Barreto et al. v. Jec II, LLC et al Doc. 44

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RENATO BARRETO and DAVID KANT,

Plaintiffs,

-v-

JEC II, LLC, BRAND ESSENCE HOSPITALITY GROUP, LLC, BAGATELLE AMERICA LLC, THE ONE GROUP HOSPITALITY, INC., THE ONE GROUP, LLC & BAGATELLE LITTLE WEST 12th LLC, all individually and d/b/a BAGATELLE NY, and LAURENT NICOUD,

Defendants.

16-cv-9729 (KBF)

OPINION & ORDER

KATHERINE B. FORREST, District Judge:

Plaintiffs Renato Barreto and David Kant filed the instant action on December 20, 2016, alleging that defendants engaged in unlawful employment discrimination and retaliation against plaintiffs under, among other statutes, Title VII of the Civil Rights Act of 1964. On April 21, 2017, defendants moved this court to stay this litigation and compel arbitration pursuant to arbitration agreements that plaintiffs signed and the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. Plaintiffs oppose defendants' motions, arguing that although they signed arbitration agreements, such agreements are invalid because they are unconscionable. Furthermore, plaintiffs argue that even if the agreements are enforceable, they are not enforceable against certain defendants who were not parties to the agreements. For the reasons set forth below, the Court finds that the agreements are not

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unconscionable and bind plaintiffs to arbitrate their underlying disputes in this action against all defendants. Accordingly, the Court GRANTS defendants' motions to compel arbitration.

I. BACKGROUND

A. FACTUAL BACKGROUND

Plaintiffs Renato Barreto and David Kant were both employed as servers/waiters by defendants at the restaurant Bagatelle, located on Little West 12th street in New York, NY. (Complaint ("Compl.") ¶¶ 8, 11, ECF No. 2.) Plaintiff Barreto began his employment at Bagatelle in 2012. (Id. ¶11.) In or around that time, Barreto and approximately 30 newly-hired employees attended a staff meeting where they were given a copy of an employee-handbook, which contained as an appendix an arbitration agreement. (Affidavit of Renato Barreto ("Barreto Aff.") ¶ 2, ECF No. 34-1; see ECF Nos. 24-3, 24-4.) The arbitration agreement is titled "**(BAGATELLE LITTLE WEST 12TH LLC)**'s Mandatory Arbitration Policy and Procedure for Resolving Disputes Arising Out of Its Employees' Employment or Termination of Employment" and provides:

> In the event of any dispute, claim or controversy including, but not limited to, any dispute, claim or controversy seeking compensatory and/or punitive damages ("claims") arising out of any employees' employment or cessation of such employment with **(BAGATELLE LITTLE WEST 12TH LLC)**, any such claims, on an individual or class basis, shall be submitted to final and binding arbitration."

(ECF No. 24-4 at 1.) (emphasis in original) According to plaintiff Barreto, the employees were instructed to sign the documents and were told that they would not be able to work for Bagatelle unless they did so. (Barreto Aff. ¶ 7.) Plaintiff

Barreto states that the employees were not provided with further instructions and were given approximately five minutes to sign and return the documents and were not told that they could take the employee handbook home.[1] (Id. ¶¶ 3, 5-6, 8.) Barreto signed the arbitration agreement on May 9, 2012. (ECF No. 24-4 at 7.)

Plaintiff Kant began his employment at Bagatelle in 2015. (Compl. ¶11.) At the commencement of his employment, Kant was also provided with an employee handbook, which contained as an appendix an arbitration agreement. (ECF Nos. 24-1, 24-2.) The arbitration agreement is titled "The Company's Mandatory Arbitration Policy and Procedure for Resolving Disputes Arising Out of Its Employees' Employment or Termination of Employment" and provided:

> In the event of any dispute, claim or controversy including, but not limited to, any dispute, claim or controversy seeking compensatory and/or punitive damages ("claims") arising out of any employees' employment or cessation of such employment with **The Company**,[2] any such claims, on an individual or class basis, shall be submitted to final and binding arbitration. . . . Any claim Employee has or may bring against The One Group, LLC, or any affiliated, subsidiary, or agent of the One Group, LLC, arising out of the employee's employment or termination of employment shall be subject to the requirements of this Arbitration Agreement."

[1] Defendants dispute plaintiffs' account of these facts. According to defendants, a presentation was given in which a Senior Director for Operations of the One Group, LLC reviewed the employee handbook and arbitration agreement with plaintiff Barreto (and the other employees present at the meeting) section-by-section. (Affidavit of Stacey Perrone in Support of the One Group Defendants' Motion to Compel Arbitration ¶¶ 7-8 ("Stacey Aff."), ECF No. 40-1.) Defendants further state that plaintiffs were permitted to ask questions and were expected to take home copies of the employee handbook and arbitration agreement. (Id. ¶¶ 9, 11.) For the purpose of this motion, the Court accepts plaintiffs' recitation of the facts as true. As discussed below, even accepting such facts as true, defendants' are entitled to compel arbitration as a matter of law.

[2] "The Company" is not defined in the agreement, but appears from the front of the employee handbook to include, inter alia, Little West 12th LLC and JEC II LLC d/b/a Bagatelle. (See ECF No. 24-1 at 1.) As discussed below, plaintiffs do not dispute that all defendants are parties to this agreement.

(ECF No. 24-2 at 1, 3.) (emphasis in original) Similarly to plaintiff Barreto, plaintiff Kant alleges that he was allocated only approximately five minutes sign and return the documents.[3] (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration ("Mem. in Opp.), ECF No. 34 at 5.) Kant signed the arbitration agreement on March 2, 2015. (ECF No. 24-2 at 6.)

B. PROCEDURAL BACKGROUND

Plaintiffs filed their complaint in this action on December 20, 2016, alleging that defendants engaged in unlawful discrimination and retaliation under Title VII of the Civil Rights Act of 1964, New York City Administrative Code § 8-107, and New York Executive Law § 296. (Compl. ¶¶ 136-68.) On April 21, 2017, defendants moved the court to stay this litigation and compel arbitration pursuant to the arbitration agreements signed by plaintiffs and the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (ECF Nos. 27, 29, 30.) Defendants argue that plaintiffs executed binding arbitration agreements, which compel them to arbitrate the instant dispute concerning their employment with and/or termination from Bagatelle restaurant. Plaintiffs oppose defendants' motions, arguing that neither plaintiff entered into a valid and binding arbitration agreement because the agreements were

[3] The Court notes that plaintiffs' complaint does not contain any factual allegations regarding the circumstances under which plaintiff Kant was presented with and signed the arbitration agreement. In addition, unlike plaintiff Barreto, plaintiff Kant did not submit a declaration attesting to such circumstances. The only statements regarding the circumstances under which plaintiff Kant was presented with and signed the arbitration agreement are contained in Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration. As stated below, this alone is grounds to grant defendants' motion as to plaintiff Kant. Nevertheless, as discussed below, even accepting these factual allegations as true, defendants are entitled to compel arbitration as a matter of law.

unconscionable. Alternatively, plaintiffs argue that even if the agreements are enforceable, they are not enforceable against the defendants who were not parties to the agreements.

II. LEGAL STANDARDS

"[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943, (1995). The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., "creates a body of federal substantive law of arbitrability applicable to arbitration agreements . . . affecting interstate commerce." Alliance Bernstein Inv. Research & Mgmt., Inc. v. Schaffran, 445 F.3d 121, 125 (2d Cir. 2006) (internal quotation marks omitted). The parties do not dispute that the agreements at issue here affect interstate commerce and, accordingly, that the FAA applies.

The Second Circuit has noted that "it is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy we have often and emphatically applied." Arciniaga v. Gen. Motors Corp., 460 F.3d 231, 234 (2d Cir. 2006) (internal quotation marks omitted). Whether a dispute should be arbitrated depends on "(1) whether there exists a valid agreement to arbitrate at all under the contract in question . . . and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement." Hartford Acc. & Indem. Co. v. Swiss Reinsurance Am. Corp., 246 F.3d 219, 226 (2d Cir. 2001) (quoting National Union Fire Ins. Co. v. Belco Petroleum Corp., 88 F.3d 129, 135 (2d Cir. 1996)). The FAA provides that an arbitration agreement "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. Accordingly, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements." Ragone v. Atlantic Video at Manhattan Ctr., 595 F.3d 115, 121 (2d Cir. 2010) (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996)).

In deciding a motion to compel arbitration under the FAA, "the court applies a standard similar to that applicable for a motion for summary judgment." Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003). "[W]here 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, we 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) (internal quotation marks omitted).

The party seeking to compel arbitration "must make a prima facie initial showing that an agreement to arbitrate existed before the burden shifts to the party opposing arbitration to put the making of that agreement 'in issue.'" Hines v. Overstock.com, Inc., 380 Fed. App'x 22, 24 (2d Cir. 2010). The moving party need not "show initially that the agreement would be enforceable, merely that one existed." Id. (emphasis in original). Subsequently, the party "seeking to avoid arbitration generally bears the burden of showing the agreement to be inapplicable

or invalid." Harrington v. Atl. Sounding Co., Inc., 602 F.3d 113, 124 (2d Cir. 2010) (citing Green Tree Fin. Corp.—Alabama v. Randolph, 531 U.S. 79, 91-92 (2000)).

III. DISCUSSION

A. Unconscionability

It is uncontested that the parties' underlying dispute in this action falls within the scope of the arbitration agreements at issue.[4] Rather, plaintiffs argue that the dispute should be litigated in this Court (and not in arbitration) because the arbitration agreements signed by plaintiffs are invalid on the ground of unconscionability.[5] For the reasons discussed below, this Court disagrees.

Under New York law, an unconscionable contract is one which "is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms." Gillman v. Chase Manhattan Bank, N.A., 534 N.E.2d 824, 828 (N.Y. 1988). "Generally, there must be a showing that such a contract is both procedurally and substantially unconscionable." Ragone, 595 F.3d at 121 (citation omitted); see also Gillman, 534

[4] The arbitration agreements signed by plaintiffs provide that "any dispute, claim or controversy including, but not limited to, any dispute, claim or controversy seeking compensatory and/or punitive damages ('claims') arising out of any employees' employment or cessation of such employment" are subject to arbitration. (ECF Nos. 24-2 at 1, 24-4 at 1.) The agreements further specify that such "claims include, but are not limited to, any federal, state or local statutory claims [] including . . . claims pursuant to Title VII of the Civil Rights Act of 1964 . . . ." (ECF Nos. 24-2 at 1, 24-4 at 1.)

[5] As defendants have put forth the signed arbitration agreements entered into by both plaintiffs, they have made the initial prima facie showing that agreements to arbitration existed. See Hines, 380 Fed. App'x at 24; Victorio v. Sammy's Fishbox Realty Co., LLC, 14-cv-8678 CM, 2015 WL 2152703, at *11 (S.D.N.Y. May 6, 2015) ("By supplying the Court with copies of each Plaintiff's signed arbitration agreement (Docket # 81), the Defendants satisfied their initial burden of establishing agreements to arbitrate.") Plaintiffs do not dispute that they signed the arbitration agreements submitted by defendants.

N.E.2d at 824. "The procedural element of unconscionability concerns the contract formation process and the alleged lack of meaningful choice;[6] the substantive element looks to the content of the contract, per se." Ragone, 585 F.3d 115 (citation omitted). Stated differently, plaintiffs here must make "some showing of an 'absence of meaningful choice . . . together with contract terms which are unreasonably favorable to the other party.'" Gillman, 534 N.E.2d at 824 (citation omitted) (emphasis added).

Plaintiffs first assert[7] that the arbitration agreements are procedurally unconscionable because plaintiffs "lacked a 'meaningful choice'" concerning arbitration. (Mem. in Opp. at 34.) Specifically, plaintiffs state that they were never told about the contents of the agreements that they were signing; they were instructed to sign the agreements if they wanted to continue being employed at Bagatelle; and they were given less than ten minutes to review and sign the employee handbooks and arbitration agreements.[8] (Id.)

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[6] To determine whether a contract is procedurally unconscionable, the Court will examine, among other things "whether the party seeking to enforce the contract has used high pressure tactics or deceptive language in the contract and whether there is inequality of bargaining power between the parties." Sablosky v. Gordon Co., 535 N.E.2d 643, 647 (N.Y. 1989); see Gillman, 534 N.E.2d at 828.

[7] As noted above, plaintiffs' complaint does not contain any factual allegations regarding plaintiff Kant's arbitration agreement and plaintiff Kant did not submit a declaration in opposition to defendants' motions to compel. Because defendants have met their initial prima facie burden of showing that an agreement to arbitrate existed, plaintiff Kant's failure to put the making of that agreement at issue is alone enough to grant defendants' motion as to him. Nonetheless, as discussed below, even accepting the factual assertions made by plaintiffs' in their brief alone, defendants are entitled to compel arbitration as a matter of law.

[8] Plaintiffs also argue that the handbooks and arbitration agreements are misleading and difficult to discern. (See Mem. in Opp. at 34.) Plaintiffs point out that the employee handbook contains the word "guide" and the signature page on the arbitration agreements are contained on a nearly blank page. (Id.)

