Rahmani v Venture Capital Props. LLC
2016 NY Slip Op 31976(U)
October 17, 2016
Supreme Court, New York County
Docket Number: 650655/2015
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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JOSEPH RAHMANI, in his Individual capacity and as a 33.3% Partner in and on behalf of VENTURE CAPITAL PROPERTIES LLC and DANIEL RAHMANI, individually and on behalf of his Team of agents and brokers,

Plaintiffs,

-against-

VENTURE CAPITAL PROPERTIES LLC, ARASH RAHMANI a/k/a JOSH RAHMANI, EBI KHALILI, EVAN WEBER, PRIME ESSENTIALS LLC, EMPIRE CAPITAL HOLDINGS LLC a/k/a EMPIRAL CAPITAL HOLDINGS (NY) LLC, MARK WINTER-GITTELSON, AARON BERGMAN, and JOHN DOE #1" through JANE DOE #5," and ABC CORP. #1 through "ABC CORP. #5",

Defendants.

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CORRECTED DECISION AND ORDER

Index No.: 650655/2015
Mot. Seq. No.: 002

O. PETER SHERWOOD, J.:

In 2015, the parties agreed to have this case referred to a JAMS mediation. Thereafter, in June 2015, the parties stipulated to appoint the mediator, retired New York State Justice Stephen Crane as the arbitrator and thereby consented to proceed under the JAMS arbitration rules (*see* JAMS Rule 1 [a]).

Despite their agreement, defendants now move before the court for an order 1) directing prior counsel who has a retaining lien on the file, to release it despite the failure of the client to pay for legal services rendered; 2) disqualifying plaintiffs' co-counsel, Claude Castro, Esq., on the ground of conflict in that he is currently representing defendants in other litigations; and 3) staying the JAMS arbitration.

Regarding the first claim, the motion is denied as defendants have not shown that there are exigent circumstances sufficient to permit issuance of an order to turnover the file without payment of attorney fees or securing compensation for the legal services provided by prior counsel (*see American Stevedoring, Inc. v Redhook Container Terminal, LLC,* 134 AD 3d 419 [1st Dept 2015]). Here, prior counsel has represented to the court that defendants will have the file as soon as plaintiffs

make or secure full payment of the fees and expenses owed. If the client disputes the amount owed, it has a readily available remedy in that he can sue to recover any overpayment.

As to the issue of disqualification of Mr. Castro, the Appellate Division, First Department has held that "matters of attorney discipline are beyond the jurisdiction of arbitrators; issues of attorney disqualification similarly involve interpretation and application of Code of Professional Responsibility and Disciplinary Rules, as well as potential deprivation of counsel of client's choosing, and cannot be left to determination of arbitrators selected by parties themselves for their expertise in particular industries engaged in" *Biderman Indus. Licensing, Inc. v Avmar N.V.,* 173 AD 2d 401 [1st Dept 1991]. Rule 1.7 of the New York Rules of Professional Conduct prohibits an attorney from representing two clients concurrently where the "representation will involve the lawyer in representing differing interests" Rules of Professional Conduct (22 NYCRR §1200.0)., Rule 1.7. Disqualification of an attorney under this rule is virtually automatic when an attorney represents a client in a proceeding against another current client (*see Steven's Distribs. Inc. v Gold, Rosenblatt & Goldstein, LLC*, No. 106283/20019, 2010 NY Misc LEXIS 3336 at *13-14 [Sup Ct NY County July 19, 2010] [finding that the concurrent representation of the individual members of an LLC in one action while suing that very same LLC appeared to violate Rule 1.7's prohibition against simultaneously representing differing interests]; *HRH Constr. LLC v Palazzo*, 15 Misc 3d 1130 [A] [Sup Ct NY County 2007] [disqualifying a law firm from representing the defendant in lawsuit brought by an LLC on the grounds that the law firm was also presently representing the plaintiff LLC in another matter]. Where an attorney simultaneously represents clients with adverse interests to each other, the so-called *"prima facie rule"* shifts the burden of proving "actual or *apparent* conflict in loyalties or diminution in the vigor of his representation" from the party seeking disqualifications to the attorney with the alleged conflict (*see id* [*quoting Aerojet*, 138 AD 2d at 4]).

