SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36
----------X
Daniel Heasman,

Plaintiff,

-against-

The Rise Group, LLC, Gareth Miles and Kimberly Massey,

Defendants.
----------X

Index Number: 657437/2017

Motion Seq. No: 001

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31
were read on this motion to/for COMPEL ARBITRATION.

Doris Ling-Cohan., J.:

Defendants move, pursuant to CPLR 7503 (a), for an order compelling arbitration and staying proceedings in this action, pending the resolution of the arbitration and for sanctions. Plaintiff cross-moves for an order disqualifying defendants' counsel, the law firm of Balestriere Fariello (the Law Firm).

Underlying Allegations

Plaintiff states that he and defendants Gareth Miles (Miles) and Kimberly Massey (Massey) were members of the Rise Group, LLC (Rise), a consulting company which began operations in 2013 (complaint, ¶¶ 3, 5). Plaintiff also states that Rise had an operating agreement dated April 30, 2015 (the Agreement), which "governs the rights and obligations of the parties" (*id.*, ¶ 4).

Plaintiff contends that on or about September 16, 2017, he sought to withdraw as a member of Rise to take a job with one of Rise's customers, a company known as MongoDB, Inc. (Mongo) (*id.*, ¶¶ 5, 24). Plaintiff maintains that, as a result of this, Miles and Massey sought to deny him his legitimate share of Rise (*id.*, ¶¶ 8, 10, 12, 14, 16). Plaintiff's complaint asserts causes of action for breach of contract, breach of fiduciary duty, unjust enrichment, breach of duty of good faith, a declaration of the parties' rights and an accounting.

The Agreement includes the following provisions:

> "8.4 Entire Agreement. This Agreement . . . constitutes the entire agreement between the parties herein . . . and supercedes any and all prior understandings or agreements between the parties, written or oral.
> * * *
>
> 8.12 Litigation. This Agreement shall be governed by, construed applied and enforced in accordance with the laws of the State of New York . . . Subject to Section 8.13, the parties agree that any action or proceeding to enforce or arising out of this agreement may be commenced in the courts of the State of New York or the United States District Courts in New York, New York. The parties consent to such jurisdiction, agree that venue will be proper in such courts and waive any objections based upon forum non conveniens. The choice of forum set forth in Section 8.13 shall not be deemed to preclude the enforcement of any judgment

obtained in such forum or the taking of any action under this agreement to enforce same in any other jurisdiction.

8.13 Arbitration. Unless otherwise provided in this agreement, any dispute between or among the parties to this agreement relating to or in any respect of this agreement, its negotiation, execution, performance, subject matter, or any course of conduct or dealing or actions under or in respect of this agreement that has not been resolved by the terms of this agreement (including the buyout terms of this agreement), shall be submitted to, and resolved exclusively pursuant to arbitration in accordance with the commercial arbitration rules of the American Arbitration Association. Such arbitration shall take place in New York, New York and shall be subject to the substantive law of the State of New York. Decisions pursuant to such arbitration shall be final, conclusive and binding upon the parties. Upon the conclusion of arbitration, the parties may apply to any court of the type described in Section 8.12 to enforce the decision pursuant to such arbitration. The parties hereby waive any rights to a jury trial to resolve any disputes or claims relating to this agreement or its subject matter. The parties hereto agree that any disputes between this agreement, the consulting agreement or the production agreement may be consolidated into one action before an arbitrator to resolve all such disputes simultaneously"

(emphasis supplied).

Plaintiff also states that he and defendants Miles and Massey hired the Law Firm in 2013 to form Rise pursuant to an operating agreement (the 2013 Operating Agreement), that the Law Firm drafted both the 2013 Operating Agreement and the Agreement and that he and the other members of Rise "communicated [their] thoughts, opinions and concerns to the attorneys at [the Law Firm] regarding both operating agreements" (plaintiff affidavit, ¶¶ 2, 3, 7, 9, 12-13). Plaintiff asserts that, due to this, the Law Firm should be disqualified from appearing in the within litigation (id., ¶ 18).

Defendants assert that the primary attorney at the Law Firm that prepared the 2013 Operating Agreement is no longer at the Law Firm (McNeil affirmation, ¶¶ 5-6). They state that the Law Firm "never provided individual counsel to [plaintiff], Massey or Miles in connection with the drafting or negotiating of the 2013 [Operating] Agreement or any other matter" (*id.*, ¶ 7). They further state that the Law Firm "never entered into any retainer agreement or letter of engagement with [plaintiff] in his individual capacity . . . [or sent] any invoices or bills for any representation [to plaintiff in his individual capacity], . . . [but rather, the Law Firm] created invoices and bills for Rise, and has received payment on behalf of Rise" (*id.*, ¶¶ 8-10). Defendants claim that, in connection with preparing the Agreement, the Law Firm advised "that it represented [Rise] and

not the individual members . . . [and that it] has sent invoices to [Rise and that Rise] . . . has paid . . . these invoices" (*id.*, ¶¶ 13, 16-17). Consequently, defendants contend that disqualification of the Law Firm should be denied.

