with Mark Segall as the mutually selected mediator. The mediation was unsuccessful.

On February 1, 2024, the defendant commenced the Arbitration by filing his statement of claim on the JAMS electronic portal. By email dated the same day, the defendant requested that JAMS issue a strike list for the appointment of a new arbitrator. On February 5, 2024, the plaintiffs submitted an email to JAMS objecting to the appointment of a new arbitrator and explaining that Segall, the mutually selected mediator, is required to be appointed as the arbitrator pursuant to the parties' arbitration agreement. The defendant responded the same day disputing that position and again requesting that a strike list be issued. On February 7, 2024, the defendant requested, pursuant to JAMS Rule 1(c), that the parties' dispute concerning the selection of an arbitrator be submitted for decision to the JAMS National Arbitration Committee ("NAC") or the office of JAMS General Counsel. JAMS Rule 1(c) provides that "[t]he authority and duties of JAMS as prescribed in the Agreement of the Parties and in these Rules shall be carried out by the JAMS National Arbitration Committee ("NAC") or the office of JAMS General Counsel or their designees." JAMS Rule 11(c) provides that "[d]isputes concerning the appointment of the Arbitrator shall be resolved by JAMS."

On February 27, 2024, Alicia Jantsch, Compliance Counsel and Member of the NAC, issued a letter on behalf of JAMS determining that where, as here, an agreement provides for a mediation/arbitration process with the same neutral, JAMS policy requires the parties, following the conclusion of the mediation, to enter an additional “med-arb stipulation” consenting to the mediator serving as arbitrator, and that, given the defendant’s refusal to sign that stipulation, Segall is unable to serve as arbitrator and a new arbitrator must be chosen. The plaintiffs emailed JAMS the same day requesting reconsideration. On March 25, 2024, Sheri Eisner, Senior Vice President, General Counsel, and Co-Chair of the NAC issued a second letter on behalf of JAMS confirming NAC’s prior determination.

The plaintiffs thereafter commenced this action on March 28, 2024, and the instant motions ensued.

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st Dept. 2014). When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court’s role is “to determine whether [the] pleadings state a cause of action.” 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002). To determine whether a pleading adequately states a cause of action, the court must “liberally construe” it, accept the facts alleged in it as true, accord it “the benefit of every possible favorable inference” (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts as alleged fit within any cognizable legal theory (see Hurrell-Harring v State of New York, 15 NY3d 8 [2010]; Leon v Martinez, 84 NY2d 83 [1994]).

Initially, the plaintiffs’ claims are subject to dismissal because they are improperly brought via a plenary action rather than a special proceeding pursuant to CPLR Article 75. CPLR 7502(a) mandates that “[a] special proceeding *shall* be used to bring before a court the first application arising out of an arbitrable controversy” (emphasis added). Further, CPLR 7503(b) provides that a party “may apply to stay arbitration on the ground that a valid agreement was not made *or has not been complied with*” (emphasis added). Thus, issues as to whether

the parties made a valid agreement to arbitrate and whether, if such an agreement was made, it has been complied with, “must be raised as threshold questions under CPLR 7503 (subd. (b)).” Am. Ins. Co. v Messinger, 43 NY2d 184, 191 (1977); see Rockland Cnty. v Primiano Const. Co., 51 NY2d 1, 6–7 (1980); Pena v Off. of the Com’r of Baseball, 125 AD3d 461 (1st Dept. 2015) (“in order to challenge the arbitration clause [as invalid] . . . [plaintiff] would have had to file a motion to stay the arbitration [pursuant to CPLR 7503(b)]”). Aside from such threshold questions concerning procedural requirements or conditions precedent to arbitration, which are reserved for the court to determine upon a motion pursuant CPLR 7503, all other questions regarding a party’s contract performance “are for the arbitrators.” Cooper v Bruckner, 21 AD3d 758, 759 (1st Dept. 2005).

Here, the plaintiffs’ complaint is “the first application arising out of an arbitrable controversy” (CPLR 7502[a]), and it seeks to challenge the defendant’s compliance with the parties’ arbitration agreement. Specifically, it alleges the defendant has breached the arbitration agreement by seeking an arbitrator other than Segall, the parties’ mutually selected mediator. A contractual provision, such as the one allegedly breached by the defendant, specifically providing the procedure for selecting an arbitrator is “a condition precedent to arbitration.” Lassiter v CNA Ins. Co., 195 AD2d 362, 363 (1st Dept. 1993). Objections to proceeding with an arbitration based on noncompliance with a provision providing for such condition precedent must be brought via a motion to stay arbitration under CPLR 7503(b). See Rockland Cnty. v Primiano Const. Co., *supra*; Am. Ins. Co. v Messinger, *supra*; Torres v Nat’l Union Fire Ins. Co., 246 AD2d 326, 327–28 (1st Dept. 1998). Thus, the plaintiffs’ claims concerning the defendant’s noncompliance with the arbitration agreement, and their challenge to proceeding with the Arbitration before any arbitrator other than Segall, should have been brought as an Article 75 special proceeding to stay the Arbitration, and, “[h]aving failed to follow the proper procedure, plaintiff[s] cannot now be heard by bringing these claims in a . . . plenary . . . action.” Pena v Off. of the Com’r of Baseball, *supra*; see Home Ins. Co. v Country-Wide Ins. Co., 134 AD2d 570, 571 (2nd Dept. 1987) (plenary action for declaratory judgment cannot be used in lieu of Article 75 special proceeding to collaterally attack arbitration).

