

CMBSW Group, LLC v Inverness Counsel, LLC

2020 NY Slip Op 32525(U)

July 31, 2020

Supreme Court, New York County

Docket Number: 650563/2020

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK **PART** **IAS MOTION 53EFM**

Justice

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CMBSW GROUP, LLC, CMBSW ASSET MANAGEMENT
LLC, CMBSW ADVISORS, LLC

Plaintiff,

INDEX NO. 650563/2020

MOTION DATE 02/13/2020

MOTION SEQ. NO. 001

- v -

INVERNESS COUNSEL, LLC, PHILIP LAWRENCE,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for STAY.

Upon the foregoing documents, and for the reasons set forth below, Inverness Counsel, LLC and Phillip S. Lawrence's (collectively, the **Defendants**) motion for a stay pursuant to CPLR § 2201 is granted.

The Relevant Facts and Circumstances

CMBSW Group, LLC (f/k/a the Solaris Group LLC), CMBSW Asset Management LLC (f/k/a Solaris Asset Management LLC), and CMBSW Advisors, LLC (f/k/a Solaris Advisors LLC) (collectively, the **Plaintiffs**) operated an investment advisory business, which sold its assets to a competitor on or about June 14, 2019 and will soon cease operations (NYSCEF Doc. No. 1, ¶¶ 16, 19). Inverness Counsel, LLC (**Inverness**) also provides investment advisory services (*id.*, ¶ 1). Mr. Lawrence is the CEO of Inverness (*id.*, ¶ 2).

Reference is made to a certain Employment Agreement (the **Employment Agreement**; NYSCEF Doc. No. 3), dated November 1, 2007 between Timothy Ghirskey and the Solaris Group LLC. Pursuant to Section 8.04 of the Employment Agreement, the parties agreed that except for the remedies to be exercised pursuant to Section 7.04 of the Employment Agreement, disputes would be resolved by arbitration. Section 7.04 provided, among other things, that in the event of a breach or threatened breach of the Employment Agreement, the employer would be entitled to injunctive relief and that Mr. Ghirskey consented to such relief.

Mr. Ghirksey was a Managing Director, member, and director of CMBSW Advisors, LLC, but stopped working for them in December of 2017 when he joined Inverness, where he currently still works. Subsequently, a dispute arose between Mr. Ghirskey and CMBSW Advisors, LLC. The gravamen of the dispute is that the Plaintiffs allege that during the last two months that Mr. Ghirksey worked for CMBSW Advisors LLC (i.e., November 1, 2017 until December 31, 2017) and immediately prior to joining Inverness in January 2018, Mr. Ghriskey secretly worked with Mr. Lawrence to divert clients to Inverness (NYSCEF Doc. No. 12).

Pursuant to the Employment Agreement, on August 7, 2019, the Plaintiffs filed a statement of claim and demand for arbitration with the American Arbitration Association against Mr. Ghriskey (the **Arbitration**) (*see* NYSCEF Doc. No. 12). In the Arbitration, the Plaintiffs allege four claims against Mr. Ghriskey: (i) breach of contract, (ii) breach of fiduciary duty, (iii) breach of the duty of loyalty, and (iv) unjust enrichment (*id.*).

Subsequently, on January 27, 2020, the Plaintiffs commenced this action against the Defendants for: (i) aiding and abetting breach of fiduciary duty, (ii) tortious interference with contract, (iii) tortious interference with existing and prospective business relationships, (iv) unfair competition (the **Complaint**; NYSCEF Doc. No. 1). The Defendants filed the instant motion for a stay pending completion of the Arbitration.

Discussion

The Defendants argue that a stay is appropriate because (i) the same conduct forms the basis of the claims asserted in the Arbitration as in the Complaint, (ii) the Defendants' liability in this action cannot be established without proving claims in the Arbitration, namely, whether Mr. Ghriskey breached any contractual or fiduciary obligations to the Plaintiffs, and (iii) the Plaintiffs should be estopped from relitigating Mr. Ghriskey's breach of contract and/or fiduciary duty in this action. In their opposition papers, the Plaintiffs argue that the Arbitration will not resolve the claims in this action against the Defendants and the Arbitration and this lawsuit do not have a complete identity of parties, claims, and damages. For the reasons set forth below, the Plaintiffs' arguments are unavailing.

Pursuant to CPLR § 2201, unless otherwise prescribed by law, a court may grant a stay of proceedings in a proper case upon such terms as may be just. It is within the sound discretion of the trial court to grant a stay "in order to avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources" (*Zonghetti v Jeromack*, 150 AD2d 561, 563 [2d Dept 1989]).

In this case, a stay is warranted. The First Department's decision in *Oxbow Calcining USA Inc. v American Indus. Partners*, 96 AD3d 646 [1st Dept 2012] is instructive. There, the plaintiff operated a calcining plant purchased through the entity GLC, which had an agreement with the Port Arthur Steam Energy LP (**PASE**) to process certain waste emissions through a steam plant. The plaintiff first initiated arbitration against PASE for breach of contract and related duties associated with the purported failure of PASE to make certain repairs to its pollution control system, for which the plaintiff paid approximately \$6,000,000 to \$9,000,000. The plaintiff then commenced an action against the former directors and controlling shareholders of GLC for fraud before and during the sale of its steam plant to PASE and for breach of fiduciary duty (*id.* at 648). The First Department held that a stay of the state court action pending arbitration was warranted because the arbitration statement of claims and complaint contained overlapping factual allegations and sought the same damages for the cost of the repair work (*id.* at 652). The Court explained that notwithstanding the lack of total identity of the parties, the arbitration could also dispose of or limit the issues to resolve in the action (*id.*).

Here, similarly, the Defendants are not parties to the Arbitration. The statement of claim in the Arbitration and the Complaint contain nearly identical factual allegations and seek the same damages – i.e., \$10,000,000 (*compare* NYSCEF Doc. No. 12, *with* NYSCEF Doc. No. 1). In particular, there exist overlapping issues of law and common questions of fact because Mr. Ghriskey's purported breach of contract and breach of fiduciary duty in the Arbitration are underlying elements of the Plaintiff's claims against the Defendants for alleged aiding and abetting breach of fiduciary duty and tortious interference with contract. Further, while Mr. Ghriskey's purported breach of contract and/or breach of fiduciary duty are not dispositive

elements of the Plaintiffs' claims for tortious interference or unfair competition, the Plaintiffs acknowledge that the underlying factual findings are nonetheless relevant to the resolution of these claims (*see* NYSCEF Doc. No. 1 at 24-25). Thus, the resolution of the Arbitration is likely to either limit or dispose of the issues in the present action.

In addition, because the Complaint alleges that Mr. Ghriskey conspired with the Defendants to steal the Plaintiffs' clients and to commit various wrongful acts, there is a significant risk of inconsistent findings of fact with respect to Mr. Ghriskey's conduct should the Arbitration and this action proceed concurrently.

For the avoidance of doubt, to the extent that the Plaintiffs argue that any award in the Arbitration may have limited estoppel effects against the Defendants as they will not have had a full and fair opportunity to litigate the issues determined in the arbitration proceeding, this misses the point. While a finding of wrongdoing by Mr. Ghriskey may not be preclusive as to all issues against the Defendants, "[b]ecause mutuality of parties is not required, a defendant may preclude a plaintiff from relitigating an issue resolved against that plaintiff in an earlier arbitration with a different defendant" (*Bernard v Proskauer Rose, LLP*, 87 AD3d 412 [1st Dept 2011] [explaining that arbitration awards may be given preclusive effect in a judicial action]).

Therefore, because there are overlapping issues of law and common issues of fact in the Arbitration that are likely to limit or even dispose of the claims in this action, the Defendants' motion for a stay pursuant to CPLR § 2201 is granted (*see Oxbow, supra; Belopolsky v Renew Data Corp.*, 41 AD3d 322, 322-323 [1st Dept 2007] [stay granted despite incomplete identity of

parties because there were common issue of law and questions of fact]; *NAMA Holdings, LLC v Greenberg Traurig, LLP*, 62 AD3d 578, 579 [1st Dept 2009] [stay granted in interest of judicial economy because of overlapping issues and common questions of fact]).

Accordingly, it is

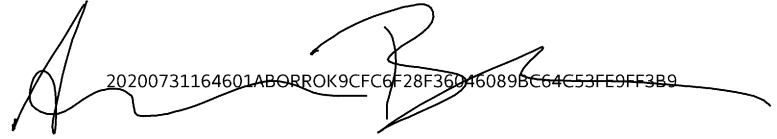
ORDERED that the Defendants' motion for a stay is granted to the extent of staying further proceedings in this action, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the action/proceeding known as *CMBSW Group, LLC (f/k/a the Solaris Group LLC)*, *CMBSW Asset Management LLC (f/k/a Solaris Asset Management LLC)*, and *CMBSW Advisors, LLC (f/k/a Solaris Advisors LLC) v. Timothy Ghriskey*, Case No. 01-19-0002-4578, pending before the American Arbitration Association; and it is further

ORDERED that the movant is directed to serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within ten days from entry and the Clerk shall mark this matter stayed as herein provided, and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk*

Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).



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7/31/2020

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE