

Flintlock Constr. Servs., LLC v Weiss

2012 NY Slip Op 33651(U)

October 24, 2012

Supreme Court, New York County

Docket Number: 156278/2012

Judge: Anil C. Singh

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

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

FLINTLOCK CONSTRUCTION
SERVICES, LLC, ET AL.
-v-

GRETCHEN WEISS

INDEX NO. 156278/12
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that ~~this motion~~ the petition is denied for the reasons stated in the annexed memorandum opinion.

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 10/24/12

H. C. Singh
HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

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 61

-----X

FLINTLOCK CONSTRUCTION SERVICES, LLC,
BASQUE CONSTRUCTION LLC, ANDREW WEISS,
and STEPHEN A. WEISS, JR.,

DECISION AND
ORDER

Petitioners,

Index No.
156278/2012

-against-

GRETCHEN WEISS,

Respondent.

-----X

HON. ANIL C. SINGH, J.:

Petitioners move by order to show cause for a permanent stay of arbitration pertaining to various claims raised in a motion to dismiss before the American Arbitration Association. Respondent Gretchen Weiss opposes the application.

Respondent commenced arbitration against Flintlock Construction Services, LLC, Basque Construction, LLC and its managing members, Andrew Weiss and Stephen A. Weiss, Jr., contending that she is a 25% owner of the companies and that the Weisses, who are her stepsons, are in breach of the parties' agreements.

In her claims for breach of fiduciary duty and fraud, Ms. Weiss contends that the Weiss brothers "have cheated her of the benefits of membership in [the] companies and refuse to honor the terms of the governing operating agreement" (Verified Petition, exhibit C, p. 1). According to Ms. Weiss, her stepsons decline to

treat her as an owner of the companies, withhold critical information from her, and deny her the cash distributions and other benefits to which she is entitled. She asserts further that the Weiss brothers have improperly diverted the company benefits due Ms. Weiss to themselves and have acted to fraudulently conceal their misdeeds from her.

In the arbitration, Ms. Weiss seeks to: 1) recover, inter alia, her share of the distributions that petitioners have paid to the Weiss brothers; 2) receive the entirety of the guaranteed payments owed to her; 3) enforce her 25% interest in Flintlock, Basque and related entities; 4) be allocated her share of tax losses with respect to Flintlock, Basque and related entities; 5) receive the information she has requested but which has been denied to her; 6) receive the health care benefits promised to her; 7) recover punitive damages for the faithless and intentional breaches of fiduciary duties of the Weiss brothers; and 8) receive an accounting with respect to Flintlock, Basque and related entities.

It is petitioners' position that under the parties' agreements, Ms. Weiss was promised a guaranteed payment of \$50,000 and given a 25% interest in Flintlock upon sale or dissolution. There is no issue here that the contract claim is subject to arbitration.

Petitioners moved to dismiss the fraud, breach of fiduciary duty and punitive

damages claim before the arbitration panel.

By order dated July 5, 2012, the panel denied the motion, stating that those claims were viable and not duplicative of the breach of contract claim. Further, the panel held that

the submission of the parties reflect a dispute as to certain facts relevant to the issue of whether the claims affect interstate commerce, and thus whether the Federal Arbitration Act controls. Accordingly, the motion to dismiss the request for punitive damages is denied without prejudice to renewal at the hearing based on a more complete record.

Petitioners contend here that the order was clearly erroneous because, under New York law, the arbitration panel lacks the authority to award punitive damages. They contend that the Federal Arbitration Act (“FAA”) does not apply because Flintrock does not engage in interstate commerce. Even assuming arguendo that the FAA applies, petitioners urge that punitive damages are not available because a breach of contract claim may not give rise to punitive damages. Thus, under New York law, the arbitration panel does not have the jurisdiction to impose punitive damages. Petitioners urge that the arbitration panel was irrational in its construction of the contracting documents.

Petitioners argue that, by providing that the parties’ agreements are to be “enforced” under New York law, the parties have displaced the FAA and made their arbitration subject to New York law. Petitioners point out that in N.J.R.

Associates v. Tausend, 19 N.Y.2d 597 [2012], the Court of Appeals wrote:

A contract may be governed by the FAA yet subject to the New York rule if the agreement between the parties so provides. We have explained that a contract specifying that New York law shall govern both “the agreement *and its enforcement*” adopts the New York rule that threshold statute of limitations issues are resolved by the courts and not arbitrators.

(19 N.Y.3d at 602)(internal citation omitted)(emphasis in original).

The petition to stay arbitration of the punitive damages, breach of fiduciary duty, and fraud claims is denied.

N.J.R. Associates, supra., is distinguishable in two significant respects. In that case, respondent asserted counterclaims, which caused petitioner to move before the Supreme Court to stay arbitration of the counterclaims on the basis of the statute of limitations. In contrast, the parties in the instant matter have charted their own course by submitting the dispute to the arbitration panel. Petitioners actively litigated before a panel of the American Arbitration Association by making a motion to dismiss which was denied. The motion was denied as there is a factual dispute as to the application of the FAA based on the activities of Flintlock.

Second, only one agreement was at issue in N.J.R. Associates, supra. By contrast, three agreements are at issue in the present arbitration.

The operating agreements of Flintlock Construction Services LLC and Basque Construction LLC contain identical choice of law provisions, which state:

This Agreement shall be construed and enforced in accordance with the laws of the State of New York, without regard to its rules of conflicts of law.

(Verified Petition, exhibits E and F, section 8.12).

By contrast, the letter agreement dated June 22, 2005, is silent regarding choice of law. It contains no choice of law provision whatsoever. Indeed, it states:

In the event of any inconsistency between this letter and the Operating Agreements of any of the Companies this letter shall control and to the extent of any such inconsistency it shall be considered to be an addendum to said Operating Agreements.

(Verified Petition, exhibit D, p. 4, para. 18).

Based on the various writings, there is an issue as to how the agreements will be construed and whether any punitive damages are available if the breach of fiduciary duty and fraud claims are sustained.

The arbitration panel denied the motion to dismiss the fraud and breach of fiduciary duty claims, finding that the claims, as alleged, stated viable causes of action which were not duplicative of the contract claim. Such a finding was not clearly erroneous. Ms. Weiss's cause of action for breach of contract is premised on a different pattern of conduct than her cause of action for fraud. Her contract claim asserts that her stepsons failed to provide payments and other benefits as provided under the parties' agreements. By contrast, her fraud claim asserts that her stepsons provided false and misleading information to her so that she would not

realize that the stepsons were causing the companies to pay themselves substantial distributions while denying her payments to which she was entitled.


In short, it is clear to the Court on the record before us that the arbitration panel's rejection of petitioners' motion to dismiss the fraud and fiduciary duty claims was not clearly erroneous.

There has been no final and definite award as the arbitration proceedings are still pending. It would be premature for this Court to intervene without a final determination of the dispute by the arbitration panel which may vindicate the legal position espoused by petitioners. In essence, petitioners impermissibly seek an advisory ruling from this Court on the merits of their motion to dismiss. I decline to make any such ruling until there has been a final determination by the arbitration panel.

For these reasons, the petition is denied.

The foregoing constitutes the decision and order of the court.

Date: October 24, 2012
New York, New York



Anil C. Singh
HON. ANIL C. SINGH
SUPREME COURT JUSTICE