SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

MUHAMMAD E. MILHOUSE,

Plaintiff,

-against-

GMRI, INC. d/b/a OLIVE GARDEN,

Defendant.

INDEX NUMBER 157602/2014
Motion Sequence 001
DECISION & ORDER

DONNA MILLS, J.:

In this action for employment discrimination, plaintiff Muhammad E. Milhouse moves for leave to serve the summons and complaint beyond the 120 days prescribed by CPLR 306-b. In turn, defendant GMRI, Inc. d/b/a Olive Garden opposes and cross-moves, pursuant to CPLR 306-b, to dismiss the complaint, or, in the alternative, to stay the action and compel arbitration.

FACTUAL BACKGROUND

Plaintiff began working for defendant, a national chain, as a kitchen utility worker, in or around September 2011. He was employed at defendant's location at 696 Avenue of the Americas, New York, New York, for about 38 hours weekly, at $11 per hour. He alleges that he informed defendant on his employment application that he is a devout Christian, obliged to attend church services on Thursday evenings and Saturday mornings. However, he was initially scheduled to work on a Thursday evening, during what he was told would be a training period.

When the next schedule kept him working Thursday evenings, he complained to the restaurant's general manager, who consulted with the kitchen manager, Alberto. Alberto was

allegedly unsympathetic, cutting plaintiff's weekly work schedule to 20 hours and then less. Plaintiff also alleges that another person was hired and given plaintiff's schedule. Alberto allegedly responded to plaintiff's complaints by claiming that plaintiff's church attendance made it difficult to create an adequate schedule.

In November 2011, plaintiff called defendant's corporate offices to inform them that he was not receiving a religious accommodation and was being retaliated against by having his schedule reduced. While plaintiff asserts that local management was instructed by higher-ups to accommodate his religious observance and provide him with the hours he was originally hired for, there was no improvement.

On March 5, 2012, Yves Jean, another store manager, fired plaintiff.

The instant action commenced on August 1, 2014, with the filing of a summons and complaint asserting causes of action for employment discrimination on the basis of religion, pursuant to Administrative Code of the City of New York § 8-107 (1) (a); for employment discrimination by retaliatory action, pursuant to Administrative Code of the City of New York § 8-107 (7); and for employment discrimination by interference with protected rights, pursuant to Administrative Code of the City of New York § 8-107 (19). Chiapetta aff, exhibit 1.

DISCUSSION

Plaintiff's Motion for Leave to Extend the Time of Service

CPLR 306-b provides that service of a summons and complaint (or a summons with notice) shall occur normally within 120 days of commencement of the action, that is, the filing of the summons and complaint. "If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that

defendant, or upon good cause shown or in the interest of justice, extend the time for service."

Plaintiff contends that he sent defendant a proposed waiver of service of summons on August 4, 2014, a few days after filing. *See* Rose reply affirmation, exhibit A, for a copy of the waiver, not countersigned by defendant. Instead, the parties agreed to mediation after extended negotiations that began even before commencement of the action. Mediation was conducted unsuccessfully on February 27, 2015. Plaintiff then asked defendant to stipulate to accept service, but was refused.

Plaintiff argues that he has met the two standards set by CPLR 306-b to extend the time of service – "good cause" and "interest of justice." "[A] showing of reasonable diligence is relevant to demonstrating good cause." *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 (2001). Plaintiff claims that his offer of a waiver of service, and acceptance of defendant's request to mediate, demonstrate his good cause for delay. Plaintiff also notes that he brought this motion only a few weeks after mediation failed, admittedly after the 120-day limit for service expired.

Plaintiff maintains that granting him the extension would be in the interest of justice.

> "The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. . . . [T]he court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant."

Leader, 97 NY2d at 105-106.

Correspondence provided by both sides shows that the parties were discussing dispute resolution proceedings even before the summons and complaint were filed. *See* Rose reply

affirmation, exhibits B-D and Chiappetta aff, exhibits 2-4. A letter from plaintiff's counsel to defendant, dated January 31, 2014, announcing representation, included a draft copy of a complaint, virtually identical to that filed on August 1, 2014. Chiappetta aff, exhibit 1. Plaintiff mailed a copy of the actual summons and complaint on August 4, 2014, with a cover letter intended as a waiver of service, if countersigned. Rose reply affirmation, exhibit A. Defendant treated the service as defective, but suggested that the parties engage in defendant's dispute resolution process, as they apparently agreed to previously, rather than litigate. Letter from George B. Pauta, defendant's counsel, to Jesse Rose, plaintiff's counsel (August 27, 2014) (Pauta opposition affirmation, exhibit B).

Discussions about arbitration and/or mediation, which began before commencement of the action, continued over months thereafter, until the unsuccessful mediation of February 27, 2015. Prejudice to defendant by late service is inconceivable under these circumstances. Plaintiff's motion for leave to serve the summons and complaint beyond the statutory time limit is granted.

Defendant's Cross Motion to Dismiss the Complaint, or Compel Arbitration

Defendant's opposition to the instant motion is based on the terms of its dispute resolution process, which defendant "requires all employees to acknowledge and agree that any employment-related dispute with Defendant, including claims under local, state and federal laws relating to harassment, discrimination, or discharge, must be submitted to Defendant's Dispute Process ('DRP'), which provides for mediation and culminates in binding arbitration." Chiappetta aff, ¶ 7. Significantly, DRP insists that it "is the sole means for resolving covered employment-related disputes, instead of court actions." *Id.*, exhibit 2 at 2. Defendant, therefore, contends that the instant action is an improper vehicle to settle the dispute, outside the bounds of

DRP.

However, in spite of defendant's claim that it "requires all employees to acknowledge and agree" to DRP, it admits that it "could not find the actual agreement bearing Plaintiff's signature." *Id.*, ¶ 8. Instead, the parties' counsel attempted to negotiate a substitute agreement in June, July and August 2014. *See* Rose reply affirmation, exhibit B; Chiappetta aff, exhibits 3-4. Even while negotiating a substitute agreement, plaintiff commenced the instant action, contrary to the bar to court action found in defendant's formal DRP. An unresolved issue then was plaintiff's insistence that defendant accept service of the summons and complaint in exchange for participating in DRP.

CPLR 7503 (a) provides that a party "may apply for an order compelling arbitration" based on "a valid agreement." A court shall decide "at the threshold, whether a valid contract exists which calls for arbitration." *Banner Cas. Co. v Fox*, 86 Misc 2d 772, 773 (Sup Ct, Nassau County 1976). "The agreement [to arbitrate] must be clear, explicit and unequivocal." *Matter of Waldron (Goddess)*, 61 NY2d 181, 183 (1984). Nothing memorializes an actual agreement to arbitrate in this matter, although the parties finally proceeded to mediation on February 27, 2015. Now, conforming to defendant's formal DRP, it opposes continuing the dispute as a court action.

Since plaintiff never agreed to defendant's exclusive version of DRP, there is no reason to discontinue the instant action, and/or adhere to defendant's DRP. The standard of CPLR 7503 (a) had not been met. Defendant's cross motion is denied.

Accordingly, it is

ORDERED that the motion by plaintiff Muhammad E. Milhouse for leave to

serve the summons and complaint beyond the 120 days prescribed by CPLR 306-b is granted, and he shall serve a copy of the summons and complaint within 20 days of service of a copy of this order with notice of entry, in accordance with the Civil Practice Law and Rules; and it is further

ORDERED that defendant shall serve an answer to the complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the cross motion by defendant to dismiss the complaint, or, in the alternative, to stay the action and compel arbitration is denied.

DATED: Aug. 25, 2015

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.