In this case, Mr. Castro seeks to represent plaintiffs in the JAMS arbitration against defendant VCP while simultaneously representing VCP in three active litigations in this court. When an attorney represents a limited liability company, he is deemed as a matter of law to represent each of its members (*see Flores v Willard j. Price Assocs, LLC*, 20 AD 3d 343, 344 [1st Dept 2005]; *see also Steven's Distribs., Inc.,* 2010 NY Misc LEXIS 336 at *16). Accordingly, by virtue of Castro's representation of VCP, Castro also represents the individual defendants Ebi Khalili and Josh

Rahmani because they are members of VCP. Thus, by representing plaintiffs in the arbitration against defendants, he is effectively "suing his client," in violation of Rule 1.7.

In an effort to avoid application of Rule 1.7, plaintiffs assert that defendants either waived or consented to Mr. Castro representing plaintiffs in this case. Plaintiffs have presented no evidence of such consent and defendants' purported failure to object to Mr. Castro's appearance on a conference call with the then mediator (now arbitrator) on March 1, 2016 is not evidence of waiver. Nothing short of clear affirmative action by the client can establish a waiver of the bright-line rule barring a lawyer from representing an interest that is adverse to that of a current client. As to the assertion that Justice Crane "overruled" defendants' objection to Mr. Castro's representation of plaintiffs (*see Marzes Affm in Opp.*, ¶ 11; NYSCEF Doc. No. 116), plaintiffs have not presented any documentary evidence in support. In any event, the issue of attorney disqualification is a matter that must be supervised by the courts, not party-appointed neutrals.

The evidence before the court shows that Mr. Castro would be conflicted were the court to permit him to appear as co-counsel for plaintiffs in the arbitration proceeding. Moreover, plaintiffs already are well represented by the firm of Maizes & Maizes LLP. That branch of defendants motion seeking to disqualify Claude Castro, Esq. from appearing on behalf of plaintiffs' in the arbitration is granted.

As to the request for a stay of the arbitration, JAMS, Rule 11 [a] provides that

> [o]nce appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

Rule 11 (b) states:

> Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

Accordingly, this court has no jurisdictional power to review or modify or overrule interim decisions or rulings of a consensual arbitrator *(see, In re American Express Merchants' Litigation,*

554 F 3d 300, 302 [2d Cir 2009]; *Emilio v Sprint Spectrum L.P.*, 508 Fed Appx 3, 5, 2013 WL 203361, at *2 [2d Cir 2009]; *Contec Corp. v Remote Solution Co.*, 398 F 3d 205, 208 [2d Cir 2005]; *T. Co Metals, LLC v Dempsey Pipe & Supply, Inc.*, 592 F 3d 329, 344-45 [2d Cir 2010]; *Arciniaga v General Motors Corp.*, 460 F 3d 231, 234 [2d Cir 2006] [the parties in this case specifically delegated questions to the arbitrator. Because the parties clearly and unmistakably intended for the arbitrator to decide these issues, the district court was not free to decide that question for itself]).

According to defendants, Justice Crane set firm dates for depositions to take place on November 3, 4 and 11, 2016. He also scheduled the arbitration hearing for December 12 through December 16. Defendants now ask the court to stay the arbitration in order to give new counsel time to prepare after receipt of the litigation file currently in the possession of prior counsel. The request for a stay is denied as the matter is squarely within the purview of the arbitrator to decide. Any request for a stay of the arbitration based on new developments, including this Corrected Decision and Order, should be addressed to Justice Crane.

This constitutes the decision and order of the court.

DATED: October 17, 2016

E N T E R,

O. PETER SHERWOOD
J.S.C.