Matter of La Boom Inc. v D & W Central Station Fire Alarm Co., Inc.
2016 NY Slip Op 32573(U)
December 19, 2016
Supreme Court, New York County
Docket Number: 651738/16
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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In the Matter of the Application of
LA BOOM INC. and PEDRO ZAMORA,

Petitioners,

-against-

D & W CENTRAL STATION FIRE ALARM CO., INC.,

Respondent.

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Index no. 651738/16

Motion seq. no. 001

DECISION & ORDER

BARBARA JAFFE, JSC:

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By notice of motion, respondent moves pursuant to CPLR 3211(a)(1) and (8) to dismiss a proceeding brought pursuant to CPLR 7503(b) to stay arbitration. Petitioners oppose.

I. BACKGROUND

Pursuant to a service agreement dated March 13, 2012, the parties agreed that "[a]ny action or dispute between the parties, including issues of arbitrability, shall, at the option of either party, be determined by arbitration to be administered by the National Arbitration Association . . . under its Commercial Arbitration Rules." The provision appears on the second page of the agreement; the subscription lines, which appear on the first page, are preceded, in bold and capital letters, by the following, "See reverse side for additional terms and conditions on this contract. Read them before you sign this contract." (NYSCEF 8, Exh. A).

On or about March 28, 2016, following receipt of respondent's demand for arbitration,

petitioners commenced this proceeding by summons with notice. Their pleading is accompanied by an affidavit and attorney affirmation in support, and all papers were served on April 18, 2016. (NYSCEF 1, 4-5).

In his affidavit, petitioner Pedro Zamora, owner of petitioner La Boom Inc., alleges that respondent installed a fire monitoring system at La Boom in March 2012 pursuant to their agreement, that he hired another provider in November 2012 to install newer, Fire Code-compliant equipment because the equipment respondent provided was no longer adequate, and that respondent consequently removed its old equipment from the premises. He denies that he agreed to arbitrate disputes arising under their agreement, and maintains that the arbitration provision was added to the contract after he signed it. (NYSCEF 4 [Affidavit of Pedro Zamora, dated March 29, 2016]). Petitioners also assert that to the extent that there was an agreement to arbitrate, it was extrinsic to their main agreement and may not be incorporated into it, and alternatively, the arbitration provision, allowing the parties to pursue arbitration at their "option," indicates the absence of a clear and unequivocal agreement to arbitrate disputes. (NYSCEF 3).

II. DISCUSSION

A. Contentions

Relying on the affidavit of its vice-president, respondent contends that the proceeding is untimely as petitioners failed to serve a petition with notice or order to show cause within the time prescribed by CPLR article 75, nor did they request an extension, and also failed to serve a notice of efiling as required pursuant to 22 NYCRR 202.5-bb. In the event that service is deemed proper, respondent argues, there exists a "clear, explicit, and unequivocal" agreement between the parties to arbitrate and thus the matter should be submitted to arbitration. It argues

that while the arbitration clause refers arbitratible matters to the National Arbitration Association (NAA), Arbitration Services, Inc. (ASI) nonetheless has jurisdiction as it merged with, and thus succeeded, NAA. (NYSCEF 8-9).

In opposition, petitioners claim that the pleadings they served on respondent were adequate to apprise it of the nature of the proceeding and any irregularities may be overlooked. Moreover, they contend that their failure to attach an efiling notice to their pleadings was inadvertent and does render service invalid, that Zamora's sworn assertion that the arbitration clause was added to the parties agreement after he signed it raises an issue of fact precluding dismissal, and that respondent fails to establish that ASI succeeded NAA absent proof based on personal knowledge. (NYSCEF 11).

B. Analysis

1. Lack of jurisdiction

To penalize petitioners for the defects and irregularities in their pleadings would exalt form over substance, where, as here, there is no indication that respondent was not otherwise properly served. (*See Matter of Billone v Town of Huntington*, 188 AD2d 526, 527-528 [2d Dept 1992] [irregularity overlooked where "(a)lthough the petitioner's order to show cause was not accompanied by any document designated a 'petition,' the attorney's affirmation, . . . did contain all of the ingredients necessary to a petition"]; *Matter of Greenberg [Ryder Truck Rental]*, 110 AD2d 585, 586 [1st Dept 1985] [while action pursuant to Insurance Law was brought in form of petition instead of summons and complaint, court converted to proper form where it otherwise had jurisdiction over matter]; *see also* CPLR 103[c] ["If the court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in

the proper form . . . ."]; CPLR 2001). Moreover, absent any authority for the proposition that petitioners' failure to include an efiling notice with the service of their pleadings constitutes a jurisdictional defect, it too may be cured.

2. Agreement to arbitrate

Pursuant to CPLR 3211(a)(1), a party may move to dismiss a cause of action based on documentary evidence provided that the evidence conclusively establishes, as a matter of law, a defense to the asserted claims. (*Leon v Martinez*, 84 NY2d 83, 87-99 [1994]). While the court must construe the pleadings liberally, it is not required to accept the truth of allegations that are flatly contradicted by documentary evidence. (*Maldonado v DiBre*, 140 AD3d 1501, 1505 [3d Dept 2016], *lv denied* 2016 NY Slip Op 92055; *Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). The evidence must be "unambiguous, authentic, and undeniable." (*Sabre Real Estate Group, LLC v Ghazvini*, 140 AD3d 724, 725 [2d Dept 2016]).

An agreement to arbitrate is a contract and, when clear, is to be enforced according to its terms. Thus, parties who clearly and expressly agree to arbitrate must do so. (*Matter of Exercycle Corp. [Maratta]*, 9 NY2d 329, 334 [1961]; *Gomez v Brill Sec., Inc.*, 95 AD3d 32, 37 [1st Dept 2012]). Absent a "clear, explicit and unequivocal" agreement to submit claims for arbitration, a party may not be compelled. (*Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 132-133 [1st Dept 2014]).

A party may challenge the enforcement of an agreement to arbitrate "on any basis that could provide a defense to or grounds for the revocation of any contract, including fraud, unconscionability, duress, overreaching conduct, violation of public policy, or lack of contractual capacity." (*Matter of Teleserve Sys. [MCI Telecom. Corp.]*, 230 AD2d 585, 592 [4th Dept 1997]).

While the validity of the entire agreement is an issue committed to the arbitrator, the court should determine whether the arbitration provision was induced by fraud or duress. (*Zurich Ins. Co. v R. Elec., Inc.*, 5 AD3d 338, 338 [1st Dept 2004]). The party asserting fraud must demonstrate that the agreement "was not the result of an arm's length negotiation, or the arbitration clause was inserted into the contract to accomplish a fraudulent scheme." (*Ferrarella v Godt*, 131 AD3d 563, 566-567 [2d Dept 2015], *lv denied* 26 NY3d 913).

Here, respondent relies solely on the arbitration provision in the parties' contract. Given the warning on the first page of the agreement, petitioners' allegation that the arbitration provision is the product of fraud is baseless, especially as they do not allege that they did not see or read it. (*See eg, Pirozzolo v Dimeo*, 141 AD2d 810, 811 [2d Dept 1988], *lv denied* 73 NY2d 704 [1989] [allegations of fraudulent inducement refuted by language of agreement itself]). Thus, absent any allegation that the arbitration provision was inserted into the contract to effect a fraudulent scheme, respondent establishes a defense as a matter of law.

Moreover, that each party has the option to initiate arbitration does not imply a lack of mutuality to submit disputes to arbitration. To the contrary, courts have enforced agreements to arbitrate which grant only one party a unilateral right to elect arbitration. (*See Sablosky v Edward S. Gordon Co., Inc.*, 73 NY2d 113, 137 [1989] [mutuality of remedy not required in arbitration agreement where there is otherwise valid consideration exchanged]; *Matter of Ball [SFX Broadcasting Inc.]*, 236 AD2d 158, 160-161 [3d Dept 1997] [petition to stay arbitration denied where, among other things, valid agreement to arbitrate was supported by consideration and did not require mutuality of remedy]).

The parties' remaining contentions unrelated to the validity of the arbitration clause may be submitted to the arbitrator. (*See eg, Cooper v Bruckner*, 21 AD3d 758, 759 [1st Dept 2005]

["All remaining questions, after the threshold ones reserved for the court (such as validity of agreement to arbitrate), . . . are for the arbitrators."]).

IV. CONCLUSION

Accordingly, for all the foregoing reasons, it is hereby

ORDERED, that respondent's motion to dismiss the petition is granted and the proceeding is dismissed.

ENTER:

Barbara Jaffe, JSC

DATED: December 19, 2016
New York, New York