Edgewater Growth Capital Partners, L.P. v Greenstar N. Am. Holdings, Inc.
2009 NY Slip Op 33341(U)
March 27, 2009
Supreme Court, New York County
Docket Number: 108641/08
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

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EDGEWATER GROWTH CAPITAL PARTNERS, L.P., *et al.*

Plaintiffs,

-against-

Index No. 108641/08
Motion Date: 11-17-08
Motion Seq. No.: 01

GREENSTAR NORTH AMERICA HOLDINGS, INC.

Defendant.

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PRESENT: EILEEN BRANSTEN, J.:

Pursuant to the Federal Arbitration Act ("FAA") and CPLR 7503 and 3211, defendant Greenstar North America Holdings, Inc. ("Greenstar") moves to compel arbitration and stay or dismiss this action. Plaintiffs Edgewater Growth Capital Partners, L.P., Edgewater IV Management LLC, Bear Holding LLC, JZ equity Partners PLC, Brian Meng, Philip B. Rooney, and James A. Gordon (collectively "Edgewater") oppose the motion.

Background

In October 2007, pursuant to the Agreement for Purchase and Sale of All Outstanding Capital Stock ("Agreement") of Recycled Holdings Corporation ("the Company"), Edgewater sold its stock in the Company to Greenstar. The parties contemplated that the Company's subsidiary would enter into an exclusive supply agreement and provide recycled materials at certain volumes to Wing Fat Printing Co. Ltd. ("Wing Fat Contract"). The

parties initially believed that the Wing Fat Contract would be in place at the time of the Agreement's closing. It became clear, however, that the contract would not be finalized in time so the parties accounted for that in the Agreement.

Specifically, section 2.6 discussed a letter of intent between the Company and Wing Fat, which set forth the material terms of the anticipated contract, including securing a necessary license. The Agreement explicitly set forth that Greenstar placed value on the contract and that the purpose of Section 2.6 was to protect it in the event that there was a problem with the Wing Fat Contract down the line.

Significantly, section 2.6 is Greenstar's "sole and exclusive remedy" with respect to the Wing Fat Contract.

Pursuant to the provision, the parties put a $5 million holdback amount in escrow to "partially protect [Greenstar] in the event the Company [was] unable to deliver the commercial relationship contemplated in the Letter of Intent on substantially the same (or more beneficial) terms as those set forth" (Agreement at 2.6[b]). The Agreement further stated that damages could be greater than $5 million but not exceed $7.5 million (the "China Damage Cap").

In accordance with the Agreement, if, within 180 days of the closing, the license was secured and the Wing Fat Contract was finalized on substantially the same or better terms than those in the letter of intent, the holdback amount would be released to Edgewater. If the

license was not secured and the contract not entered into by the first anniversary of the Agreement's closing date, then Greenstar would be "entitled to the full amount of the China Damage Cap as liquidated damages," which would be satisfied through the holdback amount and other money that was placed in escrow.

The Agreement stipulated that "if the Company . . . secures the license and enters into the [Wing Fat Contract] on substantially the same terms as the Letter of Intent before the first anniversary of the Closing Date but more than one hundred and eighty (180) days from the date hereof, the Parties agree that [Greenstar] will be harmed. In such a circumstance, the Parties agree that [Greenstar] will be entitled to recover its damages from the Escrow Amount in an amount up to the China Damage Cap, as determined in accordance with the dispute resolution provisions set forth below" (Agreement at 2.6[d][iii] [emphasis added]).

Likewise, if the Wing Fat Contract closed before the first anniversary date of the Agreement but on terms that were not substantially the same or more beneficial as those in the letter of intent, Greenstar would be harmed and entitled to damages to be determined via the dispute resolution process (Agreement at 2.6[d][iii]).

Section 2.6(d)* of the Agreement is titled "Dispute Resolution." It sets forth that if the Wing Fat Contract closed before the Agreement's one-year anniversary but Greenstar

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* The Agreement contains two sections labeled 2.6(d). Dispute resolution is covered in the second.

"believes that it is entitled to retain all or a portion of" the holdback amount under section 2.6(d)(iii), it was required to give Edgewater notice of its claim(s) within 45 days of execution of the Wing Fat Contract. The notice was to set forth the amount held in escrow that Greenstar proposed to retain and was to be accompanied by any supporting materials. Failure to object to the notice's contents within 30 days would constitute acceptance of Greenstar's claim, which would become "final and binding." If there was an objection, however, the parties were to "use reasonable good faith efforts to resolve the dispute within thirty (30) days."

Section 2.6(d) next accounts for inability by the parties to achieve resolution and, in that event, provides that they:

> "shall submit the dispute to a nationally recognized accounting firm . . . whose determination of the China Damage Claim shall be made in accordance with this Section 2.6 and shall be final and binding (the 'China Damage Arbitrator') If [the parties] are unable to agree on a China Damage Arbitrator, each will select a nationally recognized accounting firm, who will then select a third nationally recognized accounting firm to serve as 'China Damage Arbitrator' hereunder. In submitting a dispute to the China Damage Arbitrator . . ., each party shall prepare a detailed statement in support of their respective calculation of the China Damage Claim. The China Damage Arbitrator shall be required to accept any determinations for which there is agreement between [the parties], and will only decide upon matters on which there is a substantive dispute. The party whose calculation of the China Damage Claim is mathematically furthest from that of the Final China Damage Claim (as defined below) shall pay the fees and expenses of the China Damage Arbitrator. The value of the China Damage Claim determined by the China Damage Arbitrator will be binding on the parties, and shall be referred to as the "Final China Damage Claim."

On April 1, 2008, Greenstar received a letter from Edgewater, requesting release of the $5 million holdback. Greenstar responded that it did not believe that the conditions for release had been met because, among other things, the Wing Fat Contract had not timely closed within 180 days of the Agreement (March 31, 2008).

Greenstar maintains that Edgewater's counsel emailed in mid-April that a Company representative was "currently in China" to execute the Wing Fat Contract (Complaint, Ex. C). Subsequently, Greenstar received a copy of a license necessary for the Wing Fat Contract that was dated April 1, 2008. It also received an executed copy of the contract that had "an effective date of February 1, 2008," but was allegedly executed in mid-April.

On May 23, 2008, Greenstar informed Edgewater that it would not release the holdback amount and that it was claiming damages. Greenstar formally asserted that the Wing Fat Contract was not timely finalized and that "the terms of the Executed [Wing Fat Contract were] not substantially similar (or more beneficial than) the terms set forth in the Letter of Intent" (Complaint, Ex. C at 3). Greenstar next delineated perceived material differences between the letter of intent and the executed contract and claimed $5,748,953.94, reserving the right to seek additional damages later.

On June 20, 2008, Edgewater objected to the claim, responding that "Greenstar is not entitled to make a China Damage Claim." Edgewater stated that the license was secured in

March 2008,and, although it did not take effect until April 1, it made no difference since the parties continued to use a third party's license to conduct business. Edgewater also asserted that the Wing Fat Contract was entered into in February 2008 "on substantially the same terms" as the letter of intent and that Greenstar had not been damaged. It also contended that Greenstar failed to follow section 2.6's procedure because it failed to provide "supporting documentation and other materials" corroborating its claims. It informed Greenstar that it commenced this action.

In this case, Edgewater alleges that Greenstar was improperly attempting to invoke section 2.6's dispute-resolution procedure (Complaint at ¶ 2). Edgewater maintains that the "Company secured [the necessary] license, and entered into the [Wing Fat Contract] prior to March 31, 2008. Therefore Greenstar has no right, basis or ground to make a claim and cannot invoke [the] procedure" (Complaint at 4).

Edgewater alleges that "Effective February 1, 2008 the Company entered into [the Wing Fat Contract] and attaches a copy of the contract to its complaint (Complaint at ¶ 27). The undated contract conveniently begins with the recitation that it "is entered into effective as of February 1, 2008 ['Effective Date']" (Complaint Ex D [emphasis added]).

Edgewater seeks a declaration that "Greenstar has no contractual or other right, basis or ground to withhold sums due [Edgewater] or invoke the 'Dispute Resolution' procedure

set forth in the second Section 2.6[d] of the Purchase Agreement. [Edgewater also seeks] an injunction . . . [directing] that Greenstar release . . . all sums withheld" (Complaint at ¶ 5).

In July 2008, Greenstar wrote Edgewater that it would respond to the lawsuit and that because it received an objection to its claims, it was willing to meet "to use reasonable good faith efforts to resolve this dispute in accordance with Section 2.6(d) of the Agreement" (Clarke Aff., Ex. 5). No meeting was ever held.

Greenstar now moves to dismiss the complaint based on the dispute-resolution scheme contained in section 2.6 of the Agreement. It contends that the arbitration provision has been triggered because the Wing Fat Contract did not timely close. It relies on a series of emails, including an April 9, 2008 email in which a Company representative, Brian Meng, stated that he was "enroute to close the contract" (Clarke Aff, Ex 1). Days later, in response to being asked "How goes it," Mr. Meng reported: "Going well, meeting with Wing Fat President in a few hours" (*id.*) A few days later, Mr. Meng was again asked how it was going, and on April 16, 2008, he replied that "The bird is in the cage" (*id.*).

