Matter of Stroock & Stroock & Lavan, LLP v Perlis
2012 NY Slip Op 33331(U)
January 17, 2012
Supreme Court, New York County
Docket Number: 652559/11
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

Index Number : 652559/2011
IN THE MATTER OF THE
vs.
PERLIS, MICHAEL F.
SEQUENCE NUMBER : 001
COMPEL OR STAY ARBITRATION

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

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~~ by petitioner to compel arbitration before the American Arbitration Association is GRANTED per the attached Decision and Order.

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

Dated: January 17, 2012

[signature], 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

[* 2]

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

In the Matter of the Application of STROOCK & STROOCK & LAVAN, LLP, Petitioner, -against- MICHAEL F. PERLIS, Respondent.	Index No. 652559/11 DECISION AND ORDER Sequence No. 001

MELVIN L. SCHWEITZER, J.:

Petitioner, Stroock & Stroock & Lavan, LLP (Petitioner), seeks to compel respondent Michael F. Perlis (Respondent), a former partner in Petitioner, to arbitrate their dispute before the American Arbitration Association (AAA). In 1989, Respondent became a partner in Petitioner, working in Petitioner's Los Angeles office. In July 2011, Respondent withdrew from Petitioner and has gone to work for another law firm in Los Angeles. The dispute arises out of Respondent's claims for age discrimination, retaliation, constructive discharge, breach of contract , and in particular with respect to retirement benefits under the partnership agreement he signed when he joined the firm in 1989, as subsequently amended (the Partnership Agreement), which Petitioner contends Respondent forfeited when he went to work at another law firm. In furtherance of his claims including his claim to retirement benefits, on August 5, 2011, Respondent initiated a lawsuit in Superior Court, County of Los Angeles (the Superior Court Action), seeking, *inter alia*, to invalidate, under California Law, the provision of the Partnership

Agreement which would prevent him from invoking his retirement benefits if he leaves the firm and goes to work at another law firm.[1]

Petitioner initially sought to have the arbitration conducted in New York, but in its reply papers takes the position that it is up to the AAA to decide where the dispute will be arbitrated. Respondent is willing to arbitrate the parties' dispute in accordance with the Partnership Agreement (*see* Memorandum of Law in Support of Respondent's Answer to Petitioner's Second Verified Petition to Compel Arbitration, dated December 19, 2011, p. 1), but asserts that pursuant to CPLR 7503, "[i]f an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action." Respondent thus argues that the issue where the dispute is to be arbitrated should be decided by the court in the Superior Court Action. Petitioner, disagrees, and seeks to have this court compel arbitration under the terms of the Partnership Agreement, leaving it up to the AAA to decide where the arbitration will proceed. The Partnership Agreement contains an arbitration clause which provides, in part:

> "[a]ny difference or dispute between or among the parties hereto, or between any of the parties hereto and the Firm, whether or not arising under this Agreement or the Partners Retirement Plan, including the applicability of this arbitration provision, shall be settled by arbitration before the American Arbitration Association pursuant to its Commercial Arbitration Rules. The parties hereto acknowledge that by entering into this Agreement, they are waiving their right to have disputes determined in court."

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[1] On September 16, 2011 Petitioner filed its initial petition to compel arbitration (and filed an arbitration demand) with respect to the claims raised by Respondent in the Superior Court Action over whether Respondent is entitled to retirement benefits under the Partnership Agreement. After the initial petition was filed, Respondent served his initial complaint and he then filed and served a First Amended Complaint in the Superior Court Action asserting additional claims. The parties agreed to allow Petitioner to pursue this second petition addressed to the First Amended Complaint by supplementing its initial moving papers and Petitioner then served a supplemental memorandum in support of the instant petition to compel arbitration supplementing Petitioner's initial petition papers. Respondent submitted an opposition to that and Petitioner has also submitted a reply.

(Exhibit 1 to Petition (Ex. 1), at ¶ 20).

The Partnership Agreement also contains an "Applicable Law" provision, which provides:

> "[t]his Agreement shall be governed by the Laws of the State of New York without regard to the law of any other state which might be prescribed by the conflict-of-laws rules applicable in the State of New York."

(Petition, Ex. 1, at ¶ 25).

The Superior Court Action proceeding has been stayed pending this court's consideration of Petitioner's petition to compel arbitration.[2]

Discussion

The narrow issue presented to the court is whether this court should compel arbitration or whether that issue should be decided by the California Superior Court. The Federal Arbitration Act, 9 USC § 1 *et seq.* (FAA), applies to all contracts involving interstate commerce, with the term "interstate commerce" being construed broadly. *See Allied-Bruce Terminix Cos. v Dobson*, 513 U.S. 265 (1995); *Circuit City Stores, Inc. v Adams*, 532 U.S. 105 (2001). New York courts have held that the FAA also applies to partnership agreements implicating interstate commerce. *Ayco Co. v Walton*, 3 AD3d 635, 637 (3d Dept), *appeal dismissed*, No. 3-10, 2004 N.Y. LEXIS

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[2] On December 7, 2011, Petitioner obtained a stay of the Superior Court Action pursuant to California Code of Civil Procedure § 1281.4, which contemplates that a petition to compel arbitration may be filed outside of California. The Code provision provides:

> If an application has been made to a court of competent jurisdiction, whether in this State or not, for an order to arbitrate a controversy which is an issue involved in an action or proceeding pending before a court of this State and such application is undetermined, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until the application for an order to arbitrate is determined. . . .

Cal. Civ. Proc. Code § 1281.4. *See also Twentieth Century Fox Film Corp. v Superior Court*, 79 Cal. App. 4th 188, 192 (2000) (finding that Section 1281.4 "is clear and unambiguous: it requires that the trial court stay an action pending before it while an application to arbitrate the subject matter of the action is pending in a court of competent jurisdiction" (*citing Marcus v Superior Court*, 75 Cal. App. 3d 204, 209 (1977)).

1021 (May 11, 2004) ("[i]nasmuch as respondent's claims arise out of the business relationship between the parties, this dispute is governed by the FAA regardless of whether the agreement is viewed as an employment contract . . . or as a partnership agreement"). This is clearly a dispute implicating interstate commerce as Petitioner, with headquarters in New York, is a multi-state law firm and Respondent was a partner in its Los Angeles office.

Even assuming CPLR § 7503 might apply here, the court is not convinced that it *ipso facto* requires this court to dismiss Petitioner's action in favor of the Superior Court Action. As noted, the Superior Court has stayed its proceedings in contemplation of this court's entertaining the motion to compel. The court does not see how Respondent's argument that CPLR 7503 obligates the Superior Court to entertain Petitioner's petition to compel can be reconciled with that ruling. Moreover, it strikes the court that it would be a waste of the parties' and the California Superior Court's resources to have this court entertain all of the parties' arguments (as it has done) simply to then say go to California with them, particularly when the parties seem to no longer disagree that an arbitration proceeding is the correct one for resolving their dispute. Respondent has not pointed to any case law obligating the court to defy common sense by deferring to the California court due solely to the existence of CPLR 7503 relied upon by Respondent.

A party cannot simply "race to file" (as Respondent appears to have done) to avoid his contractual obligation to arbitrate and then argue that any subsequent action must be held in the forum the party selected. The court notes further that Respondent did not serve Petitioner with the complaint he filed in August until September 20, 2011, after Petitioner filed its Demand for Arbitration and Petition to Compel Arbitraton in this court. First filing cannot be determinative

here, at least in part, because it would reward efforts to undermine the arbitration clause. *See H.M. Hamilton & Co. v American Home Assurance Co.*, 21 AD2d 500, 502-503 (1st Dept 1964), *affd*, 15 NY2d 595 (1964) ("[f]or an action instituted in contravention of an arbitration agreement of course precedes an attempt to stay it, and if the action is brought in a foreign jurisdiction it is always open to the party seeking the stay to plead the arbitration agreement as a bar, for whatever the plea may be worth").

The case primarily relied on by Respondent is not persuasive. In *Matter of Arbitration of Jo-Ann-Ro Leasing*, 150 Misc 2d 1064 (Sup Ct NY Co 1991), the petitioner sought a stay in the Supreme Court of New York of a landlord-tenant action pending in New York City Civil Court. Although denying the application for the stay, the court specifically considered multiple reasons to determine whether deferral was warranted. It did not, as urged by Respondent, simply cite to § 7503 and end its analysis. The factors on which it relied are not present here. For example, in *Jo-Ann-Ro Leasing*, the case in Civil Court already had been "scheduled for immediate trial" (*Id.* at 1065) while, in contrast, Respondent's California action not only has no trial date, but the action has been stayed pending the resolution of this proceeding. The court also found that City Civil Court was the "preferred forum" for resolving the specific issue involved in that case (*i.e.* landlord-tenant disputes). In contrast, California is not a "preferred forum" for the issues in this case.

Finally, the court stresses the narrow confines of its ruling here: it is only directing the parties to go to arbitration to resolve their dispute, an issue neither party challenges at this juncture. Although Respondent seeks to stress the importance of his contention that under

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California law Petitioner cannot enforce the forfeiture provision of the Partnership Agreement, that is not an issue before this court, and the court expresses no opinion with respect to it.

Accordingly, it is hereby

ORDERED that Petitioner's petition to compel arbitration is granted.

Dated: January 17, 2012

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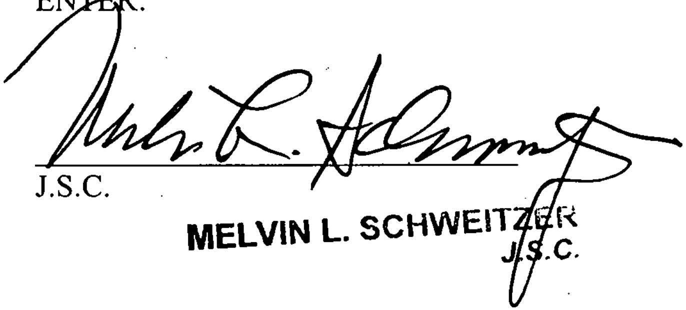

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.