Windsor St. Capital, L.P. v Syren Capital Advisors, LLC
2022 NY Slip Op 33584(U)
October 18, 2022
Supreme Court, New York County
Docket Number: Index No. 655730/2020
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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WINDSOR STREET CAPITAL, L.P., f/k/a MEYERS ASSOCIATES, L.P.

Plaintiff,

- v -

SYREN CAPITAL ADVISORS, LLC,M7 BALANCED STAGE FUND LLC

Defendants.

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INDEX NO. 655730/2020

MOTION DATE 06/10/2022, 06/10/2022

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 48

were read on this motion to AMEND COMPLAINT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 27, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54

were read on this motion to COMPEL ARBITRATION AND STAY.

Plaintiff Windsor Street Capital, L.P. f/k/a Meyers Associates, L.P. ("Plaintiff" or "Windsor Street") moves to amend its Complaint to add M7 Asset Management LLC ("Manager") and Michael C. Davis ("Davis" and with Manager "Non-Parties") as defendants. Defendants Syren Capital Advisors, LLC ("Syren") and M7 Balanced Stage Fund LLC ("M7 Fund" and with Syren "Defendants") oppose and move to compel FINRA arbitration and stay this action. Plaintiff's motion to amend is denied without prejudice and Defendants' motion to compel arbitration and stay this action is granted.

BACKGROUND

This case was commenced on October 27, 2020 by the filing of the Complaint (NYSCEF 1) in which Plaintiff asserted claims for breach of contract, conversion, money had and received, declaratory judgment, unjust enrichment, and alter ego liability against Defendants. The Complaint alleges in its first paragraph titled "Nature of the Action" that "[t]his lawsuit is brought by Windsor to receive compensation due and owing from defendants Syren and the M7 Fund arising from a sub-agent agreement in which Windsor referred clients and/or raised money for a securities offering conducted for Syren on behalf of the M7 Fund." (Cplt. ¶1). The Complaint makes the following allegations relevant to this motion:

1. Plaintiff was previously a FINRA member and terminated in 2018 for a regulatory violation (Cplt. ¶2)
2. Davis is President of Syren and Manager of the M7 Find (Cplt. ¶5)
3. "Windsor, Syren and the M7 Fund all signed a Master Selected Dealers Agreement dated July 22, 2016. . ." (Cplt. ¶7)
4. Windsor was licensed by FINRA when its claims arose and is entitled to fees under the terms of the Master Selected Dealers Agreements (Cplt. ¶¶8-19)

Defendant filed an Answer (NYSCEF 7) on February 5, 2021 asserting a single affirmative defense that "[t]he controversies Plaintiff seeks to raise in its complaint are subject to mandatory arbitration before FINRA pursuant to express written provision in Section 8 of the very same agreement upon which Plaintiff purports to bring this action" (Answer ¶28). Nothing transpired in the case until January 26, 2022, when Plaintiff requested a preliminary conference. (NYSCEF 10). A preliminary conference was scheduled for February 9, 2022 and adjourned

until April 12, 2022 in contemplation of Plaintiff's motion to amend (NYSCEF 12 ¶10 [Affirmation of David A. Schrader]).[1]

More than a year after issue was joined – on April 11, 2022 – Plaintiff moved (NYSCEF 11) to file an amended complaint. Plaintiff's counsel argues in his affirmation that on February 26, 2021, Plaintiff filed an Amended Complaint and that on March 3, 2021 it filed an Amended Summons adding Non-Parties but that these filings were rejected by the Clerk of Court for unspecified reasons (Schrader Aff. ¶¶6-8). However, Plaintiff's memorandum indicates that the rejection was because the Amended Complaint was filed a day after the time in which an amendment could be filed as of right (NYSCEF 13 at 5 [Plaintiff's Memorandum of Law in Support of Motion to Amend]).

The Proposed Amended Complaint (Schrader Aff. Ex. E) re-asserts that Plaintiff's claims "arise[e] from a sub-agent agreement" and that "Windsor, Syren and the M7 Fund (through its manager the M7 Manager) all signed a Master Selected Dealers Agreement. . ." (Prop. Am. Cplt. ¶¶1, 9). Plaintiff's counsel argues that he previously sought consent from Defendants to file the Amended Complaint but that counsel for Defendants never responded substantively to his request (Schrader Aff. ¶¶9-12). The crux of Plaintiff's argument is that CPLR 3025(b) provides for amendment to be freely granted and that there is neither prejudice or surprise here nor is the amendment without merit (NYSCEF 13 at 3-5).

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1 The Schrader Affirmation does not comply with Section VI(H) of the Part 3 Practices and Procedures requiring that "[e]xhibits to motions shall be uploaded to NYSCEF individually, with each Exhibit clearly labeled with its respective identifying information." Practices-Part-3.pdf (nycourts.gov). The affirmation and all exhibits were filed as a single pdf with no exhibit markers, making it unnecessarily difficult for the Court to review the papers submitted. Future submissions must comply with all applicable rules.

On April 25, 2022, simultaneous with the filing of their opposition to the motion to amend, Defendants moved to compel arbitration and stay this action (NYSCEF 15). Defendants submit an affirmation of Mr. Davis, a proposed named-defendant, and the manager of both Defendant Syren and Manager (NYCEF 18 ¶1 [Affirmation of Michael Davis]). Attached as Exhibit A (NYCEF 19) to the Davis Affirmation is a copy of an agreement dated January 29, 2016. The agreement is signed by Plaintiff's predecessor, Meyers Associates, and Mr. Davis once on behalf of Defendant Syren and once under the heading "Compensation as per Schedule A – subsection (ii) agreed to" on behalf of "M7 Asset Management LLC As Manager for M7 Balanced Stage Fund LLC" (NYSCEF 19 at 8). That agreement provides, in relevant part, at paragraph 15:

> All controversies, which may arise between the parties concerning this Agreement, shall be exclusively determined by arbitration, by and in accordance with, the then existing Code of Arbitration Procedure of FINRA. Hearings with regard to such dispute shall be held exclusively at the offices of FINRA in the County of New York and judgment upon any award rendered pursuant thereto may be entered in any court of competent jurisdiction.

Also annexed to the Davis Affirmation as Exhibit B (NYSCEF 20) is an unexecuted agreement dated July 2016 between Syren and Plaintiff that includes the same arbitration provision.

Defendants contend that the Complaint asserts primarily contract-based claims and that any quasi-contract or tort claims, active or proposed, are attempts to avoid FINRA arbitration. (NYSCEF 21 [Defendant's Memorandum in Support of Motion to Compel Arbitration]). Defendants oppose Plaintiff's motion to amend primarily because they contend that this matter belongs in arbitration and because the proposed amendments lack merit (NYSCEF 25 [Defendant's Memorandum in Opposition to Motion to Amend]).

On May 6, 2022, Plaintiff filed a reply in support of its motion to amend and in opposition to Defendants' motion to compel arbitration (NYSCEF 29-47). The crux of Plaintiff's argument is that only Plaintiff and Syren are parties to the arbitration agreement and that the other Defendant, M7 Fund, and the Non-Parties are faced with non-arbitrable claims. (NYSCEF 29 [Plaintiff's Combined Memorandum of Law]). Defendants filed a reply on their motion to compel arbitration on June 9, 2022 (NYSCEF 50-54). Defendants primarily argue that only Defendants have moved to compel arbitration and that, in any event, the FINRA Rules mandate arbitration (NYSCEF 50 [Reply Affirmation of Robert M. Bursky]).

DISCUSSION

A few key facts are pertinent to the resolution of these motions. *First*, the Complaint is the operative pleading – the proposed Amended Complaint remains just that, a proposal. The Non-Parties have not been served nor have they sought relief before this Court. *Second*, both the Complaint and the Proposed Amended Complaint indicate that a Master Selected Dealers Agreement was entered between Plaintiff and Defendants – the sole difference being that the proposed amendment provides that the M7 Fund signed "through its manager the M7 Manager . . ." Plaintiff's motion papers do not dispute the existence of the Agreement or the inclusion of the FINRA arbitration provision. Instead, Plaintiff argues that only Plaintiff and Syren are parties to the Agreement and that the FINRA arbitration clause is otherwise unenforceable (NYSCEF 38 at 6-11). *Third*, Syren Defendants asserted a single affirmative defense to the Complaint – that the case is arbitrable – and have preserved their right to seek arbitration. *Fourth*, by contrast, Plaintiff waited more than a year from the rejection of its proposed amendment to seek leave to amend.

