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WESTCHESTER **ALTERNATIVE DISPUTE RESOLUTION**

Court to Decide Mortgagors' Challenge Despite Arbitration Clause in Contract

PLAINTIFFS SOUGHT to refinance their mortgage. They reached an agreement with corporate defendant, relying on a salesman's representations that defendant would obtain financing for a 10-year term at interest rates of about 7.75 percent. Plaintiffs paid a fee of $855. When defendant obtained a mortgage for 30 years at 9.25 percent, plaintiffs cancelled and demanded return of their fee, which defendant refused to do. Plaintiffs sued for rescission, based on misrepresentations. Defendant moved to stay the suit and enforce an arbitration clause. Applying state law, court held that it was for the court, and not the American Arbitration Association, to decide the challenge where it was to the validity of the clause itself, or where the alleged illegality permeated the contract as a whole.

SEE PAGE 31 COLUMN 1

DECISION OF INTEREST

Mirza v. National Standard Mortgage Corp., City Court of Yonkers, Judge Dickerson. QDS:04701027.

YONKERS

Judge Dickerson

DECISION OF INTEREST

MIRZA v. NATIONAL STANDARD MORTGAGE CORP— *QDS:04701027* —

How Low Can You Go?

The plaintiffs, Betty and Sargis Mirza ["the Mirzas"], own a house located at 45 Bayley Avenue, Yonkers, New York ["45 Bayley Avenue"]. Five years ago they financed the purchase of 45 Bayley Avenue by obtaining a ten year mortgage with a fixed annual interest rate of 10 percent. Last year the Mirzas decided to refinance at a lower annual interest rate. They contacted Citibank which turned them down. Citibank recommended the defendant, National Standard Mortgage Corp. ["Standard"].

Standard's Misrepresentations

On September 11, 1998, Standard sent a sales representative, Herbert Morrison ["Morrison"], to the Mirzas' home. Morrison "promised that . . . (Standard) could obtain mortgage financing for us for a ten-year term at interest rates of around 7.75% . . . We made it clear to Mt. Morrison that we were not interested in any loan with an interest rate in excess of 7.75 percent or for more than a ten-year term"[1]. The Mirzas relied upon Morrison's promises and agreed to have (Standard) obtain refinancing . . . at the rate and term quoted by Mr. Morrison—namely a $70,000 loan for ten years at an interest rate of around 7.75 percent" and gave him a check for $855.00 "in furtherance of such refinancing."

The Mortgage Loan Application Agreement

Subsequent to the sales presentation the Mirzas received in the mail several documents one of which was a Mortgage Loan Application Agreement[2] ["the Agreement"] which they signed leaving the date blank[3].

The Arbitration Clause

The Agreement, "governed by . . . the laws of the State of New York"[4], contains an "Arbitration And Enforcement" clause[5] which provides that "Any and all disputes . . . arising out of . . . or relating to the subject mortgage loan of this Agreement, the breach of said Agreement or any alleged breach thereof . . . shall be settled solely by arbitration in the City of White Plains, County of Westchester, State of New York, before the American Arbitration Association in accordance with its rules, and in the event that any proceedings are commenced prior to arbitration hereunder, such proceedings may be commenced only in the County of Westchester . . . in a Court having jurisdiction thereof, which proceedings shall be stayed pending the arbitration of the matter and award thereon . . ." ["the Arbitration Clause"].

Lack of Mutuality

The Arbitration Clause allowed Standard, but not the Mirzas, to "forego arbitration", ignore the restriction that all lawsuits must be brought in Westchester County, and "commence proceedings in any Court in the United States" "in order to recover any expense(s) incurred by Standard on behalf of the (Mirzas) and/or in order to recover any unpaid portion of (Standard's) Fee".

The Agreement Is Canceled

Standard obtained a "mortgage commitment" from "the Emigrant Mortgage Company, Inc." ["the Emigrant Mortgage"] which provided for a duration of "thirty years with an interest rate of 9.25 percent. (Emigrant) also required an initial payment of two and one-half points for the loan". Since this was contrary to Morrison's promises ["$70,000 loan for ten years at an interest rate of around 7.75 percent"] they refused to accept the Emigrant Mortgage ["These terms were totally different than what defendant promised and were unacceptable to us"].

The Lawsuit

The plaintiffs seek a refund of their $855.00 payment on the grounds that defendant's salesman, Morrison, misrepresented that defendant could and would obtain a ["$70,000 loan for ten years at an interest rate of around 7.75 percent"].

The Motion to Stay Proceedings

Instead of filing an Answer the defendant made a motion seeking "an order compelling arbitration and staying" the instant lawsuit.

Discussion

For the purpose of deciding this motion the Court finds that the plaintiffs have stated cognizable causes of action for (1) misrepresentation whether styled as fraudulent[6] or negligent[7]; (2) rescission based upon a want or failure of consideration, unconscionability and misrepresentations[8] and (3) violation of New York State General Business Law Section 349[9] [deceptive and misleading business practices].

Arbitration Clauses

Generally, the Courts of New York "encourag(e) the resolution of disputes through arbitration" [Matter of Ball (SFX Broadcasting, Inc.), 236 A.D.2d 158, 665 N.Y.S. 2d 444, 447 (1997)] by enforcing arbitration clauses in a variety of contracts [see e.g., Brower v. Gateway 2000, Inc., 246 A.D.2d 246, 676 N.Y.S.2d 569 (1998) (arbitration clause in computer purchase contract enforced as to location (Chicago) but not as to arbitration panel (International Chamber of Commerce)); Compare: Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997) ("Yet an agreement to arbitrate must be enforced 'save upon such grounds as exist at law or in equity for the revocation of any contract' "), cert. denied 118 S. Ct. 47 (1998)] even if there is a lack of mutuality of remedy as herein [see e.g., Sablosky v. Gordon Company, Inc., 73 N.Y.2d 133, 538 N.Y.S.2d 513, 516 (1989) ("Mutuality of remedy is not required in arbitration contracts. If there is consideration for the entire agreement this is sufficient; the consideration supports the arbitration option")].

New York Law Applies

If the subject Agreement involved interstate commerce which it does not [both parties residing in Westchester County] then the broad enforcement policies underlying the Federal Arbitration Act ["FAA"] might apply herein [see e.g., Weinrott v. Carp, 32 N.Y.2d 190, 344 N.Y.S. 2d 848, 855-856 (1973); Dolomite v. Beconta, Inc., 129 Misc.2d 857, 493 N.Y.S. 2d 705, 707-709 (1985) ("Federal law preempts New York's law"); Compare: Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 901 (1996) (FAA preempts Montana law on enforceability of arbitration clauses)]. However, the Agreement expressly provides that it is to be "governed by . . . the laws of the State of New York". As such the enforceability of the subject arbitration clause is governed by New York law and not Federal law [see e.g., Smith, Barney v. Luckie, 85 N.Y.2d 193, 623 N.Y.S.2d 800, 805, 647 N.E. 2d 1308 (1995) (" Undeniably, in the absence of an explicit choice of law provision, governing Federal law would have precluded the courts . . . from addressing the Statute of Limitations issue . . . or from issuing stays under our arbitration act . . ."); Matter of Teleserve Systems, Inc., 230 A.D.2d 585, 659 N.Y.S.2d 659, 663-664 (1997)].

This Court Decides Enforceability Issues

The plaintiffs seek rescission of the Agreement on the grounds of fraudulent misrepresentation, a want or failure of consideration and unconscionability. In essence, the plaintiffs challenge not only the enforceability of the arbitration clause but the entire Agreement as well. As such it is for this Court, and not the American Arbitration Association, to "decide the challenge where it is to the validity of the arbitration clause itself, or where the alleged illegality permeates the contract as a whole" [Matter of Teleserve Systems, Inc., supra, at 659 N.Y.S.2d 664] [see also: Susquehanna Valley Central School District v. Susquehanna Valley Teachers, 46 A.D.2d 104, 361 N.Y.S.2d 416, 419 (1974) (". . . a court will enjoin arbitration . . . (1) where there is fraud or duress in the inception of the contract"), appeal denied 37 N.Y.2d 705 (1975); Board of Education v. Chautauqua Central School Teachers, 41 A.D.2d 47, 341 N.Y.S.2d 690, 695 (1973); Housekeeper v. Lourie, 39 A.D.2d 280, 333 N.Y.S.2d 932, 936 (1972); Dolomite, supra, at 493 N.Y.S.2d 708 (". . . if the alleged fraud permeates the entire contract, including the arbitration provision, that provision will be no more enforceable than the rest of the contract and the whole contract's validity becomes a question for the court")].

Standard's Motion Is Denied

The defendant's motion seeking "an order compelling arbitration and staying" this lawsuit is denied. This matter will be set down for trial before this Court on April 27, 1999 at 2:00 p.m.

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(1) Affidavit of Sargis Mirza sworn to February 16, 1999 ["Mirza Aff."] submitted in opposition to the Motion of Standard seeking an "order compelling arbitration and staying all other proceedings". In the Affidavit of Herbert Morrison sworn to February 24, 1994 ["Morrison Aff."] Morrison does not deny promising the Mirzas that "(Standard) could obtain mortgage financing for us for a ten-year term at interest rates around 7.75 percent".

(2) A portion of the Agreement is attached as Exhibit A to the undated Affirmation of Victor B. Fama, Esq. submitted in support of Standard's Motion seeking to compel arbitration.

(3) Morrison claims that he gave the Agreement to the Mirzas and they signed it on September 8, 1998 while he was in their house ["The Agreement was not later mailed to the (Mirzas) and executed by them at a later date "(Morrison Aff. at para. 3)].

(4) The Agreement at para. XII.

(5) Id. at para. XIV.

(6) See e.g., Petrello v. Winks Furniture, New York Law Journal, May 21, 1998, p. 32, col. 3 (Yks. Cty. Ct.) misrepresented "Ultrasuede HP" sofa); Gutterman v. Romano Real Estate, New York Law Journal, October 28, 1998, p. 36, col. 3 (Yks. Cty. Ct.) (real estate broker misrepresents house with septic tank as being connected to city sewer system).

(7) See e.g., Oxman v. Amoroso, 172 Misc.2d 773, 659 N.Y.S.2d 963, 968 (1997) (misrepresented au pair services); Griffin-Amiel v. Terris, 178 Misc.2d 71, 77, 677 N.Y.S. 2d 908 (1998 misrepresented wedding singer).

(8) See e.g., Brow v. Hambric, 168 Misc. 2d 502, 508, 638 N.Y.S.2d 873 (1995) (misrepresented travel agent educational program); BNI v. DeSanto, 177 Misc.2d 9, 13, 675 N.Y.S. 2d 752 (1998) (misrepresented professional referral services); Rossi v. 21st Century Concepts, Inc., 162 Misc.2d 932, 618 N.Y.S.2d 182, 186 (1994) (misrepresented and overpriced pots and pans).

(9) See e.g., Petrello, supra; Gutterman, supra; Griffin, supra, at 178 Misc.2d 77-78; Brown, supra, at 168 Misc.2d 508-509; BNI, supra, at 177 Misc.2d 14-15.