Accepting plaintiffs' factual allegations as true, the Court finds that the arbitration agreements may have been presented in a procedurally unconscionable manner. However, as discussed below, the Court finds that even accepting plaintiffs' factual allegations as true, the arbitration agreements are not substantively unconscionable as a matter of law. Thus, they are binding and enforceable upon plaintiffs.

A contract is substantively unconscionable when the terms of the contract are unreasonably favorable to the party against whom unconscionability is claimed. See Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 207 (2d Cir. 1999). Plaintiffs argue that the arbitration agreements are substantively unconscionable on two grounds: First, they claim that the arbitration agreements unreasonably favor defendants because the terms of the agreements "allow them to unilaterally modify the contract at any time, thus binding employees to a contract they may never have seen." (Mem. in Opp. at 10.) Second, plaintiffs claim that the arbitration agreements unreasonably favor defendants because they were drafted by Bagatelle, "a sophisticated business entity," and were imposed on plaintiffs without an opportunity for plaintiffs to "read, understand, or negotiate them." (Id.) Both of these arguments are without merit.

First, the arbitration agreements—according to their explicit terms—are not subject to unilateral modification by defendants. The agreements state that they cannot be modified except in writing signed by both parties. (See ECF No. 24-2 at 4 ("This policy cannot be modified except in writing signed by both the employee and

the president of The Company . . . ."); ECF No. 24-4 at 5 ("This policy cannot be modified except in writing signed by both the employee and the president of (BAGATELLE LITTLE WEST 12TH LLC)).)"

Second, "[e]ven where there is some disparity in bargaining power, there is no inherent unfairness or unconscionability in an arbitration clause if both parties are bound by it and know of its existence." JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 170 n.5. (2d Cir. 2004); see also Desiderio, 191 F.3d at 207 (holding arbitration clause in form contract on which employment was conditioned not unconscionable contract of adhesion because it bound both parties). The Court notes that the arbitration agreements at issue here bind both plaintiffs and defendants; provide that plaintiffs shall have the right to assert any claims or defenses in arbitration that could be raised in court; provide that the arbitrator shall have the authority to award such relief as may be available in court (including attorneys' fees); and provide that defendants will bear the majority of the arbitration fees. (See ECF Nos. 24-2, 24-4.) In short, the arbitration agreements do not unreasonably favor defendants and are not substantively unconscionable.[9] See Desiderio, 191 F.3d at 207; Isaacs v. OCE Bus. Servs., Inc., 968 F. Supp. 2d 564, 569 (S.D.N.Y. 2013) ("When both an employer and its employees are bound to an agreement to arbitrate, when the terms of the agreement are equally applicable to

[9] Plaintiffs' argument concerning a lack of opportunity to "read, understand, or negotiate [the arbitration agreements]" relates to the procedural, not substantive, nature of the agreements. Plaintiffs also rely heavily on Brennan v. Bally Total Fitness, 198 F. Supp. 2d 377 (S.D.N.Y. 2002). Brennan is distinguishable, however. In that case, the employer possessed the power to unilaterally modify the arbitration agreement and the arbitration agreement barred plaintiff from proceeding on her sexual harassment claim. See id. at 384. No similar restrictions are present in this case.

both parties, and when the employer bears any unreasonable cost of the arbitration, the arbitration agreement is not unreasonably favorable to the employer.")

As stated above, to show that a contract is unconscionable, there must generally "be a showing that such a contract is both procedurally and substantially unconscionable." Ragone, 595 F.3d at 121 (2d Cir. 2010) (citation omitted) (emphasis added); see also Gillman, 534 N.E.2d at 824. Here, the arbitration agreements are not substantively unconscionable as a matter of law; thus, plaintiffs have not met their burden of showing that the agreements are unenforceable or invalid on the ground of unconscionability.

B. Applicability of Barreto's Agreement to All Defendants

As stated in the Factual Background above, plaintiff Barreto's arbitration agreement is between plaintiff Barreto and defendant Bagatelle Little West 12th LLC and plaintiff Kant's arbitration agreement is between plaintiff Kant and "The Company" as well as The One Group, LLC. Plaintiff Barreto argues that even if the arbitration agreement that he signed is enforceable, it is not enforceable against the defendants who were not parties to the agreement.[10] (Mem. in Opp. at 10.) Defendants argue that Barreto should be compelled to arbitrate his claims against all defendants under equitable estoppel principles. The Court agrees.

As the Second Circuit has explained, "[u]nder principles of estoppel, a non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate a dispute where a careful review of 'the relationship among the parties,

[10] Plaintiff Kant does not dispute that all defendants are parties to the arbitration agreement that he signed. (See Mem. in Opp. at 10-12.)

the contracts they signed . . ., and the issues that had arisen' among them discloses that 'the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'" Ragone, 595 F.3d at 126-27 (quoting Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co., 271 F.3d 403, 406 (2d. Cir. 2001)). The Second Circuit has further noted, however, that this does not mean "that whenever a relationship of any kind may be found among the parties to a dispute and their dispute deals with the subject matter of an arbitration contract made by one of them, that party will be estopped from refusing to arbitrate. . . . [I]n addition to the 'intertwined' factual issues, there must be a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement." Sokol Holdings, Inc. v. BMB Munai, Inc., 542 F.3d 354, 359 (2d. Cir. 2008).

The Court finds that consistent with the applicable Second Circuit precedent, in this case there are sufficiently intertwined factual issues and a sufficient relationship between all defendants to compel arbitration between plaintiff Barreto and all defendants. Plaintiffs' claims against all defendants are intertwined with the arbitration agreement, which provides that all claims "arising out of" plaintiffs' employment with Bagatelle are subject to arbitration." (See ECF No. 24-4 at 1.) Importantly, plaintiffs raise the same discrimination and retaliation claims against all defendants and do not distinguish between defendants in any manner. See

Ragone, 595 F.3d at 128 ("In this case, there is likewise no question that the subject matter of the dispute between Ragone and AVI is factually intertwined with the dispute between Ragone and ESPN. It is, in fact, the same dispute . . . ."). In their complaint, plaintiffs allege that all of the defendants own and operate Bagatelle (Compl. ¶ 8) and state that "[a]t all times material, all of the named Defendants were joint employers of the Plaintiffs." (id. ¶ 26). Plaintiffs also allege that all defendants "could take tangible employment actions against the Plaintiffs." (Compl. ¶ 26.) It is clear that plaintiffs considered defendants to be co-employers. Plaintiffs' allegations, accepted as true, support that when plaintiff Barreto entered into his arbitration agreement, he reasonably believed he was agreeing to arbitrate his claims against all defendants. In short, the facts presented here support equitable estoppel. See Victorio v. Sammy's Fishbox Realty Co., LLC, 14-cv-8678, 2015 WL 2152703, at *17 (S.D.N.Y. May 6, 2015) ("Where a plaintiff treats all defendants as a single unit in his complaint, it further supports estopping that plaintiff from shielding himself from arbitrating with certain defendants." (citing Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 98 (2d Cir. 1999)); Donner v. GFI Capital Res. Grp., 16-cv-9581, 2017 WL 2271533, at *4 (S.D.N.Y. May 2, 2017) (compelling arbitration of claims against non-signatory supervisor of defendant employer).

IV. ATTORNEYS' FEES

All defendants except defendant Laurent Nicoud have also moved this Court for an award of attorneys' fees. (See The One Group Defendants' Memorandum of Law in Support of Their Motion to Compel, ECF No. 26, at 15-16; ECF No. 29.)

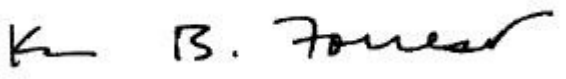
Plaintiffs have not opposed this request. Therefore, the Court GRANTS the motions as unopposed. In all events, the plain text of the arbitration agreements provide for attorneys' fees here. The agreements state: "If any party is required to file a lawsuit to compel arbitration pursuant to this policy, or defend against a lawsuit filed in court contrary to the policy's mandatory arbitration provision, such party, if successful, shall be entitled to recover his/her or its reasonable costs and attorneys' fees incurred in such an action, including costs and attorneys' fees incurred in any appeal." (ECF No. 24-2 at 4, ECF No. 24-4 at 5.)

V. CONCLUSION

For the reasons set forth above, defendants' motions to compel arbitration are GRANTED. The Clerk of Court is directed to terminate the motions at ECF Nos. 27, 29, and 30 and to terminate this case.[11]

SO ORDERED.

Dated: New York, New York
July 25, 2017



KATHERINE B. FORREST
United States District Judge

[11] Defendants have requested that the Court compel arbitration and stay this case. The Court declines to stay this case and finds that given the early procedural posture, it is appropriate to terminate this action. In the event that a future award is obtained in arbitration, a separate action can be filed to enforce the award at that time.