Rubertone v MMR Digital LLC
2017 NY Slip Op 30277(U)
February 10, 2017
Supreme Court, New York County
Docket Number: 656241/2016
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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ROBERT J. RUBERTONE,

Petitioner,

-against-

MMR DIGITAL LLC, EDWARD MANGIAROTTI and BRADFORD MATTHEWS,

Respondents.

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Index No. 656241/2016
Motion Seq: 001

DECISION & ORDER

HON. ARLENE P. BLUTH

Petitioner's petition, brought pursuant to Article 75, to permanently stay an arbitration to the extent that respondents seek to arbitrate claims arising under the Founder Agreement is granted. All other requests for relief are denied.

Background

This proceeding is about two agreements, the LLC Agreement and the Founder Agreement. The LLC Agreement, dated November 12, 2015, provides for the formation of MMR, an online sports social networking platform. The LLC Agreement contained a dispute resolution provision that requires disputes arising out of it to be submitted to arbitration. The Founder Agreement, entered into by each member of MMR on or about December 11, 2015, contains a dispute resolution provision that provides that any dispute arising out of this agreement will be handled in state or federal courts in New York County.

Petitioner insists that his role at MMR was to hire and manage technical staff between November 2015 (when MMR started operating) and May 2016. Petitioner also claims he leased

office space to MMR. Petitioner insists that around June 1, 2016 the other founders (respondents Mangiarotti and Matthews) began taking actions to reduce petitioner's responsibilities. After a few weeks of purportedly shutting petitioner out of MMR's operations, petitioner received a letter on June 17, 2016 in which he was informed that he was being terminated for cause and that MMR would exercise its right to repurchase petitioner's MMR shares (for $2.00).

Petitioner claims that on June 20, 2016, he sent a letter to MMR (to the attention of Mangiarotti and Matthews) stating that he had been subject to an involuntary termination and that he was resigning from MMR effective immediately. Petitioner insisted that his shares had fully vested under the Founder Agreement. To date, petitioner has rejected MMR's offer of $2.00 for his shares.

On November 14, 2016, respondents initiated an AAA arbitration at a location on Long Island. Petitioner alleges that he has not participated in this proceeding at all.

Respondents dispute petitioner's account of the facts and claim that petitioner did not fully commit to working for MMR. Respondents also contend that this Court does not have the power to decide the arbitrability of the disputes in this action and that the two agreements (the Founder Agreement and the LLC Agreement) are so intertwined that the arbitration clause in the LLC Agreement must govern all of respondents' claims.

In reply, petitioner claims that the Court can decide arbitrability issues because the parties did not clearly and unmistakably contract for an arbitrator to decide these issues. Petitioner insists that the Founder Agreement modified and superceded the LLC Agreement.

Discussion

CPLR 7503(b) provides that "[s]ubject to the provisions of subdivision c, a party who has

not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made . . ."

"On motions to stay or compel arbitration, a threshold question for the motion court is whether the parties made a valid agreement to arbitrate" (*Matter of Rural Media Group, Inc. v Yraola*, 137 AD3d 489, 490, 26 NYS3d 531 [1st Dept 2016] [internal quotations and citation omitted]).

It is an "established principle of contract law that a later agreement can, by implication effect a valid, enforceable modification of an earlier agreement" (*People ex rel Spitzer v Grasso*, 54 AD3d 180, 188, 861 NYS2d 627 [1st Dept 2008] [internal quotations and citation omitted]).

The key question for this Court is to assess the extent to which respondents seek to arbitrate claims that fall under the Founder Agreement, which provides for disputes to be handled in court. In the arbitration, respondents seek the following: a) a declaration that petitioner was validly terminated for 'Cause' pursuant to the terms and conditions of the Founder Agreement, b) a declaration that petitioner's unvested interest in 200,000 Class A units was validly repurchased, c) a declaration that petitioner was validly removed as manager of MMR and member of its Board of Managers under the LLC Agreement, d) a declaration that petitioner voluntarily resigned from MMR on June 20, 2016, e) awarding MMR 7 months of draw payments, f) awarding MMR costs (affirmation of respondents' counsel, exh A).

Petitioner argues that the first two claims for relief fall under the Founder Agreement and should not be subject to the arbitration. Respondents' claim that the two agreements are so intertwined and, therefore, that the LLC Agreement's arbitration provision should apply to

Founder Agreement disputes is unsupported. Although both of these agreement are involved in petitioner's removal as an employee with MMR, the Court declines to conclude that the dispute resolution provision in the Founder Agreement is superceded, and therefore rendered meaningless, by the LLC Agreement (*American Exp. Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277, 562 NYS2d 613 [1st Dept 1990] ["A contract should be construed so as to give full meaning and effect to all of its provisions"]).

Respondents cite to, *inter alia*, the *Astoria Equities* case for the proposition that the Founder Agreement and the LLC Agreement should be treated as one instrument (*Astoria Equities 200 LLC v Halletts A Dev. Co., LLC*, 47 Misc3d 171, 996 NYS2d 516 [Sup Ct, Queens County 2014]). However, the facts of *Astoria Equities* are inapposite because the two agreements in that case were signed on the same day and, here, the Founder Agreement was signed a month after the LLC Agreement.

The Founder Agreement expressly states that it was entered into in order to "induce a certain investor to purchase a convertible promissory note" (petition exh 4). To facilitate this investor, petitioner granted the Company a repurchase right and entered into a noncompetition and non-solicitation agreement (*id.*). The Founder Agreement clearly provides that any disputes arising out of it will be handled in court and there is no mention of the LLC Agreement or arbitration.

The Court further declines to read these two agreements together because the Founder Agreement contains no reference to the LLC Agreement. Given that the Founder Agreement was signed only a month after the LLC Agreement was entered into, the parties (sophisticated businessmen) were undoubtedly aware of the arbitration clause in the LLC Agreement.

They could have easily referenced the LLC Agreement in the Founder Agreement or simply inserted the arbitration clause language into the Founder Agreement. But they did not.

Although it would be much more convenient for the parties to resolve all disputes surrounding petitioner's termination in one forum, that is not what their agreements contemplate. In order to remove petitioner from the company, respondents had to take action under both agreements. Respondents were seemingly aware of this distinction because their termination letter to plaintiff states that respondents intended to terminate him as a Service Provider under the Founder Agreement and as a Manager and member of the Board of Managers under the LLC Agreement (petition exh 5).

Based on the foregoing, the Court grants petitioners' request to permanently stay the AAA arbitration to the extent that respondents seek to arbitrate any claims arising under the Founder Agreement. This includes respondents' claims for relief marked (a) and (b) (*see* respondents' exh A, Statement of Claim, at 8)

Accordingly, it is hereby

ORDERED that petitioner's petition to stay the AAA Arbitration to the extent that any claims arising under the Founder Agreement is granted.

This is the Decision and Order of the Court.

Dated: February 10, 2017
New York, New York

ARLENE P. BLUTH J.S.C.

ARLENE P. BLUTH, JSC