SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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SOUTHPORT LANE MANAGEMENT, LLC AND SOUTHPORT LANE, L.P.,

Plaintiffs,

-against-

KEVIN ADLER AND BRAIN LESSIG

Defendants.

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DECISION AND ORDER

Index No. 155915/2016

Hon. Anil C. Singh:

Motion sequence 001 and 002 are consolidated for disposition.

In motion sequence 001, plaintiffs move to dismiss four counterclaims pursuant to CPLR 3211(a)(7). Defendants oppose the motion.

In motion sequence 002, plaintiffs Southport Lane Management, LLC ("SLM") and Southport Lane, L.P. ("SLLP") (collectively, "Southport") seek an order staying arbitration pursuant to CPLR 7503(b) and (c). Defendants Kevin Adler ("Adler") and Brian Lessig ("Lessig") oppose the motion.

SLM, established in 2010, functioned as a private equity and asset manager focused on investments within the insurance industry. Defendants Adler and Lessig together with Alexander Burns ("Burns"), chief strategist of SLM, managed SLM's insurance and reinsurance investment opportunities. Burns hired both Adler and Lessig at his sole discretion acting on behalf of SLM. The defendants, prior to

September 2010, became officers of SLM and obtained an equity interest in both SLM and SLLP, which was outlined in their separate employment agreements with SLM. Defendants' employment agreements contained identical arbitration provisions. According to the amended complaint, Lessig and Adler entered into separate separation agreements with SLM in 2012, confirming the defendants' existing status as officers of SLM and equity holders in SLM and SLLP (See Pl. Amend. Compl. at 4).

The defendants' relationships with Southport gradually soured and by 2013, Lessig and Adler left Southport. Southport contends that since February 2014, it lost a significant amount of money, has limited financial capital, and functioned solely for the benefit of its creditors (id. at 4).

Plaintiffs' complaint states that Lessig and Adler, as officers of Southport, breached their fiduciary duties and committed fraud along with Burns (id). Southport contends that around October 2011, defendants and Burns tried unsuccessfully to procure a Luxembourg reinsurance company associated with North Channel Bank, a German bank. But around November 2011, defendants purchased a significant interest in North Channel Bank, and Southport argues that "defendants planned to use their authority as officers to cause plaintiffs and their affiliates to (a) acquire assets; (b) package those assets into one or more investments that could serve as collateral for a loan and use the proceeds of the

loan to close the German Bank Deal in their individual capacities" (Id. at 3). Also, around October 2012, the plaintiffs claim that defendants created three mutual funds using "Southport's name, goodwill, and financial resources to acquire the assets and funds. Burns and defendants concealed the deal and the true purpose from other members of Southport's management" (id.) Plaintiffs purport that they never received an interest in either deal and that the defendants acted on their own behalf, abandoning the interest of Southport Management.

Relevant to these motions are the arbitration provisions in the defendants' respective employment agreements. Both arbitration provisions state:

> To ensure the rapid and economical resolution of disputes that may arise in connection with your employment with Southport, you and Southport agree that any and all disputes, claims, or causes of action, in law or equity, arising from or relating to your employment, or the termination of your employment, will be resolved, to the fullest extent permitted by law by final, binding and confidential arbitration in New York, NY conducted by JAMS, or its successors, under the then current rules of JAMS for employment disputes; provided that:
>
> a. The arbitrator shall have the authority to compel adequate discovery for the resolution of the dispute and to award such relief as would otherwise be permitted by law; and
>
> b. The arbitrator shall issue a written arbitration decision including the arbitrator's essential findings and conclusions and a statement of the award; and
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> c. Both you and Southport shall be entitled to all rights and remedies that you or Southport would be entitled to pursue in a court of law; and
>
> d. Southport shall pay all fees in excess of those which would be required if the dispute was decided in a court of law.
>
> Nothing in this Agreement is intended to prevent either you or Southport from obtaining injunctive relief in court to prevent irreparable harm pending the conclusion of any such arbitration. Notwithstanding

> the foregoing, you and Southport each have the right to resolve any issue or dispute arising under the Proprietary Information and Inventions Agreement by Court action instead of arbitration.

Adler Employment Agmt. at 9; Lessig Employment Agmt. at 10.

In addition, Lessig and Adler executed separation agreements with Southport in 2012 that included similar arbitration provisions, stating:

> If any dispute shall arise between the Parties, whether arising from or related to this Agreement, or otherwise, the Parties shall remain bound by the Arbitration Agreement contained within Attachment B to the Employment Agreement dated [the particular date of the applicable Employment Agreement]. To compel arbitration, the Parties consent to the jurisdiction of the State and Federal Courts of the State of New York.

Def. Answer at 23; Separation Agmt. ¶14.

On July 15, 2016, the plaintiffs filed a complaint against the defendants. Southport's complaint alleges breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, conspiracy to commit fraud, the agreements were not bargained at arm's-length, self-dealing, and intentional breach of defendants' fiduciary duties.

Defendants' answer asserts nine affirmative defenses. The eighth affirmative defense is that this dispute is subject to arbitration.

Defendants assert five counterclaims. The first counterclaim asserts that plaintiffs owe defendants severance pay and owe a duty of indemnification. The second counterclaim seeks attorneys' fees and related expenses. The third counterclaim alleges defamation. The fourth counterclaim alleges breach of

contract regarding disparagement. The fifth counterclaim seeks punitive damages based on alleged harassment and bad faith.

On November 1, 2016, defendants' demanded arbitration by serving Southport with demands for arbitration pursuant to CPLR 7503(c), pursuant to the provisions of their agreements.

Discussion

Plaintiffs' claims and three of defendants' counterclaims are covered by the arbitration provisions

Plaintiffs argue that defendants' employment agreements and separation agreements are not valid because they include broad releases and other provisions designed to shield defendants' fraudulent actions.

The First Department in Kennelly v. Mobius Realty Holdings LLC, 33 AD3d 380 (1st Dept 2006), considered the issue whether a valid agreement to arbitrate existed between the parties. In Kennelly, the plaintiff purchased three lots on East 51st Street in Manhattan and retained the defendants -- a brokerage firm who represented the owners -- services for the transaction (See id.). The parties executed three separate agreements for the respective lots that included identical arbitration clauses (See id.) Additionally, the plaintiff purchased another parcel nearby on Second Avenue, allegedly not wishing to retain defendants' services as his broker (See id.). The plaintiff claimed that there was no valid brokerage

agreement for that particular lot (See id at 381). The defendants claimed the opposite and alleged that plaintiff executed a valid agreement identical to the previous agreements retaining their brokerage services for the Second Avenue lot (See id. at 381).

In turn, the defendants pursuant to the arbitration provision served a demand for arbitration on the plaintiff, who demanded a permanent stay of arbitration for the case to be heard in court (See id.). The court determined that plaintiff raised a threshold issue regarding the validity of the parties' agreement and was an issue for the court to decide (See id. at 382). "It is a judicial responsibility, and not the arbitrator's, to decide the threshold question of whether the parties are bound by a valid agreement to arbitrate" (id.; see also Matter of County of Rockland, 51 NY2d 1 [1980]; see also Matter of Prinze Jonas, 38 NY2d 570 (1976)).

Unlike in Kennelly, here the arbitration provisions in both the defendants' employment agreements and separation agreements explicitly state that matters regarding employment will be resolved by arbitration. In the instant action, unlike in Kennelly, Southport did not raise a threshold issue regarding the defendants' employment agreements or separation agreements. The plaintiff in Kennelly proved a possible threshold issue by asserting that he never signed nor agreed on retaining the defendants' services as broker concerning the Second Avenue property. Unlike in Kennelly, Southport and defendants' both signed and agreed to

compel arbitration in both of the defendants' respective agreements. Further, unlike in Kennelly, Southport did not submit an affidavit that "sufficiently detailed the circumstances constituting the alleged fraud" (id at 382). In the instant case, Southport did not establish a threshold issue between the parties.

Even if the employment agreements or separation agreements are not valid, the arbitration provisions within them are valid. "To demonstrate that fraud permeated the entire contract, it must be established that the agreement was not the result of an arm's length negotiation, or the arbitration clause was inserted into the contract to accomplish a fraudulent scheme" (Anderson St. Realty Corp. v New Rochelle Revitalization, LLC, 78 AD3d 972, 975 [2d Dept 2010] (internal citations omitted)).

