SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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SLI HOLDINGS, INC.,

Plaintiff,

-against-

KEVIN ADLER AND BRIAN LESSIG,

Defendants.

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KEVIN ADLER AND BRIAN LESSIG,

Crossclaim Plaintiffs,

-against-

SOUTHPORT LANE MANAGEMENT, LLC AND SOUTHPORT LANE, LP,

Crossclaim Defendants.

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SOUTHPORT LANE MANAGEMENT, LLC AND SOUTHPORT LANE, LP,

Plaintiffs,

-against-

KEVIN ADLER AND BRIAN LESSIG,

Defendants.

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DECISION AND ORDER
Index No.: 655147/2016

Motion Sequence Nos.: 003-004

Index No.: 155915/2016

Motion Sequence No.: 004

O. PETER SHERWOOD, J.:

In *Southport Lane Management LLC v Adler*, Index No.: 155915/2016 ("SLM"), Motion Sequence Number 004, plaintiffs move a second time for an order staying arbitration (*see* NYSCEF Doc. No. 37). In *SLI Holdings, Inc., v Adler*, Index No.: 655147/2016 ("SLI"), Motion Sequence Number 004, plaintiff seeks the same relief (*see* NYSCEF Doc. No. 48)[1]. In Motion Sequence Number 003, SLI seeks to strike defendants' amended answer, defenses and

[1] Unless otherwise indicated, citations to the record are to NYSCEF in the SLI case.

counterclaims[2] or in the alternative, dismissing the counterclaims asserted by defendant Adler (NYSCEF Doc. No. 33). All three motions are consolidated for decision.

The genesis of these cases lies in the employment relationship between SLM and defendants, Adler and Lessig, begun in 2011. At the time of employment, both defendants entered into employment agreements (dated February 21, 2011) which contain broad indemnification and arbitration clauses.[3] The agreements also set the terms of compensation which included base salary and performance based cash bonuses and equity (NYSCEF Doc. Nos.). According to the SLM complaint, Adler and Lessig terminated their employment on February 8, 2013 and May 31, 2013 respectively. Each signed a Separation Agreement as of December 19, 2013 (NYSCEF Doc. No. 37). SLM signed on behalf of itself, "its parents, subsidiaries, and all affiliated . . . entities, and each of their successors and assigns" (NYSCEF Doc. No. 37). On December 20, 2013, each signed a separate Purchase Agreement ("PA") selling his equity in SLM, its parent, Southport Lane, LP ("SLLP") (together "the Entities" and Premium Win Acquisitions, LLC ("PWA") (NYSCEF Doc. No. 43, pp. 28-42).

Insofar as is relevant on these motions, the Purchase Agreement provided consideration to each defendant in the amount of $2,000,000 plus "Additional Consideration [payable] in either case or equity securities" at a later date. In the PA, SLM and SLLP made certain representations and warrantys, including that

> (2) the Entities have secured all required consents to enter into this Agreement;
>
> (3) the Entities have all the required power and authority to enter into this Agreement and to carry out their obligations under this Agreement;
>
> (4) this Agreement does not and will not violate any statute . . . [or] agreement . . . to which the Entities are subject;
>
> (5) the Entities . . . have the financial abilities to meet their respective obligations under this Agreement;
>
> (6) this Agreement is a legal, binding obligation of the Entities . . .".

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[2] The counterclaims, all of which relate to contracts between SLM and defendants, are for "Indemnification", "Severance" and "Payments Due".

[3] These provisions are quoted and discussed in Justice Singh's Decision and Order denying SLM's motion to stay the arbitration of claims made by Adler and Lessig (*see* NYSCEF Doc. No. 22 in the SLM case).

The Entities also represented that defendants had not seen the books and records nor been provided any information regarding the operation or financial condition of the Entities (id, ¶ 2[b]). With respect to arbitration, the PA provided at ¶ 14:

> "if any dispute shall rise between Seller and the Entities, whether arising from, or related to this Agreement, or otherwise, each of Seller and the Entities agree to be bound by the Arbitration Agreement contained [in] the Employment Agreement"

The Employment Agreements, Termination Agreements and PA are all signed on behalf of SLM and SLLP by Alexander Burns, various capacities as Director or Chairman.

The SLM complaint was filed on July 15, 2016. It alleged breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud and conspiracy to commit fraud. It also alleged violation of New York Debtor and Creditor Law §§ 273, 276, 276-a and 278 against defendants. In an amended complaint filed on September 27, 2016 in the SLM case, plaintiffs excised the fraudulent conveyance claims (*see* NYSCEF Doc. No. 4 in SLM).

The SLI complaint was filed a day later, on September 28, 2016 "seeking a judgment pursuant to . . . New York Debtor and Creditor Law § 270 *et seq*. . . . to avoid and recover the value of . . . transfers made to defendants' (NYSCEF Doc. No. 1). The complaint alleges violation of Debtor and Creditor Law §§ 273, 274, 275, 276, 276-a and 278 against both defendants and seeks recovery of the same sums alleged in the original SLM complaint. It seeks to recover $2,781,964.23 against Adler and $2,554,085.95 against Lessig, the same amount claimed in the SLM case. Defendants' eighth affirmative defense alleges that this dispute is subject to arbitration (NYSCEF Doc. No. 22, p.4).

On November 1, 2016 the defendants served demands for arbitration pursuant to the Employment Agreements and Separation Agreements. Thereafter, SLM and SLLP moved to stay arbitration in the SLM case. In a Decision and Order dated April 14, 2017, Justice Singh denied the motion (*id.*).

The SLI case was randomly assigned to this court because plaintiff failed to disclose on the Request for Judicial Intervention that the case is related to the SLM case.[4]

In a Decision and Order dated April 19, 2017 in the SLI case, this court granted plaintiff's motions to dismiss defendants' counterclaims and to stay arbitration based on plaintiff's claim that

[4] Counsel insists the cases are not related except "in a colloquial sense". Tr. p. 26. The complaint in the SLM case shows otherwise (*see* Tr. P. 30).

SLI was not a party to or otherwise in privity with the parties to the contracts as at issue (NYSCEF Doc. Nos. 26 and 27). It now appears that SLM and SLI were affiliates at least as of the time of the alleged fraudulent conveyances (*see* Tr. 20). Plaintiffs now claim that SLI is not subject to the arbitration clause of the Employment Agreements because at the time those agreements were signed in 2011, SLI did not exist (Tr. 19). At the time of the motion, plaintiff did not disclose that SLM and SLI were affiliates and that the assertion that SLI was not bound by the arbitration provision of the employment and separation agreements was not based on a claim that SLI, SLM and SLLP were not affiliated but instead that SLI did not exist at the time those agreements were signed. These important facts cast an entirely different light on the claims plaintiff advanced when it sought to stay arbitration of the controversy. For this reason, the court will not apply the law of the case doctrine to stay defendants' second demand for arbitration filed with JAMS on or about October 31, 2017. The fact that SLI was created after the employment agreements were signed does not insulate SLI from the obligation to arbitrate because under the terms of the Separation Agreements, SLM and SLLP intended to bind not only themselves, but also their affiliates and "their successors and assigns" (NYSCEF Doc. No. 34 in SLM). Thus, SLM and SLLP agreed that the Separation Agreements would bind present and future affiliates (here SLI). Moreover, it appears that SLI existed and was an affiliate of SLM and SLLP at the time the allegedly fraudulent conversions were made. SLI may be bound by the terms of the PA, including the express warrantys given therein.

Accordingly, plaintiffs' motion to stay arbitration in the SLI case (motion sequence number 004) is DENIED. Motion sequence number 003, which is also based on the claim that SLI did not exist at the time SLM and SLLP signed the PA, is DENIED for the same reasons.

Likewise, the Second Motion to Stay in the SLM case is DENIED. Any waiver of arbitration must be clear and unequivocal (*see In re Wonderworks Constrn Corp. v RL Dolner, Inc.*, 2008 NY Slip Op. 32457, Sup. Ct, New York Cty 2008, Goodman, JSC). The mere preservation of claims by defendants in the SLI case is not evidence of a clear waiver of the right to arbitration. That defendants sought consistently to assert their claims in an arbitration proceeding is amply demonstrated by their assertion of claims for arbitration in pleadings filed on November 2, 2016, August 31, 2017 and September 21, 2017, as well as in a Demand for Arbitration served on defendants on or about October 27, 2017 (NYSCEF Doc. Nos. 4, ¶¶ JJ-YY; 28 and 29).

This constitutes the decision and order of the court.

DATED: **April 26, 2018**

ENTER,

O. PETER SHERWOOD J.S.C.