

William Lo, Administrator v. Aetna International, Inc.

3:99CV195(JBA)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2000 U.S. Dist. LEXIS 22531

March 28, 2000, Decided

March 29, 2000, Filed

DISPOSITION: Defendant's Motion to Compel Arbitration and Stay Proceedings was denied and Plaintiffs Motion to Remand was granted.

CORE TERMS: deed of trust, compel arbitration, arbitration, subject matter jurisdiction, arbitration agreement, permanent incapacity, agreement to arbitrate, arbitration clause, signature, non-signatory, arbitrate, estoppel, retirement plan, years of service, base salary, beneficiary, calculated, incapacity, conveniens, contractual, territory, abroad, benefits payable, fiduciary duty, appointment, inconsistency, breached, salary, owed

COUNSEL: For Aetna Intl Inc, DEFENDANT: Charles L Howard, Shipman & Goodwin, Hartford, CT USA. Vaughn Finn, Shipman & Goodwin, Hartford, CT USA.

For William Lo, Admin of EST of Judy Lo, PLAINTIFF: Kenneth A Votre, Votre & Associates, New Haven, CT USA.

JUDGES: [*1] Janet Bond Arterton, United States District Judge.

OPINIONBY: Janet Bond Arterton

OPINION: RULING ON PLAINTIFF'S MOTION FOR REMAND AND DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS [DOC. # 15-1, # 15-2, # 17]

Pending before the Court is Plaintiffs Motion to Remand [doc. # 17] this action to Connecticut Superior Court (Judicial District of Hartford/New Britain) where it was removed, and Defendant's Motion to Compel Arbitration and Stay Proceedings [doc. # 15-1, # 15-2] pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201 to 208 ("New York Convention").

For the following reasons, Defendant's Motion to Compel Arbitration and Stay Proceedings [doc. # 15-1, # 15-2] is DENIED and Plaintiffs Motion to Remand [doc. # 17] is GRANTED.

Factual Background

Beginning in 1987, Ms. Judy Tien Lo, served as manager of Financial Planning in Aetna International, Inc.'s (Aetna) Asia Regional Office in Hong Kong and worked at all times in Hong Kong until 1995 when she stopped working due to illness. She was subsequently diagnosed with chronic inflammatory demyelinating neuropathy and eventually died from this disease. [*2]

In this action, Ms. **Lo** (and now her estate), n1 contends when Aetna announced the introduction of the Plan in January 20, 1993, the "Members Booklet" Aetna provided to her represented that upon permanent incapacity, she would be entitled to a cash sum equal to 36 times her salary. Based on this representation, Ms. **Lo** claims she continued to work for Aetna relying upon this promise. Subsequently, Aetna created the Staff Retirement Plan by a Deed of Trust executed on April 20, 1993.

----- Footnotes -----

n1 The Court granted William Los Motion to Substitute for Party Plaintiff after a Suggestion of Death was filed on March 30, 1999. See Endorsement Doc. # 11.

----- End Footnotes-----

The Retirement Plan was organized under Hong Kong law n2 and the Plan's effective date was January 1, 1993. Plaintiff was named one of the three original trustees under the Deed of Trust and involved in the process of creating and implementing the deed of trust. See Greenwald Aff. at P13.

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n2 Although this retirement plan is analogous to an ERISA plan, it is not governed by ERISA as it was created under and governed by the laws of Hong Kong. See Deed of Trust.

----- End Footnotes----- [*3]

In the Staff Retirement Plan's Deed of Trust, Aetna International made several changes to how benefits were to be calculated which modified the formulae represented in the Members' Booklet previously distributed in January 1993. For example, while the Members' Booklet indicated the benefits payable upon permanent incapacity were the greater of (1) the member's retirement benefit at incapacity (calculated by multiplying the member's most recent base salary by her years of service and a factor, which increased with years of service); or (2) 36 times the member's salary, the Deed of Trust limited the benefits payable to the member's benefit at time of incapacity as described in (1).

In Count One, Ms. **Lo** alleges Aetna misrepresented the provisions for payment of benefits for permanent incapacity by distributing the Members Booklet. In Count Two, she alleges Aetna should be equitably estopped. In Count Three, she alleges Aetna breached its fiduciary duty as the Plan administrator. In Counts Four and Five, she alleges that denial of permanent disability benefits breached the terms of her employment contract. Ms. **Lo** seeks to recover HK\$ 2,340,000, the amount she alleges she is owed as [*4] permanent incapacity benefits as described in the Members' Booklet (36 x her most recent base salary (approximately HK\$ 65,000)). To date, the Plan disputes Ms. Los claim on the grounds that the Deed of Trust, which was subsequently executed, supersedes any representation in the Members' Booklet particularly in light of the fact that the Members' Booklet admonished members: "You should note that if there is any difference between the explanations in this booklet and the provisions in the Deed, the provisions of the Deed will govern." See Members' Booklet at P1. In addition, the Members' Booklet indicated that "[t]he Company may change the provisions of the Plan at

any time. However, your benefits earned before the date of such change will not in any way be reduced." See Member's Booklet at P9. Although Aetna represents that it previously identified this inconsistency and took steps to correct this inconsistency before the Deed of Trust was executed, see Greenwald Aff. at P17, it simply includes a letter from Kam L. Li to Florence Wong dated March 31, 1999, indicating the amended wording by underlining any changes, see Ex. C, but fails to demonstrate that such a letter was sent to [*5] Ms. Lo.

On February 1, 1999 (more than 2 1/2 years after this litigation commenced and the day before this action was removed to federal court), the Trustees sent the estate a letter enclosing a check in the amount of HK\$ 1,001,687.50 n3 representing the amount it believes represents her permanent incapacity benefit as provided for under the Deed of Trust. n4 See Def.'s Ex. D, Poon and Greenwald Letter (dated Feb. 1, 1999). Aetna's tendering of this amount made clear that Ms. Lo's acceptance of this amount did not affect the parties' dispute as to additional monies claimed. In addition, the Trustees requested that the estate provide any additional information it would like the Plan to consider before February 28, 1999, and that it would make a final determination as to Ms. Lo's incapacity benefits no later than March 1999. The record contains no indication whether the estate submitted additional information, or the Trustees amended or finalized their determination. At oral argument, the estate confirmed it had accepted payment and reserved its claims.

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n3 This amount was calculated under the terms of the Plan (2 x HK\$ 64, 635 (Ms. Lo's final base salary) x 7.75 (Ms. Lo's years of service)). [*6]

n4 At the same time, Aetna tendered a check in the amount of HK\$ 195,241.81 reflecting interest at 5%.

----- End Footnotes -----

This action was commenced in Connecticut Superior Court, Judicial District of Hartford/New Britain with a return date of October 29, 1996. On February 2, 1999, Aetna removed this action to federal court. While this action was pending in state court, Superior Court Judge Paul Sullivan ruled on Aetna's motion to dismiss which was based on forum non conveniens, plaintiffs failure to submit her claim to arbitration, and Aetna's lack of authority to make benefit determinations. See Memorandum of Decision on Motion to Dismiss (dated May 12, 1997), Def.'s Mem. of Law in Support Motion to Compel Arbitration and Stay Proceedings, Ex. 1 [doc. # 16]. In denying Aetna's Motion to Dismiss, Judge Sullivan rejected the claim that Connecticut was a forum non conveniens, or that Hong Kong was a forum of conveniens, noting that depositions could be taken in Hong Kong, that the dispute largely involved interpretation of written documents, that there are exorbitant costs associated with litigating in Hong [*7] Kong, and questioning how Hong Kong's justice system would be affected once it reverted to the Republic of China. See *id.* at 2. With respect to defendant's claim that plaintiff failed to submit her claim to arbitration or that defendant lacked authority to make benefit determinations under the Retirement Plan, Judge Sullivan concluded that "the plain answer is that plaintiff is not suing for benefits under the plan" since plaintiffs claims "are outside the plan and, if viable would not be restricted by the provisions of something which she is not seeking to enforce." *Id.* at 3.

Legal Discussion

Since resolution of Plaintiffs Motion to Remand and Defendant's Motion to Compel Arbitration, each turn on the threshold issue of whether this Court has subject matter jurisdiction 9 U.S.C. § 203, n5 the Court must first determine whether this dispute is subject to arbitration under the New York Convention. In opposing the motion to compel arbitration and in support of its motion to remand, plaintiff contends that this dispute is unrelated to any agreement to arbitrate within the meaning of the New York Convention.

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n5 The Court's subject matter jurisdiction cannot be based on diversity since both plaintiff and defendant are Connecticut residents.

----- End Footnotes----- [*8]

Aetna, the party asserting this Court's subject matter jurisdiction bears the burden of proof. See *McNutt v. General Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 182-83, 80 L. Ed. 1135, 56 S. Ct. 780 (1936); *Robinson u. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994). In order for an action to "relate" to an arbitration under the Convention, four questions must be resolved: (1) whether there is an "agreement in writing" to arbitrate the subject of the dispute; (2) whether the agreement provides for arbitration in the territory of a signatory of the Convention; (3) whether the agreement arises out of a legal relationship, contractual or not, which is considered "commercial"; and (4) whether a party to the agreement is a foreign citizen or the relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation to one or more foreign states. In challenging this Court's jurisdiction, Ms. Lo challenges the (1), (3) and (4) requirements, but concedes that Hong Kong, the site of the contemplated arbitration is within a territory of the Convention.

Plaintiff argues that the Second [*9] Circuit's interpretation of the New York Convention in *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210 (2d Cir. 1999), as requiring that a covered arbitration agreement "be signed by the parties or contained in an exchange of letters or telegrams," compels the conclusion that the Court lacks jurisdiction because Ms. Lo never signed any agreement to arbitrate this dispute.

In *Kahn Lucas*, the Second Circuit concluded that the district court lacked subject matter under the New York Convention to compel arbitration against the seller who had never signed the purchase orders containing the arbitration agreement. Ms. Lo signed the Deed of Trust as one of the three named trustees, and thus the Court must determine whether that signature satisfies the New York Convention requirement that the agreement to arbitrate be signed by the party sought to be compelled to arbitrate. Aetna argues that since Ms. Lo signed in her capacity as Trustee, and she owed all beneficiaries including herself a fiduciary duty of loyalty and prudence, therefore her signature demonstrates her acceptance of the Deed of Trust as fair and reasonable for all plan members.

The introduction [*10] to the Deed of Trust states: "This Deed is made this 20th day of April 1993 BETWEEN Aetna International Inc. . . . Douglas Currey Henck, Judy Tien Lo, and David Jeffrey Skinner all do Aetna International Inc., 3508 One

Exchange Square, 8 Connaught Place, Hong Kong (hereinafter called the 'Trustees') of the other part." Deed of Trust p. 1. Similarly, Clause 4 governing the Appointment of the First Trustees states: "the Company hereby appoints the Trustees as the first Trustees of the Plan upon the terms and provisions set out herein and the Trustees by execution hereof consent to their appointment as Trustees of the Plan." Finally, the Deed was "SIGNED, SEALED and DELIVERED by the said DOUGLAS CURRY HENCK in the presence of: /s/ SIGNED, SEALED and DELIVERED by the said JUDY TIEN LO in the presence of: /s/ SIGNED, SEALED and DELIVERED by the said DAVID JEFFREY SKINNER in the presence of: /s/." Deed of Trust at Signature Page.

Aetna cites no Hong Kong authority n6 for its assertion that by signing in her capacity as Trustee, she legally bound her and all other beneficiaries to arbitration. In the absence of any legal authority, the Court declines to conclude that Ms. Lo's signature as [*11] Trustee reflected her agreement to arbitrate this dispute, which she contends does not arise under the Plan in any event.

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n6 See Deed of Trust, Clause 24 ("This Deed shall in all aspects be governed by and interpreted according to the laws of Hong Kong,

----- End Footnotes -----

In the alternative, Aetna argues that even non-signatories to an arbitration agreement such as Ms. Lo may nevertheless be bound under the New York Convention according to ordinary contracts and agency law and specifically the principle of estoppel. See *Smith/Enron Co Generation L.P. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88 (2d Cir. 1999); *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995). Aetna claims Ms. Lo is estopped from refusing to comply with an arbitration clause since she received "a 'direct benefit' from a contract containing an arbitration clause." *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) *Deloitte Noraudit A/s v. Deloitte Haskins & Sells*, 9 F.3d 1060, 1064 (2d Cir. 1993) [*12] (holding non-signatory bound to arbitrate when it knew of the arbitration agreement and "knowingly accepted the benefits of that agreement"); cf. *Hughes Masonry Co. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836, at 838-39 ("It would be manifestly inequitable to permit Hughes to both claim that J.A. [a non-signatory] is liable to Hughes for its failure to perform the contractual duties described in the [arbitration agreement] and at the same time deny that J.A. is a party to that agreement in order to avoid arbitration of claims clearly within the ambit of the arbitration clause"). Aetna contends that the principle of estoppel applies with particular force here given the fact that Ms. Lo accepted a substantial disability benefit, HK\$ 1,001,687.50 with interest in the amount of HK\$ 195,241.81, under the Plan created by the Deed of Trust. However, Aetna's claim of estoppel is negated by the fact that Aetna offered this payment with the clear understanding that: "While payment of this money is not in any manner an admission that Judy's estate is entitled to any additional amounts under the Deed of Trust or otherwise, your acceptance of the enclosed payment is not intended to and will not prejudice in [*13] any way your right to claim additional or different benefits under the Deed of Trust or otherwise from the Trustees." See Def.'s Motion to Compel, Ex. D p.3 (emphasis added).

Since Aetna has shown no written agreement to arbitrate these claims signed by Ms. Lo in her capacity as beneficiary, the Court concludes it lacks subject matter

jurisdiction to compel arbitration under the New York Convention and does not reach Ms. Tien Lo's additional challenges to the applicability of the New York Convention, namely whether this dispute falls within the scope of the arbitration clause, whether the dispute involves a "commercial matter," or whether Aetna waived its right to arbitrate by waiting more than 2 1/2 years before seeking to compel arbitration. In the absence of subject matter jurisdiction under the New York Convention, this Court cannot compel arbitration and therefore will remand this case to Superior Court.

Conclusion

For the foregoing reasons, Defendant's Motion to Compel Arbitration and Stay Proceedings [doc. # 15-1, # 15-2] is DENIED, and Plaintiffs Motion For Remand [doc. # 17] is GRANTED. Accordingly, the Clerk is directed to close this case and REMAND to Connecticut [*14] Superior Court/Judicial District of Hartford/New Britain.

IT IS SO ORDERED.

Janet Bond Arterton

United States District Judge

Dated at New Haven, Connecticut: March 28, 2000

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