According to Greenstar, based on the Agreement, the closing date beyond March 31, 2008 alone deems it "harmed" and entitles it to invoke the agreed-upon dispute-resolution procedure. Greenstar also argues that the terms of the Wing Fat Contract were less favorable than those contained in the letter of intent. Greenstar maintains that Edgewater is ignoring

the mandatory arbitration process and that it is contractually bound to submit the claims disputes to arbitration (Supp Mem at 6).

Edgewater counters that it is for the court to determine the scope of the parties' Agreement and whether or not the dispute-resolution procedure covers the claims here. It urges that section 2.6(d) is an "appraisal clause" as opposed to an arbitration clause because it "presumes liability and relates solely to the amount of damages, not to whether any bases or grounds to assert a claim have arisen in the first instance" (Opp Mem at 5). It maintains that section 2.6(d) is all about calculation of damages--an appraisal clause--and not assessing liability.

Edgewater argues:

> "Section 2.6(d) is silent as to who determines whether facts exist that allow Greenstar to make a claim for damages in the first instance. Rather, the procedure sets forth there provides only that an 'accounting firm' is to determine the *amount* of a presumably validly asserted China Damage Claim. The fact that the provision denominates this accounting firm as the 'China Damage Arbitrator' demonstrates the limited scope of its charge and responsibility--that is, to determine 'damages,' not whether a claim exists" (Opp Mem at 6).
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> "[The questions presented here] are of a legal nature, requiring [among other things] the . . . the interpretation of what 'enter into' means . . . These are not 'accounting' questions" (Opp Mem at 14).

Analysis

Arbitration agreements are contracts and their meaning is to be determined from the language employed by the parties under accepted rules of contract law (*Matter of Cowen & Co. v Anderson*, 76 NY2d 318, 321 [1990]). Because the parties' contractual language is unambiguous and the conditions for the parties' chosen means of dispute resolution have been satisfied, this action must be stayed pending arbitration of Greenstar's China-Damage related claims.

Section 2.6(d) of the Agreement sets forth a "Dispute Resolution" procedure, which must be invoked in "the event the Company enters into the [Wing Fat Contract] prior to the first anniversary of the Closing Date, but [Greenstar] believes that it is entitled to retain all or a portion" of the holdback amount because, among other reasons, either the contract's terms were not substantially the same or more beneficial than those in the letter of intent or the contract was "entered into" more than 180 days after the Agreement's closing date. Greenstar believes that it is entitled to the holdback amount for those reasons; thus, it has the right to provide written notice to Edgewater and pursue the matter through the contractually agreed upon arrangement.

Though not itself determinative, it is telling that the parties called a dispute related to the Wing Fat Contract a "China Damage Claim" and called the accounting firm(s) entrusted to resolve any disputes the "China Damage Arbitrator." The parties elected a procedure

whereby they would submit detailed statements to the arbitrator(s) who are then to "decide upon matters on which there is a substantive dispute" (Agreement at 2.6[d][emphasis added]). Nowhere does section 2.6(d) limit the authority of the arbitrator or clearly limit the issues simply to mathematics.

To the extent that Edgewater believes there have been no damages, it can make that argument to the arbitrator(s) and it can value the China Damage Claim at zero.

In any event, the Agreement explicitly provides that even if the Wing Fat Contract has been entered into on substantially the same terms as those in the letter of intent--as Edgewater claims and regardless of what Greenstar "believes"--if it was "entered into" more than 180 days from the Agreement's closing, Greenstar is "harmed" and entitled to damages "as determined in accordance with the dispute resolution provisions" (Agreement at 2.6[d][iii]).

Edgewater has not established that there is any ambiguity about whether the Wing Fat Contract was entered into more than 180 days from the Agreement's closing. A contract is "entered into" on the day it is executed. That the parties to the Wing Fat Contract recited that it was "entered into effective as of February 1, 2008" does not create any ambiguity or alter the well-accepted meaning of "enter." Greenstar has adduced evidence establishing that the Wing Fat Contract was entered into--that it was finalized and closed--after March 31, 2008. Edgewater has not alleged anything to the contrary or supplied any proof that the contract

was actually entered into at an earlier date. It is telling that Edgewater does not assert that the parties entered into the Wing Fat Contract on February 1, 2008. It alleges just that "Effective February 1, 2008, the Company entered into" the arrangement (Complaint at ¶ 27).

Accordingly, it is

ORDERED that Greenstar's motion to compel arbitration and to stay litigation is granted; and it is further

ORDERED that the parties shall arbitrate their claims in accordance with the terms of section 2.6 of the Agreement and in conformity with the Agreement's arbitrator-selection provision; and it is further

ORDERED that the action is stayed pending the outcome of arbitration.

This constitutes the Decision and Order of the Court.

Dated: March 27, 2009
New York, N.Y.

ENTER:

Hon. Eileen Bransten