

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 14-01679 JVS (ANx) Date May 3, 2016

Title InfoSpan Inc. V. Emirates NBD Bank PJSC

Present: The James V. Selna
Honorable

Dwayne Roberts
Deputy Clerk

Not Present
Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS)

Order Re: Motion for Attorneys' Fees and Costs [154]

Plaintiff InfoSpan (Gulf), Inc. ("IS Gulf") moves for an award of attorneys' fees and costs following the Court's Entry of Judgment compelling arbitration. Mot., Docket No. 154. Plaintiff InfoSpan, Inc. ("InfoSpan") does not join in this motion. *Id.* Emirates NBD Bank PJSC ("Bank") opposes. Opp., Docket No. 159. IS Gulf has replied. Reply, Docket No. 163.

For the following reasons, the Court denies, without prejudice, IS Gulf's motion for attorneys' fees and costs.

I. Background

Since 2011, the parties have actively litigated a separate action concurrently pending before this Court, InfoSpan, Inc. v. Emirates NBD Bank PJSC, SACV 11-1062 JVS (ANx) ("InfoSpan I"). InfoSpan I concerns a Stored Value Card Processing Service and Marketing Agreement ("SVC Agreement") signed by the Bank and IS Gulf. See Zifkin Decl. Ex. A, Docket No. 154-2. The SVC Agreement contains an arbitration provision providing that: "Any controversy arising out of, or relating to this Agreement, or the breach thereof, . . . shall be submitted to arbitration per the laws of the United Arab Emirates." *Id.* at p.14, ¶ 13.5. The SVC Agreement further specified that the agreement was governed by the law of the United Arab Emirates ("UAE") and that both parties were subject to the jurisdiction of UAE courts. *Id.* at p.14, ¶ 13.2. The SVC Agreement also further provides: "If any legal action is commenced in connection with the enforcement of this [SVC Agreement] . . . , the prevailing party shall be entitled to costs, reasonable

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attorneys' fees actually incurred, and necessary disbursements incurred in connection with such action as determined by the court." Id. at p. 16, ¶ 13.16.

In November 2014, the Bank filed an answer in InfoSpan I asserting four counterclaims against InfoSpan, including (1) breach of the SVC Agreement by InfoSpan under an alter ego theory; (2) imposition of a constructive trust; (3) unjust enrichment; and (4) conversion. Answer pp. 26–34, Docket No. 234, InfoSpan I. In January 2015, the Court granted InfoSpan's motion to compel arbitration of these counterclaims under the SVC Agreement. Order re Mot. Compel Arbitration pp. 3–5, Docket No. 257, InfoSpan I. Before arbitration occurred, the Bank voluntarily dismissed its counterclaims without prejudice. Docket No. 272, InfoSpan I.

In this action, InfoSpan and IS Gulf (collectively, "Plaintiffs") sought a declaration pursuant to 9 U.S.C. §§ 201 et seq., that the four counterclaims asserted in InfoSpan I are without merit. See First Am. Compl. ("FAC") ¶ 32, Docket No. 77. After the Bank notified the Court and Plaintiffs that it had initiated arbitration before the Dubai International Financial Centre in the UAE, Plaintiffs moved to compel arbitration of its claim for declaratory relief in California. Mot. Compel Arbitration at 1:9-16, Docket No. 110. The Court granted the motion and compelled arbitration. See Order re Mot. to Compel Arbitration ("Arbitration Order"), Docket No. 116. In its Arbitration Order, the Court declined to stay the action pending the UAE arbitration, and instead stated that it would enter final judgment to render the order appealable under 9 U.S.C. § 16(a)(3) upon appointment of an arbitrator. Id. at 5-6.

The parties stipulated that the Hon. Gary L. Taylor (ret.) will serve as arbitrator. See Joint Notice re App't of Arbitrator, Docket No. 128. Plaintiffs filed a motion to stay pending arbitration. Docket No. 117. The Bank opposed. Docket No. 120. The Court denied Plaintiffs' motion. Docket No. 129.

The Court entered final judgment on January 4, 2016. Docket No. 131.

II. Discussion

The SVC Agreement contains a provision providing: "If any legal action is commenced in connection with the enforcement of this [SVC Agreement] . . . , the prevailing party shall be entitled to costs, reasonable attorneys' fees actually incurred,

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and necessary disbursements incurred in connection with such action as determined by the court.” SVC Agreement § 13.16. The final judgment entered in this case granted IS Gulf the relief sought in this action: declaratory relief compelling the parties’ dispute to arbitration. Docket No. 131.

Nevertheless, the Bank argues that the Court should deny IS Gulf’s motion for attorneys’ fees for several reasons. First, the Bank argues that IS Gulf is not a “prevailing party” for purposes of § 13.16 of the SVC Agreement by virtue of obtaining the final judgment compelling arbitration. Second, the Bank argues that awarding attorneys’ fees on this action would be premature as this action is nothing more than a preliminary matter in a broader dispute between the parties concerning the SVC agreement. Third, the Bank argues that interpretation of the contract requires the matter of the attorneys’ fee award to be referred to the arbitrator as well. Finally, the Bank argues that IS Gulf’s request for fees is deficient as to the reasonableness of attorneys’ fees. The Court considers the first two of these arguments and concludes that it need not decide other issues presented by the parties.

The Bank cites numerous cases where the party prevailing on an order granting or denying a motion to compel was denied in their subsequent motion for attorneys fees. E.g. Perry v. NorthCentral University, Inc., 10-cv-8229, 2012 WL 1753014 (D. Ariz. May 16, 2012) (denying motion for attorneys’ fees after party obtained order compelling arbitration); Foot Solutions, Inc. v. Washio, 09-cv-1207, 2009 WL 4261213 (N.D. Ga. Nov. 24, 2009) (“While [d]efendants here have succeeded in having [p]laintiff’s claims turned to arbitration, there is no information yet on whether [d]efendants have achieved more than this procedural victory”); Frazier v. Johnson, 08-cv-677, 2009 WL 331372, at *5 (M.D. Fla. Feb. 10, 2009) (“premature” to award attorneys’ fees if the arbitrator subsequently rules against party that pursued arbitration). The Bank cites these cases for the broad proposition that obtaining the party’s preferred choice of forum is not sufficient to provide a party with “prevailing party” status.

IS Gulf responds that these cases do not stand for any broad rule of federal common law, and that these cases simply form a “daisy-chain” from the reasoning in a single case from the United States Supreme Court regarding when a party is a “prevailing party” under a particular federal fee-shifting statute. Reply p. 3 n.2. IS Gulf indicates that all of these cases are distinguishable on the grounds that in this action IS Gulf’s *claim* was for declaratory relief to compel arbitration.

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The Bank has two responses. First, the Bank argues that drawing this distinction between a “claim” to compel arbitration and a successful motion to compel arbitration or to dismiss a case under 12(b)(1) elevates the form of pleadings over the substance of a party’s victories in a dispute. Second, the Bank argues that IS Gulf’s victory was even narrower than an order compelling arbitration, stating, “[t]here was no dispute over arbitrability” and the Bank characterizes IS Gulf’s victory as simply a dispute over the venue for arbitration.

The Court agrees with the Bank’s responses. In the course of the litigation of this action, neither party meaningfully disputed the fact that the parties’ underlying dispute was subject to arbitration. See Order Granting Plaintiffs’ Motion to Compel Arbitration p. 3 (discussing the Bank’s concessions that claims were arbitrable), Docket No. 116) The main dispute was whether arbitration would proceed in Dubai or the Central District of California. Id. pp. 3–4. The Court also perceives no persuasive rationale for treating this dispute differently from the other cases treating a successful motion to compel arbitration as a temporary procedural victory rather than an event conferring prevailing party status.¹

Provisions in the SVC Agreement do not compel a different result. Section 13.16 of the SVC agreement indicates when the “prevailing party” is entitled to reasonable attorneys’ fees. Although the provision states that fees should be awarded to a prevailing party “if any legal action is commenced,” such legal action must be commenced “in connection with the enforcement of this Agreement” IS Gulf could argue that this action was commenced to enforce the arbitration provisions, however, as indicated in the Court’s Order Granting Plaintiffs’ Motion to Compel Arbitration, arbitrability was not debated by the parties. IS Gulf cannot meaningfully argue that its successful action to choose the venue for arbitration was an action to enforce provisions of the SVC Agreement. Indeed, this Court ruled in favor of IS Gulf not on the basis of the provisions

¹ California authorities indicate that this distinction makes a difference in certain contexts. Compare Roberts v. Packard, Packard & Johnson, 217 Cal. App. 4th 822, 833 (2013) (“[W]e conclude that a petition to compel arbitration filed in a pending lawsuit is not an ‘action,’ and attorney fees cannot be awarded”) with Turner v. Schultz, 175 Cal. App. 4th 974, 983 (2009) (a party’s entitlement to attorneys fees incurred in an independent legal action is independent of the outcome of the arbitration of the merits of the underlying dispute). Both suits interpreted California Civil Code § 1717, a statutory provision that does not appear to apply to the present dispute. But cf. Resolution Tr. Corp. v. Midwest Fed. Sav. Bank of Minot, 36 F.3d 785, 799–800 (9th Cir. 1993) (applying California law when contract provided for California law to be used in interpreting the terms of the contract)