The plaintiffs contend that CPLR 7503 is inapplicable because they are not seeking to stay or avoid arbitration, but rather are asking the court to “find that Defendant breached the [Arbitration] Agreement and to enjoin him, and the underlying arbitration, from proceeding in a manner inconsistent with the Arbitration Agreement.” This argument is specious. An application to enjoin the Arbitration from further proceeding is effectively a procedurally improper

request to stay the Arbitration. And the assertion that the defendant will otherwise proceed with the Arbitration in a manner inconsistent with the arbitration agreement's procedure for arbitrator selection is simply another way of saying that the defendant is not complying with the procedure, which is a condition precedent to arbitration—*i.e.*, one of the express statutory bases for a stay motion under CPLR 7503(b). If anything, given the plaintiffs' evident awareness that "the arbitration was not proceeding in accordance with the [arbitration agreement's arbitrator selection] clause . . . [their] failure to seek a stay on this basis [pursuant to CPLR 7503] constitute[s] a binding waiver of its contractual right" to have Segall serve as the arbitrator. Torres v Nat'l Union Fire Ins. Co., 246 AD2d 326, 327–28 (1st Dept. 1998).

Further, even if the plaintiffs had followed proper procedure and pursued their claims via a CPLR 7503 special proceeding to stay the Arbitration, their motion to stay would be untimely. CPLR 7503(c) provides that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be . . . precluded" from objecting that "a valid agreement was not made or has not been complied with[.]" "This statutory time period is to be strictly construed." GEICO Gen. Ins. Co. v Glazer, 173 AD3d 499 (1st Dept. 2019).

Here, the defendant submits, *inter alia*, the complaint, the parties' underlying contracts, the statement of claim it filed to commence the Arbitration, email correspondence between the parties and JAMS concerning the defendant's request to select a new arbitrator, a copy of the JAMS comprehensive arbitration rules, and the two determinations issued by the JAMS NAC. These submissions conclusively demonstrate that the parties' arbitration agreement adopted the JAMS rules in their entirety; the defendant e-filed his arbitration demand pursuant to the JAMS rules on February 1, 2024, and requested the same day that JAMS issue a strike list for the selection of a new arbitrator; and the plaintiffs, despite being on notice that the defendant was (allegedly) not complying with the arbitrator selection provision in the parties' arbitration agreement, did not commence this action and move to enjoin the Arbitration from further proceeding until March 28, 2024, fifty-seven (57) days after the defendant filed his arbitration demand and thirty (30) days after the JAMS NAC issued its initial determination, on February 27, 2024, that Segall could not act as arbitrator and a new arbitrator would need to be selected.

Although there are limited exceptions to the twenty-day limitations period for filing a petition to stay arbitration, the plaintiffs have not shown that any are applicable here. This is not a situation where an untimely petition to stay is based on an assertion that the parties never

agreed to arbitrate (see GEICO Gen. Ins. Co. v Glazer, *supra* at 499-500), nor do the plaintiffs point to any defects in the defendant’s arbitration demand or raise an issue regarding misleading tactics intended to cause them to default (see Crawford v Merrill Lynch, Pierce, Fenner & Smith, 35 NY2d 291, 296 [1974]; Matter of U.S. Fire Ins. Co. (Lihterman), 201 AD2d 267, 267–68 [1st Dept. 1994]; Nationwide Ins. Co. v Singh, 6 AD3d 441, 444 [2nd Dept. 2004]). “Since a valid agreement to arbitrate exists, and [the plaintiffs] do[] not claim any infirmity [in the defendant’s arbitration demand], compliance with the statutory 20–day time limit is required.” Matter of U.S. Fire Ins. Co. (Lihterman), *supra* at 268. Thus, the plaintiffs’ complaint is not only procedurally improper but also untimely.

Therefore, the defendant’s motion to dismiss the complaint is granted and, in light of the dismissal of the complaint, the plaintiffs’ motion for a preliminary injunction is denied and the TRO previously imposed in this matter is vacated.

Accordingly, upon the foregoing papers and after oral argument, it is

ORDERED that the defendant’s motion to dismiss the complaint (MOT SEQ 002) is granted and the complaint is dismissed; and it is further

ORDERED that the plaintiffs’ motion for a preliminary injunction (MOT SEQ 001) is denied, and the temporary restraining order previously granted by order dated April 3, 2024, and continued by order dated April 29, 2024, is vacated; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

10/7/2024
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE