

TBA Global, LLC v Fidus Partners, LLC
2014 NY Slip Op 33573(U)
June 9, 2014
Supreme Court, New York County
Docket Number: 650161/2013
Judge: Melvin L. Schweitzer
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

TBA GLOBAL, LLC et al

INDEX NO. 650161/2013

-v-

MOTION DATE

FIDUS PARTNERS, LLC

MOTION SEQ. NO. 001

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 DENIED as to Petitioner TBA Global, LLC and GRANTED as to Petitioner TBA global Holding, Inc per the attached Decision and Order

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

Dated: June 9, 2014

MELVIN L. SCHWEITZER

- 1. CHECK ONE: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [X] SUBMIT ORDER [] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

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

-----X	
TBA GLOBAL, LLC and TBA GLOBAL	:
HOLDINGS, INC.,	:
	:
Petitioners,	:
	:
	:
For an Order Pursuant to Article 75 of the Civil	:
Practice Law and Rules,	:
	:
	:
-against-	:
	:
	:
FIDUS PARTNERS, LLC,	:
	:
	:
Respondent.	:
-----X	

Index No. 650161/2013
DECISION AND ORDER
Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

In this Petition and Order to Show Cause under CPLR 7503(b), Petitioners TBA Global, LLC and TBA Global Holdings, Inc. (collectively, TBA Global) seek an Order permanently staying the arbitration initiated against them by Respondent Fidus Partners, LLC (Fidus) before the American Arbitration Association (AAA).¹ That arbitration has been temporarily stayed since January 18, 2013, when the court granted TBA Global’s request for a Temporary Restraining Order. The court now denies the Petition and Order to Show Cause as to TBA Global, LLC, grants the Petition and Order to Show Cause as to TBA Global Holdings, Inc., and vacates the Temporary Restraining Order.

Background

In January 2012, TBA Global, LLC and Fidus, a financial advisory firm, entered into a written letter agreement (Agreement) for Fidus to provide “services [...] as an independent

¹ The Demand for Arbitration (attached to the Petition) also names Opco Liquidating, LLC as a Respondent.

contractor (and not in any fiduciary or agency capacity).” Petition, Exh. A, pg.4. Fidus’

“services” are described as, *inter alia*:

Fidus will serve as the exclusive financial advisor of the Company with respect to any sale or similar transaction involving the assets or equity securities of the Company; any merger or consolidation involving the Company; or any recapitalization or reorganization of the Company (hereinafter, collectively, referred to as a “Transaction”). The terms of this Agreement are as follows:

A. Services. At the Company’s request, Fidus shall provide the following services:

1. Analyze the business, properties and operations of the Company;
2. Prepare a valuation analysis of the Company, if requested by the Company;
3. Assist in negotiating a letter of intent either with (i) JHW Greentree Capital, L.P. and GreenLeaf Capital, L.P. for the acquisition of their preferred shares held in TBA Holdings, LLC, or (ii) TBA Holdings, LLC for the acquisition of its sole membership interest in the Company;
4. Prepare Confidential Materials for distribution and presentation to potential participants in a Transaction (collectively, “Prospective Investors”), which shall be reviewed for accuracy and completeness, and approved in writing, by the Company;
5. Assist in identifying and screening Prospective Investors and prepare a list of such Prospective Investors;
6. Assist in soliciting and evaluating proposals from Prospective Investors, structuring a transaction and negotiating a definitive agreement for the Transaction;
7. Assist in making presentations regarding any proposed Transaction to the Board of Directors of the Company; and
8. Assist in creating management presentations and the data room.

As compensation for these services, the Agreement provided that Fidus is entitled to an “Advisory Fee” totaling \$50,000, which is not in dispute. The Agreement also provides for a “Transaction Fee” of \$500,000 to be paid under the following circumstances:

B. [...]

2. [...] If during the term of this engagement or after termination of this engagement as set forth in Paragraph D below, a Transaction is consummated, the Company shall pay Fidus, at the time of the closing (the "Closing") of the Transaction, in immediately available funds, a transaction fee [...].

Paragraph D reads in part:

In addition, Fidus shall be entitled to the full amount of the Transaction Fee [. . .] in the event that, at any time within one year after Fidus' engagement terminates, a Transaction is consummated (or an agreement is reached thereto, which is subsequently consummated) with any party (i) identified orally or in writing as a Prospective Client by Fidus during Fidus' engagement hereunder; or (ii) with whom the Company had any discussions regarding a potential Transaction during Fidus' engagement hereunder, whether or not such discussion was initiated by Fidus; or (iii) who proposed or to whom the Company proposed a transaction during Fidus' engagement hereunder.

The Agreement also included an arbitration provision providing that "any claim or controversy arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association...." *Id.* at p. 5.

Fidus then performed under the Agreement. After nearly ten months, TBA Global, LLC entered into an Asset Purchase Agreement (AP Agreement) whereby it, along with three other entities (collectively, Sellers), sold and transferred assets and liabilities to TBA Global Events, LLC, Global Events and Marketing, LLC, and TBA Global Marketing, Inc. (collectively, Purchasers). Specifically, one of the three sellers, Global Productions & Marketing, LLC agreed to sell to Global Events and Marketing, LLC and TBA Global Canada, Inc. agreed to sell to TBA Global Marketing, Inc. The "Remaining Asset Sellers," a group comprised of TBA Global, LLC (TBA Seller) and TBA-PGI Acquisition, LLC, agreed to sell to TBA Global Events, LLC (TBA Buyer),

[...] all right, title and interest of the Remaining Asset Sellers in, to and under the assets, properties and business, of every kind and description, wherever located, real, personal or mixed, tangible or intangible, owned or held or used by the Remaining Asset Sellers in the conduct of their businesses, as the same shall exist on the Closing date, including, without limitation, all of the issued shares of capital of TBA Global Limited, a company incorporated and registered under the laws of England and Wales [...], other than the Excluded Assets (the “Remaining Assets”) [...], and TBAGE will assume the Remaining Assumed Liabilities (as defined below).

AP Agreement, ¶1.1, pgs. 1-2. The Sellers were entitled to retain a nominal amount of cash to pay “reasonable, documented expenses incurred in connection with the winding up and liquidation of the Sellers.” *Id.* at pg.2.

TBA Buyer agreed to assume, “pay, discharge or perform when due, as appropriate, only those liabilities identified on Schedule 1.3(c).” These liabilities included, *inter alia*, “All compensation and other benefits and amounts payable to employees and contractors of the Remaining Asset sellers accruing since October 31, 2012.” *Id.* at pg.10. Among liabilities explicitly excluded were “brokerage or finders’ fees or agents’ commissions or other similar payments.” *Id.* at pg. 3. After execution of the AP Agreement, TBA Seller changed its name to Opco Liquidating, LLC (Opco), and TBA Buyer changed its name to TBA Global, LLC. Fidus demanded payment of its \$500,000 Transaction Fee. The fee was not paid, and Fidus served its Demand for Arbitration, naming as Respondents TBA Global, LLC, Opco, and TBA Holdings, Inc.

Discussion

A party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay. *Matter of Hertz Corp. v Holmes*, 106 AD3d 1001, 1002 (2d Dept 2013); *see New York Cent. Mut. Fire Ins. Co. v*

Marchesi, 238 AD2d 135 (1st Dept), *lv denied* 90 NY2d 806 (1997); *Matter of Allstate Ins. Co. v DiBello*, 40 AD3d 401 (1st Dept 2007). Thereafter, the burden is on the party opposing the stay to rebut the prima facie showing by demonstrating, with clear and convincing evidence, that the parties agreed to arbitrate the dispute at issue. *Gerling Global Reins. Corp. v Home Ins. Co.*, 302 AD2d 118, 123 (1st Dept), *lv denied* 99 NY2d 511 (2003); *see Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 (2007).

The TBA Global Petitioners argue that neither should be forced to arbitrate because they are not signatories to the Fidus Agreement. Fidus does not dispute that a different entity signed the Fidus Agreement, instead arguing that TBA Buyer assumed TBS Seller's obligations to Fidus under the Asset-Purchase Agreement, and that TBA Buyer is bound through principles of successor liability, as well as estopped from denying a duty to arbitrate because it received a direct benefit under the Fidus Agreement.

Under New York law, "the fundamental, neutral precept of contract interpretation is that agreements are construed in accordance with the parties' intent, and that the best evidence of what parties to a written agreement intend is what they say in their writing." *Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25, 29 (2008) (internal citations omitted). Where, as here, a contract is negotiated by sophisticated parties at arm's length:

[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include. Hence, courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.

Vt. Teddy Bear Co., Inc. v 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004) (internal citations omitted); *see also Belle Harbor Wash. Hotel, Inc. v Jefferson Omega Corp.*, 17 AD3d 612, 612

(2d Dept 2005) (“A written agreement that is complete, clear, and unambiguous on its face must be enforced in accordance with the plain meaning of its terms.”).

The TBA Global Petitioners deny that the Fidus liability was assumed, and argue that the Asset-Purchase Agreement explicitly excluded “finder’s fees” like Fidus’. Fidus argues in response that under the terms of the Fidus Agreement, Fidus was an independent contractor, and contractor fees were assumed liabilities under the Asset-Purchase Agreement.

The court concludes that TBA Buyer has failed to establish, with prima facie evidence, that the Fidus liability was an explicitly excluded liability. Among the few defined Excluded Assets were charter documents, equity securities, and contracts and agreements “relating to brokerage or finders’ fees or agents’ commissions or other similar payments.” A&P Agreement, pg. 10. The \$500,000 fee owed to Fidus was identified in the agreement as a “transaction fee,” not an excluded “finders’ fee,” and the defined services did not include the type of service necessary to earn a “finders’ fee.”

