KPMG LLP v Kirschner
2018 NY Slip Op 32661(U)
October 16, 2018
Supreme Court, New York County
Docket Number: 653865/2018
Judge: Barry Ostrager

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

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KPMG LLP

Petitioner,

- v -

MARC KIRSCHNER, solely in his capacity as TRUSTEE of THE MILLENNIUM CORPORATE CLAIM TRUST and THE MILLENNIUM LENDER CLAIM TRUST

Respondent.

INDEX NO. 653865/2018

MOTION DATE Oct. 11, 2018

MOTION SEQ. NO. 002

DECISION AND ORDER

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HON. BARRY R. OSTRAGER:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17, 18, 19, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33
were read on this motion to/for DISMISSAL.

HON. BARRY R. OSTRAGER:

Petitioner KPMG LLP ("KPMG") commenced this special proceeding pursuant to CPLR § 7503(a) compelling Respondent Marc Kirschner (the "Trustee"), in his capacity as trustee of certain litigation trusts arising from the bankruptcies of Millennium Lab Holdings, Inc. and Millennium Lab Holdings II, LLC (together, "Millennium"), to submit to arbitration, in New York, all claims arising out of KPMG's provision of auditing services to Millennium. Additionally, Petitioner seeks an order enjoining Respondent from filing or pursuing any lawsuit in any jurisdiction alleging that KPMG failed to provide acceptable auditing services to Millennium. Respondent moves to dismiss the petition pursuant to CPLR §§ 3211(a)(2), (a)(3), and (a)(7) for lack of subject matter jurisdiction, lack of standing, and failure to state a cause of action. For the reasons stated herein, Respondent's motion to dismiss is granted without prejudice.

Background

Millennium was a privately held laboratory services company based in California. In 2012, Millennium was subject to Department of Justice ("DOJ") investigations into federal health care offenses concerning Millennium's sales and marketing practices. Millennium engaged KPMG to conduct auditing services in connection with the DOJ investigations and related litigation. KPMG and Millennium entered into a Letter Agreement whereby KPMG agreed to conduct audits of Millennium's finances "in accordance with auditing standards generally accepted in the United States of America[.]" (Letter Agreement, Feig Aff. Ex. 1 [NYSCEF Doc. 5]).

In 2014, Millennium lost a major civil litigation to a competitor, and the Department of Justice was on the verge of reaching a $256 million settlement with the company. In 2015, after entering into formal settlement agreements, Millennium filed for bankruptcy and the court confirmed a reorganization plan that, *inter alia*, created two separate litigation trusts to handle pre-bankruptcy claims of Millennium itself and pre-bankruptcy claims of certain lenders. Respondent Kirschner was appointed Trustee of the two trusts.

Purportedly in accordance with its investigatory function, the Trustee sought discovery from KPMG regarding Millennium's pre-bankruptcy claims against KPMG. The parties started negotiating a potential settlement and allegedly entered into statute of limitations tolling agreements so that the parties could achieve pre-litigation resolution of the dispute.

On August 3, 2018, KPMG commenced this special proceeding against the Trustee to compel arbitration in accordance with the Letter Agreement's purported binding arbitration provision. On August 6, 2018, the Trustee filed an action against KPMG in California Superior

Court (the "California Action"). The Trustee moves to dismiss the KPMG petition in this special proceeding.

Discussion

The relatively narrow issue before this Court is whether KPMG had standing to commence this special proceeding pursuant to CPLR § 7503(a).

The Trustee argues that KPMG lacked standing at the time it filed the petition because KPMG was not "aggrieved" as required by the CPLR and the Federal Arbitration Act (the "FAA"). The Trustee further argues that because the California Action was subsequently commenced after the filing of this special proceeding, KPMG's only recourse to compel arbitration is to make such a motion in the California Action.

KPMG argues in opposition that litigation is not a necessary precondition to a party being "aggrieved" by a failure or refusal to arbitrate under New York law and the FAA. Further, KPMG argues that even if it was not an aggrieved party when it filed the petition, it is an aggrieved party now because the California Action was initiated in violation of an agreement to arbitrate.