CPLR 3025(b) provides:

> Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.[2]

A motion to amend should be granted "absent prejudice of surprise. . .unless the proposed amendment is palpably insufficient or patently devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.,* 74 AD3d 499, 499 [1st Dept 2010][citations omitted]). An amendment may be devoid of merit where the claim is referrable to arbitration (*Brown v Twenty-First Century Fox, Inc.,* 59 Misc 3d 1201(A) [Sup Ct Bronx County 2017] *citing O'Neill v Krebs Communications Corp.,* 16 AD3d 144, 145 [1st Dept 2005]).

CPLR 7502(a) provides that a motion to compel arbitration may be "made by motion in a pending action." CPLR 7503(a) provides:

> A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. 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.

As explained by the First Department:

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[2] Plaintiff's improperly filed papers (*see* Note 1) include a copy of the rejected Amended Complaint that does not indicate the proposed changes or additions. This deficiency alone could warrant denial of the motion (*3839 Holding LLC v Farnsworth*, 2019 N.Y. Slip Op. 30721[U], 7 [N.Y. Sup Ct, New York County 2019]).

> [W]here "arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where ... the determination of issues in arbitration may well dispose of nonarbitrable matters" (*Cohenv. Ark Asset Holdings, Inc.,* 268 A.D.2d 285, 286, 701 N.Y.S.2d 385 [1st Dept. 2000]);

(*Protostorm, Inc. v Foley & Lardner LLP,* 193 AD3d 486 [1st Dept 2021]).

An affirmative defense based on an arbitration agreement is sufficient to "put plaintiff on notice of its intention to arbitrate" (*Neesemann v Mt. Sinai W.,* 198 AD3d 484, 486 [1st Dept 2021]). Further, "[t]he mere fact that plaintiffs named additional defendants, who are not signatories to the arbitration agreement, does not foreclose [a defendant's] right to enforce arbitration" (*Id. quoting Minogue v. Malhan,* 178 A.D.3d 447, 448, 114 N.Y.S.3d 62 [1st Dept. 2019]). Thus, Plaintiff's argument that its proposed claims against non-parties to the arbitration agreement operate as a bar to arbitration is unavailing (*Gurary v Rendler*, 40 Misc 3d 1231(A) [NY Sup Kings County 2013] *citing Matter of Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 49 [1997]).

The Complaint and Proposed Amended Complaint both state that an agreement was entered, and Plaintiff does not challenge the signed agreement filed by Defendants indicating that both Defendants signed the agreement. Further, Defendants have filed copies of FINRA Rules 12200 and 13200 (NYSCEF 52-53), which respectively pertain to mandatory arbitration under a written agreement or at the request of a "customer" and required arbitration under the FINRA Code as against any FINRA "Member" or "Associated Persons." Finally, Plaintiff's arguments pertaining to lapsed FINRA memberships and the availability of FINRA as a forum are rejected given the existence of a written arbitration agreement, FINRA's jurisdiction over former members for matters arising during the period of their membership, and the other factors set forth above (*BGC Notes, LLC v Gordon*, 142 AD3d 435, 438 [1st Dept 2016] ["FINRA routinely

hears arbitrations brought by customers of securities firms that are not FINRA members, and FINRA's procedures permit nonmember parties to submit to FINRA arbitration even when they do not fall under FINRA's rules on mandatory arbitration"]).

On these facts, the Court must compel arbitration. As CPLR 7503(a) provides for an automatic stay, the Court need not address the alternative request for a stay under CPLR 2201 (*Photostorm, Inc.* 493 AD3d at 487).

* * * *

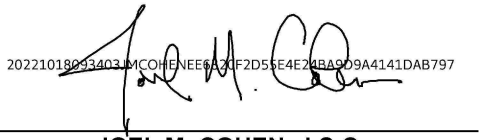
Accordingly, it is

ORDERED that Plaintiff's motion to amend is **DENIED** without prejudice; it is further

ORDERED that Defendants' motion to compel arbitration and to stay this action are **GRANTED** and this matter is stayed pending arbitration; it is further

ORDERED that the parties inform the Court by joint letter within three business days of when arbitration has been commenced and when it has been terminated.

The foregoing constitutes the Decision and Order of the Court.



10/18/2022
DATE

JOEL M. COHEN, J.S.C.

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