

<b>Gibbs v Holland &amp; Knight, LLP</b>
2017 NY Slip Op 32075(U)
October 2, 2017
Supreme Court, New York County
Docket Number: 159345/14
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X  
CHARLES F. GIBBS,

Plaintiff,

- against -

Index No. 159345/14

HOLLAND & KNIGHT, LLP,

Defendant.

-----X

**Hon. C.E. Ramos, J.S.C.**

In motion sequence 007, defendant Holland & Knight, LLP ("H&K") moves pursuant to CPLR 7503(b) and CPLR 2201 to stay the arbitration ("Gibbs Arbitration") commenced by plaintiff Charles F. Gibbs ("Gibbs") on December 7, 2016 before the International Institute for Conflict Prevention and Resolution ("CPR"), pending H&K's motion to confirm the arbitration award ("Award") issued by CPR and arbitrator Bettina B. Plevan ("Arbitrator Plevan") on September 13, 2016 in favor of H&K ("H&K Arbitration").

At oral argument on the motion, this Court granted H&K's motion to confirm the Award (NYSCEF Doc. No. 241).

For the reasons set forth below, this Court denies H&K's motion to stay, in its entirety.

**Background**

In July 2000, Gibbs joined H&K as a Class C Partner pursuant to a Class C Partner Admission Agreement, effective December 1, 2002, as provided by the employment agreement ("Employment Agreement") (Complaint, ¶ 6).

Gibbs came to H&K with significant experience in high-profile trust and estate litigation, trust and estate administration, and matrimonial matters (Complaint, ¶ 5).

Paragraph 2(a) of the Employment Agreement sets forth Gibbs' compensation for 2002 and 2003, in accordance with an annual compensation production schedule (Complaint, ¶ 8).

Paragraph 3 of the Employment Agreement provides, in relevant part, that subject to certain conditions, Gibbs' compensation for 2004 and subsequent years shall be determined by Gibbs and H&K's managing partner (Complaint, ¶ 10).

Paragraph 11 of the Employment Agreement, provides, in relevant part:

Termination of this Amendment shall be pursuant to the terms and provisions of this Amendment and shall not be subject to or controlled by the terms and provisions of the Partnership Agreement dealing with a disability, withdrawal, termination or expulsion of a partner. The right of Gibbs to receive compensation under Paragraph 2 or Paragraph 3 above shall survive termination of this Amendment.  
(Complaint, Ex. A).

On February 26, 2009, Michael Marget, a non-lawyer employee at H&K, sent a memorandum to all H&K Senior Partners, wherein Gibbs was notified of his Senior Partner Draw for the 2009 year ("2009 Memo") (Complaint, ¶ 13).

A box at the bottom of the 2009 Memo provides:

This Notice and the firm's Amended and Restated Partnership Agreement together constitute the entirety of your current compensation arrangement with Holland & Knight. To the extent that any prior written or oral

agreements or understandings concerning your compensation previously have not expired or been terminated, they are hereby terminated.  
(Complaint, Ex. C).

As of September 27, 2012, H&K amended and restated its Partnership Agreement ("Partnership Agreement") (Complaint, ¶ 21). It is undisputed that Gibbs was not a signatory to the Partnership Agreement (Complaint, ¶ 22).

Pursuant to Section 5.3 of the Partnership Agreement, H&K was to have a separate written contract with each senior partner that would detail his workload, hours, and duties (Giansello Aff., Ex. F, § 5.3).

The Partnership Agreement mandates an alternative dispute resolution procedure ("Partnership Agreement ADR Procedure") to resolve any disputes that arise between partners and H&K (Giansello Aff., Ex. F). Section 22.2 of the Partnership Agreement provides, in relevant part:

If any dispute has not been resolved by negotiation as provided in Section 22.1, the parties shall endeavor to resolve the dispute by mediation under the then current International Institute for CPR Mediation Procedure...  
(Giansello Aff., Ex. F, § 22.2)

Section 22.3 of the Partnership Agreement provides, in relevant part:

Any dispute that has not been resolved by mediation, as provided in Section 22.2 within 60 days of the initiation of such procedure, shall be finally settled by arbitration conducted *expeditiously* in accordance with the then current CPR Rules for Non-Administered Arbitration by a sole arbitrator...  
(Giansello Aff., Ex. F, § 22.3) (emphasis added).

In 2011 and 2012, Surrogate Nora Anderson ("Anderson") of the New York Surrogate Court appointed Gibbs as *guardian ad litem* in the Robles estate matter ("Robles Matter") and the Wasserstein estate matter ("Wasserstein Matter").

On December 16, 2013, H&K notified Gibbs that he would be an "[i]nactive Senior Partner for 2014 and would not be entitled to be compensated with respect to 2014" (Complaint, Ex. D).

On December 26, 2013, Gibbs purported to reject H&K's attempt to place him on Inactive Senior Partner status and effectively terminate his employment (Complaint, Ex. E).

By letter dated January 16, 2014, H&K purported to terminate the Employment Agreement, and provided Gibbs with a sixty-day termination notice (Complaint, Ex. F). By letter dated January 17, 2014, H&K provided Gibbs with notice of his proposed compensation for 2013 (Complaint, ¶ 32).

Subsequently, on February 21, 2014, Gibbs wrote to Steven Sonberg ("Sonberg"), H&K's managing partner, claiming that his proposed compensation for 2013 was deficient and did not adequately compensate him for his work on the Bock/Clark matters, which both involved high profile and lucrative litigation (Complaint, ¶ 33). According to Gibbs, he was owed, at a minimum, \$825,000 for his work on the Bock/Clark matters (Complaint, ¶ 35).

On September 22, 2014, Gibbs commenced this action ("Commercial Division Action") seeking a declaratory judgment that the Employment Agreement was not terminated until March 17, 2014, sixty days after the January Termination Notice, that Gibbs was the principal originator of the Bock/Clark matters, and that Gibbs is entitled to proper compensation for 2012, 2013, and 2014 in accordance with the Employment Agreement (Complaint, Ex. A).

The Commercial Division Action was assigned to Justice Kornreich. On April 28, 2015, Justice Kornreich held that Gibbs' claims were subject to mediation and arbitration in accordance with the dispute resolution procedures set forth in the Partnership Agreement ("April 2015 Order") (NYSCEF Doc. No. 50). Thereafter, Gibbs appealed the April 2015 Order.

While the appeal of the April 2015 Order ("Appeal") was pending, H&K learned that Gibbs had received approximately \$500,000 in Surrogate's Court fee awards while he served as *guardian ad litem* in the Robles Matter and Wasserstein Matter during his tenure in the partnership at H&K. H&K demanded that Gibbs return the funds, as mandated by the Partnership Agreement (Giansello Aff., Ex. F., § 5.5).

After an unsuccessful mediation in Summer 2015, H&K commenced the H&K Arbitration pursuant to Article XXII Section 22.3 of the Partnership Agreement, on October 9, 2015 (Giansello Aff., Ex. F., § 22.3).

Pursuant to the CPR Rules, within twenty days of receiving the notice of arbitration, a respondent is to provide a notice of defense, including any counterclaim within the scope of the arbitration clause (Giansello Aff., Ex. F, Rule 3.8). The CPR Rules also provide that "claims or counterclaims within the scope of the arbitration clause may be freely added, amended or withdrawn prior to the establishment of the Tribunal, and thereafter with the consent of the Tribunal" (*Id.*).

Thereafter, on November 25, 2015, Gibbs moved in the Commercial Division Action to stay the H&K Arbitration and H&K cross-moved to compel the H&K Arbitration. On December 10, 2015, Justice Kornreich denied Gibbs' motion to stay, and granted H&K's cross-motion to compel (NYSCEF Doc. No. 132).

The H&K Arbitration was commenced on August 1, 2016 in front of Arbitrator Plevan. On September 13, 2016, Arbitrator Plevan issued her interim award ("Interim Award"). In the Interim Award, Arbitrator Plevan noted that "there is other litigation pending between the parties concerning disputes, in particular a claim by Gibbs for additional compensation. That dispute is not the subject of this proceeding" (Robert Aff., Ex. 26). The Interim Award provided that H&K's claims for recovery of guardian ad litem fees were arbitrable (*Id.*). Arbitrator Plevan also concluded that Gibbs was obligated to compensate H&K \$18,000 for

the Robles Matter and \$413,318.09 for the Wasserstein Matter (*Id.*).

As to Gibb's off-set argument, Arbitrator Plevan concluded that Gibb's compensation claims were not at issue in the H&K Arbitration because they were subject to litigation, and therefore, could not be adjudicated (*Id.*).

On October 11, 2016, the First Department affirmed Justice Kornreich's April 2015 Order.

On October 21, 2016, H&K moved to confirm the Interim Award and on October 25, 2016, Arbitrator Plevan entered her final Award, granting H&K costs and attorneys' fees.

Gibbs opposed H&K's motion to confirm the Interim Award, and simultaneously sought a stay of enforcement of the Interim Award and final Award pending the resolution of the Gibbs Arbitration. On December 7, 2016, Gibbs commenced the Gibbs Arbitration.

In the Gibbs Arbitration, Gibbs set forth five causes of action, including declaratory judgment, breach of contract, violation of New York Labor Law, breach of fiduciary duty, *quantum meruit*, and unjust enrichment.

On December 27, 2016, H&K filed the instant motion to stay the Gibbs Arbitration.

#### **Discussion**

H&K moves to stay the Gibbs Arbitration pursuant to CPLR 7503(b) and CPLR 2201. H&K alleges that the Gibbs Arbitration



should be stayed pursuant to CPLR 7503(b) due to Gibbs' breach of the Partnership Agreement. In the alternative, H&K asserts that the Court has the authority to stay the action pursuant to CPLR 2201 under the doctrines of res judicata and claim preclusion because Gibbs deliberately withheld his compensation claims, which were purportedly part of the same transaction as the guardian ad litem claims, in the H&K Arbitration, despite having a full and fair opportunity to plead and litigate them.

CPLR 7503(b) provides, in relevant part:

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 or has not been complied with"  
(CPLR 7503[b]).

CPLR 2201 provides that "except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just" (CPLR 2201).

**A: Res Judicata and Claim Preclusion**

As to H&K's claim that the Gibbs Arbitration is barred by res judicata, H&K argues, at the outset, that this is a threshold issue and is a matter for the Court to decide and not for an arbitrator. H&K asserts that Gibbs had a full and fair opportunity to litigate his compensation claims in the H&K Arbitration, and that his failure to fully plead and litigate his claims during the proceeding results in a waiver. H&K maintains

that the H&K Arbitration and the Gibbs Arbitration involve claims that are inextricably part of the same underlying controversy, which Gibbs should have raised in the H&K Arbitration. Further, H&K alleges that Gibbs' repeated set-off arguments in the H&K Arbitration precludes him from now bringing the Gibbs Arbitration to address the same claims.

In opposition, Gibbs argues that first and foremost, the res judicata effect, if any, of a prior arbitration award is a matter for the arbitrator to decide. Moreover, Gibbs maintains that res judicata is inapplicable because the H&K Arbitration only addressed H&K's claim to guardian ad litem fees, while the Gibbs Arbitration addresses Gibb's claim to more than \$1.5 million of unpaid compensation. Gibbs also argues that issue preclusion does not bar the Gibbs Arbitration because the claims at issue were not pled or litigated in the H&K Arbitration.

Recent case law demonstrates that the Court lacks the authority to determine whether the Gibbs Arbitration is barred by the doctrines of res judicata and collateral estoppel. On a motion to stay an arbitration, this Court's "gatekeeper" role is limited to determining whether there was a valid arbitration agreement, whether the parties complied with the agreement, and whether the claim to be arbitrated is barred by the statute of limitations (*CPS 1 Realty LP v RP Brennan General Contractors &*

*Builders, Inc.*, 66 AD3d 418 [1st Dept 2009]; *Cooper v Bruckner*, 21 AD3d 758, 759 [1st Dept 2005]).

