

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 19

----- X  
ALICIA GUASTAFERRO

Plaintiff,

Index Number 600721/2010  
Submission Date 12/15/2010  
Mot. Seq. No. 002  
**DECISION & ORDER**

-against-

THE WALT DISNEY COMPANY, AMERICAN  
BROADCASTING COMPANIES, INC., RDF  
MEDIA USA, INC., and RDF MEDIA LIMITED,

Defendants.

-----X

**Appearances: For Plaintiff:**  
Morelli Ratner, P.C.  
By David S. Ratner, Esq.  
950 Third Avenue, 11<sup>th</sup> Floor  
New York, New York 10022  
212-751-9800

**For Defendants:**  
Levine Sullivan Koch & Schulz LLP  
By Nathan E. Siegel, Esq.  
321 West 44<sup>th</sup>, Suite 510  
New York, New York 10036  
212-850-6100

Papers considered in review of this motion to compel arbitration:

<b>Papers</b>	<b>Numbered</b>
Notice of Mot. and Motion with Annexed. Ex.....	<u>1</u>
Memo. of Law in Supp. of Motion.....	<u>2</u>
Notice of Cross-Mot. and Affirm. in Opp.....	<u>3</u>
Memo. of Law in Opp. ....	<u>4</u>

---

HON SALIANN SCARPULLA, J.:

On March 22, 2010, plaintiff Alicia Guastafarro (“Guastafarro”) brought this action for monetary damages arising out of defendants’ alleged exploitation of her on the television series “Wife Swap,” when she was fifteen years old. In March, 2007, defendants approached Guastafarro’s parents and offered them an opportunity to appear on “Wife Swap” in return for the payment of \$20,000.00. Guastafarro’s mother, Karen

Guastafarro, signed the proffered “Wife Swap Release And Waiver, Agreement Not To Sue, Indemnification and Hold Harmless Agreement, And Participant Agreement” (hereinafter “the release and waiver agreement”) on her own behalf as well as on Guastafarro’s behalf.

In her complaint, Guastafarro alleges that despite having been promoted as a reality show, defendants “gave plaintiff lines to repeat, directed her behavior, made her wear costumes, filmed her in entirely fictitious situations, and required multiple cuts and re-takes of particular scenes, all to maximize public embarrassment.” Specifically, defendants allegedly represented to the public on the show that Guastafarro was a proverbial spoiled child who received Christmas presents every morning and who had her parents do her school work. Guastafarro allegedly had to also state for the camera “I am the most popular girl in school” and “I feel sorry for people who aren’t as gorgeous as me.”

Guastafarro alleges that, as a result of the airing of the show, she faced negative comments and epithets made by non-parties, which ranged from simple negative characterizations to calls for gang rape and murder. In her school, Guastafarro allegedly experienced verbal bullying as a result of her appearance on the show. Guastafarro further alleges that because of the emotional fallout from her forced participation on “Wife Swap,” Guastafarro is currently undergoing treatment for post-traumatic stress disorder, depression and moderate suicidal tendencies and panic attacks.

Guastafarro asserts causes of action for judgment declaring that there is no valid contract or release between Guastafarro and defendants, for violation of New York Art and Cultural Affairs Law §§ 35.01 and 35.03, for unjust enrichment, intentional infliction of emotional distress, prima facie negligence, violations of New York Civil Rights Law §§ 50 and 51 and defamation. With respect to the cause of action under the Art and Cultural Affairs Law, Guastafarro alleges that defendants failed to obtain a permit from the Department of Labor for her participation in the show as a child actor or entertainer and failed to seek approval by a justice of the Supreme or Surrogate Court. Regarding the cause of the action under the Civil Rights Law, Guastafarro alleges that she did not personally execute any agreement or release, and that defendants lacked her valid consent for the use of her image.

Defendants now move pre-answer for an order pursuant to CPLR 7503 to stay this action and to compel arbitration. Defendants rely on section (VI)(I)(1) of the release and waiver agreement, providing that “[i]n the event that the Parties are unable to resolve any Dispute informally, then such Dispute shall be submitted to final and binding arbitration.” The release and waiver agreement also provides that the arbitration clause shall be governed by the Federal Arbitration Act.<sup>1</sup> Defendants argue that under the Federal

---

<sup>1</sup>The analysis is the same under the Federal law and New York State law. “New York law [] follows the same standard as federal law with respect to who determines arbitrability: generally, it is a question for the court unless there is ‘a clear and unmistakable agreement to arbitrate arbitrability.’” *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 208, n. 1 (2d Cir. 2005) (quoting *Shaw Group, Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115, 121 (2d Cir. 2003)).

Arbitration Act, any challenges to the enforceability of the entire agreement on grounds of illegality must be determined by an arbitrator, not this Court, citing in support *Buckeye Check Cashing v Cardegna*, 546 U.S. 440 (2006).

Guastafarro cross-moves for summary judgment under CPLR 3212 on her cause of action for declaratory judgment. Guastafarro argues that even though defendants have not joined issue, the Court should entertain her summary judgment cross-motion because the parties “submitted evidentiary proof and raised arguments which demonstrated that they were deliberately charting a summary judgment course,” citing *Mancuso v Rubin*, 52 A.D.3d 580, 582 (2<sup>nd</sup> Dep’t 2008).

Regarding the substance of the cross-motion, Guastafarro challenges the existence of any valid written agreement that is binding on her, including the mandatory arbitration clause, on the ground that defendants did not seek approval of the Court under Arts and Cultural Affairs Law § 35.03(1) and did not obtain a permit from the Department of Labor required of all child performers under the age of sixteen years. The crux of Guastafarro’s argument is that without the judicial approval, her mother’s consent is insufficient to bind her to the release and waiver agreement, including the arbitration clause. Guastafarro also argues that the declaratory judgment cause of action must be decided by the Court by analogizing her challenge on the ground of infancy to the federal authority excepting mental capacity challenges from arbitration, citing *Spahr v Secco*, 330 F.3d 1266, 1273 (10<sup>th</sup> Cir. 2003).

## **Discussion**

New York law favors arbitration. Once the parties' mutual intention to submit to arbitration and forego access to judicial remedies is clear, the parties are required to proceed to arbitration. *Lory Fabrics, Inc. v Dress Rehearsal, Inc.*, 78 A.D.2d 262, 267 (1<sup>st</sup> Dep't 1980) (citations omitted). If arbitration is mandatory, the obligation to arbitrate extends not only to the contract's signatories, but also to those who are expressly contemplated within the agreement and who by their actions consented to it. *See Ranieri v Bell Atlantic Mobile*, 304 A.D.2d 353, 354 (1<sup>st</sup> Dep't 2003); *see also Hirschfeld Prods., Inc. v Mirvish*, 218 A.D.2d 567, 569 (1<sup>st</sup> Dep't 1995) (rejecting an "attempt to distinguish officers and directors from the corporation they represent for the purposes of evading an arbitration agreement").

Under CPLR 7503, there are two threshold issues a court may entertain: whether the dispute at issue is arbitrable and whether the arbitration is timely and falls within the statute of limitations. *See Zachariou v Manios*, 68 A.D.3d 539, 540 (1<sup>st</sup> Dep't 2009). The merits of a controversy governed by an agreement subject to a binding arbitration provision are exclusively within the province of the arbitrators. *See Olympia v York OLP Co. v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 214 A.D.2d 509, 512 (1<sup>st</sup> Dep't 1995).

Here, Guastaferrero argues that she is not bound by the arbitration provision of the release and waiver agreement because, while her mother executed the release and waiver agreement, she did not personally sign it, and also because defendants failed to obtain

prior court approval of the release and waiver agreement. That Guastafarro did not execute the release and waiver agreement does not relieve her of the obligation to arbitrate because a parent may bind a child to a contract for the performance of lawful services in the entertainment industry. *See Shields v Gross*, 58 N.Y.2d 338, 345 (1983). When Karen Guastafarro signed the release and waiver agreement on Guastafarro's behalf, she effectively bound Guastafarro to the arbitration clause contained therein. *See Matter of Prinze v Jonas*, 38 N.Y.2d 570, 573 (1976); *Matter of Bay Anesthesia, P.C.*, 194 A.D.2d at 397.

Further, absence of court approval pursuant to Arts and Cultural Affairs Law § 35.03(1) does not automatically void the release and waiver agreement, because court approval under the statute is not mandatory. Paragraph 1 of the Arts and Cultural Affairs Law § 35.03 provides:

A contract made by an infant or made by a parent or guardian of an infant, or a contract proposed to be so made, under which (a) the infant is to perform or render services as an actor, actress, dancer, musician, vocalist or other performing artist, or as a participant or player in professional sports . . . may be approved by the supreme court or the surrogate's court . . . If the contract is so approved the infant may not, either during his minority or upon reaching his majority, disaffirm the contract on the ground of infancy or assert that the parent or guardian lacked authority to make the contract.

