| **Allyance Media Group, Inc. v Acker Family 2016 Gift Trust** |
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| 2022 NY Slip Op 32888(U) |
| August 24, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 656852/2022 |
| Judge: Margaret Chan |
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SUPREME COURT OF THE STATE OF NEW YORK

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ALLYANCE MEDIA GROUP, INC.,

Petitioner,

- v -

ACKER FAMILY 2016 GIFT TRUST, ACKER FAMILY 2012 GIFT TRUST, ADAM BLANK 2018 DYNASTY TRUST, ADAM BLANK, and ANDREA ACKER

Respondents.

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**INDEX NO.** 656852/2022

**MOTION DATE** 06/21/2022

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 5, 6, 7, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 were read on this motion to/for STAY.

Petitioner Allyance Media Group, Inc. (Allyance) brings this petition against the above-captioned respondents to stay arbitration before JAMS initiated by respondents against Allyance. After JAMS had determined to proceed to the selection of an arbitrator, Allyance moved by order to show cause for a stay of the arbitration.

## Background

*The Stock Repurchase Negotiation*

In early 2022, Allyance and respondents were negotiating the repurchase of 1,000,000 shares of Allyance stock that respondents had purchased in late 2018 (NYSCEF # 1 – Petition, ¶'s 7-8). After some back and forth, Allyance's counsel emailed respondents' counsel on April 11, 2022 attaching execution copies of the stock purchase agreement and release ("marked against what [had been] previously circulated") along with a draft of a simple acknowledgment and cross-receipt and stock power, and blank signature pages. The email requested a confirmation of when the documents are signed, after which, Allyance's counsel will forward to his client. "Reserving all rights." (NYSCEF # 13 at 2). Respondents' counsel replied the next day by emailing executed copies of the transaction documents (NYSCEF # 13 at 2). Respondents' counsel followed up on April 13, 2022 stating that he had not received payment as expected and will check tomorrow. (NYSCEF # 14 at 3). Allyance's counsel responded the same day stating that the agreements were sent out to Allyance for signature and that they are confirming on a closing date. (NYSCEF # 14 at 2). Respondents' counsel followed up by email on April 22, 2022: "I

am glad we finally got this done. When should we expect to have the countersigned documents and payment?" (*id.* at 2). No response to that email is on the record.

Counsel for Allyance, John Rosenberg, avers that he had advised David Pfeffer, counsel for respondents, that "Allyance's willingness and ability to proceed with the stock repurchase transaction that is the subject of the Contemplated Agreement would require an investor to provide the funds necessary to close the transaction." (NYSCEF # 11 – Rosenberg Aff, ¶ 14). He and Pfeffer again discussed the matter after he received respondents' signed Contemplated Agreement on April 12, 2022, including the fact that Allyance had not signed the Contemplated Agreement. Rosenberg recounts that Pfeffer had surmised that "the reason that Allyance had not signed the Contemplated Agreement was that the investor who was going to provide the funds necessary to cover the price of the stock repurchase had run into difficulties in light of the recent precipitous decline in the stock market" to which Rosenberg expressed was probably right (*id.*, ¶ 15).

Respondents' counsel describes a different conversation: "On May 10, 2022, I communicated by telephone with John Rosenberg, counsel for Petitioner, at which time he confirmed to me that: (a) Petitioner and Respondents had entered into a valid Agreement; and (b) Petitioner would make the $1 million payment in exchange for the purchase of Respondents' shares as set forth in the Agreement" (NYSCEF # 25 – Pfeffer Aff, ¶ 5).

*Arbitration*

Soon thereafter, respondents sought arbitration through JAMS to recover the $1,000,000 purchase price as well as statutory interest and attorneys' fees. On May 16, 2022, respondent's counsel emailed their JAMS Demand for Arbitration Form to Allyance's counsel (NSYCEF # 15). The demand form noted that a Notice of Default and Demand to Cure (the Notice) informing Allyance that it Allyance was in default of the terms of the Agreement in that Allyance had failed to pay the Purchase Price, and that it had until May 11, 2022 to cure, which Allyance had not cured (i*d.* at 3). In email correspondence with JAMS and respondents, Allyance's counsel, reiterating a reservation of rights, stated that "JAMS has no authority to arbitrate this dispute or any alleged rights, claims, defenses etc arising under an agreement that was never signed and thus never in effect" (NYSCEF # 18 at 4).

Respondents' May 27, 2022 position statement characterized the stock repurchase negotiation as resulting in a binding agreement (NYSCEF # 32 at 2-4). Respondents cited the arbitration provision in the partially signed agreement:

> 14.5. Arbitration. Any dispute or controversy arising under or in connection with this Agreement, or any documents or instruments executed pursuant to its provisions, or the breach thereof, shall be resolved solely by binding arbitration before a single arbitrator

> administered by and in accordance with the then current rules of the Judicial and Mediation Services in New York, New York, and judgment upon the award rendered by the arbitrator shall be final and conclusive and may be entered in any court having jurisdiction thereof.

(NYSCEF # 13 at 7.)

On June 3, 2022, Allyance's counsel submitted a letter response to respondent's position statement via email to JAMS and respondents. The email prefaced that the submission is "without waiver of or prejudice to Allyance's position that this arbitration may not properly proceed, and shall not be deemed to be participation in the arbitration" (NYSCEF # 19 at 2). The letter itself also states that "JAMS is not empowered to determine the threshold issue presented in this proceeding, *i.e.,* whether or not an enforceable agreement that includes an arbitration provision exists between [Allyance] and [respondents] notwithstanding that [Allyance] did not execute any such agreement" (*id.* at 3). Citing various cases, Allyance asserted determination of this threshold issue is left to the courts (*id.*). Respondents' June 6 reply argued that Allyance's cases were distinguishable or irrelevant (NYSCEF # 34 at 2-3).

On June 9, 2022, JAMS advised the parties that whether arbitrability issue under the parties' agreement is for the appointed arbitrator to decide, and that Allyance may participate in the arbitrator appointment process without waiving its rights (NYSCEF # 21 at 3).

*Petition to Stay Arbitration*

On June 16, 2022, the return date that JAMS had scheduled for responses to the strike and rank lists (*id.*), Allyance filed the present petition seeking a stay of the arbitration and requested JAMS to suspend its proceedings until the court rules on the petition (NYSCEF # 22 at 4). Respondents replied the same day, arguing that Allyance's request was improper and defective under CPLR 7503 to stay an arbitration (*id.* at 3). Respondents noted that under CPLR 7503 (b), application to stay arbitration is available to one who has not "participated in the arbitration" – Allyance had already submitted a position statement and sur reply to JAMS (*id.* at 2). Respondents add that Allyance's application to stay is untimely under CPLR 7503 (c) as it was filed more than twenty days after service of the arbitration demand (*id.* at 3). On June 17, 2022, JAMS affirmed its previous determination noting that the appointment of an arbitrator will proceed unless the matter is stayed by court order (*id.* at 2). On June 21, 2022, this court signed the order to show cause staying the appointment of arbitrators pending the hearing of Allyance's petition (NYSCEF # 9 at 2).

Allyance argues that it neither waived nor forfeited its right to seek a stay of the Arbitration or that it participated in the arbitration within the meaning of

CPLR 7503 (NYSCEF # 24 – MOL at 10). Further, Allyance argues that its application to seek a stay is timely and not barred by the twenty-day limitation period since respondents failed to include the requisite twenty-day notice language in its demand. And because the demand was emailed to Allyance's counsel and an Allyance officer, it was not properly served under CPLR 7503(c) (*id.*).

Allyance also asserts that the court, not the arbitrator, should determine whether Allyance agreed to arbitrate, which Allyance maintains that it did not (NYSCEF # 24 at 15-19). Allyance asserts that based on "the clear language of the parties' contemplated agreement, and the indisputable evidence concerning the parties' understanding and intent," and "absent the execution and delivery by Allyance of the parties' contemplated agreement[,]" there is no binding agreement between the parties, and no agreement to arbitrate (*id.* at 16). Allyance cites what it refers to as the Execution and Delivery Provision of the contract, which it characterizes as providing that the contemplated agreement between the parties would become valid and binding only "when executed and delivered" by Allyance (*id.* at 17). Allyance also argues that the communications of the parties and the context of the negotiations further evidence that Allyance did not intend to be bound by the partially executed agreement (*id.* at 18-19).

Respondents argue that Allyance's "considerable participation" in the arbitration cannot be construed as "purposefully restrained conduct" (NYSCEF # 41 – Opp at 8-10). In support of their argument that Allyance's stay is untimely, respondents note that they filed their demand for arbitration on May 17, 2022, so that Allyance's June 16, 2022 petition was later than the twenty days available under CPLR 7503 (c) (*id.* at 6). Respondents assert that their demand to arbitrate was properly served, noting that the stock purchase agreement provided that arbitration would be "administered by and in accordance with the then current rules of [JAMS]," which rules allow for service through JAMS' electronic filing system (*id.*). Respondents further argue that the e-filing was sufficient service under New York law (*id.* at 7).

