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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2

Justice

Index Number : 108597/2011
MITCHELL, SETH
vs
CANTOR FITZGERALD, L.P.
Sequence Number : 005
RENEWAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11/21/12

Lwy
_____, J.S.C.
LOUIS B. YORK

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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SETH MITCHELL,

Plaintiff,

Index No 108597/2011

-against-

CANTOR FITZGERALD, L.P.,

Defendant.

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YORK, J.:

Defendant's motions sequence number 5 to renew its motion to stay or dismiss the proceedings and sequence number 6 to dismiss the complaint and amended complaint are consolidated for disposition. Plaintiff opposed both motions and submitted a cross-motion for default judgment.

BACKGROUND

Plaintiff Seth Mitchell ("Mitchell") was hired by Cantor Fitzgerald & Co. ("CF & Co." or "Company") on February 22, 2011 as a Managing Director in the DCM High Yield Trading Department. His employment was terminated on March 18, 2011.

On May 17, 2011 Mitchell filed a summons with endorsed complaint against Cantor Fitzgerald, L.P. ("CFLP), the parent company of CF & Co., in the Civil Court of the City of New York (Index No. CV-021879-11/NY). The endorsed complaint stated a cause of action for "breach of contract of warranty for $18,750.00 with interest from 03/18/2011. [Defendant] failed to make payments under non-compete clause US employment contract."

On September 1, 2011 Mitchell started these proceedings *pro se*. In his complaint he alleged that he had a valid oral contract of employment with CF & Co. for two years. He

maintained that CF & Co. had harmed him purposely and with malicious intent. In particular, he accused the company of wrongful hiring in that his purported employment was a means to collect damaging information about him under the pretext of a background check. He further advanced a claim of breach of express and implied contract for failure to pay him salary and benefits during the non-compete period. Mitchell added a cause of action for "statutory federal employment discrimination" which defendant allegedly perpetrated by singling him out and preventing him from succeeding as a managing director. He alleged that defendant had some "undocumented discriminatory reasons such as age, marital status, religion, or sexual orientation." Plaintiff's claim for "quantum meruit" is based on defendant's attempts to impose on him an onerous and unconscionable loan instead of paying directly for his potential relocation to Asia. Mitchell also claimed that some employees were inappropriately in possession of his personal information received through the background investigation. Finally, plaintiff alleged that he was defamed by a statement that he was unable to complete relatively simple human resources hiring tasks on a timely basis. In his original complaint Mitchell sought $3,000,000.00 in compensatory damages and $10,000,000,00 in punitive damages.

On September 21, 2011, defendant CF & Co. filed a motion to have these proceedings stayed or dismissed in favor of arbitration. It made an analogous motion in the Civil Court of the City of New York on November 14, 2011. As a condition of his employment with CF & Co. Mitchell executed a Uniform Application for Securities Industry Registration ("Form U4") and Cantor Fitzgerald Form U4 Disclosure to Associated Persons (the "Form U4 Disclosure"). The Form U4 Disclosure provides:

> (1) You agree to arbitrate any dispute, claim or controversy that may arise between you and your firm, or customer, or any other person that is required to arbitrate under the rules of the self-regulatory organizations with which you are registering. This means that you are giving up the right to sue a member,

> customer, or another associated person in court including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.
> (2) A claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute, is not required to be arbitrated under FINRA rules. Such a claim may be arbitrated at FINRA only if parties have agreed to arbitrate it, either before or after the dispute arose. The rules of other arbitration forums may be different.

In addition to signing the U4 Form and Disclosure, Mitchell also signed the Cantor Fitzgerald Arbitration Agreement and Policy (the "Arbitration Agreement"), according to which the parties agreed to arbitrate any disputes related to Mitchell's employment with the company. The Arbitration Agreement reads:

COVERAGE OF ALL CLAIMS OF ANY KIND:

> The disputes or claims subject to arbitration include any and all claims, demands or actions of any kind involving you and any Cantor Fitzgerald Group Company (or any person employed by or an agent of or a partner of a Cantor Fitzgerald Group Company, including those arising out of the Employee Handbook, Conduct and Compliance Manuals, those related to employment, employment discrimination, compensation or benefits, and including any tort claim or claim under any federal, state, or local statute, regulation or ordinance… and any and all claims under the common law of any state or otherwise.

In its order of October 25, 2011 this court delayed a decision on the motion to stay or dismiss until the Civil Court decided the analogous motion. After the Civil Court first dismissed the action for plaintiff's default and then restored it to its calendar, this court, in its order of April 6, 2012, denied defendant's motion with leave to renew once the Civil Court issues it decision. It also ordered defendant to answer the complaint. On January 30, 2012 the Civil Court stayed the action in favor of arbitration. It determined that the only cause of action before it, for breach of employment contract, "clearly falls within the type of controversy which must be arbitrated."

