UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GAIL A. WASHBISH, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.	:	Civil No. 3:21-cv-1521 (AWT)

RULING ON MOTION TO DISMISS

Defendant International Business Machines Corporation ("IBM") has moved to dismiss plaintiff Gail A. Washbish's First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, the motion is being granted.

I. FACTUAL ALLEGATIONS AND BACKGROUND

Plaintiff Gail Washbish was formerly employed as a systems engineer by defendant IBM from 1996 to 2016. On August 17, 2016, the plaintiff's employment was terminated, and she was offered severance pay in exchange for signing the Separation Agreement at issue in this case. The Separation Agreement required the plaintiff to release certain claims and submit others to mandatory arbitration within 300 days of the termination, including claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA"). The plaintiff alleges that the defendant misled her by stating that her employment was

terminated because her position was being relocated to another IBM office or facility when, in reality, she was being discharged based on her age.

In April 2017, the plaintiff filed a complaint against the defendant with the U.S. Equal Employment Opportunity Commission ("EEOC"). On July 19, 2021, the EEOC sent the plaintiff a letter stating: "We found that you were discriminated against in violation of the ADEA in that you were discharged based on your age. We asked Respondent [IBM] to resolve this matter through conciliation, however, it declined to do so." Ex. A, First Am. Compl. ("FAC") (ECF No. 41-1) at 1. The EEOC letter also stated that the plaintiff would lose her right to sue unless she filed suit "within 90 days of receipt of this letter." Id.

In late July 2021, the plaintiff filed an arbitration demand with respect to her age discrimination claim. A few months later, on October 14, 2021, the plaintiff filed a second arbitration demand. That same day, the plaintiff filed this lawsuit in Connecticut Superior Court. Defendant IBM removed the case to federal court.

The First Amended Complaint has four counts. The First Count is a claim for age discrimination in violation of the Connecticut Fair Employment Practices Act, Conn. Gen. Stat. § 46a-60 ("CFEPA"). The Second Count is a claim for age discrimination in violation of the ADEA. The Third Count and

Fourth Count are related to the ADEA claim. The Third Count seeks a declaratory judgment with respect to the timing provisions in the Separation Agreement applicable to an ADEA claim. The Fourth Count is a claim that IBM fraudulently induced the plaintiff to waive her right to pursue ADEA claims in court.

IBM contends that the plaintiff's ADEA and related claims (Second, Third, and Fourth Counts) must be dismissed because the plaintiff's Separation Agreement constitutes an enforceable agreement to arbitrate those claims. IBM contends that the plaintiff's CFEPA claim (First Count) must be dismissed because the plaintiff released that claim in the Separation Agreement.

II. LEGAL STANDARD

Under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), a "written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. "[B]efore an agreement to arbitrate can be enforced, the district court must first determine whether such agreement existed between the parties." Meyer v. Uber Techs., Inc., 868 F.3d 66, 73 (2d Cir. 2017).

"The question of arbitrability usually arises in the context of a motion to compel arbitration" pursuant to Section 4 of the FAA, which allows parties to "petition the district court for an order directing that 'arbitration proceed in the manner

provided for in such agreement.'" Nicosia v. Amazon.com, Inc., 834 F.3d 220, 229 (2d Cir. 2016). However, the question of arbitrability may also arise in a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). "Some district courts in this Circuit have treated motions to dismiss based on mandatory arbitration clauses as motions to compel arbitration" on the basis that the defendant "manifest[s] an intention to arbitrate the dispute." Id. at 230. On a motion to compel, the court (1) must "determine whether the parties agreed to arbitrate," (2) must "determine the scope of that agreement, (3) "if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable," and (4) "if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration." JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 169 (2d Cir. 2004). In such cases, where "all of the claims raised in an action are subject to a binding arbitration agreement, and where no party has sought a stay, the court may opt to dismiss rather than to stay, the action." Dylan 140 LLC v. Figueroa, 2019 WL 12339639, at *6 (S.D.N.Y. Nov. 8, 2019). But where a defendant's "motion to dismiss neither sought an order compelling arbitration nor indicated that [the defendant] would seek to force [the plaintiff] to arbitrate in the future, it [is] not proper to

construe the motion to dismiss as a motion to compel arbitration." Nicosia, 834 F.3d at 229. See, e.g., Bombardier Corp. v. Nat'l R.R. Passenger Corp., 333 F.3d 250, 254 (D.C. Cir. 2003) (declining to treat Rule 12(b)(6) motion as motion to compel arbitration where "Amtrak's motion exhibited no intent to pursue arbitration" and "sought outright dismissal with no guarantee of future arbitration").

"In deciding motions to compel, courts apply a 'standard similar to that applicable for a motion for summary judgment.'" Nicosia, 834 F.3d at 229 (quoting Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003)). See Doctor's Assocs., Inc. v. Alemayehu, 934 F.3d 245, 247 n.1 (2d Cir. 2019) ("In reviewing a motion to compel arbitration, we 'consider all relevant, admissible evidence submitted by the parties and contained in pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits.'" (quoting Nicosia, 834 F.3d at 229)). "If there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary." Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003) (citing 9 U.S.C. § 4). "[B]ut where the undisputed facts in the record require the matter of arbitrability to be decided against one side or the other as a matter of law, [the court] may rule on the basis of that legal issue and 'avoid the need for further court proceedings.'" Wachovia Bank, Nat'l Ass'n v.

VCG Special Opportunities Master Fund, Ltd., 661 F.3d 164, 172 (2d Cir. 2011) (quoting Bensadoun, 316 F.3d at 175).

III. DISCUSSION

A. ADEA and Related Claims

The defendant seeks to have the court "enforce the unambiguous terms of the Separation Agreement by dismissing the FAC in its entirety and with prejudice." Def.'s Mem. (ECF No. 44) at 30. The plaintiff contends that the court should "find that IBM's arbitration agreement is unenforceable and permit Plaintiff to proceed in this Court" or else "declare that the timing provisions in IBM's arbitration provisions . . . are unenforceable and void, prior to compelling her to arbitration." Pl.'s Opp. (ECF No. 45) at 6.

Although the defendant's motion is styled a motion to dismiss, the defendant has expressed its intent to require the plaintiff to proceed under the agreement to arbitrate with respect to her ADEA and related claims. See Def.'s Mem. at 3 ("[T]his Court should enforce Plaintiff's agreement both to arbitrate her federal claim and to waive her state law claim, and dismiss this case with prejudice so that it can be resolved in the pending arbitration Plaintiff initiated."); Def.'s Reply (ECF No. 46) at 10 ("IBM simply seeks to arbitrate Plaintiff's ADEA claim under the terms of the agreement the parties signed."). Thus, with respect to the plaintiff's ADEA and

related claims, the court treats the defendant's motion as a motion to compel arbitration. See Nicosia, 834 F.3d at 229.

The threshold question is "whether the parties agreed to arbitrate." JLM Indus., Inc., 387 F.3d at 169. Under the FAA, a "written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . ." 9 U.S.C. § 2. "[B]efore an agreement to arbitrate can be enforced, the district court must first determine whether such agreement existed between the parties." Meyer v. Uber Techs., Inc., 868 F.3d 66, 73 (2d Cir. 2017).

Here, the parties agreed to arbitrate the plaintiff's ADEA claim. The plaintiff signed the Separation Agreement, see Kennedy Decl., Ex. A (ECF No. 14-1), at 4, and she does not contest its "relevance, authenticity, or accuracy," Nicosia, 834 F.3d at 231. However, the plaintiff does contest the enforceability of the Separation Agreement. She claims that it is unenforceable and otherwise void because "IBM has fraudulently induced Plaintiff to waive her right to pursue ADEA claims in court." FAC ¶ 51. See also FAC ¶¶ 26-42. The defendant contends that the plaintiff has waived her ability to challenge the enforceability of the arbitration agreement by initiating

and participating in two arbitrations without objecting to the jurisdiction of the arbitrator. The court agrees.[1]

"If a party willingly and without reservation allows an issue to be submitted to arbitration, he cannot await the outcome and then later argue that the arbitrator lacked authority to decide the matter. If, however, a party clearly and explicitly reserves the right to object to arbitrability, his participation in the arbitration does not preclude him from challenging the arbitrator's authority in court." Opals on Ice Lingerie v. Body Lines, Inc., 320 F.3d 362, 368-69 (2d Cir. 2003) (quoting AGCO Corp. v. Anglin, 216 F.3d 589, 593 (7th Cir. 2000)). "An objection to the arbitrability of a claim must be made on a timely basis, or it is waived." ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc., 102 F.3d 677, 685 (2d Cir. 1996).

IBM maintains that the plaintiff initiated two arbitrations against it and then participated "in the proceedings, including through briefing and argument at hearings." Def.'s Mem. at 9. But "until Plaintiff filed her opposition brief to IBM's first

[1] Because the plaintiff has waived this argument, the court does not address the defendant's arguments that the plaintiff has failed to allege or demonstrate fraud directed at the agreement to arbitrate, see Def.'s Mem. at 11, that she has failed to state a claim for fraudulent inducement, see id. at 14, and that she has failed to satisfy the heightened pleading standards of Rule 9(b), see id. at 15.

motion to dismiss in March 2022 . . . , eight months after filing the first arbitration, Plaintiff gave no indication that she had any objection to the arbitral forum." Id. In her opposition, the plaintiff characterizes her actions as "fil[ing] arbitration demands to preserve her claims in the event that she must ultimately arbitrate the merits of her ADEA case." Pl.'s Mem. at 4. But nowhere in the First Amended Complaint or in her opposition does the plaintiff refer to any action she took to explicitly reserve the right to object to arbitrability.

The plaintiff contends that the defendant "has waived the right to arbitrate by its conduct." Pl.'s Opp. at 8. Specifically, the plaintiff contends that

> since IBM has asserted to this Court that the arbitration agreement, by its terms, does not permit the substance of Plaintiff's claims to proceed in arbitration, IBM has effectively conceded that it does not agree to arbitrate her ADEA claims on the merits. This concession is tantamount to IBM conceding that the (timely) claims asserted here are not arbitrable (at least according to IBM) and that they therefore must be allowed to proceed in court since Plaintiff cannot waive her rights to litigate her ADEA claims.

Id. The court agrees with IBM that the plaintiff has conflated the concepts of "not arbitrable" with "likely [to] lose in arbitration." Def.'s Reply at 9. The cases relied on by the plaintiff are inapposite. See Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022) (addressing waiver of right to arbitrate by employer which had litigated employment dispute for eight months

before seeking to compel arbitration); Stanley v. A Better Way Wholesale Autos, Inc., No. 3:17-cv-1215-MPS, 2018 WL 3872156, at *4, *6 (D. Conn. Aug. 15, 2018) (resolving parties' dispute "over which arbitration body--the AAA or the ARDC--is the proper one here and whether ABW has waived its right to arbitrate" where defendant "refused to pay the required fees to arbitrate before the AAA or otherwise respond to the AAA's requests, despite the AAA's repeated requests that it do so"); Schreiber v. Friedman, 2017 WL 5564114, at *11 (E.D.N.Y. Mar. 31, 2017) (finding defendant's "failure to submit to arbitration, delay tactics, and noncompliance with the Rabbinical Courts' orders amount to a waiver of his right to compel arbitration"). Rather, this is a case where "IBM simply seeks to arbitrate Plaintiff's ADEA claim under the terms of the agreement the parties signed." Def.'s Reply at 10.