Respondents also assert that Allyance's issues with respect to service of the demand for arbitration is a procedural question for the arbitrator (*id.*). Respondents argue that a valid and enforceable agreement to arbitrate exists and that "an attorney's email on behalf of his client may constitute acceptance in the absence of a signed instrument" especially when Allyance's counsel did in fact confirm Allyance's intent to be bound (*id.* at 10). Respondents add that "a party's signature is not dispositive as to the existence of an 'executed and delivered' agreement" (*id.* at 11). Respondents characterize Allyance's counsel's email conveying that the agreement was sent to his client for signature and that he was confirming with them on a closing date "was simply referencing post-Agreement requirements" (*id.* at 11-12). Finally, respondents posit that the arbitrator, not the court, has authority to decide the initial dispute as to arbitrability (*id.* at 12-13).

**Discussion**

CPLR 7503 provides:

> (b) ...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....
>
> (c) ... A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice... and stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with .... Such notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded.

*Participation*

Allyance maintains that it did not participate in the arbitration under the meaning of CPLR 7503. Respondents disagree citing in support *Infinity Ins. Co. v Daily Med. Equip. Distribution Ctr., Inc.*, which held that letter submissions opining as to the inapplicability of arbitration and also submitting a police report and explanation of benefits documents constituted participation in arbitration (39 Misc 3d 582, 587 [Supt Ct, Kings County 2013]). However, Allyance's situation is more akin to *Matter of Blamowski* (*Munson Transp.*) (91 NY2d 190 [1997]) in which the Court of Appeals found that the submission of six letters over the course of several months did not constitute "participation" where the initial letter stated that there was no obligation to arbitrate and the subsequent letters reiterated this position. The Court considered the final letter which contained citations to case law and determined that the legal arguments in the last letter only maintained the party's position not to participate in arbitration (*id* at 196).

Respondents' reliance on *JJF Assocs., LLC v Joyce* (59 AD3d 296 [1st Dept 2009) and *Flintlock Const. Servs., LLC. v Weiss* (122 AD3d 51 [1st Dept 2014]) is unavailing (NYSCEF # 41 at 8-9). In *JJF Assocs.*, the party seeking a stay in that case had in fact originally compelled arbitration and its participation involved attending a prehearing conference and motion to dismiss, far beyond the involvement of Allyance here (59 AD3d at 297). Likewise in *Flintlock,* the party seeking the stay had participated for eight months and made a motion to dismiss before the arbitrator (122 AD3d at 56).

*Timeliness*

Allyance's application for a stay is not time-barred. "[T]he validity of the 20-day limitation period depends upon the sufficiency of the notice" and when the "notice of arbitration [does] not contain the requisite language of CPLR 7503 (c)" it cannot be said that one has "been 'served with a notice of intention to arbitrate' within the meaning of CPLR 7511 (b) (2)" (*Blamowski*, 91 NY2d at 195). Here, respondents admit they did not include the requisite language of CPLR 7503 (c) respecting the preclusive effect of failing to apply to stay arbitration within twenty days (NYSCEF # 42 at 26:19-20). But they argue that such language was not necessary "since we filed through JAMS [by] acceptable JAMS procedure" (*id.* at 26:20-22). Respondents rely on *New Brunswick Theological Seminary v Van Dyke* for the idea "that parties to an arbitration agreement may prescribe a method of service different from that set forth in the CPLR.... either by stipulating the manner in the arbitration clause or, more generally, by adopting the arbitration rules of an arbitration agency" (184 AD3d 176, 179–180 [internal quotation marks and citations omitted], *appeal dismissed* 36 NY3d 937 [2020], *lv denied* 36 NY3d 912 [2021]). Respondents are mistaken.

Even accepting for arguments sake that service of the notice of intention to arbitrate satisfied the rules and procedures of JAMS,[1] nonetheless that would not make up for the notice's lack of the requisite language of CPLR 7503 (c), and *New Brunswick*, relied upon by respondents, does not find otherwise. Respondents fail to identify whether the specific rules of JAMS authorize such an abbreviated notice nor do respondents point to any authority confirming the preclusive effect of such an abbreviated notice. The other cases respondents rely upon do not involve allegations of a party purporting to commence arbitration with a notice missing the requisite language of CPLR 7503 (c).

*Agreement to Arbitrate*

"[I]f the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed" (*Scheck v Francis*,

[1] It is unclear whether the method of transmitting e-service here even satisfied Rule 8 (c) of the rules and procedures of JAMS, which respondents assert governs service here. Rule 8 (c) provides as follows in part that "E-service shall be deemed complete when the Party initiating e-service or JAMS completes the transmission of the electronic document(s) to the JAMS Electronic Filing System for e-filing and/or e-service." (NYSCEF # 41 at 6.) Among the initial emails of JAMS on coordinating the commencement of arbitration was the following note: "For those of you who have not yet registered, JAMS Access is our document management system and all parties in an arbitration are required to register for the service of arbitration documents." (NYSCEF # 17 at 3). Respondents do not explain whether any Allyance representative had signed up for JAMS Access – counsel for Allyance states that they did not (NYSCEF # 42 at 12:17-18).

26 NY2d 466, 469–470 [1970]). "The issue of whether a party is bound by an arbitration provision in an agreement it did not execute is a threshold issue for the court, not the arbitrator, to decide" (*In re 215-219 W. 28th St. Mazal Owner LLC*, 177 AD3d 482, 483 [1st Dept 2019]).

It is undisputed that Allyance did not sign the stock purchase agreement, and respondents have failed to otherwise show evidence of the parties "unequivocal intent" to agree to the terms of the stock purchase agreement within which the arbitration provision derived (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007] [holding that the "proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute at issue," which must be met with evidence of "unequivocal intent"]). Respondents' counsel's report that, during a telephone call, Allyance's counsel John Rosenberg[2] confirmed the parties' entry into a valid agreement is insufficient to meet respondents' burden (NYSCEF # 25, ¶ 5).

Respondents' argument that the signature was a "mere formality" is unavailing (NYSCEF # 41 at 4). Communications on the record include the following emails from Allyance's counsel: "Please confirm you are signed off and we will forward to our client. Reserving all rights"; and later: "We have sent the agreements out our [sic] client for signature and are confirming with them on a closing date" (NYSCEF # 13 at 2; NYSCEF # 14 at 2). These communications demonstrate that the parties did not enter into a binding agreement in that the focus was on getting signatures on the agreement (*see e.g. In re Meister's Will* in support thereof (39 AD2d 857 [1st Dept 1972], *affd sub nom. In re Est. of Meister*, 32 NY2d 626 [1973] [finding that the parties contemplated a formal written contract and that they were not bound until the contract was signed, including on account of the counsel for the seller never having been given authority to sell or contract but only to draft a document; that terms that seller's counsel negotiated were submitted to the seller; and that seller's counsel's transmittal letter referred to the enclosure as a proposed contract]).

Respondents' assertion that the arbitrator should decide the arbitrability of the dispute and their reliance in support thereof on *Garthon Bus. Inc. v Stein* and *Life Receivables Tr. v Goshawk Syndicate 102 at Lloyd's* are unavailing because such cases involve situations where it was undisputed that the parties had agreed to arbitrate, which has not been established here (respectively, 30 NY3d 943 [2017] [holding arbitrator should resolve dispute involving final agreement; 66 AD3d 495, 496 [1st Dept 2009], *affd* 14 NY3d 850 [2010] [same]). The other cases respondents rely upon are distinguishable (*Kowalchuk v Stroup*, 61 AD3d 118, 120 [1st Dept 2009] [holding that counsel bound principals where counsel emailed to counter-

[2] Respondents' memorandum of law indicates that it was Allyance's counsel Branch Furtado who made the call (NYSCEF # 41 at 11). Allyance noted this difference during oral argument, to which respondents did not respond (NYSCEF # 42 at 19:23 to 20:10).

party's counsel that "we have reached a settlement"]; *Mun. Consultants & Publishers, Inc. v Town of Ramapo*, 47 NY2d 144, 149 [1979] [holding that contract had been agreed upon by town on the basis of resolution of the town board authorizing the contract's execution by its counsel, whereas no such resolution or other communication of the principal is involved here]; *Stonehill Cap. Mgmt., LLC v Bank of the W.*, 28 NY3d 439, 446 [2016] [binding agreement found despite lack of signed agreement where party seeking to contest enforceability had conceded in an internal written memorandum that it had verbally committed to the deal]).

**Conclusion**

Accordingly, it is

ORDERED and ADJUDGED that the petition to stay the arbitration before Judicial Arbitration and Mediation Services, Inc. (Ref. No. 5425000351) is granted, and the arbitration is permanently stayed.

This constitutes the Decision and Order of the court.

8/24/2022
DATE

MARGARET CHAN, J.S.C.

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