BGC Notes, LLC v Gordon

Supreme Court of New York, New York County

July 13, 2015, Decided

651808/14

Reporter
2015 N.Y. Misc. LEXIS 2524; 2015 NY Slip Op 31221(U)

[**1] ***BGC NOTES***, LLC, Plaintiff, - against - KEVIN J. GORDON, Defendant. Index No. 651808/14

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

arbitration, employment agreement, partner, Partnership, disputes, nonsignatory, days, arbitration clause, summary judgment, ceased, courts, terms

Judges: [*1] SALIANN SCARPULLA, J.S.C.

Opinion by: SALIANN SCARPULLA

Opinion

DECISION and ORDER

SALIANN SCARPULLA, J.:

In this action to recover on a note, plaintiff ***BGC Notes***, LLC ("***BGC Notes***") moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint, against defendant Kevin J. Gordon ("Gordon"), to recover the sum of $699,652.58, plus prejudgment interest (motion seq. no. 001).[1] Gordon moves for: (1) an order compelling ***BGC Notes*** to arbitrate its claims under the Rules of the Financial Industry Regulatory Authority ("FINRA"); and (2) an order staying this action (motion seq. no. 002). Motion sequence numbers 001 and 002 are consolidated for disposition.

From April to November 2012, Gordon worked as a broker for BGC Financial, L.P. ("BGC Financial") on its Asset Backed Swaps Desk. Prior to commencing his employment, Gordon executed a "Cash Advance Distribution Agreement and Promissory Note" dated August 1, 2011 ("the Note"), under which Gordon agreed to borrow the [**2] principal sum of $700,000 [*2] from ***BGC Notes***, an affiliate of BGC Financial. On that same date, August 1, 2011, Gordon simultaneously entered into a five-year employment agreement with BGC Financial ("the Employment Agreement").

In its motion, ***BGC Notes*** argues that it is entitled to summary judgment in Lieu of complaint because the note executed by Gordon is an instrument for the payment of money only, and Gordon failed to make any payments on the Note. ***BGC Notes*** claims that the Note became due and payable when: (1) Gordon failed to become a partner in BGC Holdings, L.P. ("BGC Holdings"), an entity related to BGC Financial, within 90 days of commencing his employment; or, alternatively, (2) Gordon resigned from BGC Financial on November 9, 2012 and immediately ceased to be a partner in BGC Holdings. In support of its motion, ***BGC Notes*** submits an affidavit from assistant general counsel and vice president of BGC Financial and BGC Holdings, Andrew M. Kofsky ("Kofsky"). According to Kofsky, the Note "contemplated that, after starting at BGC Financial, Gordon would eventually become a limited partner in BGC Holdings." Kofsky asserts that ***BGC Notes*** agreed to loan $700,000 to Gordon on condition that he was a partner [*3] in BGC Holdings within 30 days of executing the Note. Kofsky states, however, that because Gordon "was not a limited partner in BGC Holdings" within the thirty-day pday period, ***BGC Notes*** had no obligation to pay out the loan. Nevertheless, ***BGC Notes*** advanced $700,000 to Gordon on April 30, 2012, subject to the Note 's terms.

[**3] Kofsky explains that the Note set forth various events under which it would become immediately due

[1] BGC Notes alternatively moves for an order granting summary judgment in lieu of complaint in the sum of $704,063.08, plus interest at an annual rate of 1.15% from June 11, 2014, costs of collection, and reasonable attorney's fees.

and payable, such as if Gordon failed to become a partner in BGC Holdings within 90 days of the start of his employment, or if he ceased to be a partner in BGC Holdings prior to the expiration of his five-year employment agreement.

Kofsky states that the "BGC entities offered to make Gordon a partner in BGC Holdings . . . [but] Gordon declined to sign the organization's limited partnership agreement . . . [and he] did not become a partner in BGC Holdings." in the expectation that Gordon would eventually sign the partnership agreement, BGC Holdings made allocations to partnership units set aside in Gordon's name, which were then applied by ***BGC Notes*** to pay a total of $8,064.92 toward the Note.

On November 9, 2012, Gordon resigned from BGC Financial. Kofsky asserts that **[*4]** the Note became due and payable upon Gordon's failure to become a partner in BGC Holdings within 90 days, or alternatively, upon his resignation because he could no longer remain a partner. Kofsky states that the outstanding balance due on the Note was $699,652.58 as of November 9, 2012, and $704,063.08 as of June 11, 2014.

In opposition, Gordon argues that ***BGC Notes*** has failed to make *a prima facie* case to recover on the Note because it is not an instrument for the payment of money only, and requires proof outside the Note. Further, Gordon asserts that he became a partner in BGC Holdings, and he is entitled to offset certain amounts owed to him.

[4]** Gordon also moves to compel arbitration of ***BGC Notes***' claims on the grounds that: (1) ***BGC Notes*** is bound by the arbitration provisions in the Employment Agreement, FINRA code, and the Form U-4; (2) ***BGC Notes*** may not force him to waive his right to compel arbitration; (3) ***BGC Notes*** is bound by BGC Financial's agreement to arbitrate even though it is a nonsignatory to the Employment Agreement; and (4) any issues of arbitrability should be referred to the FINRA arbitration panel.

BGC Notes opposes arbitration arguing that Gordon agreed that any **[*5]** disputes arising under the Note would be subject to this Court's exclusive jurisdiction; and ***BGC Notes*** is not a party to the Employment Agreement or a FINRA member.

The first paragraph of the Note states that Gordon "hereby agrees . . . that Lender [***BGC Notes***] will lend Maker [Gordon] the principal sum of Seven Hundred Thousand U.S. Dollars ($700,000) (the 'Loan'), pursuant to the terms of this Agreement. The Loan shall be payable by Lender within thirty (30) days of the parties' execution of this Agreement (where Maker is already a partner in the partnership in BGC Holdings, L.P. (the 'Partnership')."

Under the Note, Gordon agreed to "repay the Loan (principal and interest) from the net Partnership distributions" on all of his "Partnership units," and these "repayments will continue for as long as Maker is a Partner until the Loan is repaid in full." The Note further provided that if a portion of the loan remain unpaid "on such date as Maker ceases to be a Partner, the Lender will not seek to recover the remaining unpaid portion of the **[**5]** Loan . . . if Maker remained a current partner in the Partnership and did not breach of any of his or her obligations to the Partnership or any Affiliate" **[*6]** as defined by the Note.

Section 2 of the Note states that "any remaining unpaid portion of the Loan shall become immediately due and payable to the Lender, without notice or demand" upon the occurrence of certain events, including but not limited to "at any time prior to the Reference Date, Maker ceases to be a Partner," and if Gordon "fails to become a partner in the Partnership within 90 days of Maker' s Commencement Date."

Discussion

It is a matter for the courts "to determine whether the parties had agreed to arbitrate" which may require "interpretation of the Financial Industry Regulatory Authority (FINRA) Code." *MF Global, Inc. v. Morgan Fuel & Heating Co., Inc., 71 A.D.3d 420, 420-421, 896 N.Y.S.2d 326 (1st Dep't 2010)*. FINRA is a "registered self-regulatory organization under the Securities Exchange Act of 1934 . . . and has the authority to regulate its securities firm members by creating and enforcing rules." *Citigroup Global Mkts. Inc. v. Abbar, 761 F.3d 268, 274, n.4 (2d Cir. 2014)*. FINRA Rule 12200 requires members to arbitrate a dispute if the dispute arises in connection with the business activities of the member. *Goldman, Sachs & Co. v Golden Empire Schs. Fin. Auth., 764 F.3d 210, 214 (2d Cir. 2014)*.

Gordon argues that ***BGC Notes*** should be compelled to arbitrate this dispute because it is bound by the arbitration clause in his Employment Agreement. Section 9 of **[**6]** the Employment Agreement between

Gordon and BGC Financial states that "any disputes, differences or controversies [*7] arising under this Agreement or Employee's employment shall, to the maximum extent permitted by applicable law, be settled and finally determined by arbitration before a panel of three arbitrators in New York, New York, according to the rules of the Financial Industry Regulatory Authority (if required)."

In opposition, ***BGC Notes*** argues that it should not be required to arbitrate because it is not party to the Employment Agreement. BCG Notes points out that the relevant agreement to which it is a party - the Note - provides for resolution of disputes in the New York State courts:

> "Maker agrees that any and all disputes arising under this Agreement are subject to litigation in the courts of the State of New York and acknowledges that this Note is an agreement for the payment of money only subject to enforcement pursuant to NY CPLR §3213. With regard to any and all disputes arising under this Agreement, Maker hereby irrevocably submits to (1) the exclusive jurisdiction of the New York state courts and (b) service of process by mail. Maker hereby waives all of Maker's rights to personal service of process"

Thus, under the Employment Agreement, Gordon agreed to arbitrate disputes with his employer BGC [*8] Financial, and, under the Note, to litigate disputes with ***BGC Notes*** in New York state courts. ***BGC Notes*** commenced this action to enforce the terms of the Note, however, the money advanced pursuant to the Note, and the terms or repayment, are dependent to a significant degree on the Employment Agreement. As such, resolution of the disputes [**7] involving the Employment Agreement and the Note should be resolved in one forum, and, for the reasons discussed below, that forum is arbitration.

