

Dolah v ICT, LLC

2023 NY Slip Op 33180(U)

September 13, 2023

Supreme Court, New York County

Docket Number: Index No. 650820/2023

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

Justice

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FALASTEEN DOLAH,

Plaintiff,

- v -

ICT, LLC, MICHAEL URSINI

Defendant.

-----X

INDEX NO. 650820/2023

MOTION DATE 09/08/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Plaintiff's motion to vacate is granted as described below.

Background

Defendants previously moved to compel arbitration or, in the alternative, to dismiss (NYSCEF Doc. No. 3). The Court granted that motion as plaintiff failed to submit any opposition (NYSCEF Doc. No. 9).

Plaintiff explains that the parties entered into a series of stipulations to adjourn the aforementioned motion. She explains that on June 22, 2023, her attorney served counsel for defendants with a proposed stipulation that would dismiss the instant action without prejudice and submit the instant dispute to arbitration. Counsel for plaintiff attached an email exchange in which counsel for defendants observed that his client was traveling and so he would need some time to discuss the proposed stipulation (NYSCEF Doc. No. 13 at 7 of 33). Counsel for defendant noted that "I will not move to default plaintiff for failure to submit opposition while this plays out. If need be, we can submit a revised briefing schedule" (*id.*).

Unfortunately, no briefing schedule was ever uploaded and so the motion was fully submitted without opposition on June 23, 2023 and the Court issued a decision on the unopposed motion on June 26, 2023.

Plaintiff complains that defendants refused to enter into an order to vacate the Court's order despite counsel for defendants' apparent assertion that he would not move for a default.

In opposition, defendants blame plaintiff for letting the motion be submitted to this Court without any opposition. They insist that plaintiff's assertion that the arbitration clause was procured by fraud was not included in the complaint and cannot be raised for the first time in connection with this motion. Defendants claim that plaintiff has no meritorious defense or reasonable excuse for her default. They also claim that this action is subject to arbitration.

In reply, plaintiff insists that her default should be vacated as defendants wrongfully refused their consent to reinstate this matter after the Court granted the motion to dismiss. She insists that this case should be decided on the merits.

Discussion

As an initial matter, the Court grants the branch of the motion that seeks to vacate the Court's order granting defendants' motion to dismiss without opposition. Cases should be decided on their merits. And this is not a situation in which plaintiff ignored this case; rather, it seems that plaintiff thought the parties were close to reaching a resolution to send the dispute to arbitration and that she simply forgot to adjourn the instant motion. Maybe plaintiff thought that this Court would take a while to decide the motion rather than issue a prompt decision. In any event, the Court finds that the failure to request an adjournment is a reasonable excuse and plaintiff cited a meritorious case through the verified complaint.

The next step is to address the defendants' initial motion to compel arbitration. The investment agreement contains a clause that states that "Any dispute or controversy arising under or in connection with this Agreement shall be settled exclusively by arbitration, conducted by a single arbitrator agreed by the parties in New York, NY in accordance with the rules of the American Arbitration Association" (NYSCEF Doc. No. 1, exh A ¶ 10).

This agreement compels the Court to issue a stay of this matter and send the instant dispute to arbitration. Plaintiff's complaint contends that she entered into this agreement, but claims that she never received the promised return on her investment. The complaint contains no request that the Court invalidate the agreement or the arbitration provision itself.

Plaintiff appears to recognize that the dispute should be sent to arbitration, but demands that she wants both defendants to be in the arbitration (both the corporate defendant and the individual defendant). The issue is whether or not the individual defendant should be a part of the arbitration. The Court observes that "The AAA rules authorize the arbitration tribunal to rule on its own jurisdiction, including objections with respect to the existence, scope or validity of the arbitration agreement" (*Life Receivables Tr. v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 495-96 [1st Dept 2009], *affd*, 14 NY3d 850 [2010]).

That means that, here, the issue of the scope of the agreement should, in the first instance, be decided by the arbitrator. Non-signatories to an arbitration provision may be estopped from avoiding arbitration where "they derived direct benefits from said agreement" (*In re SSL Intern., PLC*, 44 AD3d 429, 430, 843 NYS2d 264 [1st Dept 2007]). Plaintiff alleges that defendant Ursini, the managing director of defendant ICT, LLC fraudulently procured funds from plaintiff. And defendants here initially made a motion seeking to arbitrate. Clearly, the arbitrator can rule

about whether the scope of the agreement applies to Ursini. And if the arbitrator finds that the scope of the arbitration provision does not apply to defendant Ursini, then that matter will be litigated in this Court.

Moreover, the Court declines to dismiss the causes of action against Ursini at this stage of the case because “a corporate officer who participates in the commission of a tort can be held personally liable even if the participation is for the corporation's benefit” (*Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 211, 797 NYS2d 1 [1st Dept 2005]). Plaintiff alleges that Ursini committed multiple torts, including common law fraud, negligent misrepresentation, and conversion. It is premature to dismiss the claims against him solely because he was the managing director of the corporate defendant.

Moreover, all of the causes of action are alleged against both defendants. Therefore, it makes little sense as a practical matter to have two parallel disputes (one in arbitration against the corporate defendant and one here against defendant Ursini) that involve the same exact facts and evidence. The dispute should be, at least in the first instance, decided in arbitration as proscribed by the parties’ agreement.

Accordingly, it is hereby

ORDERED that plaintiff’s motion to vacate is granted; and it is further


ORDERED that defendants’ motion to compel arbitration and to stay this action is granted; and it is further

ORDERED that plaintiff shall arbitrate her claims against defendants in accordance with the subject investment agreement; 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 order to show cause to vacate or modify this stay upon the final determination of the arbitration; and it is further

ORDERED that a conference is scheduled for January 31, 2024 at 10 a.m. The parties should upload a status update about the arbitration by January 24, 2024 or this control date will be adjourned. This is just to keep track of this case; if the arbitration is ongoing, the parties may seek an adjournment by stipulation.

9/13/2023		
DATE		ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE