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INDEX
NO. 12519-05

**SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 18 NASSAU COUNTY**

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

**Motion R/D: 8-15-05
Submission Date: 8-24-05
Motion Sequence No.: 001/MOT D**

**NATIONAL MEDICAL HEALTH CARD
SYSTEMS, INC.**

x

Plaintiff,

**COUNSEL FOR PLAINTIFF
Smith Campbell, LLP
110 Wall Street
New York, New York 10005**

- against -

JOSEPH FALLARINO,

Defendant,

x

**COUNSEL FOR DEFENDANT
Kreines & Engelberg, Esqs.
330 Old Country Road
Mineola, New York 11501**

ORDER

The following papers were read on Plaintiff's motion to stay arbitration:

- Order to Show Cause dated August 5, 2005;
- Affidavit of Thomas M. Campbell sworn to on August 8, 2005;
- Emergency Affidavit of Thomas M. Campbell sworn to on August 8, 2005;
- Plaintiff's Memorandum of Law;
- Affidavit of Joseph Fallarino sworn to on August 19, 2005;
- Affirmation of Thomas M. Campbell, Esq. dated August 23, 2005;
- Plaintiff's Reply Memorandum of Law.

Plaintiff, National Medical Health Card System, Inc. ("National") moves to stay the arbitration commenced by Defendant Joseph Fallarino ("Fallarino") pending the hearing and determination of National's action for rescission of the contract which contains the disputed arbitration clause.

BACKGROUND

By written agreement dated June 15, 2004, National hired Fallarino as its Senior Vice President of Human Resources and Employee Development for a period of two years.

National alleges that it discharged Fallarino for cause on March 1, 2005. The reasons for Fallarino's termination are alleged to be: (1) Fallarino engaged in inappropriate conduct with two female employees; (2) Fallarino changed the broker and insurer for National's employee benefit plan to a friend at increased cost to National; and (3) Fallarino misled National's Board of Directors concerning a discrepancy between the salary contained in his formal offer of employment and the salary provided in the Employment Agreement.

After Fallarino's termination, National claims it discovered that Fallarino's resume contained several material misrepresentations regarding his work experience. National also asserts that Fallarino improperly took his employment file with him when his employment was terminated. Had it known of these misrepresentations, National claims it would not have offered Fallarino employment in the first instance.

Fallarino denies all of National's allegations. He claims that the female employees who made the complaints were subordinates to whom he had given less than favorable performance evaluations.

The insurance coverage, he avers, was changed because the broker with whom National had been doing business did not provide all of the services required by National. The new broker was designated by National's CEO, James Smith. Fallarino claims the new insurance arrangement actually saved National money.

Fallarino claims that the former broker, who was a close personal friend of a member of National's Board of Directors, orchestrated these false allegations in retaliation for losing the National account.

While Fallarino concedes that his resume contained certain inaccuracies, he asserts that National was advised of all inconsistencies or inaccuracies in his resume before he was hired.

The section of Paragraph 13.13 of Fallarino's employment agreement relevant to this proceeding states:

"13.13 Arbitration. Except for any proceeding seeking equitable remedies in respect hereof (including, without limitation, for enforcement of Sections 6 and 9 above), any dispute or controversy under the Agreement shall be resolved by final and binding arbitration before a single impartial arbitrator designated and acting under the rules and regulations of the American Arbitration Association ("AAA") located in Nassau County, Long Island."¹

¹Paragraphs 6 and 9 of Fallarino's employment agreement are not involved in this application. Paragraph 6 contains a provision prohibiting disclosure and use of confidential information. Paragraph 9 contains a covenant not to compete.

After Fallarino was terminated, the parties attempted to negotiate a severance package. When negotiations failed, Fallarino filed a Request for Arbitration ("Request"). The exact date the Request was served is unknown. Additionally, the contents of the Request were not disclosed inasmuch as a copy has not been provided to the Court by either party. However, a letter from the American Arbitration Association ("AAA") – dated July 20, 2005 – addressed to counsel for Fallarino and National indicates the AAA received the Request on June 30, 2005. The letter requests National serve its response by August 1, 2005.

The AAA letter provided the parties with a list containing the names of possible arbitrators and requested that the parties provide the AAA with the names of acceptable arbitrators by August 1, 2005. Upon receipt of the list, AAA would designate an arbitrator. The AAA extended National's time to respond to August 9, 2005.

On August 8, 2005, National commenced this action. The action seeks to rescind Fallarino's employment agreement and recover the sums previously paid to Fallarino. Contemporaneously with the filing of the summons and complaint, National filed an order to show cause seeking a preliminary injunction to stay the arbitration pending the hearing and determination of National's cause of action for rescission. The order to show cause contained a provisions staying National's time to answer, move or take any other appropriate action in the Arbitration pending the hearing of this motion.

DISCUSSION

An issue not addressed by either party is dispositive of this application. That is, was the application to stay the arbitration timely made?

CPLR 7503(3) provides that a party served with a demand to arbitrate has twenty (20) days from the service of the demand to move to stay the arbitration. If the party upon whom the demand for arbitration fails to so move within twenty (20) days of the service of such demand, the party "...shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time." CPLR 7503(c). See, Matter of Steck(State Farm Ins. Co.), 89 N.Y.2d 1082 (1996); and Transportation Ins. Co. v. Desena, 17 A.D.3d 478 (2nd Dept. 2005). The court may not extend a party's time to move to stay arbitration. Matter of Matarasso(Continental Cas. Co.), 56 N.Y.2d 264 (1982); Aetna Life & Casualty Co. v. Stekardis, 34 N.Y.2d 182 (1974); and Matter of CNA Ins. Co. v. Carsley, 243 A.D.2d 474 (2nd Dept. 1997).

The only exceptions to the twenty (20) day rule are where the party seeking to stay arbitration alleges that the parties did not agree to arbitrate (Matter of Matarasso [Continental Cas. Co.], *supra*) or the agreement to arbitrate is facially illegal or public policy to prohibits the arbitration of the issues. Matter of Land of the Free, Inc. v. Unique Sanitation, Inc., 93 N.Y.2d 942 (1999).

Fallarino's employment agreement provides for arbitration of all controversies or disputes arising under the agreement.

The demand for arbitration was served in June 2005. Even without knowing the exact date, and assuming such service to have been on June 30 (although it logically had to be earlier) Plaintiff's time to move to stay arbitration expired on July 20. Thus, the application to stay arbitration, which was made on August 8 or August 9, 2005 and which was more than twenty (20) days after the demand for arbitration, was served.²

The issues raised in the complaint in this action involve a dispute arising out of Fallarino's employment agreement. Fallarino's employment contract is not facially illegal. Nor would it be against public policy to permit disputes arising from an employment agreement to be submitted to arbitration.

A claim of fraud in the inducement is one which can be heard and decided by an arbitrator. Avalon International Trading Corp. v. GST Receivables Mgt. Corp., 220 A.D.2d 248 (1st Dept. 1995).

In addition, it would appear that, based upon the findings herein, there is a serious question as to whether this action should continue.

Accordingly, it is,

²The Order to Show Cause provided for service on Fallarino on or before August 9, 2005. The exact date of service is unknown since the affidavit of service is not before the Court. However, since Fallarino opposed the motion on the merits and did not raise any objections to the method or timeliness of service, the Court assumes service was made timely and in accordance with the provisions of the Order to Show Cause.

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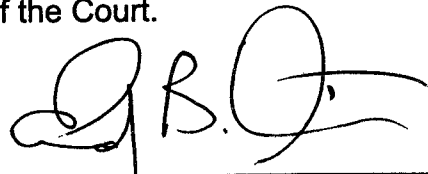
ORDERED, that Plaintiff's motion to stay arbitration is **denied**; and it is further,
ORDERED, that the parties are directed to proceed to arbitration before the
American Arbitration Association forthwith; and it is further,

ORDERED, that the stay of arbitration contained in the Order to Show Cause is
hereby vacated. Plaintiff is directed to comply with all pre-arbitration procedures within
twenty (20) days of the date of this order; and it is further,

ORDERED, that, on the Court's motion, counsel for the parties are directed to
show cause why this action should not be dismissed on December 13, 2005 at 9:30
a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
November 14, 2005



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE