| **World Cable Inc. v Thompson-West** |
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| 2012 NY Slip Op 31136(U) |
| April 25, 2012 |
| Sup Ct, NY County |
| Docket Number: 100709/12 |
| Judge: Donna M. Mills |
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SCANNED ON 5/1/2012
[* 1]

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

**PRESENT : DONNA M. MILLS**
*Justice*

**PART 58**

*WORLD CABLE INC.,*

Plaintiff,

-v-

TRACY THOMPSON-WEST,

Defendant.

INDEX NO. 100709/12

MOTION DATE ______

MOTION SEQ. NO. 001

MOTION CAL NO. ______

The following papers, numbered 1 to ______ were read on this motion.

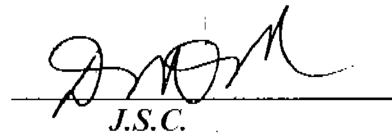
| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/Order to Show Cause-Affidavits Exhibits.... | 1 |
| Answering Affidavits– Exhibits | 2 |
| Replying Affidavits | 3 |

CROSS-MOTION: ___ YES ___ NO

Upon the foregoing papers, it is ordered that this motion is decided as follows:

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.

**Dated:** 4/25/12



*J.S.C.*

DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION NON-FINAL DISPOSITION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

WORLD CABLE INC.,

Petitioner,

- against -

TRACY THOMPSON-WEST,

Respondent.

INDEX NO. 100709/12

DECISION/ORDER

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DONNA M. MILLS, J:

In this special proceeding, Petitioner World Cable Inc. ("Petitioner") brings this action against Respondent Tracy Thompson-West ("Respondent"), to stay arbitration pending the determination of this declaratory judgment petition that there is no employment contract between these parties.

BACKGROUND

Petitioner is a television company that distributes television programming to retail customers via cable. Respondent is an individual with experience in the relevant television market and who previously was employed by national distributors of television programming.

On or about December 2, 2010, Petitioner and Respondent entered into a written employment contract. Pursuant to the employment contract, Respondent agreed to be employed by Petitioner as Petitioner's Chief Executive Officer for a period of three years commencing on January 1, 2011. The employment contract contains a provision providing for specific payments to be made by Petitioner to Respondent in the event that Petitioner terminated the employment contract prior to the expiration of its term.

The employment contract also contains a provision which states that in the event of any dispute between Petitioner and Respondent in any way related to the terms of the employment contract, it would be resolved exclusively by binding arbitration by the American Arbitration Association.

Despite having signed the employment contract, Petitioner contends that

Respondent never was hired nor performed any work because the contract was conditioned upon Respondent providing up to four million dollars by investors into the Petitioner, and since that was not feasible after the contract was signed, the parties went their separate ways. Respondent contends that there were no conditions to the employment contract and alleges that she was terminated without cause and without making the payments specified under the early termination clauses of the Employment Contract.

The parties were unable to resolve their dispute, which led to the Respondent commencing a proceeding against Petitioner in Supreme Court, New York County. On or about August 19, 2011, Petitioner's attorney moved for a change of venue to Queens County from New York County. The parties thereafter entered into a stipulation dated October 11, 2011, whereby Respondent and Petitioner stipulated and agreed to discontinue the lawsuit without prejudice, and to submit this matter to binding arbitration pursuant to the arbitration clause contained in the employment contract.

Pursuant to the stipulation, Respondent served a demand for arbitration on Petitioner, and an amended demand for arbitration on or about November 17, 2011. Notwithstanding the stipulation entered into between the parties in the first action, Petitioner commenced this action for an order staying arbitration, and an order declaring the employment contract unenforceable.

Petitioner alleges in its petition that it entered into the employment contract with Respondent because Petitioner anticipated that Respondent would provide financing for Petitioner from unspecified investors, and that this investment would be made before Respondent was employed by Petitioner. However, there is no reference to the supposed financing or investors anywhere in the employment contract which was executed by the parties. Petitioner further alleges that the aforesaid expectation on the part of Petitioner constitutes a failure of consideration, a mutual mistake, and or fraud.

APPLICABLE LAW & DISCUSSION

Petitioner's claim that the contract should be voided due to lack of consideration is without merit. Consideration is found where there is either a benefit to the promisor or a detriment to the promisee ( see, Weiner v. McGraw–Hill, 57 N.Y.2d 458, 464, 457 N.Y.S.2d 193, 443 N.E.2d 441). In this employment contract, consideration for

Petitioner's promise to pay Respondent for her services were proposed in the contract to benefit Petitioner (2 Corbin, Contracts § 6.2, at 213–216). An employee's agreement to be employed is sufficient consideration for an employment contract (Hajdu Nemeth v Zachariou, 309 AD2d 578 [1st Dept 1982]). Thus, because the employment contract was supported by consideration, the agreement to arbitrate was likewise supported by consideration ( see, Sablosky v. Edward S. Gordon Co., supra, at 137, 538 N.Y.S.2d 513, 535 N.E.2d 643). Not only is there adequate consideration to support the agreement by Respondent to submit to arbitration but the employment contract provides that in the event of any dispute between Petitioner and Respondent in any way related to the terms of the employment contract, it would be resolved exclusively by binding arbitration.

A mutual mistake, however, exists where "the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (Chimart Assoc. v. Paul, 66 N.Y.2d 570, 573, 498 N.Y.S.2d 344, 489 N.E.2d 231)."When an error is not in the agreement itself, but in the instrument that embodies the agreement, 'equity will interfere to compel the parties to execute the agreement which they have actually made, rather than enforce the instrument in its mistaken form' " ( Hadley v. Clabeau, 161 A.D.2d 1141, 555 N.Y.S.2d 951). The party alleging that there is a mutual mistake must establish such mistake by clear and convincing evidence ( see Matter of Vadney, 83 N.Y.2d 885, 886–887, 612 N.Y.S.2d 375, 634 N.E.2d 976; see also PJI 4:11). Here, the record establishes only a unilateral mistake by Petitioner who argues that the parties neglected to include in the contract the oral understanding that employment was conditioned upon Respondent obtaining the prerequisite financing. Respondent refutes the Petitioner's contention that there was a condition placed on her employment. It is clearly stated that the employment contract shall supersede any and all previous contracts arrangements or understandings between the parties.

The elements of fraud in the inducement require proof of "a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the [party to whom the representation was made], and resulting injury" (Centro Empresarial Cempresa S.A. v.

America Movil, S.A.B. de C.V., 2011 WL 2183293, 2011 N.Y. Slip Op 04720 [Ct App 2011] [internal quotation marks omitted] ). Each of these elements must be satisfied by clear and convincing evidence ( see State v. Industrial Site Services, Inc., 52 AD3d 1153, 1157 [3d Dept 2008]). As such, Petitioner's arguments based on lack of consideration, mutual mistake and/or fraud is baseless

The Court also agrees with Respondent that this application for a stay of arbitration is not timely. CPLR section 7503 ( c) requires that petition seeking a stay of arbitration must be brought within twenty days after a demand for arbitration. The twenty day limitation period set forth in CPLR 7503( c) is to be strictly enforced and the court has no jurisdiction, unless there was never an agreement to arbitrate, to entertain an untimely application (Matter of Propulsora v Omni Hotels Franchising Corporation, 211 AD2d 546 [1st Dept 1995]).

Here, Respondent served Petitioner's counsel with a demand for arbitration and an amended demand for arbitration dated November 15, 2011 and served upon Petitioner's counsel on or about November 17, 2011. The petition to stay arbitration was filed on January 23, 2012. As the petition to stay arbitration has been made by Petitioner over two months after a demand for arbitration was served upon Petitioner's counsel, the petition is untimely and must be denied.

Finally, the parties entered into an aforementioned stipulation in this Court disposing of the matter and agreeing to arbitrate this matter, yet Petitioner commenced this action. It has long been held that "[p]arties, by their stipulations, may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce (Matter of New York, Lackawanna & W. R.R. Co., 98 N.Y. 447, 452 [1885] ). The parties herein are bound by their stipulation and the court is bound to enforce it.

Accordingly it is

ADJUDGED that the petition to stay the subject arbitration is denied in all respects, and the petition is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED that the parties shall proceed to arbitration forthwith and

respondent's counsel shall serve a copy of this judgment upon the arbitral tribunal; and it is further

ADJUDGED that respondent, having an address at 381 Park Ave. South, Suite 701, New York New York 10016, do recover from petitioner, having and address at 3152 Albany Crescent, Second Floor, Bronx, New York 10463, costs and disbursements in the amount of $______________as taxed by the Clerk, and that respondent have execution therefor.

Dated: 4|25|12

ENTER:

J.S.C.

UNFILED JUDGMENT

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