SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE PART 61
Justice

Index Number : 151848/2013
BOTTOMS, SARAH
vs.
WORLD CLASS LEARING ACADEMY
SEQUENCE NUMBER : 001
COMPEL/STAY ARBITRATION

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 decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 7/30/13

HON. ANIL C. SINGH
SUPREME COURT JUSTICE, J.S.C.

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: IAS PART 61

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SARAH BOTTOMS,

Plaintiff,

Index No.:
151848/2013

- against-

WORLD CLASS LEARNING ACADEMY OF NEW YORK, LLC, BRITISH SCHOOLS OF AMERICA, LLC, and JOHN TAYLOR and DAWN TAYLOR,

Defendants.

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HON. ANIL C. SINGH, J.:

In motion sequence 001, brought pursuant to CPLR 7503 (b) and 7502 (a), plaintiff Sarah Bottoms moves to stay the arbitration sought by defendants World Class Learning Academy of New York LLC (WCL), British Schools of America, LLC (BSA), John Taylor and Dawn Taylor (collectively defendants). In motion sequence 002, which is hereby consolidated with 001, defendants move, pursuant to 9 USC § 1, *et seq.* and CPLR 3211, to compel plaintiff to submit the claims alleged in the complaint to arbitration, and dismiss all the claims in this action. In the alternative, defendants request a stay of all claims pending arbitration, pursuant to CPLR 7503 (a), and move to dismiss the statutory claims as against WCL and John and Dawn Taylor.

BACKGROUND AND FACTUAL ALLEGATIONS

Pursuant to an employment agreement dated September 17,

2010, plaintiff was hired by BSA to serve as the Director of Admissions and Marketing for WCL. WCL is BSA's New York-based school, located in New York, New York. In addition to WCL, BSA operates private schools abroad, as well ones in Boston, Charlotte, N.C., Chicago, IL., Houston, TX., and Washington, DC. BSA is a Delaware limited liability company with its principal place of business in Texas. WCL is a Delaware limited liability company with its principal place of business in New York.

The employment agreement provides that plaintiff was, among other duties, required to "[o]ptimize school's enrollment, enhance positioning and raise school recognition in the community, enhance brand equity ... [d]rive and actively pursue enrollments and conversion rates of enquiries and outreach...." Nicotra affirmation, exhibit B at 1. The agreement subjected plaintiff to a three-month probation period. After the completion of such, plaintiff could be terminated only if plaintiff were found guilty of "willful misconduct, gross negligence, theft, fraud or other illegal conduct, any willful act that injures the reputation of the Company, drug use and/or drug abuse." *Id.* at 4.

The agreement also includes the following provision regarding arbitration:

> "11. Arbitration
> Your employer is British Schools of America LLC, operating in the state of Texas, USA.

> "Should controversy arise that requires arbitration it will be undertaken by a single arbitrator licensed to practice law in Texas and should be solely and exclusively determined under Texas state law. Selection of the arbitrator should be mutually agreed in writing. The arbitrator should be appointed within 30 days of a request by either party for arbitration. The cost of arbitration shall be split equally between both parties.
>
> "In the event that an arbitrator is not appointed or that any arbitration process does not produce an outcome acceptable to either party, any dispute will be solely and exclusively be determined under Texas state law."

Id. at 3-4.

Plaintiff signed the agreement, as did John Taylor, acting on behalf of BSA.

Pursuant to a letter dated January 3, 2013, plaintiff was terminated from WCL for low enrollment. She then filed a complaint against WCL, John Taylor and Dawn Taylor, grounded in wrongful termination and discrimination. Specifically, plaintiff filed causes of action against all parties for breach of contract, breach of the covenant of good faith and fair dealing, discrimination, hostile work environment and retaliation under New York State and New York City Human Rights Laws. Plaintiff's complaint alleges that, during the course of her employment, she was subject to discrimination and hostile work environment based on her sex, age and nationality. She further contends that, after she complained about such conduct, defendants breached her employment agreement by retaliating against her and terminating

her employment.

In response to the complaint, defendants sent plaintiff's counsel a letter, received on April 3, 2013, requesting that plaintiff withdraw the complaint and submit her dispute to arbitration. The letter states the following, in pertinent part:

> "On September 17, 2010, your client executed an employment contract with World Class Learning Academy of New York. This contract contains an arbitration provision that requires the parties to submit the instant dispute to arbitration.
>
> "Accordingly, Defendants request that [plaintiff] withdraw her Complaint and submit this dispute to arbitration. If [plaintiff] does not consent, Defendants intend to move for an order compelling arbitration and staying the current action pursuant to CPLR 7503. Accordingly, this letter will serve as Defendants' notice of intention to arbitrate under CPLR 7503 (c), and unless [plaintiff] applies to stay the arbitration within twenty days, [plaintiff] shall thereafter be precluded from objecting that a valid agreement was not made or with which has not been complied."

Affirmation of A. Michael Weber, exhibit C at 1.

As a result of this letter, plaintiff timely moved on April 23, 2013, pursuant to CPLR 7503 (b) and 7502 (a), to stay any arbitration. Plaintiff also alleges that, pursuant to CPLR 7503 (a), defendants' notice of intent to arbitrate was defective.

On May 23, 2013, plaintiff filed an amended complaint which added BSA as a defendant. The amended complaint also withdrew the individual breach of contract claims as against John and Dawn Taylor, partially mooting defendants' motion to dismiss.

Plaintiff contends that the arbitration clause in the

employment agreement is not enforceable since it is ambiguous and does not require plaintiff to arbitrate any of her claims. In her view, the arbitration clause merely places certain conditions on arbitration, if an arbitration is commenced and agreed to, such as the type of arbitrator and the choice of law. Furthermore, according to plaintiff, the clause provides for additional conditions on judicial resolution of the claims, in the event that arbitration does not take place. Plaintiff also argues that both her breach of contract claims and her discrimination claims are not subject to arbitration since, for her discrimination claims in particular, there is no specific language referencing these types of claims.

In response, defendants argue that the employment contract "contains an arbitration clause calling for arbitration of disputes arising out of the parties' employment relationship." Defendants' memorandum of law at 3. As such, the clause is enforceable and any and all of plaintiff's claims fall within the scope of the arbitration agreement.

DISCUSSION

Defendants argue that the Federal Arbitration Act (9 USC § 1 *et seq.*) (FAA) should apply to this dispute. The FAA is an expression of a strong federal policy favoring the enforcement of arbitration agreements. *Ragone v Atlantic Video at Manhattan Ctr.*, 595 F3d 115, 121 (2d Cir 2010). Section 2 of the FAA

broadly mandates that a written arbitration provision in a contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* In other words, the FAA governs disputes arising out of the arbitration provision of a contract affecting interstate commerce. *Matter of Diamond Waterproofing Sys, Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 253 (2005).

Under New York law, under a motion to compel or to stay arbitration, the court may address, relevant to the present case, "(1) whether the parties made a valid agreement to arbitrate; [and] (2) if so, whether the agreement has been complied with...." *Matter of Town of Orangetown v Rockland County Policemen's Benevolent Assn.*, 105 AD3d 861, 861 (2d Dept 2013); *see also* CPLR 7503 (a) and (b). Likewise, a court asked to compel arbitration proceedings under the FAA must "first 'determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement [internal citation omitted].'" *National City Golf Fin. v High Ground Country Club Mgt. LLC*, 641 F Supp 2d 196, 202 (SD NY 2009).

Although there is a strong federal policy to favor arbitration, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit [internal quotation marks and

citation omitted]." *AT & T Tech. v Communications Workers of Am.*, 475 US 643, 648 (1986). Moreover, "the purpose of Congress in enacting the FAA was to make arbitration agreements as enforceable as other contracts, *but not more so* [internal quotation marks and citations omitted, emphasis in original]." *Cap Gemini Ernst & Young, US, LLC v Nackel*, 346 F3d 360, 364 (2d Cir 2003).

It is the court - not the arbitrator - which has the initial authority to determine whether or not the parties are bound to arbitrate pursuant to the agreement. As set forth in *Cap Gemini Ernst & Young, US, LLC v Nackel*, "while the FAA creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act, in evaluating whether the parties have entered into a valid arbitration agreement, the court must look to state law principles [internal quotation marks and citation omitted]." *Id.; see also Wilson v Subway Sandwich Shops, Inc.*, 823 F Supp 194, 198 (SD NY 1993)(a court is to apply ordinary contract principles to determine whether an agreement to arbitrate exists).

