Kellman v Whyte
2013 NY Slip Op 32938(U)
November 15, 2013
Sup Ct, New York County
Docket Number: 653142/11
Judge: Barbara R. Kapnick

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK Justice

PART 39

Index Number : 653142/2011
KELLMAN, FRANCINE
vs
WHYTE, STEPHEN R
Sequence Number : 001
COMPEL/STAY ARBITRATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/15/13

BARBARA R. KAPNICK, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

----------x

FRANCINE KELLMAN,

Plaintiff,

-against-

STEPHEN R. WHYTE, VITUS GROUP INC., f/k/a MODERN REALTY, INC., VITUS NEW YORK f/k/a APD NEW YORK, LLC, and VITUS DEVELOPMENT LLC f/k/a ALLIED PACIFIC DEVELOPMENT LLC,

Defendants.

----------x

DECISION/ORDER
Index No. 653142/11
Motion Seq. Nos. 001
004

BARBARA R. KAPNICK, J.:

Background

Defendant Stephen R. Whyte ("Whyte") is a resident of Seattle, Washington and is the founder, Managing Director and President of defendant Vitus Group, Inc. ("Vitus Group"). Vitus Group is a Delaware corporation based in Seattle, which develops affordable housing throughout the United States. (Whyte Affid., ¶¶ 1-2).

Vitus Group is the sole Managing Member of defendant Vitus Development LLC ("Vitus Development"), f/k/a Allied Pacific Development, LLC, and Vitus Development is the sole Managing Member of defendant Vitus New York ("VNY"), f/k/a APD New York, LLC. Whyte is the President of Vitus Development and the Chairman, President and Secretary of VNY. (*Id.*, ¶ 3).

Plaintiff Francine Kellman ("Kellman") was employed by Vitus Group as an Associate Director from about September 15, 2008 through December 2010, when she voluntarily terminated her employment. Kellman also served as an officer and Vice President of VNY once that company was formed in October 2008. (*Id.*, ¶ 4; Employment Letter, discussed *infra*).

Whyte asserts that he hired plaintiff to open a branch office for Vitus Group and its affiliates in New York. The proposed terms of plaintiff's employment were outlined in a three-page letter dated July 18, 2008, signed by Whyte on behalf of Modern Realty, Inc. ("Modern"),[1] and plaintiff (the "Employment Letter"). (*Id.*, ¶ 5). Paragraph 3.c of the Employment Letter, entitled Profit-Sharing, includes the outline of a profit sharing plan and specifically provides that "[t]his summary of the profit sharing plan is intended as a summary only. The detailed profit sharing agreement between the parties shall be set forth in the operating agreement of [VNY], as amended." Further, paragraph 12 of the Employment Letter, entitled Severance, refers to "the definition of 'cause' [for termination] as contained in the operating agreement of [VNY]."

---

[1] The parties use the names "Modern" and "Vitus Group" interchangeably, (*see*, Tr., 3:13-17). Hereinafter, Modern shall be referred to as Vitus Group.

Under her signature in the Employment letter, plaintiff made the following notation: "(Subject to addendum signature and agreement)." Plaintiff asserts that she made this notation at Whyte's instruction and that she never received or signed an addendum to the Employment Letter. (Kellman Affid., ¶¶ 7-9).

Plaintiff began working for Vitus Group in New York on or about September 15, 2008. Shortly thereafter, on or about October 28, 2008, VNY was formed. (Kellman Affid., ¶¶ 10-11; Whyte Affid., ¶¶ 7-8). On or about October 29, 2008, Whyte, in his capacity as President of Vitus Development, and plaintiff, in her individual capacity, signed the Operating Agreement of VNY (the "Operating Agreement"). Pursuant to the terms of the Operating Agreement, Vitus Development was VNY's Managing Member and plaintiff was its Non-Managing Member.

