SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden. Justice PART 11

Index Number : 158208/2012
DEVERS, JEFFREY
vs.
IMPERIUM PARTNERS GROUP, LLC
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 5-30-13
MOTION SEQ. NO. _____

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

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 decided in accordance with the attached Memorandum Decision + Order.

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

Dated: October 9, 2013

_____, J.S.C.
HON. JOAN A. MADDEN
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

----------x

JEFFREY DEVERS,

Plaintiff,

-against-

Index No. 158208/12

IMPERIUM PARTNERS GROUP, LLC,

Defendant.

----------x

JOAN A. MADDEN, J.

Defendant Imperium Partners Group, LLC ("Imperium") moves pursuant to CPLR 7503(a) to compel arbitration and to dismiss this action or to stay it pending the completion of arbitration.[1] Plaintiff Jeffrey Devers ("Devers") opposes the motion, which is granted as set forth below.

Background

In this action, Devers, who is a former managing member of Imperium, seeks to be indemnified for $18,000 of attorneys' fees that he allegedly incurred in connection with responding to a subpoena in a lawsuit concerning certain patents. ("the Patent Lawsuit"). The Patent Lawsuit was commenced on March 30, 2011, by Imperium Holdings, an entity set up by Imperium to control patents that it purchased from non-party ESS Technologies, Inc. ("ESS")

Imperium acquired a controlling interest in ESS through its subsidiary, called Imperium Master Fund, in February 2008.[2] Following the acquisition of ESS in 2008, Devers and his former business partner, John Michaelson ("Michaelson), who is a current managing member of Imperium, engaged in a heated litigation regarding Michaelson's handling of the ESS investment.

---

[1]Imperium also moved to dismiss for failure to properly serve it; however, after the motion was submitted Devers served the complaint through the Secretary of State so this aspect of the motion is moot.

[2]As part of this transaction, ESS was split into three companies, ESS, IP Holdings, and Semiconductor Holdings.

The dispute was settled in accordance with a Settlement Agreement dated January 18, 2010 ("the Settlement Agreement"). Under the Settlement Agreement, Devers resigned and voluntarily withdrew "as a Member, Managing member, partner, agent and/or employee" of the Imperium entities. Paragraph 6 of the Settlement Agreement provides that Devers releases and discharges Michaelson and Imperium and certain other individual defendants. However, it also provides that it does not "release or discharge any and all rights [of Devers] under 5.4 [of Imperium's] Amended Operating Agreement that Devers would otherwise be entitled to had he not entered into this Agreement." See Settlement Agreement, ¶ 6A. Section 5.4 of the Amended Operating Agreement requires, *inter alia*, for Imperium to indemnify its Members and Terminated Members for attorneys' fees incurred in connection with their involvement with Imperium.

Imperium now moves to compel arbitration, asserting that Devers' right to indemnification must be arbitrated under the Settlement Agreement which provides, in relevant part, that "[a]ll disputes, claims or controversies between the parties arising out of, relating to or in connection with this Agreement, or the breach, termination or validity thereof ...will be referred to and finally resolved on an expedited basis exclusively by arbitration referred to the American Arbitration Association ("AAA")." See Settlement Agreement, ¶ 17B. Imperium argues that any right Devers may have to be indemnified for attorneys' fees incurred in the Patent Lawsuit[3] is subject to arbitration as his right to indemnification arises from paragraph 6 of the Settlement Agreement.

---

[3]Imperium argues that Devers is not entitled to indemnification for attorneys' fees incurred in the Patent Lawsuit, as Devers was not a party to the Patent Lawsuit and was unlikely to ever be named as a party, and that he did not accept Imperium's offer to retain counsel for him. Devers, on the other hand, maintains that his right to be indemnified is not conditioned on his status as a party or potential party and does not require him to accept Imperium's offer of counsel. As to the merit of Devers' underlying claims is not relevant to resolution of this motion to compel, the court will not address it.

As further support for its argument that the parties intended to arbitrate Devers' right to indemnification, Imperium points to the last clause of the Settlement Agreement's arbitration provision which specifically provides that "[i]f a significant issue in dispute involved the rights to indemnification or advancement, then the arbitrator shall be familiar with Delaware law concerning indemnification and advancement " and argues that such knowledge was required since Imperium is a company formed under Delaware law.

Devers opposes the motion, asserting that this dispute does not arise under the Settlement Agreement as it concerns his right to indemnification for attorneys' fees under Section 5.4 of the Amended Operating Agreement, which the Settlement Agreement specifically states survives the settlement. Moreover, Devers argues that the indemnification provisions in the Settlement Agreement, do not apply to the instant dispute as they govern only claims by, or on behalf of, or against, certain entities defined in paragraph 4, and only if the claims are "Prior Claims" i.e. claims that result from acts up to, and including, the date of the Settlement Agreement. Devers argues that his right to indemnification for the Patent Lawsuit cannot be considered a "Prior Claim" as it arose after the Settlement Agreement since the Patent Lawsuit was commenced almost two months after the Settlement Agreement was executed, and the subpoena in the Patent Action was served 20 months later.

Accordingly, Devers asserts his right to indemnification for attorneys' fees he incurred in connection with the Patent Lawsuit is governed exclusively by section 5.4 of the Amended Operating Agreement and is not subject to arbitration.

Discussion

CPLR 7503(a) provides that a "party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration." On a motion to compel arbitration, the court addresses three threshold questions: (1) whether the parties have made a valid agreement to arbitrate, (2) if so, whether the particular dispute falls within the arbitration clause, and (3)

whether a condition precedent to arbitration has been complied with. See Rockland County v. Primiano Construction Co, Inc., 51 NY2d 1, 7 (1980); Grossman v. Laurence Handprints-N.J., Inc., 90 AD2d 95, 99 (2d Dept 1982). In this case, there is no dispute that the parties entered into a valid agreement to arbitrate, and the third requirement is inapplicable since there is no condition precedent in the Agreement.

Accordingly, the only issue is whether this dispute over Devers' right to indemnification falls within the arbitration clause of the Settlement Agreement. As arbitration is contractual by nature, a party cannot be required to arbitrate any dispute that he has not agreed to arbitrate. Waldron v Goddess, 61 NY2d 181, 183 (1984); see also, Thomson-CSF, S.A. v American Arbitration Ass'n., 64 F3d 773, 776 (2d Cir 1995); Clarendon Natl. Ins. Co. v Lan, 152 F Supp2d 506, 519 (SD NY 2001). An agreement to arbitrate must be clear, explicit, and unequivocal and must not depend upon implication or subtlety. Waldron v Goddess, 61 NY2d at 183-184; The Harriman Group, Inc. v. Napolitano, 213 AD2d 159, 163 (1st Dept 1995).

At the same time, however, when, as here, the arbitration clause is broadly worded any restrictions on arbitration must be contained in the arbitration clause itself. Silverman v Benmore Coats, Inc., 61 NY2d 306, 307-308 (1984); see generally, Book 7B, McKinney's Consol. Laws of N.Y., CPLR 7501, C7501:4. In the instant case, there are no such restrictions, so that the court's inquiry focuses on whether there is a "reasonable relationship" between the contract containing the broad arbitration provision, in this case the Settlement Agreement, and the underlying dispute. Sisters of Saint John the Baptist v. Phillips R. Geraghty Constructor, Inc., 67 NY2d 997, 998 (1986); Nationwide General Ins. Co. v Investors Ins Co. of America, 37 NY2d 91, 96 (1975); State v. Phillip Morris Inc., 30 AD3d 26, 31 (1st Dept 2006).

Here, there is a reasonable relationship between the broad arbitration clause in the Settlement Agreement requiring that "all disputes, claims or controversies between the Parties arising out of, relating to, or in connection with this Agreement" be arbitrated, and Devers' claims in this action for indemnification of attorneys' fees incurred in the Patent Lawsuit. Such a

relationship exists as Devers' right to indemnification derives from paragraph 5.4 of the Amended Operating Agreement and the preservation of that right under paragraph 6 of the Settlement Agreement.[4]

Finally, while paragraph 4 of the Settlement Agreement contains an indemnification provision which apparently does not cover the indemnification claim asserted by Devers in this action, Devers' claims are nonetheless arbitrable as they are addressed under Paragraph 6 of the Settlement Agreement.

Accordingly, the motion to compel arbitration and to dismiss the complaint is granted.[5]

Conclusion

In view of the above, it is

ORDERED that the motion to compel arbitration and to dismiss the complaint is granted and it is further

ORDERED that the complaint is dismissed; and it is further

ORDERED that plaintiff Jeffrey Devers shall arbitrate his claims against defendant Imperium Partners Group, LLC in accordance with paragraph 17B of the Settlement Agreement.

DATED: October 9, 2013

J.S.C.

[4] In fact, the Amended Operating Agreement contains an arbitration clause, and while Devers argues that the arbitration clause was extinguished by the Settlement Agreement, such argument appears to be at odds with his position that his rights arise from the Amended Operating Agreement alone.

[5]Based on the above, the court need not address Imperium's position that the decision by Justice Cynthia Kern dismissing an interpleader action brought by Devers' former law firm (See Friedman Kaplan Seiler & Adelman LLP v. Devers et al, Sup Ct. NY Co.; Index No. 152610/12) is controlling here.