Specifically, the arbitration clauses provide:

> To ensure the rapid and economical resolution of disputes that may arise in connection with your employment with Southport, you and Southport agree that any and all disputes, claims, or causes of action, in law or equity, arising from or relating to your employment, or the termination of your employment, will be resolved, to the fullest extent permitted by law by final, binding and confidential arbitration in New York, NY conducted by the Judicial Arbitration and Mediation Services/Endispute, Inc. ("JAMS"), or its successors, under the then current rules of JAMS for employment disputes.

(Adler Employment Agmt. 9; Lessig Employment Agmt. 10).

The language in the parties' arbitration agreements is unambiguous and easily interpreted from the language within the defendants' employment contracts. There is no evidence that the arbitration provisions were permeated by fraud. In

interpreting arbitration agreements, courts will "give effect to the parties' intent and reasonable expectations based on the language used in the agreement" (DiMartino v. Dooley, 2009 WL 27438, at * 5 (S.D.N.Y. Jan. 6, 2009)). Not only did the defendants' employment agreements include arbitration provisions, but the separation agreements also included an arbitration provision signifying Southport's intention to arbitrate employment matters in JAMS.

Moreover, pursuant to CPLR 7503(b), in order to stay arbitration, a significant issue must arise "that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502." (CPLR §7503(b); see also, Zachariou v. Manios, 68 AD3d 539, 539–40 [1st Dept 2009]). "It should be emphasized that in the absence of a compelling public policy, arbitration is a preferred means for the settlement of disputes" (Prinze v. Jonas, 38 NY2d 570, 574 (1976)).

The parties executed valid employment agreements and separation agreements requiring that all employment issues that arise between the parties are arbitrated by JAMS. Therefore, pursuant to the arbitration provisions in the agreements, all of plaintiffs' claims and defendants' counterclaims are to be arbitrated. In order for a party to be compelled to arbitrate, "the agreement must be clear, explicit and unequivocal" (In re Waldron v. Goddess, 61 N.Y.2d 181, 183 (1984)).

Southport's complaint alleges breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, conspiracy to commit fraud, the agreements were not bargained at arm's-length, self-dealing, and intentional breach of defendants' fiduciary duties. Defendants counterclaims allege severance pay and indemnification, attorneys' fees, defamation, breach of contract regarding disparagement, and punitive damages and sanctions. "Once it is determined that a valid agreement to arbitrate exists and that the matter in controversy falls within the scope of the agreement, all judicial inquiry must end" (Liberty Mgt. & Const. Ltd. v. Fifth Ave. & Sixty-Sixth St. Corp., 208 AD2d 73 [1st Dept 1995]). Plaintiffs' claims and three of defendants' counterclaims pertain to defendants' employment at Southport and must be submitted to JAMS.

"[A]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage" (AT&T Technologies, Inc. v. Communications Workers of America., 475 U.S. 643, 649 (1986) (internal quotation marks and citation omitted); see also Monarch Consulting Inc. v. Nat'l Union Fire Ins. Co., 26 N.Y.3d 659, 674-76 (2016)). The arbitration provisions in the agreements are clear and convincing that any matters pertaining to defendants' employment will be determined by JAMS.

Cost of arbitration

Moreover, plaintiffs allege that in order to adequately arbitrate this issue, the parties will need to find a "well qualified neutral," which could exceed $100,000 plus the additional 12% JAMS fee. The arbitration provision states, "Southport shall pay all fees in excess of those which would be required if the dispute was decided in a court of law." Southport contends that the cost of arbitration would prevent it from pursuing its claims against the defendants.

The plaintiffs' rely on the case Brady v. Williams Capital Grp., L.P., where the New York Court of Appeals court determined, "the issue of a litigant's financial ability is to be resolved on a case-by-case basis. The inquiry should consider the following questions: whether the litigant can pay the arbitration fees and costs; what is the expected cost differential between arbitration and litigation in court; and whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum" (Brady v. Williams Capital Group, L.P., 14 NY3d 459, 460 (2010)).

In this case, unlike in Brady, Southport's employment contracts did not include an equal sharing of arbitration fees and costs, but instead Southport's exclusive responsibility to pay all fees required in arbitration. Southport did not submit concrete evidence showing that the cost of litigating in court would be less expensive than an arbitral forum. "Arbitration is a creature of contract, and it has

long been the policy of this State to interfere as little as possible with the freedom of consenting parties in structuring their arbitration relationship" (id. at 465). Southport failed to demonstrate that it was unable to bear the costs of arbitration, thus invaliding the arbitration agreement. Plaintiff did not prove that the cost of arbitration is substantial enough to deter plaintiffs from asserting claims in the arbitral forum.