FAA Applies

Plaintiff alleges that the FAA does not apply, and cites as an example, *Ferro v Association of Catholic Schools* (623 F Supp 1161, 1166-1167 [1985]). In that case, the court found that the

employment contract between a New York elementary school teacher and his New York school did not appear to be a transaction involving commerce. However, the present case is distinguishable from *Ferro v Association of Catholic Schools*.

Plaintiff is a New York resident and BSA, her employer, is a Texas corporation. BSA operates schools all over the world. Under the FAA, with exceptions not relevant here, agreements to arbitrate employment contract disputes are generally enforceable. *Circuit City Stores v Adams*, 532 US 105, 119 (2001). "[T]he FAA encompasses a wider range of transactions than those actually 'in commerce' - that is, 'within the flow of interstate commerce' [internal citation omitted]." *Citizens Bank v Alafabco, Inc.*, 539 US 52, 56 (2003); *see also Matter of Diamond Waterproofing System, Inc. v 55 Liberty Owners Corp.*, 4 NY3d at 252 (holding that the FAA applied since the out-of-state parties were involved in the transaction and various materials were obtained from out-of-state).

Accordingly, the court finds that the FAA is applicable to the arbitration provision in plaintiff's employment agreement.

Arbitration Clause Does Not Compel Arbitration

As explained above, to succeed on a motion to compel arbitration governed by the FAA, the first prong to satisfy is whether the parties created a valid agreement to arbitrate under state law. The arbitration agreement at hand contained a choice

of law clause whereby Texas law is to be applied to any arbitration and dispute. As such, Texas law is applied to any questions pertaining to contract formation. In *Ramasamy v Essar Global Ltd.* (825 F Supp 2d 466, 469 [SD NY 2011]), the court noted that the FAA does not preempt choice of law provisions, and held, "[h]ere, the employment contracts contain a Texas choice of law provision. ... Accordingly, this Court applies Texas contract law to determine whether the arbitration clause governs this dispute between [plaintiff] and [defendant]."

"Construction of an unambiguous contract is a question of law [internal quotation marks and citation omitted]." *Bates v MTH Homes-Texas, L.P.*, 177 SW3d 419, 422 (Tex App Houston, 1st Dist 2005).[1] Under the doctrine of *contra proferentem*, "an ambiguous contract will be interpreted against its author." *Evergreen Natl. Indem. Co. v Tan It All, Inc.*, 111 SW3d 669, 677 (Tex App Austin 2003).[2] Furthermore, it is the defendants' burden to demonstrate that parties agreed to arbitrate. As set forth in *Aldridge v Thrift Fin. Mktg., LLC* (376 SW3d 877, 882) [Tex App Fort Worth 2012], "[u]nder the FAA, a party seeking to

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[1] *See US Oncology Inc. v Wilmington Trust FSB*, 102 AD3d 401, 402 (1st Dept 2013) ("A contract is ambiguous when on its face it is reasonably susceptible of more than one interpretation [internal quotation marks and citations omitted]").

[2] "[A]mbiguities in a contractual instrument will be resolved *contra proferentem*, against the party who prepared or presented it." *151 W. Assoc. v Printsiples Fabric Corp.*, 61 NY2d 732, 734 (1984).

compel arbitration must satisfy a two-pronged burden of proof...."[3]

The contractual language in the arbitration clause here in issue, the phrase,"[s]hould controversy arise that requires arbitration," is ambiguous and does not definitely provide that the parties agreed that all legal disputes between them would be subject to mandatory arbitration. The language of paragraph 11 is also unclear as to what kinds or types of controversies require arbitration, if any. Defendants maintain that this paragraph is "broad" and provides for "arbitration of disputes arising out of the parties' employment relationship" (*see* Defendants' memorandum of law in support, at 6; memorandum of law in opposition at 3). Notably, however, after the phrase "should controversy arise" there is no explanatory statement such as "in connection with this agreement" or "out of the conditions of your employment," which are usually referenced in standard arbitration provisions. In addition, defense counsel tries to make his point by ignoring key words and adding others and paraphrasing the first sentence of paragraph 11 as "encompassing any 'controversy [] that requires arbitration'" (Defendants' memorandum of law in support at 6). With respect to contract interpretation, "[t]he

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[3] *See Eiseman Levine Lehrhaupt & Kakoyiannis, PC v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 (1st Dept 2007) ("proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute at issue").

plain meaning of the contractual language should be looked to in order to ascertain the intent of the parties [internal citation omitted]". *Aldridge v Thrift Fin. Mktg., LLC*, 376 SW3d at 883.[4]

The third paragraph of paragraph 11 states the following, "[i]n the event that an arbitrator is not appointed or that any arbitration process does not produce an outcome acceptable to either party, any dispute will be solely and exclusively be determined [sic.] under Texas state law." This language creates further confusion as to which, if any, future claims are subject to arbitration, since it leaves the possibility open for a judicial forum to resolve the parties' issues. There is simply no language in paragraph 11 that mandates arbitration of claims arising out of the agreement itself or plaintiff's employment.

