YVELANDE BOURSIQUOT vs. UNITED HEALTHCARE SERVICES OF DELAWARE, INC.,[1] & others.[2]

No. 19-P-1697.

Plymouth. July 9, 2020. - October 14, 2020.

Present: Blake, Shin, & Ditkoff, JJ.

Federal Arbitration Act. Arbitration, Appropriateness of judicial proceedings, Authority of arbitrator, Arbitrable question, Scope of arbitration. Contract, Arbitration, Employment, Termination, With hospital. Employment, Termination. Hospital.

Civil action commenced in the Superior Court Department on March 11, 2019.

A motion to dismiss and to compel arbitration was heard by Angel Kelley, J.

Daniel J. Blake for United Healthcare Services of Delaware, Inc., & another.
Adam J. Rooks for the plaintiff.

[1] Doing business as Fuller Hospital. As is our custom, we refer to this defendant by the name appearing in the plaintiff's complaint. On appeal, this defendant identifies itself as Universal Healthcare Services of Delaware, Inc.

[2] Rachel Legend and Rajendra Trivedi. Dr. Trivedi is not a party to this appeal.

DITKOFF, J. The defendants, United Healthcare Services of Delaware, Inc., doing business as Fuller Hospital (hospital), and its chief executive officer, Rachel Legend (collectively, the hospital defendants), appeal from an order of a Superior Court judge denying their motion to compel arbitration of claims by the plaintiff, Yvelande Boursiquot, that she was illegally terminated from her employment as a social worker at the hospital.[3] The parties dispute whether an arbitration agreement (agreement), signed by the plaintiff at the beginning of an unpaid internship at the hospital, applies to her subsequent paid employment. Concluding that the judge erred in reserving that question for herself where the agreement reserved to an arbitrator the question of its own applicability and interpretation, we reverse and remand the case for the entry of an order compelling arbitration of this question.

1. Background. In spring 2016, the plaintiff was approximately twenty-seven years old and was a student earning a master's degree in social work. She applied for and obtained an unpaid internship at the hospital. During orientation in

[3] The hospital defendants do not challenge in this appeal so much of the Superior Court judge's order as denied their motion to dismiss the plaintiff's claims against them. In our discussion, we refer to the motion simply as a motion to compel arbitration.

September 2016, the plaintiff was instructed to sign a number of documents, including the agreement. When the plaintiff asked whether all of the paperwork applied to her as an intern, she was instructed to sign everything and that any inapplicable documentation would be removed from her file. It is evident that the agreement remained in the plaintiff's file.

The agreement, entitled "Alternative Resolution for Conflicts ('ARC') Agreement," is a broad arbitration agreement. In relevant part, § 1 of the agreement (delegation provision) provides the following:

> "Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial. Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Agreement."

Also delegated to an arbitrator is the resolution of "all disputes regarding the . . . propriety of the demand for arbitration" and "the authority to hear and decide dispositive motions, and/or a motion to dismiss and/or a motion for summary judgment by any party." The agreement further states that it (1) "is a contract between you, the employee," and the hospital and (2) is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (FAA).

In bold type, under a separately numbered paragraph entitled, "An Employee's Right To Opt Out Of Arbitration," the agreement states that arbitration is not a mandatory condition of employment and sets forth a mechanism for opting out at any time within thirty days of receiving the agreement. The plaintiff did not opt out.

In May 2017, the plaintiff's internship ended, and she accepted an offer of full-time employment at the hospital. Although the plaintiff filled out additional paperwork at this time, she was not presented with, and did not execute, a new arbitration agreement.

The plaintiff alleges that a doctor with whom she often worked made negative comments about the plaintiff and her pregnancy, as well as about certain minority patients. The plaintiff repeatedly complained about this conduct to her supervisors at the hospital. When the plaintiff filed a formal complaint in June 2018 about the doctor, the hospital's chief executive officer informed the plaintiff that she would be suspended without pay unless she withdrew the complaint. The chief executive officer also instructed the plaintiff not to keep a log of the doctor's abusive behavior. Approximately two months later, the hospital terminated the plaintiff's employment, ostensibly because she complained internally about understaffing, because of a charting issue that occurred almost

one year earlier, and because of tardiness caused by her young son's medical appointments.

In March 2019, the plaintiff filed a complaint in the Superior Court alleging that the hospital defendants terminated her employment on the basis of sex and pregnancy, in violation of G. L. c. 151B. The plaintiff also claimed that she was terminated in retaliation for complaining about the doctor.[4] The hospital defendants moved to compel arbitration pursuant to the agreement. See G. L. c. 251, § 2 (a). The plaintiff opposed the motion to compel and argued that she was not bound by the agreement because she was not an employee when she signed it. The plaintiff further claimed that the agreement was unconscionable.

After a nonevidentiary hearing, the motion judge found that "there is a factual question whether the parties mutually intended the Agreement to apply to any permanent paid employment that [the plaintiff] might obtain following her internship." The judge denied the motion to compel after concluding that "it is unclear whether in signing the Agreement in connection with an unpaid internship of limited duration, [the plaintiff]

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[4] The plaintiff also complained that the doctor was liable to her for intentional infliction of emotional distress. The doctor filed a motion to dismiss the claim against him, which was denied. That order is not before us. There is no claim that the doctor (or, for that matter, the plaintiff) is entitled to arbitration of the plaintiff's claim against the doctor.

bargained for and agreed to arbitration of all claims, including discrimination claims, arising from her subsequent paid employment." The motion judge did not address the hospital defendants' argument that whether the agreement applied to the plaintiff's paid employment was itself a matter that had to be arbitrated. The hospital defendants appealed the order denying their motion to compel arbitration, which is immediately appealable pursuant to G. L. c. 251, § 18 (a) ("An appeal may be taken from:-- [1] an order denying an application to compel arbitration made under [G. L. c. 251, § 2 (a)]").

2. Standard of review. Where there are no material factual disputes, "[w]e review the denial of a motion to compel arbitration de novo." Landry v. Transworld Sys. Inc., 485 Mass. 334, 337 (2020). "Where, as here, a party has moved to compel arbitration and the other side 'denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall, if it finds for the applicant, order arbitration; otherwise, the application shall be denied.'" Chambers v. Gold Medal Bakery, Inc., 83 Mass. App. Ct. 234, 241 (2013), quoting G. L. c. 251, § 2 (a).[5]

[5] "The procedural counterpart under the [FAA] . . . does not apply to a motion to compel arbitration brought in a Massachusetts State court." McInnes v. LPL Fin., LLC, 466 Mass. 256, 261 n.7 (2013). Accordingly, a State judge in Massachusetts follows the procedures set forth in G. L. c. 251, not the procedures set forth in 9 U.S.C. § 4.

In this context, "proceed summarily" means "that a judge determines whether there is a dispute as to a material fact; and, if there is not such a dispute, the judge resolves the issue as a matter of law." St. Fleur v. WPI Cable Sys./Mutron, 450 Mass. 345, 353 (2008). If, however, there is a disputed issue of fact, "the judge conducts an expedited evidentiary hearing on the matter and then decides the issue." Id.

3. Arbitrability of the interpretation of the agreement. "Whether the parties have agreed to arbitrate is a matter to be decided finally by the court and not by the arbitrator," Parekh Constr., Inc. v. Pitt Constr. Corp., 31 Mass. App. Ct. 354, 359 n.8 (1991), unless there is "'clea[r] and unmistakabl[e]' evidence" that the parties agreed to arbitrate arbitrability. Massachusetts Highway Dep't v. Perini Corp., 83 Mass. App. Ct. 96, 100 (2013), quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). "In this respect, the usual presumption in favor of arbitration is reversed." Massachusetts Highway Dep't, supra at 101.

As we have intimated, we have no quarrel with the motion judge's conclusion that there is a genuine "question whether the parties mutually intended the Agreement to apply to any permanent paid employment that [the plaintiff] might obtain following her internship." The motion judge erred, however, when she reserved that question for her own resolution. The

agreement specifically provides for arbitration of "disputes arising out of or relating to interpretation or application of this Agreement." The term "'relating to' . . . suggests an 'expansive sweep' and 'broad scope.'" New Cingular Wireless PCS LLC v. Commissioner of Revenue, 98 Mass. App. Ct. 346, 355 (2020), quoting Acushnet Co. v. Beam, Inc., 92 Mass. App. Ct. 687, 695 (2018). The plaintiff disputes that the agreement applies to her paid employment, presenting a quintessential question of interpretation and application for "a decision maker [who] must analyze the [arbitration] agreement[] in assessing the merits" of that claim. Machado v. System4 LLC, 471 Mass. 204, 216 (2015). The agreement identifies that decision maker as an arbitrator.

Although we have not found a reported case addressing the specific language found in the agreement, the United States Court of Appeals for the Ninth Circuit addressed similar language in Momot v. Mastro, 652 F.3d 982 (9th Cir. 2011). There, the relevant agreement stated,

> "If a dispute arises out of or relates to this Agreement, the relationships that result from this Agreement, the breach of this Agreement or the validity or application of any of the provisions of this [section], and, if the dispute cannot be settled through negotiation, the dispute shall be resolved exclusively by binding arbitration."

Id. at 984. The court held "that this language, delegating to the arbitrators the authority to determine 'the validity or

application of any of the provisions of' the arbitration clause, constitutes 'an agreement to arbitrate threshold issues concerning the arbitration agreement.'" Id. at 988, quoting Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68 (2010) (Rent-A-Center). Because "the parties clearly and unmistakably agreed to arbitrate the question of arbitrability," the circuit court reversed the order of a Federal district court judge, who had decided that the arbitration agreement did not apply to the particular claims before him under the terms of the agreement. Momot, supra.

To be sure, the agreement in Momot, unlike the agreement here, assigned to an arbitrator the question of the agreement's validity. The issue in Momot, however, like the issue here, was the applicability and interpretation of the arbitration agreement. Accordingly, Momot is on point.

Momot has been relied on by other Federal courts in adjudicating cases involving a similar arbitration agreement, written by Uber Technologies, Inc. That agreement states that arbitrable disputes "include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision." Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1208 (9th Cir. 2016). The Federal courts

have concluded that this language "clearly and unmistakably indicates [the parties'] intent for the arbitrators to decide the threshold question of arbitrability." Id. at 1209, quoting Momot, 652 F.3d at 988.[6]

Our conclusion is fortified by our review of other sections of the agreement. See Merrimack College v. KPMG LLP, 88 Mass. App. Ct. 803, 805 (2016), quoting Sullivan v. Southland Life Ins. Co., 67 Mass. App. Ct. 439, 442 (2006) (we "construe the contract as a whole, in a reasonable and practical way, consistent with its language, background, and purpose"). Accord Patton v. Johnson, 915 F.3d 827, 835 (1st Cir. 2019). The agreement here repeatedly expresses an expansive scope. It "applies to any past, present or future dispute arising out of or related to Employee's application for employment, employment and/or termination of employment," and "survives after the employment relationship terminates." It broadly covers "disputes that otherwise would be resolved in a court of law."

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[6] Accord Mwithiga v. Uber Techs., Inc., 376 F. Supp. 3d 1052, 1061-1062 (D. Nev. 2019); Gray v. Uber, Inc., 362 F. Supp. 3d 1242, 1245-1246 (M.D. Fla. 2019); Mumin v. Uber Techs., Inc., 239 F. Supp. 3d 507, 522-523 (E.D.N.Y. 2017); Kai Peng v. Uber Techs., Inc., 237 F. Supp. 3d 36, 53 (E.D.N.Y. 2017); Saizhang Guan v. Uber Techs., Inc., 236 F. Supp. 3d 711, 728 (E.D.N.Y. 2017); Congdon v. Uber Techs., Inc., 226 F. Supp. 3d 983, 988 (N.D. Cal. 2016); Micheletti v. Uber Techs., Inc., 213 F. Supp. 3d 839, 845 (W.D. Tex. 2016); Lee v. Uber Techs., Inc., 208 F. Supp. 3d 886, 892 (N.D. Ill. 2016); Bruster v. Uber Techs. Inc., 188 F. Supp. 3d 658, 663-664 (N.D. Ohio 2016).

And the agreement specifically delegates to the arbitrator other threshold questions, such as "all disputes regarding the timeliness or propriety of the demand for arbitration." Accordingly, the agreement to arbitrate "should be construed as broadly as it was intended." Danvers v. Wexler Constr. Co., 12 Mass. App. Ct. 160, 163 (1981), quoting Carter, Moore & Co. v. Donahue, 345 Mass. 672, 676 (1963).

4. Unconscionability of the delegation provision. Like the FAA, G. L. c. 251 is intended "to put arbitration agreements on 'the same footing as other contracts.'" St. Fleur, 450 Mass. at 349, quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974). Thus, an arbitration agreement is valid "save upon such grounds as exist at law or in equity for the revocation of any contract," G. L. c. 251, § 1, "such as fraud, duress, or unconscionability." St. Fleur, supra at 350.[7] The plaintiff makes no claim of duress, but rather relies on the defense of unconscionability.[8] "Under Massachusetts law, '[t]o prove that

[7] We interpret the substantive provisions of the FAA and its Massachusetts counterpart in the same manner. McInnes, 466 Mass. at 260. Although the agreement provides that it is governed by the FAA, State law "concerning the validity, revocability, and enforceability of contracts generally" determines whether parties have executed a valid and enforceable arbitration agreement. Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987). See Landry, 485 Mass. at 338.

[8] The plaintiff argues on appeal that the agreement was fraudulently induced. Because she did not raise that argument before the motion judge, it is waived before this court. See

the terms of a contract are unconscionable, a plaintiff must show both substantive unconscionability (that the terms are oppressive to one party) and procedural unconscionability (that the circumstances surrounding the formation of the contract show that the aggrieved party had no meaningful choice and was subject to unfair surprise).'" Machado, 471 Mass. at 218, quoting Storie vs. Household Int'l, Inc., U.S. Dist. Ct., No. 03-40268, slip op. at 17 (D. Mass. Sept. 22, 2005).

Before the motion judge, the plaintiff argued that the agreement as a whole was unconscionable, without addressing whether the question of unconscionability was itself reserved to the arbitrator. But "a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." Rent-A-Center, 561 U.S. at 70. Rather, the unconscionability challenge must "be directed specifically to the agreement to arbitrate [in question] before the court will intervene." Id. at 71. Thus, where, as here, the parties have agreed to arbitrate gateway questions of arbitrability, and no challenge is raised to "the delegation provision specifically," the provision should be enforced, "leaving any challenge to the

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Tortolano v. Lemuel Shattuck Hosp., 93 Mass. App. Ct. 773, 779-780 (2018).

validity of the [a]greement as a whole for the arbitrator." Id. at 72.

At oral argument before this court, the plaintiff acknowledged that she has no unconscionability claim specifically directed to the delegation provision, as opposed to the agreement as a whole. Nonetheless, she argues that the issue of unconscionability is appropriate for judicial resolution because, unlike in Rent-A-Center, the delegation provision here does not expressly delegate questions of enforceability to the arbitrator. Putting aside that the plaintiff failed to raise this argument to the motion judge,[9] we think that there is "clear and unmistakable" evidence that the parties agreed to arbitrate questions of arbitrability, including unconscionability. Rent-A-Center, 561 U.S. at 69 n.1. Accordingly, the issue whether the agreement is unconscionable is also one reserved for the arbitrator.

It bears mentioning that our conclusion in no way presumes that the plaintiff's underlying claims are subject to arbitration. An arbitrator will decide that question. The case against the hospital defendants will be stayed in the meanwhile. See G. L. c. 251, § 2 (d) ("Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for

[9] The hospital defendants do not argue waiver on this basis.

arbitration . . . has been made").[10] If the arbitrator determines that the agreement does apply and is enforceable, the arbitrator will presumably proceed to arbitrate the plaintiff's claims. If the arbitrator determines that the agreement does not apply or is unconscionable, the case will resume in the Superior Court for a judicial determination of the plaintiff's claims against the hospital defendants.

5. Conclusion. So much of the order as denied the hospital defendants' motion to compel arbitration of the plaintiff's claims against the hospital defendants is reversed. The case is remanded for the entry of an order allowing the motion to compel arbitration and staying proceedings on the plaintiff's claims against the hospital defendants. The remainder of the order, denying the hospital defendants' motion to dismiss, is affirmed.

So ordered.

[10] On remand, the Superior Court judge has the discretion to stay the case against the doctor, but need not do so. See G. L. c. 251, § 2 (d) ("if the issue is severable, the stay may be with respect to such [arbitrable] issue only").