Demand for arbitration served properly

Southport's allegations that defendants' demand for arbitration was served improperly does not have merit. Pursuant to CPLR 7503(c), a demand to arbitrate "shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. Service of the application may be made upon the adverse party, or upon his attorney if the attorney's name appears on the demand for arbitration or the notice of intention to arbitrate. Service of the application by mail shall be timely if such application is posted within the prescribed period." (CPLR 7503(c)).

Southport argues that it did not receive defendants' demand for arbitration, but, according to the evidence at hand, Southport received their demand for arbitration on or about November 4, 2016. "A rule which provides that service is complete upon mailing is a sound one. It allows a claimant to determine with certainty when its claim has been made and to control whether the claim has been

timely interposed" (Allied Wholesale, Inc. v. Asia N. Am. Eastbound Rate Agreement, 212 AD2d 472, 473 [1st Dept 1995]). Exhibits I and J show that the demand for arbitration was delivered by priority and certified mail. The defendants provided plaintiffs with appropriate notice and was within the twenty-day period. Plaintiffs' allegations have no merit.

Motion to Dismiss Counterclaims pursuant to CPLR 3211(a)(7)

Plaintiffs move to dismiss the second, third, fourth and fifth counterclaims.

Pursuant to CPLR 3211(a)(7), a motion to dismiss for failure to state a cause of action lies if the pleading is defective on its face. The pleading must be construed liberally, the factual allegations are deemed to be true, and the nonmoving party is granted the benefit of every possible favorable inference (Mahler v. North Shore Camp, LLC, 145 A.D.3d 678, 678 [2nd Dept., 2016])

The second counterclaim alleges that defendants have rights to indemnification, including the right to have all legal fees reimbursed, under a provision in the employment agreements, which states in part:

> To the fullest extent permitted by applicable law, Southport agrees to advance your incurred reasonable legal expenses and to indemnify you (an "Indemnified Party") from and against any and all losses, claims, damages and liabilities, joint or several, to which such Indemnified Party may become subject relating to, arising out of, or in connection either with this Agreement or the actions entailed with performing the duties required of the position of President and/or an officer of Southport….

In short, the Court finds that the second counterclaim is sufficient to state a cause of action based on the simple fact that the agreements contain the broadly-worded indemnification provision. Whether the defendants are entitled to indemnification under the provision is a factual issue for the arbitrator.

The third counterclaim asserts a cause of action for defamation based on the allegations contained in the complaint. "It is well established that a statement made in the course of legal proceedings is absolutely privileged if it is at all pertinent to the litigation" (Lacher v. Engel, 33 A.D.3d 10, 13 [1st Dept., 2006]; see also Kaye v. Trump, 58 A.D.3d 579 [1st Dept., 2009; Arts4All, Ltd. v. Hancock, 5 A.D.3d 106 [1st Dept., 2004]).

The fourth counterclaim alleges breach of contract regarding disparagement based on a provision in the separation agreements, which states in part:

> The parties … agree that each will not do or say anything that would have the effect of diminishing or constraining the goodwill and reputation of the other.

The fourth counterclaim is sufficient to state a cause of action based on the simple fact that that the separation agreements contain this broadly-worded provision. Whether a party violated the provision is a factual issue for the arbitrator.

The fifth counterclaim seeking attorneys' fees and sanctions alleges that the complaint and amended complaint were filed in "bad faith" and for the sole

purpose of "harassing" the defendants. New York does not recognize a common-law cause of action to recover damages for harassment (Daulat v. Helms Bros., Inc., 18 A.D.3d 802, 803 [2nd Dept., 2005]).

Accordingly, it is

ORDERED that the motion to stay arbitration between plaintiffs Southport Lane Management, LLC and Southport Lane, L.P. and defendants Kevin Adler and Brian Lessig is hereby denied;[1] and it is further

ORDERED that the motion to dismiss counterclaims is granted, and the third and fifth counterclaims are dismissed.

The foregoing constitutes the decision and order of the court.

Date: April 14, 2017
New York, New York

Anil C. Singh

[1] The court notes that defendants failed to move to compel arbitration and stay this action.