Arbitration

Initially, whether a controversy is subject to arbitration is a matter for the court to determine and the proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007]). There must be "an express, unequivocal agreement" to arbitration (*Matter of Marlene Indus. Corp. [Carnac Textiles]*, 45 NY2d 327, 333 [1978]). Without such a clear and explicit agreement to arbitrate, a party cannot be compelled to submit to arbitration (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006]). However, "[a]rbitration is favored in New York State as a means of resolving disputes, and courts should interfere as little as possible with agreements to arbitrate" (*Shah v Monpat Constr., Inc.*, 65 AD3d 541, 543 [2nd Dept 2009]). Moreover, "when the parties' agreement specifically incorporates by reference the AAA rules, which provide that '[t]he tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration

agreement,' and employs language referring 'all disputes' to arbitration, courts will 'leave the question of arbitrability to the arbitrators'" (*Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 496 [1st Dept 2009], *affd* 14 NY3d 850 [2010], *quoting Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 47 [1997]).

Disqualification of Counsel

The advocate witness rule is based upon the attorneys' "duties of both confidentiality and loyalty to their clients [and it therefore] precludes attorneys from representing interests adverse to a former client on matters substantially related to the prior representation" (*Tekni-Plex, Inc. v Meyer & Landis*, 89 NY2d 123, 130 [1996]). Under the rule, "a party seeking disqualification of its adversary's lawyer must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse" (*id.* at 131). However, "[d]isqualification of a law firm during the litigation implicates not only the ethics of the profession but also the substantive rights of the litigants [since it] denies a party's right to representation by the attorney of its choice" (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443 [1987]). "On a

motion for disqualification, '[t]he challenging party carries a heavy burden of identifying the projected testimony of the advocate-witness and demonstrating how it would be so adverse to the factual assertions or account of events offered on behalf of the client as to warrant his [or her] disqualification'" (*Dishi v Federal Ins. Co.*, 112 AD3d 484, 484 [1st Dept 2013], *quoting Broadwhite Assoc. v Truong*, 237 AD2d 162, 163 [1st Dept 1997]; *see also Kelleher v Adams*, 148 AD3d 692, 692-693 [2d Dept 2017]; *Hele Asset, LLC v S.E.E. Realty Assoc.*, 106 AD3d 692, 693 [2d Dept 2013]).

Sanctions

"Sanctions are retributive . . . [to] punish past conduct [and] . . . goal oriented . . . in deterring future frivolous conduct" (*Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34 [1st Dept 1999]; *see also Yenom Corp. v 155 Wooster St. Inc.*, 33 AD3d 67, 70 [1st Dept 2006]). "[F]rivolous conduct can be defined [as follows]: the conduct is without legal merit; or is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or asserts material factual statements that are false" (*Levy*, 260 AD2d at 34; *see also Matter of Grayson v New York City Dept. of Parks & Recreation*, 99 AD3d 418, 419 [1st Dept 2012]). "[A] somewhat colorable argument" is not sanctionable since it is not completely without merit and can be supported by a reasonable argument for extension, modification

or reversal of existing law (*Kremen v Benedict P. Morelli & Assoc., P.C.*, 80 AD3d 521, 522 [1st Dept 2011]).

Discussion

Plaintiff asserts that the Agreement is ambiguous, since in Section 8.12, there are references to actions "arising out of" the Agreement. However, this language refers to jurisdiction and venue of an action or proceeding and the enforcement of a determination of the arbitration proceeding. The arbitration provision, Section 8.13, states that "any dispute . . . relating to [the Agreement] shall be submitted to, and resolved exclusively pursuant to arbitration." This broad language clearly indicates the parties' agreement to arbitrate disputes (*see Matter of Smith Barney*, 91 NY2d at 46; *Gibson v Seabury Transp. Advisor LLC*, 91 AD3d 465, 465 [1st Dept 2012]). Since the Agreement "specifically incorporates by reference the AAA rules, . . . the question of arbitrability [is also left] to the arbitrators" (*Life Receivables*, 66 AD3d at 496). Consequently, the portion of defendants' motion that seeks an order staying proceedings in this action and compelling the parties to proceed to arbitration is granted.

The portion of defendants' motion that seeks to impose sanctions is denied, since defendants have not shown the sort of "frivolous conduct" that would warrant the imposition of sanctions (*Levy*, 260 AD2d at 34). Plaintiff has presented "a

somewhat colorable argument" in support of his claim that the Agreement is ambiguous and this is insufficient to be considered the type of wrongful behavior that sanctions are intended to deter (*Kremen*, 80 AD3d at 522).

Plaintiff seeks to disqualify the Law Firm, based upon the advocate witness rule. However, plaintiff has not established that he had an attorney-client relationship with the Law Firm or that his contacts with the Law Firm, prior to Rise being formed, was substantially related to the circumstances of his conduct in the fall of 2017, when he sought to leave Rise and join Mongo. Plaintiff has, therefore, not met the "heavy burden" required to warrant disqualification of the Law Firm (*Dishi*, 112 AD3d at 484). As such, plaintiff's cross motion to disqualify the Law Firm is denied.

Order

Based upon the above, it is

ORDERED that the portion of defendants' motion that seeks to compel arbitration is granted; and it is further

ORDERED that plaintiff Daniel Heasman shall arbitrate his claims against defendants in accordance with the The Rise Operating Agreement dated April 30, 2015; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by motion, to vacate or modify said stay upon the final determination of the arbitration; and it is further

ORDERED that the portion of defendants' motion that seeks to impose sanctions on plaintiff and his counsel is denied; and it is further

ORDERED that plaintiff's cross motion to disqualify defendants' counsel is denied; and it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiff, with notice of entry.

Dated: 10/9, 2018

Doris Ling-Cohan, J.S.C.

JUSTICE DORIS LING-COHAN

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

J:\Judge_Ling-Cohan\Arbitration-ADR\heasman m. saks.wpd