Defendant explained that it did not have the Civil Court decision to present it to this court prior to its April 6, 2011 order.

On May 1, 2012 CF& Co. and CFLP answered the complaint and simultaneously moved to renew the motion to stay or dismiss the proceedings in favor of arbitration, the current motion sequence number 5. On May 16, 2012, without leave of the court, Mitchell served some of the designated defendants with what he called an amended verified complaint Ashem LLC v CF Group Management, Inc. et al. He purported to assign to Ashem LLC, of which he is the sole member, all past, present and future claims against the defendants. The allegations of the amended complaint remained in essence the same, but the relief sought was $32,268,750.00 in compensatory damages and $10,000,000.00 in punitive damages. On June 4, 2012 defendants moved to dismiss Mitchell's original complaint and Ashem, LLC's amended complaint (motion sequence number 6). Mitchell cross-moved for judgment of default, ostensibly in response to motion number 5, without notice of cross-motion and presenting the motion papers directly to the court. He subsequently moved, by an order to show cause dated July 4, 2012, for summary judgment against defendant CFLP for failure to answer the complaint (motion sequence number 8). This latter motion superseded an attempted cross-motion for default which was procedurally deficient. By order dated October 23, 2012, this court denied the motion sequence number 8.

DISCUSSION

Motions sequence number 5 and 6 seek the same relief – stay or dismissal of the current action in favor of arbitration. Motion number 6 was submitted in response to plaintiff's attempt to amend the original complaint without leave of court. It is not necessary for this court to determine whether the service of the amended complaint was valid. Instead the only issue before the court is the enforceability of two arbitration agreements signed between Seth Mitchell and

CF & Co. The Civil Court of the City of New York has directed the parties to FINRA arbitration on the issue of breach of contract. The complaint in the present action covers a broader set of claims, which, defendants argue, are subject to arbitration.

Plaintiff contends that "this multi-claim controversy being pursued by Plaintiff contains both employment and non-employment-based claims" and that claims not related to employment should not be arbitrated (Pl. Memo. of Law, P. 1)

The Court of Appeals has emphasized that both an arbitration agreement in Form U4 and an arbitration agreement between a broker-dealer and a registered representative are forms of contract. "[A]rbitration is a creature of contract, and it has long been the policy of this State to interfere as little as possible with the freedom of consenting parties in structuring their arbitration relationship." Credit Suisse First Boston Corp. v Pitofsky, 4 NY3d 149, 154-55; 791 N.Y.S.2d 489 [2005](internal quotations omitted).

Whether all claims in the complaint are covered by the two agreements to arbitrate is a matter of contract interpretation. The Arbitration Agreement, in plain language, refers to "any and all claims, demands or actions of any kind" involving Mitchell and any of Cantor & Fitzgerald companies or their employees. None of the exceptions listed in the agreement apply (disputes related to purchase of shares in CFPL, workers compensation or agreement in the form of a promissory note or loan agreement). This agreement complements the mandatory arbitration clause in Form U4. Though claims of employment discrimination are not subject to mandatory FINRA arbitration, they may be arbitrated by FINRA, if parties agree to do so, as they did in the Arbitration Agreement.

Mitchell objects to the jurisdiction of FINRA on the ground that neither CFLP nor he are members of FINRA, and thus there is no requirement for them to be bound by FINRA rules (Pl.

Memo of Law, P.5). Mitchell signed the U4 form in connection with his employment with Cantor Fitzgerald and Co., a member of FINRA. Though parties dispute whether Seth Mitchell himself is registered with FINRA, and no evidence was submitted to the court on this issue, this is not relevant for the purposes of FINRA arbitration. According to FINRA's Code of Arbitration Procedure for Industry Disputes, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4193, arbitration is mandatory between and among members and associated persons (Rule 13200). The Code defines a "person associated with a member" as "[a] natural person who is registered or has applied for registration under the Rules of FINRA" and for purposes of the Code, a person formerly associated with a member is a person associated with a member (Rule 13100). Seth Mitchell meets this definition, since he applied for registration with FINRA and was formerly employed by CF and Co.

To the extent some claims, such as defamation, may not fall under FINRA arbitration, the Arbitration Agreement provides for an alternative forum – a panel of arbitrators according to the rules of the American Arbitration Association.

CONCLUSION

For the foregoing reasons, it is

ORDERED that defendants' motion to dismiss the complaint is granted and it is further

ORDERED that parties proceed to arbitration.

Dated: 11/21/12

ENTER:

J.S.C.

LOUIS B. YORK