Section 5.4 of the Operating Agreement (the "Non-Solicitation Provision") provides as follows:

> Non-Solicitation. Each Non-Managing Member agrees that, as of the date of such Member's execution of this Agreement, and continuing for a period that is one (1) year after the date that such Member's Reference Employee ceases to be employed by the Company or any of its Affiliates, neither such Member nor its Reference Employee will (i) solicit or encourage any employee, consultant or other service provider of Company or any of its Affiliates to terminate his, her or its employment, consulting or other service arrangement with Company or such Affiliate, and (ii) solicit or encourage any

[* 5]

business partner or client of the Company or any of its Affiliates to terminate its relationship with Company or any of its Affiliates or otherwise interfere with such relationship. EXCEPT AT THE SOLE AND ABSOLUTE DISCRETION OF THE MANAGING MEMBER, ANY VIOLATION OF THIS SECTION 5.4 SHALL RESULT IN A RIGHT OF THE COMPANY TO PURCHASE THE VIOLATING MEMBER'S MEMBERSHIP INTEREST FOR THE SUM OF ONE DOLLAR ($1), AND EACH MEMBER HEREBY IRREVOCABLY APPOINTS THE MANAGING MEMBER ITS ATTORNEY-IN-FACT TO TAKE ALL ACTIONS NECESSARY TO EFFECT SUCH A SALE OF THE MEMBER'S MEMBERSHIP INTEREST, WHICH APPOINTMENT IS COUPLED WITH AN INTEREST AND IS IRREVOCABLE.

Section 12.2 of the Operating Agreement (the "Arbitration Provision") provides, in pertinent part, as follows:

(a) Discussion. If there arises any dispute, controversy or claim arising out of or relating to this Agreement or to the Company's affairs or the rights or interests of the Members or the breach or alleged breach of this Agreement, whether arising during the Company term or at or after its termination or during or after the liquidation of the Company (a "Claim"), the Members shall first meet and discuss the Claim. The Members agree that there is no obligation, express or implied, to act reasonably or in good faith during such discussion, and each Member may act in such Member's sole discretion during such discussion.

(b) Arbitration. If not settled by discussion between the Members within thirty (30) days from the date one Member requests in writing to meet with the other Members to discuss a Claim (or the date that the Members first meet to discuss the Claim, whichever occurs first), the Claim shall be settled at the request of any Member by final and binding arbitration conducted in the City of Seattle, Washington, administered by and in accordance with the Streamlined Arbitration Rules and Procedures of J.A.M.S./Endispute or, if such rules no longer exist, the existing rules of practice and procedure of J.A.M.S./Endispute (both sets of rules are collectively referred to as the "Rules of J.A.M.S./Endispute"), and judgment upon any award rendered by the arbitrator may be entered by any state or federal court having jurisdiction thereof. The arbitrator shall be a retired Washington or

> federal judge selected in accordance with the Rules of J.A.M.S./Endispute. The arbitrator and not a jury will decide the dispute.

Plaintiff asserts that Whyte informed her that the Operating Agreement was a writing that he himself had just "put together" and she was given no opportunity to review it prior to signing it. Further, she claims that Whyte assured her there was no reason for her to review the Operating Agreement with an attorney and that, while it was necessary for her to sign it in order to confirm the terms of the Employment Letter, the Agreement was just *pro forma*. Plaintiff further contends that she was unaware that the Operating Agreement contained an Arbitration Provision, or what the legal effect of said Provision would be. (Kellman Affid., ¶¶ 13-23).

In about December 2010, plaintiff voluntarily quit her employment with Vitus Group. (Kellman Affid., ¶ 34; Whyte Affid., ¶¶ 4, 10). Thereafter, by letter dated January 21, 2011, she contacted Whyte through her attorney in order to address the payment of her present and future profit sharing for two projects on which she had worked, for which she was a 10% owner. (Kellman Affid., ¶ 40; Whyte Affid., ¶ 10).

Further, plaintiff maintains that it was only after she sought the foregoing payments that she first learned of Whyte's allegation that she had breached the terms of her employment. (Kellman

Affid., ¶ 41). Whyte claims that he learned from plaintiff that she solicited another Vitus Group employee in the New York office, Brian Raddock ("Raddock"), to terminate his employment with Vitus and to go work with plaintiff in her next business venture. (Whyte Affid., ¶ 10). He alleges that plaintiff's actions violated the Non-Solicitation Provision and, as such, on January 26, 2011, VNY, through its Managing Member Vitus Development, exercised its rights pursuant to that Provision to purchase plaintiff's membership interest in VNY for $1. (Whyte Affid., ¶¶ 10-11; Kellman Affid., Ex. 4 [Letter from defendants' counsel to plaintiff's counsel]). Plaintiff did not cash the $1 check sent to her by defendants and, through her attorney, returned it to Whyte. (Kellman Affid., ¶¶ 41-42).

Plaintiff denies that she solicited any VNY employees to terminate their employment with VNY at any time prior to or after her departure from VNY. She asserts that Raddock had been seeking alternate employment for an extended period and, after he learned she would be leaving VNY, repeatedly asked her if he could join her in her new endeavor. Plaintiff admits that she finally consented to Raddock's request and he did go to work for her. However, she insists that Raddock solicited her and not vice versa. (Kellman Affid., ¶¶ 34-39).

In accordance with the terms of the Arbitration Provision in the Operating Agreement, plaintiff commenced arbitration in Seattle (the "Arbitration") by filing a "Demand for Arbitration Before JAMS," dated April 22, 2011, in which she asserted claims similar to those asserted in this litigation. However, in November 2011, plaintiff withdrew the Arbitration prior to hearing.

She then commenced the instant litigation by filing a Summons and Verified Complaint, dated November 11, 2011, asserting the following nine causes of action: (1) breach of contract (against Vitus Group and VNY); (2) and (3) violation of New York Labor Law ("NYLL") (against Vitus Group and VNY); (4) *quantum meruit* (against Vitus Group and VNY); (5) unjust enrichment (against Vitus Group and VNY); (6) fraud (against all of the defendants); (7) conversion (against Vitus Group and VNY); ("second 7") fraud (against Whyte); and (8) an accounting.

Defendants filed a Verified Answer, dated February 6, 2012, asserting numerous affirmative defenses.

Defendants now move, under motion sequence no. 001, for an order compelling arbitration of all claims pursuant to the Federal Arbitration Act ("FAA"), 9 USC §§ 1-16.

Plaintiff separately moves, under motion sequence no. 004, for

leave to amend the Complaint pursuant to CPLR 3025(b).

Discussion

Plaintiff argues, in the first instance, that she is not required to arbitrate her claims because the gravamen of her case is the enforcement of the Employment Letter, which does not contain an arbitration clause. She also claims that the Employment Letter, which predates the Operating Agreement, sets forth the rights and obligations of the parties and contains all the necessary elements of an enforceable contract, including the profit sharing provisions that plaintiff is seeking to enforce. She further argues that defendants' attempts to merge the Employment Letter and the Operating Agreement are without merit because the Employment Letter does not make reference to the Non-Solicitation or Arbitration Provisions contained in the Operating Agreement, and the Arbitration Provision cannot be extended to include the parties to the Employment Letter.

Plaintiff, however, ignores the plain language of the Employment Letter, which provides that the profit sharing structure outlined in that document was intended only as a summary and indicates that the detailed profit sharing agreement would be set forth in the Operating Agreement. Thus, the profit sharing agreement which plaintiff seeks to enforce in the instant

litigation is found, in its full expression, within the Operating Agreement.

Moreover, the Arbitration Provision, by its terms, applies to "any dispute, controversy or claim arising out of or relating to [the Operating] Agreement." Because plaintiff's claims relate to her non-receipt of payments pursuant to the profit sharing agreement, which is set forth in the Operating Agreement, the Arbitration Provision applies to the claims asserted against Vitus Development, which is a signatory to the Operating Agreement. Further, despite the fact that VNY is not a signatory to its own Operating Agreement, it can enforce the Arbitration Provision contained therein. *See, e.g., Arfa v. Zamir,* 2008 WL 2078678 (Sup Ct, NY Co April 29, 2008), *modified on other grounds,* 55 AD3d 508 (1st Dep't 2008); *Hoffman v. Finger Lakes Instrumentation, LLC,* 7 Misc.3d 179 (Sup Ct, Monroe Co 2005). Thus, the claims asserted against VNY are also subject to the Arbitration Provision.