In *Matter of Prinze v Jonas*, 38 N.Y.2d 570 (1976), the Court of Appeals ruled that General Obligations Law § 3-105(1), which was a predecessor and identical to the current Arts and Cultural Affairs Law § 35.03(1) in substance and form, was not intended to “enlarge the infant's right to disaffirm, but rather to completely eliminate the power to

disaffirm under certain circumstances.” *Matter of Prinze*, 38 N.Y.2d at 575. “[A] major reason for its enactment was to provide a degree of certainty for parties contracting with infants in the entertainment industry so that the validity of such contracts would not be rendered doubtful or subject to subsequent litigation concerning reasonableness . . .” *Id.* Accordingly, lack of court approval under this section does not render an agreement with a minor null and void, but simply postpones the determination of the agreement’s validity until attempted disaffirmance. *Matter of Prinze*, 38 N.Y.2d at 576; *see cf. Cohen v Brunswick Record Corp.*, 31 Misc.2d 525, 527 (Sup.Ct., New York County, October 10, 1961) (positing that an infant may disclaim a song recording agreement executed by both the infant and the mother).

Here, irrespective of whether Guastaferrero’s participation in a “reality” TV show fell under a category of entertainment activity mentioned in Arts and Cultural Affairs Law § 35.03(1), the “Wife Swap” release and waiver agreement is not void as a matter of law, but may be voidable. Because Guastaferrero is bound by the arbitration clause, the determination of whether disaffirmance or modification of the release and waiver agreement is warranted on grounds of infancy is reserved for the arbitrator, not the Court. *See Buckeye Check Cashing, Inc. v Cardegna*, 546 U.S. 440, 444-46 (2006). It is also for the arbitrator to determine the issue of illegality on the ground that defendants failed to obtain permits from the Department of Labor required under the Arts and Cultural Affairs

Law § 35.01. See *Matter of Natl Equip. Rental Ltd. v American Pecco Corp.*, 28 N.Y.2d 639, 641 (1971).

Despite the Court of Appeals holding in *Matter of Prinze*, Guastaferrero argues that the issue of disaffirmance of contracts on the basis of infancy is solely for the courts and not subject to arbitration. Guastaferrero attempts to distinguish *Matter of Prinze*, arguing that in *Matter of Prinze* the public policy protecting minors *under the age of eighteen* was not in issue, because the plaintiff was *nineteen* when he executed the contract he was attempting to disaffirm on the grounds of infancy.

It is true that in *Matter of Prinze* the Court of Appeals stated that “[s]ince petitioner was 19 years of age when he signed the contract, the public policy protecting minors is really not, and cannot be, the issue here.” *Prinze* 38 N.Y.2d at 576. But, in *Matter of Prinze*, the person who executed the contract was the nineteen year old infant plaintiff. Here, Guastaferrero did not execute the release and waiver agreement. Her mother and legal guardian, an adult with full ability to appreciate the consequences of the release and waiver agreement, executed it on Guastaferrero’s behalf. Thus, that Guastaferrero was fifteen at the time the release and waiver agreement was executed by her mother on her behalf does not distinguish this action from *Matter of Prinze* and does not raise any separate public policy concern not already addressed by the Arts and Cultural Affairs Law.

For the same reason, the Court finds it inapposite to analogize this action to exemption from arbitrability for lack of mental capacity to enter into a binding contract. *See Spahr v Secco*, 330 F.3d 1266, 1272 (10<sup>th</sup> Cir. 2003). In any event, *Spahr* does not represent a unified position among the federal circuits on exempting the defense of lack of mental capacity from arbitrability. *See Primerica Life Ins. Co. v Brown*, 304 F.3d 469, 472-73 (5<sup>th</sup> Cir. 2002) (finding that the mental capacity defense is a defense to the entire agreement and not a specific challenge to the arbitration clause). In any event, there is no indication that Karen Guastafarro was mentally impaired or unable to appreciate the consequences of execution of the release and waiver agreement.

The Court's enforcement of the arbitration clause in the release and waiver agreement does not affect Guastafarro's ability to challenge the enforceability of the rest of the agreement. Because of the absence of court approval of the release and waiver agreement under the Arts and Cultural Affairs Law § 35.01(3), Guastafarro is not foreclosed from having the arbitrator review the reasonableness of the agreement her mother executed, and Guastafarro may raise all available grounds for disaffirmance and damages raised in this action.

In accordance with the foregoing, it is

ORDERED that defendants' motion to compel arbitration and to stay this action is granted; and it is further

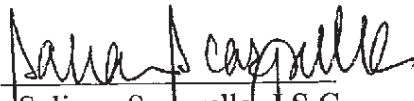
ORDERED that plaintiff's cross-motion for summary judgment on the first cause of action is denied as moot; and it is further

ORDERED that plaintiff Alicia Guastafarro shall arbitrate her claims against all defendants in accordance with the Section VI(I) of the release and waiver agreement, dated March 29, 2007; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify the stay.

Dated: March 28, 2011  
New York, New York

ENTER:

  
Saliann Scarpulla, J.S.C.