CPLR § 7503(a) provides:

> A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration.... If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

Likewise, the FAA dictates: "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition ... for an order" compelling arbitration. 9 U.S.C. § 4. The Appellate Division has stated that under CPLR §

7503(a) "a party to an arbitration agreement is not aggrieved until litigation of an issue within the operation of the arbitration provision is attempted." *Koob v. IDS Financial Services, Inc.*, 213 A.D.2d 26, 30-31 (1st Dep't 1995). Federal courts interpreting the FAA have come to the similar conclusion that "unless the respondent has resisted arbitration, the petitioner has not been 'aggrieved' by anything, and there is nothing for the court to compel." *SH Tankers Ltd. v. Koch Shipping Inc.*, 2012 WL 2357314, at *3 (S.D.N.Y. 2012) (internal quotations and citations omitted). The Second Circuit has stated that "[a] party has refused to arbitrate if it commences litigation or is ordered to arbitrate the dispute by the relevant arbitral authority and fails to do so." *LAIF X SPRL v. Axtel, S.A. de C.V.*, 390 F.3d 194, 198 (2d Cir. 2004) (internal quotations omitted). Thus, a party is considered "aggrieved" if the non-aggrieved party (1) commences litigation in lieu of arbitration, or (2) refuses to comply with an order of a relevant arbitral authority to arbitrate the dispute. *See Jacobs v. USA Track & Field*, 374 F.3d 85, 89 (2d Cir. 2004) (holding that petitioner was not an aggrieved party where respondents had neither commenced litigation nor failed to comply with an order to arbitrate by the arbitral authority).

Here, it is undisputed that (1) the Trustee had not commenced litigation at the time KPMG's petition was filed, and (2) no order had been issued by an arbitral authority. KPMG was thus not an aggrieved party at the time it commenced this special proceeding.

KPMG filed this petition *before* the Trustee commenced the California Action, and thus, the Court does not have jurisdiction to adjudicate such a petition from a non-aggrieved party even though the California Action has since been commenced. *See Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004) ("It has long been the case that the jurisdiction of the court depends upon the state of things at the time of the action brought."). Further, courts "have adhered to the time-of-filing rule regardless of the costs it imposes." *Id.* at 571. Thus, the

petition in this special proceeding must be dismissed for lack of subject matter jurisdiction and lack of standing.

The Trustee also argues that the dismissal must be granted *with prejudice* because KPMG is not entitled to commence a separate special proceeding to compel arbitration, but rather must file a motion to compel in the California Action. For this argument, the Trustee relies on the language of CPLR § 7503(a), which states in relevant part that: "If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action."

While this Court notes that judicial efficiency would be achieved by KPMG filing its motion to compel in the California Action, the CPLR does not dictate such a result. "Contrary to respondents' contention based on the principles of comity, this Court has enjoined litigation in other states pending New York actions under CPLR 7503." *Matter of Gramercy Advisors LLC v. J.A. Green Dev. Corp.*, 134 A.D.3d 652, 653 (1st Dep't 2015); *see PromoFone, Inc. v. PCC Mgt.*, 224 A.D.2d 259, 260 (1st Dep't 1996) ("We agree with the IAS Court that the motion to compel arbitration was brought in the proper forum and that CPLR 7503(a) did not require dismissal of the New York special proceeding seeking to stay the California action and to compel arbitration in this State."); Siegel & Connors, NY Prac § 592 at 1154 (6th ed 2018) ("If the action brought in violation of an agreement to arbitrate is brought outside New York, it will of course be beyond the power of a New York court to affect it with a simple stay. In that instance, as long as New York is the place agreed on for arbitration, the court can issue an outright injunction enjoining the violating party—the plaintiff in the foreign action—from proceeding with it."). For over half a century, New York courts have enjoined parties from litigating a foreign action in contravention of an agreement to arbitrate in New York. *See H. M.*

Hamilton & Co. v. American Home Assur. Co., 21 A.D.2d 500, 502 (1st Dep't 1964) ("If our courts may only prevent inconsistent actions or proceedings in the courts or administrative agencies of this State, they will only be providing partial enforcement of the promise to arbitrate; if the court's power to stay were thus limited, the obligation of the contract could easily be frustrated by the prosecution of actions or proceedings in another jurisdiction." (quoting *Matter of S.M. Wolff Co. (Tulkoff)*, 9 N.Y.2d 356, 362 (1961)). Thus, an aggrieved party may seek to compel arbitration and enjoin pending proceedings in other states under CPLR § 7503(a). It is for this reason that the Trustee's motion to dismiss must be granted without prejudice to KPMG renewing its petition with proper standing.

Accordingly, it is hereby

ORDERED that Respondent's motion to dismiss this proceeding is granted without prejudice to the commencement of a new proceeding within twenty (20) days of the service of this Decision and Order with Notice of Entry.

10/16/2018
DATE

BARRY R. OSTRAGER, J.S.C.

BARRY R. OSTRAGER
JSC

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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