However, the Arbitration Provision cannot be inferred to extend to the Employment Letter. The Court of Appeals has stated that

> [a]lthough arbitration is favored as a matter of public policy, equally important is the policy that seeks to avoid the unintentional waiver of the benefits and safeguards which a court of law may provide in resolving

> disputes. Indeed, unless the parties have subscribed to an arbitration agreement it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent.

TNS Holdings, Inc. v. MKI Securities Corp., 92 NY2d 335, 339 (1998)(internal quotation marks and citations omitted). Despite the references in the Employment Letter to certain portions of the Operating Agreement, Vitus Group did not subscribe to, or demonstrate "a clear indication of intent" to be bound by the Arbitration Provision in the Operating Agreement. In addition, Whyte, in his individual capacity, is not a signatory to either the Employment Letter or the Operating Agreement and has not indicated his clear intent to be bound by the Arbitration Provision. For the foregoing reasons, plaintiff's claims asserted against Vitus Group and Whyte individually are excluded from the reach of the Arbitration Provision.

The parties next dispute whether the Federal Arbitration Act ("FAA") applies to the Arbitration Provision. The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 USC § 2. The FAA reflects a "liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, ___ US ___, 131 SCt 1740, 1745 (2011)(*citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 US 1, 24

[1983]).

In particular, plaintiff argues that the FAA cannot apply because the case does not "involve" interstate commerce. "It is well settled that the FAA applies to any and all contracts involving interstate commerce. Further, it has been held that the term 'involving interstate commerce' should be broadly read as 'the functional equivalent of "affecting".' *Diamond Waterproofing Co. v. 55 Liberty Owners Corp.*, 6 AD3d 101, 104 (1st Dep't 2004), *aff'd* 4 NY3d 247 (2005) (internal citations omitted); *see also, ImClone Systems Inc. v. Waksal*, 22 AD3d 387, 387-388 (1st Dep't 2005).

Here Vitus Group, a Delaware corporation based in Seattle, entered into the Employment Letter with plaintiff, a New York resident, for work to be performed in New York. Moreover, the Arbitration Provision is part of the Operating Agreement of a company, the members of which reside and do business in different states. Thus, it is clear that the parties' contractual relationship "involves" interstate commerce. In fact, plaintiff implicitly conceded as much when she commenced the Arbitration in Seattle.

Plaintiff next asserts that the Arbitration Provision cannot be enforced against her because the Operating Agreement was

fraudulently induced and the question of enforceability under these circumstances is for this Court. The United States Supreme Court has stated that

> [c]hallenges to the validity of arbitration agreements upon such grounds as exist at law or in equity for the revocation of any contract can be divided into two types. One type challenges specifically the validity of the agreement to arbitrate. The other challenges the contract as a whole, either on a ground that directly effects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.

Buckeye Check Cashing, Inc. v. Cardegna, 546 US 440, 444 (2006)(internal quotation marks and citations omitted).

> [I]f the claim is fraud in the inducement of the arbitration clause itself - an issue which goes to the making of the agreement to arbitrate - the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

Id. at 445, *quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 US 395, 403-404 (1967).

Since here plaintiff asserts that the Operating Agreement, and not just the Arbitration Provision, was fraudulently induced, that question is reserved for the arbitrator and cannot be considered by this Court.

For the foregoing reasons, defendants' motion to compel arbitration of the Complaint is granted only with respect to those claims asserted against Vitus Development and VNY. Plaintiff's claims asserted against Vitus Group and Whyte in his individual capacity are stayed pending a final determination of the arbitration. At the conclusion of the arbitration, plaintiff shall inform this Court as to whether or not she chooses to pursue the stayed claims.

Since the remaining claims in this Court are now stayed, plaintiff's motion for leave to amend the Complaint, which purports to make changes which both parties agree are minor and non-substantive, is denied at this time without prejudice to renew if deemed appropriate after completion of the arbitration hearing.

This constitutes the decision and order of this Court.

Date: Nov. 15, 2013

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.