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Arbitration Award Confirmed

October 13, 1995

WESTCHESTER COUNTY: SUPREME COURT

Justice Barone

YOUNG v. Young; GUILETTE v. Guilette; QUINN v, Quinn; SCHNEIDER v. Schneider—See memorandum on file.

Justice Cowhey

* HERMANN v. BAHRHAMI—Upon the foregoing papers, it is ordered and adjudged that these motions are consolidated and granted in part and denied in part.

Plaintiff and defendant were each 50 percent owners of a North Carolina corporation known as Fashion Printing, Inc. In 1990, Fashion Printing merged with a corporation known as Originit which was owned and controlled by two individuals known as Reiter and Yorke. Following the merger, Originit had four equal principal partners, with defendant Bahrarni as its President and plaintiff Hermann its Vice President. Apparently, pursuant to the merger, the parties executed a Shareholder's Agreement, a Redemption Agreement and a series of Employment Agreements, identical in form and substance for each of the four principals of the company. The action concerns the adversarial relationship between plaintiff and defendant which culminated in the firing of plaintiff "for cause" by the company on June21, 1993. Plaintiff claims that defendant had a personal vendetta against plaintiff and maneuvered to have plaintiff ousted from the company, not to benefit the company, but to satisfy defendant's own personal objectives. Defendant argues that he was acting solely as president of the company for the betterment of the company. Plaintiff also claims that the termination by the company breached his Employment Agreement since said Agreement restricted any termination of plaintiff to 'for cause' which was restricted to three limited areas—felony conviction; misappropriation or embezzlement of funds or perpetration of a material fraud on the company; or gross negligence. Plaintiff's Employment Agreement called for the arbitration of any contract-related disputes. Plaintiff

commenced arbitration proceedings against Originit at the same time the summons and verified complaint was served and filed in this action against defendant Bahrami individually. Defendant Bahrami moved to stay this action pending the arbitration and to compel plaintiff to arbitrate the claims against him in the Onginit arbitration. The instant action was stayed by order of the Court (Burrows, J.) on December 3, 1993, but the Court denied defendant's other requests for relief. The Court stated:

"Motion granted to the extent that the instant action is stayed pending arbitration. Cross-motion denied, without prejudice. Plaintiff's own affidavits in opposition to the motion are the best evidence that the facts and circumstances to be arbitrated are intrinsically related, if not the same, as those to be tried…"

The three arbitrators issued an award on September 19, 1994 in full settlement of all claims submitted to the arbitration, The arbitrators ordered the company to pay plaintiff-claimant $632,297.50 for purchase of plaintiff's shares of stock and pay plaintiff-claimant $110,410.46 in back pay. The award also stated, "The balance of claimant's claim is hereby denied." At the conclusion of the arbitration hearing, which lasted for six days and produced 1,400 pages of transcript, counsel for both plaintiff-claimant and Originit both stated to the Chairman of the panel that they had had a full and fair opportunity to present their case.

Plaintiff moves pursuant to CPLR 7510 for an order confirming the arbitration award rendered in said related proceeding of Hermann v. Originit Fabrics, Inc., 13- 116-00798/93. Defendant argues that the Court is without jurisdiction to consider plaintiff's application to confirm. The parties have not called the Court's attention to any provision in the arbitration agreement mandating that the award could only be confirmed by a court in a certain county. In the absence of such a mandate and, where as here, this Court has a related action— the instant action at bar—already pending before it and one of the parties, plaintiff, resides in Westchester County, the Court does have jurisdiction to consider the application to confirm (CPLR 7510; 7502(a); See McKinney's Practice Commentary C7502:2 (1992); A & R Construction Co., Inc. v. Gorlin-Okun, Inc., 41 A.D.2d 876).

Upon a review of the arbitration award, the satisfaction of the award by Originit and there being no opposition to its confirmation presented, the Court confirms the arbitration award and directs that judgment be entered thereon.

Plaintiff also seeks an order restoring action to the Court's active calendar. As previously stated, this action had been stayed by the Court pending arbitration. Defendant opposes restoring the action to the Court's active calendar and moves to dismiss the action, or in the alternative, for summary judgment. Defendant argues that the issues and claims raised in this action are identical to the issues and claims raised and decided in the arbitration proceeding against the company Originit and, therefore, this action is barred by the doctrines of res judicata and collateral estoppel. Plaintiff concedes that the facts underlying the complaint "are intrinsically related if not the same" as those arbitrated but argues that he was precluded from raising the causes of action in the complaint at the arbitration by the stay issued by the Court. Plaintiff further argues that he is not seeking damages for his breach of contract claims and that he is only seeking damages for his tort claims.

On April 6, 1990, plaintiff and company Originit entered into a two-year Employment

Agreement, which was to be automatically renewed on an annual basis thereafter. On the relevant dates contained in the complaint, the Employment Agreement was in effect. Regarding arbitration, paragraph 21 of the Employment Agreement states:

"In the event of any dispute arising under this Agreement, the parties agree that any claim o[4 controversy between any of the parties hereto arising out of or pertaining to any matter contained in this Agreement, or any difference as to the interpretation or performance of any of the provisions of this [A}greement shall be settled by arbitration in New York City. New York, before one (1) arbitrator mutually agreed upon by the parties of the American Arbitration Association under its then prevailing rules. In the event the parties cannot agree on an arbitrator, the Company shall select one arbitrator and the Executive shall select one arbitrator. The two arbitrators so selected shall then select a third arbitrator and the three arbitrators shall hear any claims herewith. The arbitrators sitting in any such controversy shall not have the authority or power to modify or alter any express condition or provision of this Agreement, or any modification thereof, or to render any award which by its terms has the effect of altering or modifying any express condition or provision of this Agreement, or modification thereof."

Clearly, under the terms of the Employment Agreement, only disputes arising under the said Agreement could be submitted to arbitration. Such disputes would include the firing of the plaintiff by Originit. Hence, the back pay award by the arbitrators was proper. The key question is whether plaintiff raised, or could have raised in the arbitration, all of the claims asserted in his complaint. The focus of the arbitration concerned the actions the company took and whether such actions were in accordance with the Employment Agreement. In contrast, some of plaintiff's causes of action in the complaint focus on defendant's actions to have plaintiff removed from the company—issues that would be outside of the jurisdiction of the arbitration panel (Deregebus v. Campari Export-Import SPA., 144 N.Y.S.2d 56). Therefore, plaintiff's causes of action (#1,2,4) for tortious interference with contractual relations, tortious interference with prospective economic advantage and defamation as it regards defendant's actions are properly before this Court and not barred by the doctrines of res judicata and collateral estoppel (Kret V. Brookdale Hospital Medical Center. 93 A.D.2d 449).

Any arguments that the causes of action in the complaint were not heard by the arbitrators because of the court stay are not accurate since the arbitrators plainly dealt with the breach of contract claim (cause of action number 6) and plaintiff states that he is not here seeking damages for that claim. Additionally, the Court notes that causes of action number 3 and number 5, which concerns alleged defamation actions by the company, are not properly included in this action, since this action is not solely against defendant Bahrami personally. Accordingly, causes of action numbered 3, 5, and 6 are dismissed (Matter of Liberty Mutual Insurance Co., 625 N.Y.S.2d 619).

Furthermore, defendant's contention that Bahrami is immune from personal liability because he was acting solely in his capacity as President of the company are belied by Bahrami's own words which attribute his actions to personal reasons. As found in the minutes of Originit's June 21, 1993 Board of Directors' meeting, defendant stated:

"I have called this board meeting to request that the Board either purchase my shares of the corporation according to our contract, or purchase Mr. Dick Hermann's shares. *My reasons are personal and include a lack of trust for my partner.* I am requesting each member to declare their feelings at this meeting." (Emphasis supplied).

A corporate officer is liable individually for tortuous interference if he commits independent torts (Murtha v. Yonkers Child Care Assoc., Inc., 45 N.Y.2d 913). Upon viewing the allegations of the complaint liberally and in the light most favorable to plaintiff as isproper upon a motion to dismiss, the Court finds that the issue of whether defendant Bahrami committed independent torts against plaintiff has been sufficiently pleaded and requires a plenary trial to resolve (Shields v. School of Law of Hofstra University, 77 A.D.2d 867; Renato v. George, 52 A.D.2d 939; Katz v. American Technical Industries, 96 A.D.2d 932).

Moreover, plaintiff's application for leave to amend his complaint to add a cause of action against this defendant for attorney's fees plaintiff incurred in the arbitration proceeding against the company is denied. The arbitration award clearly stated that the parties shall each bear their own legal fees incurred in the course of the arbitration, and this Court will adhere to the arbitration panel's determination of the issue.

Richard A. Roth, of Littman Krooks & Roth, was counsel for the Plaintiff.

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