NEW YORK APPELLATE DIGEST, LLC

A "Targeted Research" Memorandum Collecting the Decision-Summaries in the New York Appellate Digest Database which Address When a Nonsignatory Can Be Compelled to Arbitrate Pursuant to an Agreement to Arbitrate (to which the Nonsignatory Was Not a Party), and When a Nonsigantory Can Enforce an Agreement to Arbritate (to which the Nonsignatory Was Not a Party). The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header to Return There.

When Can Nonsignatories Be Compelled to Arbitrate?
When Can Nonsignatories Enforce an Agreement to Arbitrate?
A "Targeted Research" Memorandum Drawn Entirely from the New York Appellate Digest Database—April 22, 2021

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DIRECT BENEFIT.

IN THIS CLASS ACTION AGAINST NATIONAL GRID AND LONG ISLAND POWER AUTHORITY (LIPA) STEMMING FROM THE LOSS OF POWER DURING HURRICANE SANDY, THE PUBLIC IS SUBJECT TO THE ARBITRATION CLAUSE IN THE CONTRACT BETWEEN NATIONAL GRID AND LIPA, FILING A PRE-ANSWER MOTION TO DISMISS AND APPEALING THE RULING ON IT DID NOT WAIVE ARBITRATION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, in a class action stemming from the loss of power during Hurricane Sandy, determined: (1) the public was a third-party beneficiary of a contract between National Grid and the Long Island Power Authority (LIPA); (2) the public was subject to the arbitration clause in the contract; and (3) filing a pre-answer motion dismiss did not act as a waiver of arbitration:

… [U]nder limited circumstances nonsignatories may be compelled to arbitrate" … . "Under the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits' the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement" … . "The benefits must be direct, and the party seeking to compel arbitration must demonstrate that the party seeking to avoid arbitration relies on the terms of the agreement containing the arbitration provision in pursuing its claim" … . …

National Grid … demonstrated that the plaintiffs derived a direct benefit from the [contract] and that the plaintiffs are explicitly relying upon the terms of that agreement to support their claims against National Grid. Accordingly, under these circumstances, the plaintiffs should be compelled to arbitrate in accordance with the arbitration clause … . …

… [T]the service of a pre-answer motion to dismiss does not constitute waiver of the right to arbitrate, since "a defendant is entitled to have the sufficiency of a complaint tested before a duty to seek arbitration arises" … . Similarly, an appeal from the denial of a motion to dismiss does not result in waiver of the right to arbitrate … . Matter of Long Is. Power Auth. Hurricane Sandy Litig., 2018 NY Slip Op 07127, Second Dept 10-24-18

DIRECT BENEFIT.

NONSIGNATORY WHICH RECEIVED A DIRECT BENEFIT FROM AN AGREEMENT WITH AN ARBITRATION PROVISION IS SUBJECT TO ARBITRATION (FIRST DEPT).

The First Department determined defendant, Gordon, was entitled to compel arbitration with an entity which was not a party to the document with the arbitration provision. Plaintiff, BGC Notes, loaned $700,000 to Gordon as part of an employment arrangement with another related entity, BGC Financial. The employment agreement contained the arbitration clause and the note for the loan required resolution of any disputes in the courts. Although BGC Notes was not a party to the employment agreement, it was deemed to receive a direct benefit from the employment agreement. Therefore BGC Notes was subject to the arbitration clause in the agreement:

Although BGC Notes was not a signatory to the employment agreement, which is the document actually containing the arbitration provision, BGC Notes nonetheless received a "direct benefit" directly traceable to the employment agreement … . Specifically, section 3(d) of the employment agreement provides that BGC Financial would "cause" BGC Notes to make a loan to Gordon by way of the very note that BGC Notes sues upon in this action, and BGC Notes received all the benefits that an entity ordinarily receives upon the giving of a loan … . Thus, BGC Notes derived benefits from the employment agreement, and BGC Notes' contention that section 3(d) conferred a benefit only to Gordon, and at most an "indirect" benefit to BGC Notes itself, belies the terms of the employment agreement … . BGC Notes, LLC v Gordon, 2016 NY Slip Op 05775, 1st Dept 8-11-16

DIRECT BENEFIT.

NONSIGNATORIES ARE COMPELLED TO ARBITRATE UNDER THE DIRECT-BENEFIT ESTOPPEL THEORY (SECOND DEPT).

The Second Department determined the nonsignatory, plaintiff's LLC (Shavae), is bound by the arbitration provision in the contract (SRA) entered by plaintiff (Revis) under the direct-benefit estoppel theory. Revis is a professional football player and defendant Schwartz is an attorney who represented Revis in contract negotiation and marketing and endorsements:

… Revis entered into an agreement with Schwartz pursuant to which they agreed to arbitrate "gateway" questions of arbitrability … * * *

… [T]he defendants contend that although Shavae (plaintiff's LLC) is not a signatory to the SRA, it too is bound by the broad arbitration clause contained therein. The defendants are correct.

"Under the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory 'knowingly exploits' the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement"… . "The benefits must be direct, and the party seeking to compel arbitration must demonstrate that the party seeking to avoid arbitration relies on the terms of the agreement containing the arbitration provision in pursuing its claim" … .

Here, the complaint does not distinguish between the two plaintiffs in terms of the relief sought. In other words, Shavae seeks the same relief as Revis in each of the eight causes of action asserted in the complaint. Even assuming that Shavae is not an alter ego of Revis … , Shavae independently seeks to recover … damages for Schwartz's alleged breach of the SRA. … [T]he complaint alleges that Shavae is entitled to recover amounts that should have gone to it pursuant to the terms of the SRA and Shavae independently seeks to rescind the SRA and recover "rescissory damages."

Given the allegations in the complaint that Shavae was entitled to certain benefits under the SRA and that it was entitled to recover various types of damages due to

Schwartz's alleged breach of that agreement, Shavae should be compelled to arbitrate in accordance with the arbitration clause contained in the SRA by application of the direct benefits theory of estoppel Revis v Schwartz, 2020 NY Slip Op 08094, Second Dept 12-30-20

The Nonsignatory "Exploited the Benefits" of the Agreement to Arbitrate

DIRECT BENEFIT

THE SUBCONTRACTORS DID NOT SIGN THE PRIMARY CONTRACT WHICH INCLUDED AN ARBITRATION PROVISION; HOWEVER THE SUBCONTRACTORS EXPLOITED THE ARBITRATION PROVISION BY PARTICIPATING IN PRE-ARBITRATION MEDIATION; THEREFORE THE SUBCONTRACTORS WERE ESTOPPED FROM COMPELLING LITIGATION (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that the subcontractors, who did not sign the primary contract which included an arbitration provision in the "General Conditions," had exploited the benefits of the primary contract and therefore should be compelled to arbitrate. The primary contract was between Corning Hospital and Gilbane, the general contractor. One subcontractor (Mancini) was responsible for general construction of the building and the other (Alliance) was responsible for the installation of veneer stone panels, which had begun to fall off the building:

… "[U]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement" … . … "Where the benefits are merely 'indirect,' a nonsignatory cannot be compelled to arbitrate a claim. A benefit is indirect where the nonsignatory exploits the contractual relation of the parties, but not the agreement itself" … . Noting that "it can be difficult to distinguish between direct and indirect benefits," the Court of Appeals stated that "[t]he guiding principle is whether the benefit gained by the nonsignatory is one that can be traced directly to the agreement containing the arbitration clause" … .

Respondent argues that Mancini and Alliance are estopped from compelling litigation regarding the veneer stone panels because Alliance previously served a demand for arbitration on Gilbane and Mancini, with the demand specifically stating that one of the bases for seeking arbitration was the dispute resolution section of the General Conditions related to the construction project … . Following that demand for arbitration, Alliance, Gilbane and Mancini took part in mediation, as required prior to arbitration per a provision of the dispute resolution section of the General Conditions — a provision that Alliance also cited in its demand for arbitration. As a result of the mediation, those three entities then entered into a settlement agreement and released each other from liability regarding anything related to the veneer panels. …

Based on Alliance's demand citing the applicability of the arbitration section of the General Conditions, and Mancini's acquiescence to that demand, both of these nonsignatories to the prime contract and General Conditions should be compelled to arbitrate pursuant to the direct benefits theory of estoppel. Accordingly, the applications to permanently stay arbitration should have been denied, and the parties should proceed to arbitration. Matter of Alliance Masonry Corp. (Corning Hosp.), 2019 NY Slip Op 09348, Third Dept 12-26-19

To Be Compelled to Arbitrate, the Nonsignatory Must Rely on the Agreement to Arbitrate

INDIRECT BENEFIT.

NONSIGNATORY COULD NOT BE COMPELLED TO ARBITRATE UNDER DIRECT BENEFIT ESTOPPEL DOCTRINE

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversed the appellate division and determined a party who was not a signatory to an agreement which included an arbitration clause could not be compelled to arbitrate under the direct benefit estoppel doctrine. In explaining the doctrine, the court wrote:

Under the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory "knowingly exploits" the benefits of an agreement

containing an arbitration clause, and receives benefits flowing directly from the agreement … .

Where the benefits are merely "indirect," a nonsignatory cannot be compelled to arbitrate a claim. A benefit is indirect where the nonsignatory exploits the contractual relation of the parties, but not the agreement itself … . * * *

… [G]iven the various nuances of contractual arrangements and that nonparties may derive some value from others' agreements, it can be difficult to distinguish between direct and indirect benefits. The guiding principle is whether the benefit gained by the nonsignatory is one that can be traced directly to the agreement containing the arbitration clause. The mere existence of an agreement with attendant circumstances that prove advantageous to the nonsignatory would not constitute the type of direct benefits justifying compelling arbitration by a nonparty to the underlying contract. Also, absent the nonsignatory's reliance on the agreement itself for the derived benefit, the theory would extend beyond those who gain something of value as a direct consequence of the agreement. **Matter of Belzberg v Verus Investments Holdings Inc, 149, CtApp 10-17-13**

Here there was no Showing the Nonsignatory Was Even Aware of the Agreement to Arbitrate

INDIRECT BENEFIT.

PLAINTIFFS WERE NOT SIGNATORIES TO CONTRACTS WHICH REQUIRED ARBITRATION OF WAGE-UNDERPAYMENT ALLEGATIONS AND PLAINTIFFS DID NOT EXPLOIT THE BENEFITS OF THE CONTRACTS; THEREFORE PLAINTIFFS COULD NOT BE COMPELLED TO ARBITRATE (SECOND DEPT).

The Second Department determined the plaintiffs in this putative class action alleging wage-underpayment in violation of Labor Law article 6 could not be compelled to arbitrate. Plaintiffs were not parties to the contracts with defendants which compelled arbitration and did not seek to exploit the benefits of those contracts:

… [U]nder limited circumstances nonsignatories may be compelled to arbitrate" … . Under the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory "knowingly exploits" the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement … . "The benefits must be direct, and the party seeking to compel arbitration must demonstrate that the party seeking to avoid arbitration relies on the terms of the agreement containing the arbitration provision in pursuing its claim" … . Where the benefits are merely "indirect," a nonsignatory cannot be compelled to arbitrate a claim … . "A benefit is indirect where the nonsignatory exploits the contractual relation of the parties, but not the agreement itself" … .

Here, contrary to the defendants' contention, the plaintiffs should not be compelled to arbitrate based upon the agreements. The record does not establish that the plaintiffs were even aware of the existence of the agreements or that they knowingly exploited the benefits of the agreements … . Arboleda v White Glove Enter. Corp., 2020 NY Slip Op 00098, Second Dept 1-8-20

The Party Seeking to Compel Nonsignatories to Arbitrate has a "Heavy Burden" of Proof, Not Met Here

INDIRECT BENEFIT.

NONSIGNATORY NOT BOUND BY ARBITRATION CLAUSE IN ENGAGEMENT LETTER (FIRST DEPT).

The First Department, noting that Supreme Court should have decided whether a nonsignatory was bound by an arbitration clause and deciding the issue in the interest of judicial economy, determined the nonsignatory was not bound:

Millennium Lab Holdings, Inc. and Millennium Lab Holdings II, LLC (Millennium Holdings, LLC), pursuant to an engagement letter, retained petitioner KPMG LLP to audit their financial statements for certain time periods. The engagement letter contained a clause requiring arbitration of "[a]ny dispute or claim arising out of or relating to this Engagement Letter or the services provided hereunder." * * *

The parties agree that the only theory under which respondent, as a nonsignatory to the engagement letter containing the arbitration clause, can be required to arbitrate is on the equitable estoppel/direct benefits grounds. We find that petitioner has not met its "heavy burden" … under that theory.

The benefits that the investors whose interests respondent represents derived from the engagement letters between petitioner and nonparty Millennium were "merely indirect" … . Here … respondent pleaded solely common-law claims and did not invoke the engagement letter … . …

Millennium and petitioner did not contemplate that the investors represented by respondent would benefit from the engagement letter. …

… [T]here is no indication in the record that the investors whom respondent represents had actual knowledge of the engagement letters between petitioner and Millennium … . Matter of KPMG LLP v Kirschner, 2020 NY Slip Op 02286, First Dept 4-16-20

"Nonsignatory" Officers and Employees of a "Signatory" Corporation May Enforce the Agreement to Arbitrate

ENFORCEMENT BY NONSIGNATORIES.

ALTHOUGH INDIVIDUAL DEFENDANTS, OFFICERS OR EMPLOYEES OF DEFENDANT CORPORATION, DID NOT SIGN THE AGREEMENT IN THEIR INDIVIDUAL CAPACITIES, THEY ARE ENTITLED TO ENFORCE THE ARBITRATION PROVISION OF THE AGREEMENT (FIRST DEPT).

The First Department determined the individual defendants, officers or employees of the corporate defendant, are entitled to enforce the arbitration provision of the contract, even though they were not signatories:

The individual defendants, who were officers or employees of [defendant corporation] and did not sign the [agreement] in their individual capacities, are nevertheless entitled to enforce the arbitration provision, because any breach of the

[agreement] would have to be the result of an action or inaction attributable to them. A rule allowing corporate officers and employees to enforce arbitration agreements entered into by the corporate principal "is necessary not only to prevent circumvention of arbitration agreements but also to effectuate the intent of the signatory parties to protect individuals acting on behalf of the principal in furtherance of the agreement" … . Further, even a nonsignatory may be estopped from avoiding arbitration where he knowingly accepted the benefits of an agreement with an arbitration clause … . Huntsman Intl. LLC v Albemarle Corp., 2018 NY Slip Op 04962, First Dept 7-3-18

A "Nonsignatory" Agent of the Signatory May Enforce the Agreement to Arbitrate

ENFORCEMENT BY NONSIGNATORIES.

NONSIGNATORIES, AGENTS OF THE DEFENDANT SIGNATORY, ARE ENTITLED TO ENFORCE THE ARBITRATION AGREEMENT. (SECOND DEPT).

The Second Department determined the nonsignatories, defendant's law partner (Feinsod) and law firm (S&F), are entitled to enforce the arbitration provision in the contract (SRA) under agency principles. Plaintiff (Revis) is a professional football player and defendant (Schwartz) is an attorney who represented plaintiff in contract negotiation and marketing and endorsements:

… Revis entered into an agreement with Schwartz pursuant to which they agreed to arbitrate "gateway" questions of arbitrability … * * *

… [T]he complaint alleged that the defendant Jonathan Feinsod is partners with Schwartz, and that they are co-owners of the defendant S&F. The complaint further alleged that "all of the [d]efendants are jointly and severally liable for the conduct of . . . Schwartz and Feinsod as detailed in this Complaint." The complaint also alleged that "Revis and Shavae [Revis's LLC] agreed to be represented by . . . Schwartz and all work done by . . . Feinsod and [S&F] that related to . . . Revis and Shavae was done on behalf of . . . Schwartz."

The Court of Appeals has recognized that "Federal courts have consistently afforded agents the benefit of arbitration agreements entered into by their principals to the extent that the alleged misconduct relates to their behavior as officers or directors or in their capacities as agents of the corporation" … .

Adopting this rule, the Court of Appeals noted that "[t]he rule is necessary not only to prevent circumvention of arbitration agreements but also to effectuate the intent of the signatory parties to protect individuals acting on behalf of the principal in furtherance of the agreement" … .

Here, the allegations in the complaint which were made against S&F and Feinsod relate solely to work that "was done on behalf of . . . Schwartz." Given the allegations in the complaint, the nonsignatory defendants identified therein—Feinsod and S&F—were entitled to enforce the arbitration provisions contained in the SRA … . Revis v Schwartz, 2020 NY Slip Op 08094, Second Dept 12-30-20