Except under limited circumstances, nonsignatories to an agreement are "not subject to arbitration agreements." *Matter of Belzberg v. Verus Invs. Holdings Inc., 21 N.Y.3d 626, 630, 999 N.E.2d 1130, 977 N.Y.S.2d 685 (2013)*. A nonsignatory party to an agreement containing an arbitration clause may be so bound, however, based on the ordinary principles of contract and agency including: "(I) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." *Thomson-CSF, S.A. v American Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995)*; *see TNS Holdings v. MKI Sec. Corp., 92 N.Y.2d 335, 339, 703 N.E.2d 749, 680 N.Y.S.2d 891 (1998)*.

Under the principles of estoppel, a nonsignatory may be compelled to arbitrate where he or she "knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement." *Matter of Belzberg, 21 N.Y.3d at 631* (internal quotations omitted). in determining whether a nonsignatory receives a direct [*9] benefit, "[t]he guiding principle is whether the benefit gained by the nonsignatory is one that can be traced directly to the agreement containing an arbitration clause." *Id. at 633*.

Here, I find that ***BGC Notes*** should be compelled to arbitrate because it receives direct benefits flowing from the Employment Agreement, which contains an arbitration clause. In setting forth Gordon's compensation, the Employment Agreement provided [**8] that Gordon would receive a $700,000 loan from ***BGC Notes***, in addition to salary and commissions. The Note expressly stated that BGC Financial would cause ***BGC Notes*** to make the $700,000 loan "[i]n consideration for services performed . . . and as consideration for Employee's consent to enter this Agreement." Based on this provision, ***BGC Notes*** clearly received a direct benefit from the Employment Agreement as it obtained the right to make the loan to Gordon under this agreement.

That ***BGC Notes*** benefitted from the Employment Agreement is further supported by the fact that the repayment terms under the Note were directly related to the Employment Agreement. The Note states that Gordon shall "repay the Loan (principal and interest) from the net Partnership distributions . . . on all [*10] of Maker's Partnership units (including future units) in the Partnership exclusive of any purchased by Maker with money in connection with a separate subscription agreement." The Note also sets forth various events under which the Note will "become immediately due and payable to the Lender, without notice or demand," such as if Gordon failed to become a partner in BGC Holdings within 90 days of starting his job at BGC Financial, or if he ceased to be a partner in BGC Holdings prior to the expiration of the Employment Agreement. Thus, ***BGC Notes***' right to receive payment on the loan was directly related to the status of Gordon's employment with BGC Financial.

For the above reasons, ***BGC Notes*** is estopped from avoiding arbitration because it received a direct benefit

from the Employment Agreement - i.e., the ability to make the **[**9]** loan to Gordon under which it would be entitled to collect principal and interest payments. *Merrill Lynch Intl. Fin., Inc. v. Donaldson, 27 Misc. 3d 391, 397, 895 N.Y.S.2d 698 (Sup. Ct. New York County 2010)* (compelling nonsignatory to arbitrate where it financed a loan that served as part of the compensation offered to a financial advisor and registered broker under an employment agreement containing an arbitration clause); **[*11]** *Merrill Lyneh International Finance Inc. v. Todd Gutkin, Index No. 601176/2009, 2009 N.Y. Misc. LEXIS 3656 (Sup. Ct. New York County Dec. 17, 2009)*; *Carvant Fin. LLC v. Autograd Advantage Corp., 958 F.Supp. 2d 390, 397 (E.D.N.Y. 2013)*. Accordingly, I grant Gordon's motion for an order compelling ***BGC Notes*** to arbitrate the claims in this action under the rules of FINRA, and staying this action pending the resolution of such arbitration. ***BGC Notes***' motion for summary judgment in lieu of complaint is denied, because ***BGC Notes*** must seek resolution of the matter in arbitration.

In accordance with the foregoing, it is

ORDERED that plaintiff ***BGC Notes***, LLC's motion for summary judgment in lieu of complaint (motion seq. no. 001) is denied; and it is further

ORDERED that defendant Kevin J. Gordon's motion to compel arbitration and to stay this action (motion seq. no. 002) is granted; and it is further

ORDERED that plaintiff ***BGC Notes***, LLC shall arbitrate its claims against defendant Kevin J. Gordon in accordance with the terms of the Employment Agreement dated August 1, 2011 between BGC Financial, L.P. and Kevin Gordon; and it is further

[10]** 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 to vacate or modify this stay and or to **[*12]** confirm/ disaffirm the arbitration award upon the final determination of the arbitration.

This constitutes the decision and order of this Court.

Dated: New York, New York July

July 13, 2015

ENTER

/s/ Saliann Scarpulla

Saliann Scarpulla, J.S.C.