Matter of Kliger-Weiss Infosystems, Inc. v Epicor Retail Solutions Corp.
2011 NY Slip Op 33799(U)
August 31, 2011
Supreme Court, New York County
Docket Number: 109108/11
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HELVIN L. SCHWEITZER Justice
HELVIN L SCHWEITZER J.S.C.

KUCERA-WEISS INTERNATIONAL, INC.

-v-

EXCOR RETAIL SOLUTIONS CORP.

INDEX NO. 109108/11

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by petitioner to stay an arbitration proceeding commenced by respondent before the AAA is DENIED; and the temporary restraining order entered August 8, 2011 is VACATED.

Dated: August 31, 2011

HELVIN L SCHWEITZER J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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

In the Matter of the Application of KLIGER-WEISS INFOSYSTEMS, INC.,	
Petitioner,	Index No. 109108/11
For an Order Under CPLR Article 75 Staying Arbitration,	DECISION AND ORDER
-against-	Motion Sequence No. 001
EPICOR RETAIL SOLUTIONS CORPORATION	
Respondent.	

MELVIN L. SCHWEITZER, J.:

Petitioner Kliger-Weiss Infosystems, Inc. ("KWI") moves by order to show cause for a preliminary injunction staying an arbitration proceeding commenced by respondent Epicor Retail Solutions Corporation ("Epicor") before the American Arbitration Association ("AAA") until Epicor satisfies certain alleged pre-conditions to arbitration as set forth in a contract between the parties. The dispute arises out of a sub-licensing arrangement between the parties set forth in several documents (collectively, the "Contract"). Epicor claims it is owed approximately $683,000 under the Contract, which, in breach of the Contract, KWI refuses to pay. The Contract contains a multi-step dispute resolution procedure that culminates in arbitration, which is provided in Schedule B to the Contract. *See* Ex. 1, Schedule B, to the Affidavit of Douglas J. Good, sworn to on August 5, 2011. Schedule B provides that:

> If the parties are unable to resolve the dispute by negotiation, any party may submit a dispute for mediation by written notice to the other parties. The mediator shall be selected by mutual agreement of the parties.

> The parties shall meet and conduct the mediation, under the guidance of the mediator, in order to discuss their differences and to seek a resolution of the dispute. The mediation shall be treated as a settlement discussion and shall be confidential. The mediator may not testify for any party in any later proceeding relating to the dispute. The mediation proceedings may not be recorded or transcribed.
>
> Each party shall bear its own costs of the mediation, but shall share the costs of the mediator equally. If the parties have not resolved the dispute by mediation *within 90 days after submission to mediation*, any party may submit the dispute to arbitration.
>
> If the parties are unable to resolve such dispute pursuant to Section 2, the dispute shall be submitted to binding arbitration to be conducted in New York, New York before a single arbitrator (the "Arbitrator") in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the "AAA") then in effect and the further procedures set forth herein. (emphasis added)

On April 1, 2011, Epicor demanded mediation of the dispute, the parties agreed on a mediator, a mediation was held, settlement negotiations broke down and no settlement was reached. During the process, on April 19, 2011, Epicor also filed a demand for arbitration before the AAA, and now seeks to proceed with the arbitration. KWI, on the other hand, asserts that the parties did not satisfy the 90-day provision contained in the mediation clause quoted above.

The issue presented here is whether the AAA arbitrator should decide whether the mediation procedure has been satisfied or whether this court should decide the issue. The court concludes the issue is one for the arbitrator to decide, not this court. The United States Supreme Court has held that questions concerning whether prerequisites to arbitration have been met are for arbitrators – not courts – to decide. *John Wiley & Sons, Inc. v Livingston*, 376 U.S. 543, 557-58 (1964) (holding that the issue of whether two prerequisite steps to arbitration had been followed should be decided by an arbitrator); *see also Howsam v Dean Witter Reynolds, Inc.*, 537

U.S. 79, 85 (2002) (quoting the Uniform Arbitration Act of 2000 that an "arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled").

Thus, it is up to the AAA arbitrator to decide whether any prerequisites to arbitration, such as 90 days passing after a request for mediation, have been met.[1]

Apart from its failure to show probability of success, KWI has not demonstrated that it would suffer irreparable injury if the AAA arbitration proceeds. KWI claim that it would be prejudiced by incurring "the expense of filing" its answer and any counterclaim in the AAA arbitration. However, it is axiomatic that no irreparable injury exists where the petitioner can be compensated by money damages.

Finally, a balancing of the equities weighs against granting KWI a preliminary injunction and slowing down the pending AAA arbitration. The whole point of including an arbitration clause in the contract was to have an expedited AAA procedure for resolving disputes. And even KWI is not disputing the validity of the arbitration clause, under which the parties agreed to resolve any disputes before a AAA Arbitrator, not in court.

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[1] Epicor argues that the issue of who decides whether the prerequisite to arbitration has been met should be decided under CPLR 7503, rather than the Federal Arbitration Act, 9 U. S. C. 1, *et seq* (the "FAA") The court disagrees. This dispute between KWI, based in Port Washington, New York, and Epicor, with headquarters in Quebec, Canada affects "commerce" as that term is used in FAA § 2, making the FAA applicable. *See Cantor Fitzgerald Securities v Refco Securities*, LLC, 83 AD3d 592, 593 (1st Dept 2011); *see also Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 (2005). The fact that the Contract in issue here provides for the application of the "substantive law . . . in the arbitration" does not render CPLR Article 75 applicable to decide the threshold procedural issue. Rather, the choice of law provision in the Contract only provides for the application of New York law in deciding the substantive *contract* dispute and cannot be used to render the FAA inapplicable. *See e.g. In the Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 NY2d 173, 180 ("the parties' choice of law will be given effect if to do so will not conflict with the policies underlying the FAA"). In any event, New York courts have similarly held that the timeliness of a claim for arbitration is for determination by the arbitrator, not the courts. See *Merritt Engineering Consultants, P.C. v 55 Liberty Owners' Corp.*, 18 AD3d 210, 210 (1st Dept 2005), *citing Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d at 253.

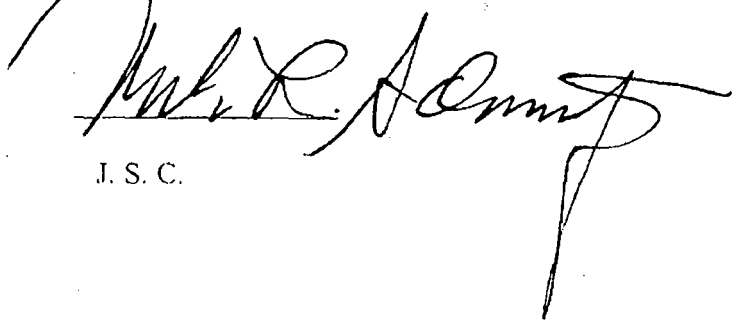
Accordingly, it is hereby

ORDERED that petitioner's motion for an order staying the arbitration is denied; and it is further

ORDERED that the temporary retraining order entered on August 8, 2011 is vacated..

Dated: August 31, 2011

ENTER



J. S. C.