As noted by plaintiff, the cases set forth by defendants are distinguishable from the present situation. For example, in *Rudolph & Beer v Roberts* (260 AD2d 274, 274 [1st Dept 1999]), the court resolved the issue of whether or not an unsigned arbitration agreement could be enforced. Similarly in, *Warnes, S.A. v Harvic Intl., Ltd.* (92 Civ 5515, 1993 WL 228028, *1, 1993 US Dist LEXIS 8457 [SD NY 1993]) the court upheld an unambiguous arbitration agreement where the issue was the absence of a

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[4] The New York Court of Appeals has held that, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 (1990).

properly designated arbitration forum. The arbitration clause in that case stated that "[a]ll disputes, controversies, or differences which may arise between the parties, out of or in relation to or in connection with this contract, or for the breach thereof, shall be finally settled by arbitration in New York in accordance with...." *Id.* at *1. Other cases referenced by defendants either reference broad arbitration clauses or discuss which particular claims fall within the scope of an arbitration agreement.

The court finds that the parties did not have a valid agreement to arbitrate the claims plaintiff makes in this action. Furthermore, plaintiff does not want to arbitrate the claims set forth in her complaint and, without a valid and compulsory arbitration provision, cannot be compelled to do so. *See Royston, Rayzor, Vickery & Williams, LLP v Lopez*, Number 13-11-00757, 2013 Tex App Lexis 7843, *9 (2013) ("Courts may not order parties to arbitrate unless they have agreed to do so").[5]

Since, as a result of this decision, the defendants cannot compel arbitration, a discussion regarding which of plaintiff's claims fall under the scope of the arbitration agreement is irrelevant. Likewise, although plaintiff appears to abandon her claim on an alleged defective arbitration demand, this is moot at

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[5] *See Eiseman Levine Lehrhaupt & Kakoyiannis, PC v Torino Jewelers*, 44 AD3d at 583.

this time.[6]

Defendants' Motion To Dismiss The Breach of Contract Claims as Against WCL

Defendants seek to dismiss the statutory claims as alleged against WCL, since BSA, not WCL, is the party to the employment contract. Plaintiff argues that, despite being a non-signatory, WCL should not be dismissed since she performed the services set forth in her agreement for WCL's benefit, and that WCL assumed the obligations of the agreement. In response, defendants maintain that BSA and WCL were not a joint employer of plaintiff, and that WCL cannot be held liable as BSA's alter ego.

On a motion to dismiss pursuant to CPLR 3211, the facts as alleged in the complaint are accepted as true, the plaintiff is given the benefit of every possible favorable inference, and the court must determine simply whether the facts alleged fit within any cognizable legal theory. *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375-376 (1st Dept 2003). Plaintiff has alleged that WCL's acts were "substantially intertwined" with those of BSA's. Plaintiff's memorandum of law, at 19. She worked at WCL, reported to WCL and was paid by WCL. At this time, plaintiff has provided sufficient facts to withstand dismissal of the breach of contract claims as against

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[6] The court notes that the defendants' notice of intent to arbitrate was valid and effective.

WCL. Accordingly defendants' motion to dismiss the statutory claims as against WCL, is denied.[7]

CONCLUSION AND ORDER

Accordingly, it is hereby

ORDERED that the motion of plaintiff Sarah Bottoms to stay arbitration (motion sequence 001) is granted; and it is further

ORDERED that the motion of defendants World Class Learning Academy of New York LLC, British Schools of America, LLC, John Taylor and Dawn Taylor to compel arbitration and dismiss the complaint herein (motion sequence 002) is denied in its entirety; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on October 16, 2013, at 9:30 AM.

Dated: 7/30/13

ENTER:

ANIL C. SINGH

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

[7] Defendants' request to dismiss the statutory claims as against John and Dawn Taylor, is moot, since in the amended complaint plaintiff withdrew those claims.