COURT FILE NO: 05-CV-303286PD3
DATE: 20080505

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SPORT HAWK USA INC. AND SCOCAN RSA MANAGEMENT LTD.

Plaintiffs

- and -

NEW YORK ISLANDERS HOCKEY CLUB

Defendant

BEFORE: The Honourable Madam Justice Darla A. Wilson

COUNSEL: *Christopher W. Besant,*
for the Plaintiffs

Michael W. Kerr,
for the Defendant

HEARD: April 30, 2008

WILSON D.A., J:

ENDORSEMENT

[1] There are 2 motions before the court: one brought by the Plaintiff for an order validating service of the statement of claim and setting aside the notice of action dismissal and for judgment in the sum of $125,000.00 USD plus interest; and a motion brought by the defendant for an order that the purported service of the Statement of Claim is invalid and a further order dismissing or permanently staying the action.

THE BACKGROUND

[2] This action arises as a result of a written agreement entered into between Sport Hawk and the defendant for the supply of air charter services for the defendant hockey team during the 2000-2001 season of the NHL. Sport Hawk alleges that the defendant has not paid the sum of $125,000 USD for the services provided.

[3] A Statement of Claim was issued in Ontario December 29, 2005. It appears nothing was done in terms of service of the claim until June 15, 2006, when counsel for the Plaintiff sent a copy of the Statement of Claim to the defendant by mail and courier. The defendant does not dispute that the Statement of Claim was received. Counsel for the defendant, Mr Kerr, wrote to the solicitor for the Plaintiff on July 26, 2006 advising that the service was irregular and invalid. Furthermore, counsel advised that under the agreement that was signed between the parties "any dispute between the parties hereto in connection with this agreement shall be referred by the parties to arbitration in New York …" Mr. Kerr advised that the agreement also stipulated that the law of New York applied and he inquired whether the Plaintiff was going to discontinue the Ontario action and proceed with arbitration. There was no response to this letter from the Plaintiff solicitor.

[4] Mr. Kerr wrote again July 28, 2006 advising that if the Plaintiff was not prepared to discontinue the Ontario action he would bring a motion to dispute jurisdiction of the Ontario court. On the same day, counsel for the Plaintiff wrote back advising that she was seeking instructions from her client and would respond to Mr. Kerr's letters. Subsequently, there was some discussion between counsel and on August 23, 2006, Mr. Kerr wrote again inquiring whether counsel for the Plaintiff had instructions to discontinue the action and he noted that the dispute ought to be resolved by arbitration. There was no response to this letter.

[5] On October 24, 2006, Mr. Kerr wrote again requesting confirmation of the Plaintiff's intentions with respect to proceeding with the action. No reply was received to this letter and indeed, it appears that there was no further correspondence until March 4, 2008 when the solicitor for the Plaintiff wrote to defence counsel advising that unless she was in receipt of the Statement of Defence by March 7, 2008, the Plaintiffs would move for an order validating service of the Statement of Claim and for default judgment.

[6] A motion was brought before Master McAfee on March 10, 2008 which apparently was adjourned, although there is no copy of the Master's endorsement in the materials before me.

THE ISSUES

[7] The Plaintiff's position is that that the Arbitration Agreement is not engaged because there is no "dispute" within the meaning of paragraph 5.09 of the agreement. Counsel argued that the defendant had not advised of the reason that payment had not been made for the services rendered so there was no dispute between the parties. It is the

position of the Plaintiffs that there is no obligation on them to proceed to arbitration, as the requirement to do so has not been triggered by a dispute. The Plaintiffs wish to proceed with the Ontario action.

[8] In argument, counsel for the Plaintiffs emphasized that the defendant had not filed its Statement of Defence, thus the Plaintiffs did not know why payment had not been made under the agreement and there was no "dispute". In my view, there is no merit to this argument. Black's Law Dictionary defines "dispute" as "a conflict or controversy, especially one that has given rise to a particular lawsuit." It is patently obvious there is a "dispute" between the parties: the defendant has not paid the plaintiff monies that are allegedly due and owing under an agreement for services rendered. The Plaintiff obviously does not agree that it is not entitled to payment so it has issued a Statement of Claim in Ontario. Lawsuits are about disputes or disagreements between parties.

[9] Both parties signed the Operating Services Agreement which sets out the terms of the contract. One of the terms that both parties agreed to was that the agreement was to be construed according to the laws of the state of New York. Another term was that **"any dispute between the parties hereto in connection with this Agreement shall be referred by the parties to arbitration in New York in accordance with the provisions of the applicable law as defined in Section 5.05 hereof."** (Emphasis mine). It is clear that the parties contemplated that there might be a disagreement or a dispute between them arising out of the performance of the contract and they specifically determined that as opposed to proceeding with litigation, the matter would be resolved by way of arbitration. Similarly, given that one of the Plaintiffs is an Ontario company and the defendant is an American limited partnership, the issue of the law that applies was dealt with in the agreement and it was determined that the applicable law would be that of the state of New York.

[10] For reasons set out above, I reject the argument that there is no "dispute" between the parties so the arbitration requirement is not engaged. There is no suggestion that the agreement is void. In my view, I need not go beyond the terms of the contract between the 2 parties which clearly sets out the mechanism for resolving disputes. I am mindful of the many policy considerations behind holding parties to the terms of the contract they agreed to. The language of the International Commercial Arbitration Act, R.S.O. 1990 is mandatory that if a matter is the subject of an arbitration agreement and action is brought before the court, the court **shall** refer the parties to arbitration. In the Court of Appeal case of *Mantini v. Smith Lyons LLP* (2003), 228 D.L.R. (4th) 214 (C.A.), Justice Feldman noted that if a claim is one which must be decided by an arbitrator under the terms of the agreement, then under s. 7(1) of the Arbitration Act, the court is required to stay the action and refer the claims to arbitration.

[11] Given my decision that the terms of the Operating Services Agreement apply, there is no need for me to determine the issue of jurisdiction and further, there is insufficient evidence before me to make such a determination in any event. I need not deal with the Plaintiff's motion to validate service of the Statement of Claim under the circumstances.

[12] This court orders that the within action is stayed and the parties shall proceed to arbitration in New York in accordance with Section 5.09 of the Operating Services Agreement. If the parties cannot agree on costs, written submissions may be made within 20 days of the release of my decision.

Wilson D.A., J.

Released: May 5, 2008