

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

THOMAS CALZONE and LYDIA ST. HILAIRE,

Plaintiff,

DECISION AND ORDER

v.

Index #2007/01894

PAT LARRABEE, ROCHESTER CLINICAL
RESEARCH, INC., 500 HELENDALE
ASSOCIATES, LLC, M&T BANK CORPORATION,
and CITIZENS BANK,

Defendant.

Defendants Pat Larrabee and Rochester Clinical Research, Inc. ("RCR") move for an order pursuant to CPLR 7503(a) directing all claims made by plaintiff Calzone against the moving defendants proceed to arbitration and for a stay of all claims against these defendants pending the outcome of arbitration.

According to Calzone, he worked for defendant RCR under a shareholders agreement and an employment agreement from 1998 until January 2007 when he was terminated. Both agreements had a broad arbitration provision. In July 1999, Calzone and Larrabee executed a Shareholders' Agreement ("the 1999 Shareholders' Agreement"). There was also an additional signatory to this agreement, Sandra J. Van Camp, who is no longer a shareholder of RCR. Contrary to Calzone's argument, RCR is by the terms of the shareholders' agreement a party thereto. Hoffman v. Finger Lakes Instrumentation, LLC, 7 Misc.3d 179 (Sup. Ct. Monroe Co. 2005).

The case of Willoughby Rehabilitation and Health Care Center, LLC v. Webster, 31 A.D.3d 537, 538 (2d Dept. 2006), relied on by plaintiff, which involved an agreement which expressly and "unambiguously exclud[ed]" the plaintiff corporations as parties thereto, is inapposite.

Section 16.7 of the 1999 Shareholders' Agreement states:

Any dispute, disagreement or question as to this Shareholders' Agreement or the rights pursuant to it, whether based on tort or otherwise, relating to, or arising out of, the ownership of shares in this company and/or arising pursuant to the terms of this agreement, other than a claim based on a statute providing an exclusive means of enforcement, shall be first submitted to the general attorneys meeting for resolution. This meeting shall be conducted within 30 days of any such request. If the matter is not adjudicated to the Shareholder or the corporation's satisfaction at that meeting, the parties involved agree to submit the same within 30 days of that meeting for a binding final arbitration. This arbitration shall be in accordance (sic) the Rules of the American Arbitration Association in effect at the time the arbitration is initiated. Any claim or dispute subject to arbitration shall be waived and forever barred if it is not presented for arbitration within 30 days of the date when the claim was presented at said meeting.

Calzone alleges that this agreement was superceded by a new shareholders' agreement in 2006 ("2006 Proposed Shareholders' Agreement"). While it is conceded that the revised draft agreement was never executed by the parties, plaintiffs allege that the 2006 Proposed Shareholders' Agreement is valid

nevertheless due to partial performance by the parties and/or estoppel working to prevent defendants from denying the modification of the 1999 agreement. The 2006 Proposed Shareholders' Agreement does not include an arbitration provision.

Defendants' motion to compel arbitration also relies upon Calzone's Employment Agreement entered into July 1999. The Employment Agreement contains an arbitration clause mirroring the clause found in the 1999 Shareholders' Agreement. The Employment Agreement also states with respect to the "Terms of Employment" that the employee (Calzone) and employer (RCR) will continue the employment relationship until Calzone's death, his disability, his early termination on written notice, his termination for cause, or "Two years from the date this agreement is executed," whichever is earlier. Defendants maintain that the parties continued Calzone's employment on the same terms as the 1999 agreement after the written agreement expired except that the continuation of the employment relationship upon the same terms is held, because of the Statute of Frauds, to be on a year-to-year basis. Borne Chemical Co., Inc. v. Dictrow, 85 A.D.2d 646, 648 (2d Dept. 1981); Hubbell v. Hubbell Highway Signs, Inc., 72 A.D.2d 923 (4th Dept. 1979). This rule, where it is applicable (and Calzone does not *on the facts of the parties' relationship* between 2001 and 2006 rebut its application here), applies to

continue an arbitration provision in an expired written contract.

As explained:

In Vann v. Kreindler, Relkin & Goldberg, 54 N.Y.2d 936, 445 N.Y.S.2d 139, 429 N.E.2d 817 (1981), which the New York Court of Appeals decided before Waldron [61 N.Y.2d 181 (1984)], the plaintiff signed a partnership agreement with a law firm that contained a broad arbitration clause. The original partnership agreement dissolved two years later, in 1974, upon the withdrawal of one of the original partners. Id. at 818. No new written agreement was executed by the partnership's members before the plaintiff's withdrawal from the firm in 1979. Id. The Appellate Division found that the members of the successor firm treated the original partnership agreement as continuing in effect, and held that the arbitration agreement continued to be in force. Id. The Court of Appeals affirmed. "It is undisputed that the 1972 agreement contained a broad and unequivocal arbitration provision. By treating that agreement as continuing in force after the dissolution of the original partnership, the members of the successor partnership demonstrated their intention to be governed by that agreement's arbitration clause." Id. (citations omitted).

George v. LeBeau, 455 F.3d 92, 95 (2d Cir. 2006). Application of Vann to this case is required.

Plaintiff relies on Dash & Sons, Inc. v. Tops Markets, LLC, 30 A.D.3d 998, 999 (4th Dept. 2006), and Donnkenny Apparel, Inc. v. Lee, 291 A.D.2d 224 (1st Dept. 2002). Cf., Bessette v. Niles, 23 A.D.3d 996, 997 (4th Dept. 2005). As explained in George v. LeBeau, 455 F.3d at 95-96, however, these cases apply a different rule, required by CPLR 7501, in cases involving an "expired agreement contain[ing] an explicit provision that any renewal of the agreement had to be in writing." Id. 455 F.3d at 96 (citing Donnkenny Apparel, Inc. v. Lee, supra). Here, Calzone's

employment agreement was silent on renewal. True it is that the employment agreement stated that "no provision of this agreement shall be modified, waived or discharged unless the modification, waiver and discharge is agreed to in writing and signed by both parties" (§6[b]), but this would appear to require that the arbitration provision be observed if the contract was otherwise renewed by the conduct of the parties in accordance with the rule of Vann v. Kreindler, Relkin & Goldberg, supra. Here, there was no "express repudiation" of the prior contract's terms as there was in New York Telephone Co. v. Jamestown Telephone Corp., 282 N.Y. 365, 372 (1940), and in Bessette v. Niles, supra. Nor did the expired agreement by its terms preclude renewal by conduct, as in Donnkenny Apparel, Inc. v. Lee, supra. The case of Dash & Sons, Inc. v. Tops Markets, LLC, supra, is simply an application of Donnkenny Apparel, and in any event the facts of that case showed only that "the parties continued to act in accordance with some of the terms of the [expired written] agreements." Dash & Sons, Inc. v. Tops Markets, LLC, 30 A.D.3d at 999 (emphasis supplied). Here, there is no contention that Calzone's employment relationship was continued in 2001 on only some of the material terms of the expired written employment agreement. Accordingly, defendants succeed in their argument that they may take advantage of the arbitration provision in Calzone's expired written employment agreement. Digitronics Inventioneering Corp.

v. Jameson, 11 A.D.3d 783, 784 n.1 (3d Dept. 2004).

Validity of the 1999 Shareholders' Agreement

Plaintiffs claim that the 1999 Shareholders' Agreement expired and that the 2006 Proposed Shareholders Agreement should govern the parties' relationship as shareholders. The 1999 Shareholders' Agreement contains no express terms suggesting that it has expired, and it contains a merger clause that states:

16.8 This Agreement contains the entire understanding of the parties hereto with regard to the subject matter hereof, and may not be amended or modified, nor may any of its provisions be waived, except by a writing executed by all of the parties hereto on, in the case of a waiver, by each party waiving compliance.

"As a general rule, where a contract has a provision which explicitly prohibits oral modification, such a clause is afforded great deference." Healy v. Williams, 30 A.D.3d 466, 467 (2d Dept. 2006). New York's adherence to this principle is demonstrated in General Obligation Law Section 15-301(1):

A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent.

Due to the deference to merger clauses in the law, a party claiming oral modification "can only prevail upon proof that there was an oral modification and that the performance of the

modification was not merely executory, but had actually been performed in a manner which was unequivocally referable to that oral modification." Healy, 30 A.D.3d at 467-68. See also, Rose v. Spa Realty Associates, 42 N.Y.2d 338, 343 (only "when the oral agreement to modify has in fact been acted upon to completion" may it be proved) ("section 15-301 nullifies only 'executory' oral modification. Once executed, the oral modification may be proved"), 344-45 ("to enforce what is less than a fully executed oral modification, the statute must be satisfied") (1977); J&R Landscaping, Inc. v. Damianos, 1 A.D.3d 563, 564 (2d Dept. 2003) (enforcing oral modification where it was fully performed). In either the case of modification, however, the partial performance undertaken must be "unintelligible or at least extraordinary, explainable only with reference to the oral agreement," Anostario v. Vicinanza, 59 N.Y.2d 662, 664 (1983), and "so, too, conduct relied upon to establish estoppel must not otherwise be compatible with the agreement as written." Rose v. Spa Realty Associates, 42 N.Y.2d at 344.

Plaintiffs allege that the 2006 Proposed Shareholders' Agreement was "fully and mutually agreed upon by all parties." Plaintiffs' memo of law at 12. That argument alone gets Calzone nowhere in view of the merger clause and the almost wholly executory form of the 2006 draft shareholders agreement. In re Vecchitto, 229 F.3d 1136, unpublished text available 2000 WL

1508872 (Table) (2d Cir. 2000) (affirming 235 B.R. 231, 236 [D. Conn. 1999], which is published).¹ See also, Zollinger v. Carrol, 137 Idaho 397, 400, 49 P.3d 402, 405 (2002). Cf., Murray Walter, Inc. v. Sarkisian Bros., Inc., 107 A.D.2d 173, 176-77 (3d Dept. 1985). Plaintiffs further allege that the 2006 Proposed Shareholders' Agreement was partially performed by the parties when they increased their insurance to reflect the increased value of RCR and used the increased value in financial affidavits submitted to obtain funding from banks. But defendants show that this well anteceded the alleged formation of the 2006 agreement, i.e., in 2003, and therefore cannot constitute partial performance in reliance on its existence. Merrill Lynch Interfunding, Inc. v. Argenti, 155 F.3d 113, 123 (2d Cir. 1998) ("occurred before the time the oral agreement was reached

¹ Wherein it was stated:

First, we agree that the Shareholder Agreement was an executory contract. See In re Riodizio, Inc., 204 B.R. 417, 424 (Bankr.S.D.N.Y.1997) (finding that shareholder agreement is "[m]anifestly" an executory contract); In re Parkwood Realty Corp., 157 B.R. 687, 689 (Bankr.W.D.Wash.1993) (finding that stock repurchase provision in shareholder agreement is an executory contract); see also Stella v. Graham-Paige Motors Corp., 232 F.2d 299, 301 (2d Cir.) (noting that holder of an option to buy stock has a fixed right and obligation under an executory contract), cert. denied, 352 U.S. 831 (1956).

If a shareholders agreement is executory for purposes of the Bankruptcy Code, then it is assuredly executory for purposes of the common law and General Obligations Law, because "the bankruptcy definition is narrower than the traditional definition outside of bankruptcy." 31 Richard A. Lord, Williston on Contracts §78:39, at 97-98 (4th ed. 2004).

and thus can not be considered partial performance"). Calzone also invokes equitable estoppel, alleging that he detrimentally relied on the 2006 Proposed Agreement and Larrabee's representations that she would sign it when he signed personal guarantees relating to the obligations of 500 Helendale Associates, LLC, of which he was one of five equal members. But defendants successfully show that the signing of the personal guarantees, which all LLC members executed, was referable to Calzone's interest in the LLC, and not exclusive to the alleged 2006 Shareholders Agreement. Anostario v. Vicinanza, 59 N.Y.2d at 664.²

Calzone's claim that his causes of action against the moving defendants do not come within the scope of the 1999 Shareholders' Agreement is not compelling. In particular, his allegation that the valuation of the shares does not relate to the "ownership" of the shares as contemplated by Section 16.7 of the 1999 Shareholders' Agreement is not persuasive. The valuation of one's shares is a matter that relates to the ownership of the

² It has also been held that "a contracting party may orally waive enforcement of a contract term notwithstanding a provision to the contrary in the agreement." Madison Ave. Leasehold, LLC v. Madison Bentley Assoc. LLC, 30 A.D.3d 1, 5 (1st Dept. 2006), quoting Alside Aluminum Supply Co. v. Berliner, 32 A.D.2d 731 (4th Dept. 1969). A waiver "may be evinced by words or conduct, including partial performance." Madison Ave., 30 A.D.3d at 5. There is no indication that defendants orally waived the arbitration provisions in either the 1999 Shareholders Agreement or Calzone's Employment Agreement.

shares. The fifth and sixth causes of action are, therefore, subject to arbitration under the arbitration clause of the 1999 shareholders agreement, and would in any event be covered under the arbitration clause of the employment agreement.

Condition Precedent

Plaintiffs also take aim at the condition precedent to arbitration contained in the 1999 Shareholders' Agreement, which states that disputes "shall be first submitted to the general attorneys meeting for resolution." Plaintiffs claim that the condition precedent of the "general attorneys meeting" is illusory and thus cannot be enforced. In the event of a finding that this condition precedent is illusory, plaintiffs conclude that the entire arbitration provision is unenforceable. The agreement, however, has a severance clause which would appear to foreclose Calzone's argument.

But it is not necessary to reach that question. "[O]n a motion to stay or compel arbitration, the court's role is that of a gatekeeper, limited to deciding only three threshold questions: whether the parties made a valid agreement; if so, whether the parties complied with the agreement . . . whether the claim sought to be arbitrated is barred by the statute of limitations," and "whether public policy precludes arbitration." Cooper v. Bruckner, 21 A.D.3d 758, 759 (1st Dept. 2005). The court is not to exceed these gatekeeping functions. "As long as the agreement

to arbitrate is clear and unequivocal, the question of whether the agreement as a whole is unenforceable due to vagueness . . . is for the arbitrators to resolve." Id.

500 Helendale Operating Agreement

The Operating Agreement of 500 Helendale Associates, LLC contains two provisions, and each party relies on one to support its position:

13. Miscellaneous

13.2 This Agreement shall be governed by and construed in accordance with the laws of the State of New York applicable to agreements made and to be performed wholly in such State. Any action, suit or proceeding arising out of or relating to this Agreement shall be brought in New York State Supreme Court located in Nassau County, New York and all parties consent to the jurisdiction of such court...

14. Disputes

14. Any dispute, disagreement or question as to the terms of the Operating Agreement, or the rights of the Members pursuant thereto or whether based on tort or otherwise, relating to, or arising out of, the Operating Agreement, other than a claim based on a statute providing an exclusive means of enforcement, shall be first submitted to the Members for resolution. An attempt at resolution shall be conducted within 30 days of any such request. If the matter is not then adjusted, the Members agree to submit the same within 30 days of that resolution attempt meeting for a binding final arbitration. This arbitration shall be in accordance with the Labor Arbitration Rules and the American Arbitration Association in effect at the time the arbitration is initiated. Any claim or dispute subject to arbitration shall be waived and forever

barred if it is not presented for arbitration within 30 days of the date when the claim was presented at said [*copy provided to court is incomplete]....

The LLC's arbitration provision is limited to a "dispute, disagreement or question as to the terms of the Operating Agreement, or the rights of the Members pursuant thereto." The second and third causes of action relate to Calzone's rights as a member of the LLC and with respect to his rights under the Operating Agreement. He cannot evade this by alleging fraud in connection with the non-execution of the draft 2006 Shareholders Agreement. Nor can the forum selection clause be interpreted as writing the arbitration provision out of the agreement. Lawyer's Fund for Client Protection of The State of New v. Bank Leumi Trust Co. of N.Y., 94 N.Y.2d 398, 404 (2000); Columbus Park Corp. v. Dept. of Housing Pres. and Dev. of City of N.Y., 80 N.Y.2d 19, 31 (1992) ("a construction which makes a contract provision meaningless is contrary to basic principles of contract interpretation").

There are seven equal LLC members, only two of which have an interest in RCR, but each of whom executed personal guarantees covering the LLC's credit lines and a recently refinanced mortgage. The LLC is RCR's landlord. Calzone wants in the second cause of action rescission of his personal guaranty on the ground of fraudulent inducement by misrepresentation concerning whether a new RCR shareholder agreement would be signed, a claim

which in the abstract, i.e., divorced from the remedy sought, is covered by the arbitration clauses of the 1999 shareholders agreement and Calzone's employment agreement. But the remedy sought would also be covered by the arbitration provision in the LLC operating agreement. If Calzone succeeds in rescinding the guaranties, that would leave the other six LLC members holding the bag on the LLC's obligations by virtue of their own personal guaranties, and that would affect their rights as members in the LLC in a manner which contrasts sharply with Calzone's interest in the LLC. Almost certainly it would upon liquidation if the LLC's liabilities exceeded assets, but it could, under the terms of this operating agreement, affect distributions to members while a going concern. Additionally, the LLC operating agreement requires a two-thirds vote to approve a mortgage or pledge, and thus specifically refers to the very obligations each LLC member, including Calzone, guaranteed. Indeed, the agreement even prescribes the manner of distribution of proceeds from a mortgage refinancing. So the court concludes that an attempt to rescind the guaranty involves a "dispute, disagreement or question as to . . . the rights of the Members pursuant" to the LLC operating agreement.

Accordingly, defendants' motion is granted. Settle order bifurcating the causes of action in the complaint to be arbitrated on notice.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: April 17, 2007
Rochester, New York