SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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HYUNCHEOL HWANG,

Plaintiffs,

Index No.: 652288/2017

-against-

DECISION AND ORDER

MIRAE ASSET SECURITIES (USA) INC., MIRAE ASSET DAEWOO CO., LTD., HYO SEOK CHAE, JUN YOUNG KIM, AND WOONGKI CHO,

Defendants.

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Saliann Scarpulla, J.

In this action, *inter alia*, to recover damages for breach of contract, plaintiff Hyuncheol Hwang ("Hwang") moves to stay arbitration, and defendant Mirae Asset Securities (USA) Inc. ("Mirae") cross moves to compel arbitration, and stay this action pending the resolution of the arbitration.

On May 18, 2016, Hwang entered into an employment agreement with Mirae.[1] At the time, Mirae was a broker-dealer firm registered with Financial Industry Regulatory Authority ("FINRA"). Pursuant to his employment agreement, Hwang would be employed as Mirae's Head of Prime Brokerage Services and Capital Markets Business, beginning on June 1, 2016. He would be employed for a five-year term, unless Mirae terminated his employment with or without cause, or if Hwang resigned with or without cause. The employment agreement includes a mandatory forum selection clause which

[1] Mirae was then known as Daewoo Securities (America) Inc.

requires the parties to litigate any disputes relating to the terms of the agreement, including any counterclaims, in either a state or federal court sitting in New York County. The employment agreement also contained a provision requiring both Mirae and Hwang to agree to any alterations or changes to the agreement in a signed written agreement.

Immediately after entering into the employment agreement, Hwang applied to become a FINRA representative in June 2016, by filling out a Form U4, which included a clause stating "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions or by-laws of the SROs indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction."

On February 28, 2017, Mirae notified Hwang that his employment was terminated for cause because he was "unable to effectively manage such a critical and complex business," which was a material breach of his duties under the agreement.

On March 10, 2017, Hwang's counsel sent a preservation (litigation hold) letter to Mirae's counsel, indicating that Hwang intended to file claims against Mirae, and counsel requested that Mirae preserve relevant documents. On March 16, 2017, Hwang's counsel sent a draft complaint to Mirae's counsel that was captioned to be filed in Federal court.

On April 27, 2017, Mirae filed a FINRA arbitration statement of claim. In the arbitration, Mirae asserted the following claims: 1) declaratory award that Hwang was terminated for cause; 2) breach of employment agreement; 3) fraudulent inducement and

misrepresentation, seeking rescission of the agreement and recoupment of the compensation paid to Hwang under the agreement; and 4) breach of duties of good faith and loyalty owed to his employer, seeking disgorgement of the compensation paid to Hwang under the agreement. That same day, Hwang commenced this action against Mirae, its Korean parent entity, and three individual executives.

In his complaint Hwang alleges that he was terminated without cause, and is therefore entitled to his base salary for the remainder of his employment term, the remainder of his sign-on bonus, his retention bonus, his annual bonuses, his additional annual bonuses, and his benefits for the remainder of his employment term. He asserts causes of action for (1) breach of contract; (2) violation of NYLL Section 193; (3) a declaratory judgment that Hwang did not breach the agreement; (4) a declaratory judgment that the employment agreement should not be rescinded; and (5) a declaratory judgment that Hwang did not breach any duty of good faith and loyalty.

Hwang now moves to stay the arbitration and Mirae cross moves to compel arbitration and stay this action pending the resolution of the arbitration.

Hwang argues this action should not be arbitrated because his employment agreement contains a forum selection clause directing the parties to litigate any disputes relating to the terms of the agreement in a New York court. He also contends that the U4 does not amend or supersede the forum selection clause in his employment agreement, because any amendment thereto would have required both parties to enter into a signed written agreement to modify its terms.

Hwang further maintains that Mirae did not enter into an agreement with Hwang via the U4 because Mirae was not a party to the U4. Rather, the U4 was an agreement between Hwang and FINRA. Mirae merely signed a portion of the U4 in which it represented that to the best of its knowledge, Hwang was currently bonded and familiar with FINRA rules and regulations, was qualified for the position, and that Mirae had communicated with Hwang's previous employers to verify the accuracy of the information provided in the application. As such, Hwang argues, the U4 cannot constitute a written agreement to amend his employment agreement.

Mirae argues that Hwang agreed to arbitrate any employment related claims with Mirae when he signed his U4, which replaced his earlier employment agreement to resolve his claims in a different forum. Further, Rule 12200 of FINRA requires Mirae and Hwang to submit any disputes arising under the employment agreement to FINRA for arbitration.

Discussion

The proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute at issue. "A court will not order a party to submit to arbitration absent evidence of that party's unequivocal intent to arbitrate the relevant dispute and unless the dispute falls clearly within that class of claims which the parties agreed to refer to arbitration." *Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v. Torino Jewelers, Ltd.*, 44 A.D.3d 581, 583 (1st Dept. 2007).

Pursuant to FINRA Rule 12200, parties must arbitrate a dispute if arbitration is required by a written agreement, or requested by the customer; the dispute is between a

customer and a member or associated person of a member; and the dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

When he signed the U4, Hwang executed a boilerplate agreement to arbitrate any dispute, claim or controversy that could arise between him and Mirae that was required to be arbitrated under the rules. However, a month prior, Hwang and Mirae signed a negotiated employment agreement, in which both parties specifically agreed to the forum selection clause, and a clause requiring that any changes to the employment agreement be set forth in a signed written agreement.

Mirae argues that because the U4 was signed after the employment agreement, the agreement to arbitrate in the U4 automatically supplanted and superseded the forum selection clause in the employment agreement. I disagree. Mirae presents no evidence to show that the parties intended the arbitration clause in the U4 to supplant the forum selection clause in the employment agreement. Rather, the evidence presented demonstrates that the parties intended to be bound by the forum selection clause in the employment agreement.[2]

Hwang avers in his affidavit in support that, when he signed the employment agreement, both he and Mirae understood that Hwang's position at Mirae would require

[2] Notably, the First Department has held that specific contract terms can supersede FINRA's arbitration rules. *See Goldman, Sachs & Co. v. Golden Empire Schs. Fin. Auth.*, 764 F.3d 210 (2d Cir. 2014); *Bortman v. Lucander*, 150 A.D.3d 417 (1st Dept. 2017).

him to sign the FINRA U4. As such, his signing of the U4 -- which was done a few weeks after the employment contract was executed -- was contemplated when the employment agreement, and specifically the forum selection clause, was negotiated and executed. Mirae submits no evidence to the contrary.

Further, Hwang's employment contract contains a clause requiring any changes to the agreement be set forth in a signed written agreement. Mirae submits no evidence to show that both parties knowingly agreed, in a written employment contract modification, to eliminate the forum selection clause in Hwang's employment agreement. If the parties intended to change the forum for disputes concerning Hwang's employment, they would have had to indicate such in a signed written agreement, but they did not do so. *See Globe Food Services Corp. v. Consolidated Edison Co.,* 184 A.D.2d 278 (1st Dept. 1992).

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Hyuncheol Hwang's motion to stay arbitration is granted, and defendant Mirae Asset Securities (USA) Inc.'s cross motion to compel arbitration is denied; and it is further

ORDERED that the arbitration proceeding before FINRA is stayed; and it is further

ORDERED that defendants are directed to serve an answer to the complaint pursuant to the time limits set forth in the CPLR as of the date of this order.

This constitutes the decision and order of this Court.

Dated: February 28, 2018
New York, New York

J.S.C
HON. SALIANN SCARPULLA