Young v SixAgency, Inc.
2015 NY Slip Op 32427(U)
December 23, 2015
Supreme Court, New York County
Docket Number: 150715/2015
Judge: Joan M. Kenney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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Rachel Young,

Plaintiffs,

-against-

SixAgency, Inc., and Khalid Meniri, individually,

Defendants.

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DECISION AND ORDER
Index Number: 150715/2015
Motion Seq. No.: 001

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to compel arbitration.

Papers	**Numbered**
Notice of Motion, Affirmations, and Exhibits	1-12
Opposition Affirmation and Exhibits	13-16
Reply Memo of Law	17-18

In this action, defendants, SixAgency, Inc. (SixAgency), and Khalid Meniri (Meniri) (collectively defendants), move for an Order, pursuant to CPLR 7503, to compel arbitration and stay the action pending arbitration.

Factual Background

Plaintiff was employed by SixAgency from October 21, 2013 though November 4, 2014. As a condition of her employment, plaintiff was required to sign a Non-Disclosure Agreement. Defendants allege that she was also required to sign an At-Will Employment Agreement, which they misplaced at some point during her employment. Plaintiff disputes this, alleging that she was never required to sign an At-Will Employment Agreement. Regardless, on or about October 28, 2014, plaintiff agreed to sign the Employment Agreement in existence at that time, which she backdated to October 1, 2013.

The Employment Agreement contains the following arbitration clause:

> A. Arbitration. In consideration of my employment with the company, its promise to arbitrate all employment-related disputes and my receipt of the compensation, pay raises and other benefits paid to me by the company, at present and in the future, I agree that any and all controversies, claims, or disputes with anyone (including the company and any employee, officer, director, shareholder or benefit plan of the company, in their capacity as such or otherwise), arising out of, relating to, or resulting from my employment with the company or the termination of my employment with the company, including any breach of this agreement shall be subject to binding arbitration under the arbitration rules set forth in the New York Civil Practice Law and Rules, Article 75, Section 7501 through 7514 (the "Rules") and pursuant to New York Law. The Federal Arbitration Act shall continue to apply with full force and effect notwithstanding the application of procedural rules set forth in the Act. Disputes that I agree to arbitrate, and thereby agree to waive any right to a trial by jury, include any statutory claims under local, state, or federal law, including, but not limited to, claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act, the Worker Adjustment and Retraining Notification Act, the Employee Retirement Income Security Act of 1974, the Family and Medical Leave Act, the New York State Human Rights Law, the New York City Human Rights Law, if applicable, the New York Labor Code, the New York Workers' Compensation Law, Claims of Harassment, Discrimination, and Wrongful Termination, and any statutory or common law claims. Notwithstanding the foregoing, I understand that nothing in this agreement constitutes a waiver of my rights under Section 7 of the National Labor Relations Act. I further understand that this agreement to arbitrate also applies to any disputes that the company may have with me.

(Meniri Aff. Ex.B).

Additionally, plaintiff signed an arbitration agreement with TriNet HR Corporation (TriNet), a professional employer organization, with whom SixAgency contracted for human resources and other administrative services on behalf of SixAgency. As a condition of employment, employees were required to sign and accept the terms of TriNet's HR Passport System within 5 days of creating an account. On May 1, 2014, plaintiff electronically accepted the terms of TriNet's Terms and Conditions Agreement (TriNet Agreement), which contained the following Dispute Resolution Protocol (DRP):

> A. How the DRP Applies. This DRP covers any dispute arising out of or

relating to your employment with TriNet. The Federal Arbitration Act applies to this DRP. Also, existing interal procedures for resolving disputes, as well as the option of mediation, will continue to apply with the goal being to resolve disputes before they are arbitrated. This DRP will survive termination of the employment relationship. With only the exceptions described below, arbitration will replace going before a government agency or a court for a judge or jury trial.

F. Enforcement of the DRP. This DRP is the full and complete agreement relating to arbitration as the means to resolve covered disputes between you and TriNet and between you and your worksite employer unless the DRP is waived by your worksite employer or superseded by other terms and conditions of your employment with your worksite employer. If any portion of this DRP is determined to be unenforceable, the remainder of this DRP still will be enforceable, subject to the specific exception in section d, above. With respect to covered disputes, each party waives any rights under the law for a jury trial and agrees to arbitration in accordance with the terms of this DRP.

10. Acknowledgment. By clicking below, I am acknowledging that I have read and understand the contents of this Terms and Conditions Agreement (including, but not limited to, the DRP), that I have the responsibility to read and familiarize myself with the TriNet Employee Handbook and Additional Policies for my company and that I agree to abide by the terms and conditions set forth above and the policies and procedures set forth in the Employee Handbook and Additional Policies.

I understand that my employment with TriNet is at-will and that either I or TriNet can terminate the employment relationship at any time, with or without reason. I understand that the policies of TriNet and my company can be changed at any time, and I understand and acknowledge that none of the at-will-related language in this TCA, the Employee Handbook, or elsewhere is intended to limit the exercise of rights under Section 7 of the NLRA. Finally, I agree to abide by the terms and conditions set forth above and the policies and procedures set forth in the Employee Handbook, Addendum and Additional Policies.

Finally, I agree and understand that TriNet may change this TCA as well as its policies, procedures and benefits at any time in its sole discretion, that any updated versions of the same will be available on HR Passport and will be binding on me and that my continued employment with TriNet constitutes as acceptance of any revised documents.

(Belloise Aff. Ex.A).

Plaintiff was terminated on November 4, 2014. On January 23, 2015, plaintiff brought this action against defendants alleging discrimination (quid pro quo and hostile work

environment), harassment, wrongful termination, and retaliation based on her gender and sex under the New York State Human Rights Law and the New York City Human Rights Law.

Defendant now seeks a stay of the action and to compel arbitration given that the claims arise from plaintiff's employment with SixAgency.

Arguments

Defendant asserts that plaintiff signed two valid arbitration agreements subjecting plaintiff to binding arbitration for any claims arising from her employment with SixAgency and termination therefrom.

Plaintiff argues that the arbitration agreements are substantively and procedurally unconscionable and should be deemed void because the agreement requires plaintiff to pay equal shares of the arbitrators' and administrative fees, denies the right to attorneys' fees, and that it favors the defendants.

Discussion

CPLR 7503(a) provides that a "party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration." When deciding a motion to compel arbitration pursuant, the court's role is to determine whether there is a valid, enforceable arbitration agreement between the parties that encompasses the issue that is the subject of the motion to compel arbitration (see *Koob v IDS Fin. Servs.*, 213 AD2d 26, 30, 629 NYS2d 426 [1995]).

"It is now clear that statutory claims may be the subject of an arbitration agreement...and by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits them to their resolution in an arbitral, rather than judicial forum" (*Gilmer v Interstate/Johnson Lane Corp.*, 500 US 20 [1991]). Here, the arbitration agreement

specifically includes discrimination claims under the New York State Human Rights Law and the New York City Human Rights Law as employment-related disputes that are subject to binding arbitration.

Under New York law, a contract is unconscionable when it "is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforcible [sic] according to its literal terms." *Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 537 NYS2d 787, 534 NE2d 824, 828 (1988). Generally, a determination of unconscionability requires "a showing that the contract was both procedurally and substantively unconscionable when made–i.e. 'some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party'" (*id.;* quoting *Williams v Walker-Thomas Furniture Co.*, 350 F2d 445, 449).

"The existence of large arbitration costs could preclude a litigant...from effectively vindicating her federal statutory rights in the arbitral forum, a result which cuts against the broad public policy in favor of arbitration. The Supreme Court adopted a case-by-case approach by ruling that where...a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring the costs that would deter the party from arbitrating the claim" (*Green Tree Fin. Crop.-Alabama v Rudolph,* 531 US 79, 91 [2000]). Here, plaintiff argues that the arbitration agreement between her and SixAgency requires that plaintiff pay an equal share of the arbitrator's fees as well as administrative fees. Plaintiff estimates that the total arbitration costs and fees, ranging from $26,400 to $40,000, is prohibitively expensive and would prevent plaintiff from effectively representing her rights in an arbitral forum.

The issue of whether the fee splitting provision in the arbitration agreement is prohibitively expensive as against plaintiff need not be addressed. In its reply papers, defendant has waived the fee splitting provision, thus plaintiff cannot show that the arbitration costs could preclude her from effectively vindicating her rights in arbitration. *See In re Currency Conversion Fee Antitrust Litig.*, 265 FSupp2d 385, 411-412 (SDNY 2003).

Plaintiff also argues that the arbitration agreement is substantively unconscionable because it contains a provision denying the right to attorneys' fees. The New York City Human Rights Law (Administrative Code of City of NY §8-502(f)) provides that the court, in its discretion, may award the prevailing party costs and reasonable attorneys' fees. To the extent an arbitration agreement waives a plaintiff's right to obtain attorneys' fees, the agreement is invalid. *DeGaetano v Smith Barney, Inc.*, 983 FSupp 459,468-69 (SDNY 1997). Here, the employment agreement states that "the arbitrator may, if he or she deems appropriate, award reasonable attorneys' fees and costs to the prevailing party in the event the opposing party's claim was substantially unjustified and unreasonable, except as prohibited by law." (Miniri Aff. Ex. B, Section 14B of Employment Agreement). This arbitration provision does not deny plaintiff the right to attorneys' fees, but rather places the discretion upon the arbitrator to award attorneys' fees to the prevailing party in accordance with the law, and thus is not substantively unconscionable.

Plaintiff next argues that the arbitration agreement is substantively unconscionable in that it favors the defendants by allowing SixAgency to unilaterally modify the terms and conditions. When there is an at-will employment relationship, the employer may unilaterally alter the terms of employment, and the employee may end the employment if the new terms are unacceptable

(see *Hanlon v Macfadden Publs.*, 302 NY 502, 505, 99 NE2d 546; *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 649, 892 NYS2d 895; *JCS Controls, Inc. v Stacey,* 57 AD3d 1372, 1373-1374, 870 NYS2d 679). The alleged unconscionable provision in the employment agreement at issue states "that TriNet may change this TCA [Terms and Conditions Agreement] as well as its policies, procedures, and benefits at any time in its sole discretion, that any updated versions of the same will be available on HR Passport and will be binding on me and that my continued employment with TriNet constitutes acceptance of any revised documents." (Belloise Aff. Ex. A. Section 10). This provision is not unconscionable because any changes to the TCA would be available on the HR Passport, which is accessible to all employees, and employees either could accept the changes in exchange for continued employment or, in the alternative, if they did not agree to the changes, they could end their employment. Regardless, the employment agreement as was consented to by plaintiff upon her employment has not been changed or altered since it was first implemented in January 2013. Under the Employment Agreement, both parties are bound to arbitration, and thus cannot be said to unreasonably favor defendants. *See Desiderio v Nattional Ass'n of Sec. Dealers,* 191 F3d 198, 207 (2d Circ.1999), *cert denied,* 121 S.Ct. 756 (2001) ("arbitration agreements that bind both parties to arbitration may not be said to favor the stronger party unreasonably.").

The test for procedural inadequacy in forming a contract is whether, in light of all the facts and circumstances, a party lacked "a meaningful choice" in deciding whether to sign the contract. *Id.* Although it is true that "one who signs an agreement without full knowledge of its terms might be held to assume the risk that [s]he has entered a one-sided bargain," this rule does not apply if a plaintiff is able to demonstrate an absence of meaningful choice. *Id.* In making this

determination, a court should focus on evidence of high pressure or deceptive tactics, the use of fine print in the contract, any disparity in experience and education between the parties, and whether there was disparity in bargaining power. *See Gillman*, 73 NY2d at 10-11, 537 NYS2d 787, 534 NE2d 824.

Plaintiff alleges that as a result of harassment and pressure by her supervisor, she was forced to sign the employment agreement and back date it to several weeks prior to her start date. In order for a party to show that a contract was signed under duress, she must show "(1) a threat, (2) which was unlawfully made, and (3) caused involuntary acceptance of contract terms, (4) because the circumstances permitted no other alternative." *Kamerman v Steinberg,* 891 F2d 424, 431 (2d Cir 1989)(quoting *Gulf & W Corp. v Craftique Prods., Inc.*, 523 F.Supp. 603, 610 (SDNY 1981). Plaintiff points to several e-mails and text messages in which defendant asks plaintiff to sign the employment agreement and return it immediately because it was missing from her file. She alleges that she backdated the agreement because she did not trust defendant's motive for having her sign the agreement. Plaintiff also alleges that she was only given 5 days to sign the arbitration agreement and without any notice that she could or should consult with an attorney. She further alleges that the agreement contained a hidden waiver of class action suits.

In light of these allegations, plaintiff has not sufficiently demonstrated that she lacked a meaningful choice in signing the employment/arbitration agreement. While plaintiff says she did not trust defendant's motive, this alone does not show that she was under any threat or compulsion by unlawful restraint to sign the agreement. Plaintiff also had unlimited access to review the agreement which was posted on the HR Passport (see Belloise Aff. ¶8), and always had the option to walk away from her employment. While plaintiff argues that 5 days to review

and accept the agreement was too short of a time, she nonetheless reviewed and accepted it the same day she was presented with it. Additionally, plaintiff fails to cite any legal authority that 5 days is too short of a time. Plaintiff also fails to cite any legal authority that defendants were required to instruct her to consult with an attorney before accepting the terms of the agreement. Notwithstanding, plaintiff could have consulted with an attorney, but chose not do so. Finally, the class action waiver was not hidden in the terms of the agreement, but rather it was highlighted in bold font in Section 9 of the TriNet Agreement (see Belloise Aff. Ex. A). Moreover, courts in New York have uniformly held that an arbitration provision is enforceable even though it waives plaintiff's right to bring a class action (*see e.g. Gilmer*, 500 US 20, 32).

In light of the foregoing, the arbitration provision is valid and covers plaintiff's alleged claims.

ORDERED that defendant's motion to compel arbitration and to stay the herein litigation, is granted; and it is further

ORDERED that Young shall arbitrate her claims in accordance with the terms of the Agreement; and it is further

ORDERED that the action is stayed pending the out come of arbitration.

December 23, 2015:

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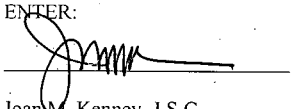

Joan M. Kenney, J.S.C.