“Finders’ fee” is not defined in the A&P Agreement, but a definition identified by the court provides that a finders’ fee is: “[A] fee that is paid to someone who finds a source of financial backing or to someone who brings people together for business purposes.”

Dictionary.com. Fidus did not agree to forego being paid if it failed as a matchmaker. Rather, it agreed to provide, *inter alia*, “services [...] as an independent contractor (and not in any fiduciary or agency capacity) [. . .] [and] to be “the exclusive financial advisor of the Company [TBA Seller] with respect to any sale or similar transaction involving the assets or equity securities of the Company.” Petition, Exh. A, pg. 4. Nor does the “transaction fee” earned by Respondent fall into the catchall category of “other similar payments” included after the words “brokerage or finders’ fees or agents’ commissions.” A&P Agreement, ¶ 1.3(d). The agreed upon services go

well beyond mere “bringing people together.” They comprise an array of business, financial and advisory services, which arguably could add value to any business transaction.

Petitioners have submitted affidavits from the individuals who signed the A&P Agreement, attesting that their intent was that the transaction fee was an excluded finder’s or broker’s fee. Geddes Affd. ¶ 10; Balzer Affd. ¶ 5. However, the court will not consider parole evidence to interpret the terms “finders’ fee” because the parties to the contract are not disputing the meaning, and in the context of the agreement as a whole, the terms are not susceptible of more than one meaning. *See Korff v Corbett*, 18 AD3d 248 (1st Dept 2005); *see also World Monuments Fund, Inc. v Ninety-Five Madison Co.*, 47 AD3d 547 (1st Dept 2008).

Whether TBA Buyer agreed to assume the Fidus liability is a more difficult issue to resolve. By its terms, the A&P Agreement limited assumed liabilities to, “those liabilities identified on Schedule 1.3(c),” including, *inter alia*, “All compensation and other benefits and amounts payable to employees and *contractors* of the Remaining Asset sellers accruing since October 31, 2012.” *Id.* at pg. 10. (Emphasis added.)

The agreement itself contains no definition of the word “contractor.” Petitioners argue that “Fidus was not an independent contractor in the same sense as the independent contractors TBA Seller hired for its day-to-day operations.” Affidavit of Robert Geddes (Geddes), Pet. Exh. 14.² Petitioners also rely on an Affidavit by Michael Cowan (Cowan), the Managing Director of SLC Capital Partners (SLC), who attests that SLC and Post Capital Partners formed TBA Buyer to purchase TBA Seller. Cowan attests that “Given TBA seller’s insolvent financial condition, had SLC and Post Capital been required to put up another half a million dollars just to

² Geddes was the CEO of TBA Global from 2004 to 2007, and currently he is a TBA Holdings Board member.

pay Fidus (and not to support TBA Seller's business), the deal would not have gone through." Pet. Exh. 13.

Petitioners did not expressly limit the term "contractors" to those "hired for its day-to-day operations." Additionally, in a separate provision, TBA Buyer expressly limited other assumed liabilities to those "incurred in the ordinary course of business from October 31, 2012 through the Closing date." A&P Agreement, Schedule 1.3(c). If the contracting parties had intended to limit the meaning of "contractors" in the manner now urged by Petitioners, they would have done so.

Petitioners have failed to meet their burden as to TBA Buyer, but as to the separate company and Petitioner TBA Holdings, LLC, they have succeeded in showing that TBA Holdings, LLC was not a party to either the Fidus or the A&P Agreement, and Respondent has not submitted sufficient evidence to rebut the showing. TBA Buyer is bound to arbitrate pursuant to the Fidus Agreement.

Because the court finds that TBA Buyer assumed the Fidus liability, and that TBA Holdings, LLC is a stranger to the underlying agreements, it is not necessary to decide Respondent's additional grounds of estoppel and successor liability. Accordingly, it is hereby

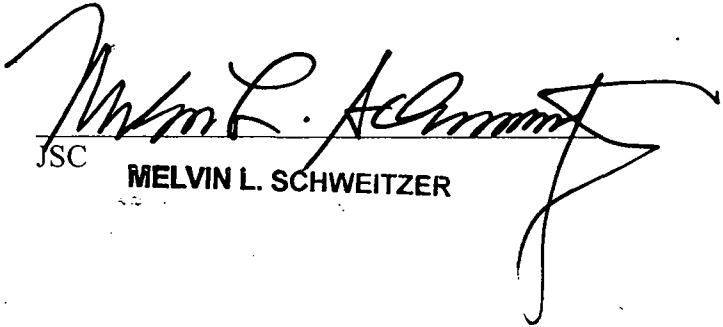
ORDERED that Petitioners' Petition and Motion for Permanent Stay of Arbitration are granted as to Petitioner TBA Global Holdings, Inc. and denied as to Petitioner TBA Global, LLC; and it is further

ORDERED that the temporary stay of arbitration is vacated.

Petitioners shall submit the Judgment to the Clerk.

Dated: June 9, 2014

ENTER,


JSC MELVIN L. SCHWEITZER