

Anchin Alert

Anchin, Block & Anchin LLP
Accountants and Advisors

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Defendant's Participation in Litigation Waives Right to Compel Arbitration

In our litigation, forensic and valuation services practice, we are often involved in cases where there is a question of whether or not an arbitration provision in an agreement can be enforced. *The New York Law Journal* recently reported a case¹ which held that the defendant's participation in litigation waived the right to compel arbitration.

In this case, the subject parties entered into an agreement for services for plaintiff to provide janitorial, lawn care and snow removal services to defendant at specified locations. The agreement contained a dispute resolution provision requiring that disputes be submitted to arbitration.

The defendant terminated the agreement, and the plaintiff sent two separate invoices pertaining to work performed before termination. Those invoices were not paid by the defendant, and the plaintiff sued to recover amounts due.

The defendant moved to dismiss the complaint for several reasons, including that the plaintiff failed to comply with the dispute resolution provision in the agreement.

The court stated that a litigant could not compel arbitration when its use of the courts was clearly inconsistent with the claim that the parties were obligated to settle their differences by arbitration. In this case, the defendant participated in a preliminary conference, exchanged discovery and established deposition dates. The court found that the defendant waived its right to compel arbitration when it engaged in these activities which were not consistent with the right to arbitrate. The court held that the defendant's participation in this litigation showed an affirmative acceptance of the judicial forum, and the court denied the defendant's motion.

For more information, please contact Anthony Bracco, David Beckman, Margaret Kolb, or Dennis Neier of Anchin's Litigation, Forensic and Valuation Services Group at 212.840.3456.

¹ Trombley Painting Corp. v. Global Indus. Servs., 2014-0685 (July 13, 2016)



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