

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

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BRIAN D. WHITNEY, :  
 :  
 Plaintiff, :  
 :  
 vs. : Civil Action No.  
 : 3:00CV00978  
 BERNARD MIZEL and :  
 DAVID L. ESLICK, :  
 :  
 Defendants. :  
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ORDER STAYING ACTION

The defendants have moved to stay this action. The questions that should be considered in deciding a motion such as the instant motion were set forth in Cosmotek Mumessillik Ve Ticaret Ltd. Sirkketi v. Cosmotek USA, Inc., 942 F.Supp. 757 (D. Conn. 1996):

[T]he primary questions are (1) whether there are common issues in the arbitration and the court proceeding, and (2) if so, whether those issues will be finally determined by the arbitration. American Shipping Line v. Massan Shipping Indus., 885 F.Supp. 499, 502 (S.D.N.Y. 1995). If the answer to both questions is in the affirmative, the movant must then bear the heavy burden of showing that "the nonarbitrating party will not hinder the arbitration, that the arbitration will be resolved within a reasonable time, and that such delay that may occur will not cause undue hardship to the parties." American Shipping Line, 885 F.Supp. at 502 (citing [Sierra Rutile Ltd. v. Katz, 937 F.2d 743, 750 (2d Cir. 1991)]; [Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co., 339 F.2d 440, 442 (2d Cir.1964)]). A stay may not be granted, despite the

existence of compelling reasons to grant it, if defendants have not shown that plaintiff would not undergo undue hardship from the resultant delay. . . . See Sierra Rutile Ltd., 937 F.2d at 750; American Shipping Line, 885 F.Supp. at 503.

Id. at 760-61.

The first part of the inquiry is, then, whether there are common issues in the arbitration and the court proceeding, and if those issues can and will be finally determined by the arbitration. Here, both conditions are satisfied. The factual allegations underlying the claims in the Arbitration Demand and those in the Amended Complaint are precisely the same. The Arbitration Demand reveals that the alleged conduct of Mizel and Eslick, which is the basis for the plaintiff's claim in this case, will also be the central issue in the arbitration. Also, the arbitration provision in Whitney's employment agreement provides as follows:

(b) The parties agree that any controversy, claim or dispute arising out of or relating to the terms and conditions of this Agreement (except for those contained in Sections 6 and 7 above) shall be settled by arbitration before a mutually selected arbitrator to be in the City of Hartford, Connecticut in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect. The parties agree that Executive's sole remedy for a breach of this Agreement shall be monetary damages. The parties agree that the discovery provisions of the Federal Rules of Civil Procedure shall govern any such arbitration. Judgment may be entered on the Arbitrator's award in any court having jurisdiction, and the parties consent

to the jurisdiction of the courts of Connecticut for this purpose. The prevailing party shall be entitled to all costs and expenses resulting from such dispute or controversy. If such controversy, claim or dispute involves a claim for injunctive or other equitable relief, and suit or cross-claim for such relief is filed in a court of competent jurisdiction, the litigation shall be bifurcated to the extent feasible, to the end that all issues other than those required to be determined by the court shall be determined by arbitration as hereinabove required.

Amended Complaint, Ex. B, § 9(b). Thus, it is clear that the common issues will be finally determined by the arbitration.

Accordingly, the court considers next whether the defendants have shown that they will not hinder the arbitration, that the arbitration will be resolved in a reasonable time, and that the delay in the litigation resulting from the stay will not cause undue hardship to the parties.

At this stage of the case, the court is persuaded that the defendants will not hinder the arbitration. The fact that Mizel and Eslick are the highest ranking officers in USI and therefore have the ability to hinder the arbitration is no indication that they will do so. The court places more weight on Whitney's refusal to consent to a number of arbitrators proposed by the AAA and his conduct vis-a-vis the finalization of the confidentiality order. Also, it seems appropriate that any stay be of a limited duration, i.e., six months. If the arbitration has not been concluded by the end of that period,

the court would evaluate whether actions by the defendants had hindered the arbitration prior to considering any request for an extension of the stay. In that regard, the court will require the parties to submit a detailed status report within ten days of the date of this order setting forth the expected timetable for completion of the arbitration and specifying which party is required to take what steps by what dates. Thus, the defendants will have a great incentive to not act in any way to hinder the arbitration, particularly since the defendants are represented in this action by the same counsel who represent the corporate respondents in the arbitration.

The court also concludes that the defendants have shown that the plaintiff will not undergo undue hardship from the delay resulting from a stay. First, if the plaintiff is successful in the arbitration, he will have been afforded all the relief he seeks. In the Arbitration Demand, he seeks approximately \$20.5 million, "exclusive of certain defamation damages, pre-judgment interest, attorneys' fees, punitive damages, costs and expenses, and other potential damages." Arbitration Demand at 22. In this case, he seeks monetary damages estimated to be approximately \$20 million, "plus punitive damages, costs and expenses, reasonable attorney's fees, prejudgment interest and such other relief as is just and proper." Amended Complaint at 18. Therefore, although the plaintiff argues that the litigation will have to proceed

irrespective of the outcome of the arbitration, that is not so.

In addition, to the extent the plaintiff wishes to pursue this action after the arbitration is concluded, he can move to lift the stay immediately and take advantage of the discovery already completed in the arbitration, which discovery is governed by the provisions of the Federal Rules of Civil Procedure. The court does not find persuasive the plaintiff's contention concerning duplicative discovery. Finally, the court finds unpersuasive the plaintiff's argument that any collateral estoppel effects would be unfair. See Dean Witter Reynolds, Inc. v. Bird, 470 U.S. 213, 221-223 (1985).

For these reasons, the court concludes that the defendants have met their burden of showing that a stay is appropriate in this case.

Accordingly, the defendants' motion to stay the action (doc. #24-2) is hereby GRANTED. This case is hereby STAYED until August 24, 2001, but the plaintiff may move to lift the stay at any time once the arbitration has been concluded. A status conference will be held at 11:00 a.m. on July 27, 2001. In addition, the parties shall submit a detailed status report within ten days of the date of this order setting forth the expected timetable for completion of the arbitration and specifying which party is required to take what steps by what dates.

An order concerning the Report of Parties' Planning

Meeting (doc. #10) will be entered, once the stay has expired or been lifted.

Each of the defendants' motion to dismiss the amended complaint (doc. #24-1) and the plaintiff's motion to take jurisdictional discovery (doc. #26) is hereby DENIED, without prejudice to renewal once the stay has expired or been lifted.

It is so ordered.

Dated this 27th day of February 2001, at Hartford,  
Connecticut.

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Alvin W. Thompson  
United States District Judge