Here, as discussed below, it has already been decided that the timing of the Gibbs Arbitration was not in breach of the Partnership Agreement. The parties have not raised any statute of limitations arguments. Accordingly, the Court's further involvement is unnecessary and unwarranted.

#### **B. Breach of the Partnership Agreement**

H&K also argues that Gibbs' breach of the Partnership Agreement's requirement to arbitrate claims expeditiously warrants a stay of the Gibbs Arbitration under CPLR 7503(b). H&K maintains that although this requirement does not set forth a firm deadline, Gibbs' should be penalized for his dilatory and evasive conduct and avoidance of arbitration. H&K also argues that Gibbs breached the CPR rule, which is incorporated into the Partnership Agreement, which requires the parties to use their best efforts to submit a dispute for decision within six months of the initial pre-hearing conference and issuance of the award within one month thereafter (*Giansello Aff.*, Ex. B, §§ 1.1, 18.7).

Gibbs argues that H&K's allegations that he engaged in dilatory and evasive conduct are insufficient to establish a breach of the Partnership Agreement. Rather, Gibbs contends that his decision to await the outcome of the Appeal before proceeding

with the Gibbs Arbitration was lawful and not the product of delay.

H&K has failed to establish that Gibbs' conduct was in breach of the Partnership Agreement, and, as a result, a stay of the Gibbs Arbitration pursuant to CPLR 7503(b) is inappropriate at this juncture. Awaiting the outcome of his appeal before proceeding with arbitration, itself, is insufficient to constitute breach of the Partnership Agreement's requirement that the parties to engage in arbitration *expeditiously* (Giansello Aff., Ex. F, § 22.3).

Since the Commercial Division Action was commenced on September 23, 2014, Gibbs has actively prosecuted his claims and participated in the H&K Arbitration. After the Court denied Gibbs' motion to stay the H&K Arbitration and granted H&K's motion to compel arbitration, Gibbs focused his efforts on appealing the ruling. The H&K Arbitration commenced on August 1, 2016, shortly after the Appellate Division affirmed this Court's Order on June 28, 2016. Thereafter, once Gibbs had exhausted his right to appeal, he commenced the Gibbs Arbitration. This timeline negates H&K's assertions that Gibbs engaged in evasive and dilatory conduct. The fact that Gibbs waited nine months to perfect the Appeal does not amount to breach of the Partnership Agreement.

Regardless, CPLR 7503(b) is inapplicable to the instant matter, as it only entitles "part[ies] who ha[ve] not

participated in the arbitration and who ha[ve] not made or been served with an application to compel arbitration" to move for a stay (CPLR 7503[b]). H&K fits into neither of those categories, as it has actively participated in the Gibbs Arbitration. Moreover, Gibbs filed the Notice of Arbitration for the Gibbs Arbitration on December 7, 2016 (Heymann Aff., Ex. 2). H&K does not claim that it was not served with such notice. Accordingly, H&K is not entitled to relief under CPLR 7503(b).

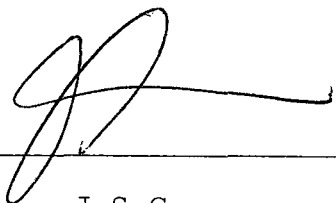
Absent a showing that proceeding with the Gibbs Arbitration would violate public policy of the State, any remaining issues, including whether the Gibbs Arbitration is barred by res judicata, "are within the exclusive province of the arbitrator to resolve" (*Rabinovich v Shchegol*, 251 AD2d 25 [1st Dept 1998]; *Port Authority of New York and New Jersey v Port Authority Police Sergeants Benev. Assoc.*, 225 AD2d 503, 503 [1st Dept 1996]). H&K has failed to establish otherwise.

Accordingly, it is

ORDERED that Holland & Knight LLP's motion to stay the Gibbs Arbitration is denied.

Dated: October 2, 2017

Enter:



J.S.C.

**CHARLES E. RAMOS**