Because there is an agreement to arbitrate between the parties, the court must next "determine the scope of that agreement." JLM Indus., Inc., 387 F.3d at 169. Here, the scope of that agreement covers the plaintiff's cause of action under the ADEA because Section 5 of the Separation Agreement provides in relevant part:

> You agree that any and all legal claims or disputes between you and IBM under the federal Age Discrimination in Employment Act of 1967 (ADEA) . . . will be resolved on an individual basis by private, confidential, final and binding arbitration according to the IBM Arbitration

> Procedures and Collective Action Waiver (which are attached and incorporated as part of this Agreement). . . . You understand that you are giving up your right to a court action for Covered Claims, including any right to a trial before a judge or jury in federal or state court.

Kennedy Decl., Ex. A, at 2.

Next, because the plaintiff asserts a federal statutory claim, the court "must consider whether Congress intended [that claim] to be nonarbitrable." JLM Indus., Inc., 387 F.3d at 169. See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) ("Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."). The plaintiff contends that Congress did not intend her ADEA claim to be arbitrable because the Separation Agreement does not comply with the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) ("OWBPA").

Added by Congress to the ADEA in 1990, the "Older Workers Benefit Protection Act (OWBPA) imposes specific requirements for releases covering ADEA Claims." Oubre v. Entergy Operations, Inc., 522 U.S. 422, 424 (1998). The OWBPA applies to a waiver of "any right or claim" under the Age Discrimination in Employment Act. Id. (quoting 29 U.S.C. § 626(f)(1)). "The phrase 'right or claim' as used in § 626(f)(1) is limited to substantive rights

and does not include procedural ones." Estle v. Int'l Bus. Machines Corp., 23 F.4th 210, 214 (2d Cir. 2022) (quoting 29 U.S.C. § 626(f)(1)). The "substantive right" protected by the OWBPA "includes 'federal antidiscrimination rights' and 'the statutory right to be free from workplace age discrimination,' as distinguished from procedural rights, like 'the right to seek relief from a court in the first instance.'" Id. (quoting 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 259, 265-66 (2009)). Thus, in 14 Penn Plaza, the Supreme Court upheld an agreement requiring a party "to resolve ADEA claims by way of arbitration instead of litigation" because that agreement did "not waive the statutory right to be free from workplace age discrimination." 14 Penn Plaza, 556 U.S. at 265.

The plaintiff contends that, here, the agreement to arbitrate is unenforceable because it requires the plaintiff to waive a substantive right but does not comply with the requirements set forth in the OWBPA for the waiver of a substantive right. The Separation Agreement provides in relevant part:

> To initiate arbitration, you must submit a written demand for arbitration to the IBM Arbitration Coordinator no later than the expiration of the statute of limitations . . . that the law prescribes for the claim that you are making or, if the claim is one which must first be brought before a government agency, no later than the deadline for the filing of such a claim. If the demand for arbitration is not timely submitted,

> the claim shall be deemed waived. The filing of a charge or complaint with a government agency . . . shall not substitute for or extend the time for submitting a demand for arbitration.

Kennedy Decl., Ex. A, at 4 (emphasis added). The plaintiff contends that this provision undercuts "the ADEA timing scheme," which "is a substantive right" that triggers "the protections of the OWBPA." Pl.'s Opp. at 14. Because the Separation Agreement does not comply with the OWBPA, the plaintiff contends, the agreement is invalid as to this timing provision. The plaintiff identifies several possible deficiencies in terms of whether the Separation Agreement complies with the OWBPA. See id. at 16-17.

However, assuming arguendo that the plaintiff can show that the Separation Agreement does not comply with the OWBPA, her argument is nonetheless unavailing in light of Estle and its interpretation of 14 Penn Plaza. In 14 Penn Plaza, the Supreme Court addressed "whether a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the [ADEA] is enforceable." 14 Penn Plaza, 556 U.S. at 251. The Court noted that "federal antidiscrimination rights may not be prospectively waived," but the Court held that the agreement to arbitrate was enforceable because "[t]he decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination." Id. at 265-

66.

In Estle, the Court of Appeals relied on 14 Penn Plaza to affirm the dismissal of a lawsuit against IBM which sought "a declaration that the collective-action waiver in the separation agreement is invalid under the ADEA." Estle, 23 F.4th at 212. The court applied the Supreme Court's "distinction between 'substantive right[s]' and non-substantive, or procedural rights," id. at 213, and held that "collective action, like arbitration, is a procedural mechanism, not a substantive right," id. at 214 (internal quotation marks and citation omitted). The court also rejected the plaintiffs' argument that "the plain meaning of '*any* right or claim' in § 626(f)(1) is not limited to 'substantive' rights" by noting the Supreme Court's "unambiguous interpretation of § 626(f)(1)" in 14 Penn Plaza. Id. at 215. Because the plaintiffs in Estle could "still bring ADEA age discrimination claims individually," in line with the applicable separation agreement at issue in that case, "the fact that they may not pursue them as collective actions does not mean that they have waived the substantive rights or claims themselves." Id. at 214.

Consequently, Washbish has not waived any "substantive rights" under the ADEA, only "procedural" rights such as the right to seek relief from a court, id., and the "protected right of an employee to file a charge or participate in an

investigation or proceeding conducted by the [Equal Employment Opportunity] Commission," 29 U.S.C. § 626(f)(4); see also 29 C.F.R. § 1625.22(i)(3). Because the plaintiff has waived only "procedural" rights under the ADEA, she has not waived any "right or claim" under the ADEA, and the OWBPA does not apply to the Separation Agreement. 29 U.S.C. § 626(f)(1). The parties' agreement to arbitrate ADEA claims is enforceable, and arbitration must proceed in the manner provided for in the Separation Agreement. See 9 U.S.C. § 4.

B. CFEPA Claim

The defendant moves to "dismiss Plaintiff's state-law claim with prejudice because Plaintiff released such claims." Def.'s Mem. at 8. Section 2 of the Separation Agreement provides in relevant part: "By signing this Agreement you release IBM from ALL claims that you may have against it at the time of signing . . . including, without limitation: . . . all state and local laws prohibiting discrimination on the basis of age." Kennedy Decl., Ex. A, at 1. Although the plaintiff asserts that "she was fraudulently induced by IBM to enter into an agreement that provided a modest severance payment in exchange for a release of most legal claims," FAC ¶ 4, the Fourth Count of the First Amended Complaint requests merely that the court "[f]ind and declare the whole of the arbitration provision in IBM's Separation Agreement . . . unenforceable and otherwise void,"

Id. at 13 (emphasis added). In neither the First Amended Complaint nor the plaintiff's opposition to the motion to dismiss does the plaintiff contest the fact that the Separation Agreement waives any CFEPA claim or argue that a CFEPA claim cannot be waived. See id. ¶ 51 (noting only that "IBM has fraudulently induced Plaintiff to waive her right to pursue ADEA claims in court"). In any event, the court concludes that the plaintiff has waived her right to challenge the defendant's arguments as to her CFEPA claim by failing to object to them in her opposition to the motion to dismiss.

Therefore, the plaintiff's CFEPA claim is being dismissed.

IV. CONCLUSION

Accordingly, Defendant International Business Machines Corporation's Motion to Dismiss (ECF No. 43) is hereby GRANTED. The First Count is dismissed with prejudice. Because the remaining claims are subject to a binding arbitration agreement, and no party has sought a stay, the Second, Third, and Fourth Counts are also dismissed, and the parties shall proceed to arbitration in accordance with the terms of the Separation Agreement.

The Clerk shall close this case.

It is so ordered.

Dated this 9th day of March 2023, at Hartford, Connecticut.

/s/AWT
Alvin W. Thompson
United States District Judge