STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION
Addison Unit — Docket No. 37-2-18 Ancv

Heller vs. Dupoise

ENTRY REGARDING MOTION

Count 1, to Compel Arbitration (37-2-18 Ancv)

Title: Motion to Compel Arbitration (Motion 1)
Filer: Kandice Heller
Attorney: William H. Meub
Filed Date: February 26, 2018

Response filed on 03/20/2018 by Attorney James C. Foley for Defendant Gary J. Dupoise

The court previously ruled on this motion. At a hearing on March 29, the court orally granted a motion to vacate that decision and revisit the merits of this motion. The issue before the court is whether arbitration of the remaining dispute is mandated by a prior settlement agreement.

The dispute turns on the significance of the agreed choice of an arbitrator. The settlement agreement stated as follows: "In the event that there are items on which Gary and Kandi disagree, or the Parties disagree on the reasonable steps required for Kandi to prepare a final list of items under this Paragraph, the Parties shall submit their dispute to Michael Marks or Tad Powers for binding arbitration." Settlement Agreement, ¶ 2. As a result of a dispute with Plaintiff's counsel, the designated arbitrators have declined to do the arbitration. Plaintiff argues that another arbitrator should be chosen; Defendant argues that the choice of specific arbitrators was a material term of the agreement and the arbitration requirement is now void.

Our arbitration statute, like its federal counterpart, states that if the designated arbitrator "fails or is unable to act," the court shall appoint another arbitrator. 12 V.S.A. § 5675. Nonetheless, arbitration agreements are contracts, and "we cannot compel a party to arbitrate a dispute before someone other than the [designated arbitrator] when that party had agreed to arbitrate disputes only before the [arbitrator] and the [arbitrator], in turn, . . . has refused . . . to arbitrate the dispute in question." Moss v. Premier Bank, 835 F. 3d 260, 265 (2d Cir. 2016), quoting In re Salomon Inc. Shareholders' Derivative Litigation, 68 F. 3d 554, 557-58 (2d Cir. 1995). If the designation of the arbitrator appears to be "as important a consideration as the agreement to arbitrate itself, a court will not sever the failed term from the rest of the agreement and the entire arbitration provision will fail." Zechman v. Merrill Lynch, 742 F. Supp. 1359, 1364 (N.D. Ill. 1990).

The question many courts ask is whether the choice of arbitrator was "integral to the agreement" or merely an "ancillary logistical concern." *See, e.g.*, Miller v. GGNSC Atlanta, LLC, 746 S.E. 2d 684-87, 686 (Ga. Ct. App. 2013). That question depends upon the language of the agreement. Id. An agreement that has an "express designation of a single arbitration provider weighs in favor of a finding that the designated provider is integral to the agreement to arbitrate." Rivera v. America Gen. Financial Services, 259 P. 3d 803, 812-13 (N. M. 2011).

Here, the parties designated the arbitrator who had served as the mediator who helped them reach the settlement agreement, as well as one of his partners. The arbitration term was essentially a follow-up to the mediation, to resolve the one dangling issue not entirely finished by the mediation. Thus, the court finds it a fair inference that the choice of arbitrators was expressly made because of the connection to the mediation,

and the fact that the mediator and his firm had all of the background materials provided during the mediation. Thus, the court finds the term to be "integral" to the agreement.

Order

The motion to compel arbitration is denied. This case is closed.

Electronically signed on April 26, 2018 at 11:58 AM pursuant to V.R.E.F. 7(d).

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Helen M. Toor
Superior Court Judge