Hichez v United Jewish Council of the E. Side
2018 NY Slip Op 32327(U)
September 17, 2018
Supreme Court, New York County
Docket Number: 653250/2017
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

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EPIFANIA HICHEZ, CARMEN CARRASCO and SEFERINA ACOSTA, individually and on behalf of all others similarly situated,

DECISION AND ORDER

Plaintiffs,

Index No. 653250/2017

-against-

UNITED JEWISH COUNCIL OF THE EAST SIDE, HOME ATTENDANT SERVICE CORP.,

Mot. Seq. No. 001

Defendant.

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KATHRYN E. FREED, J.

The following documents filed with NYSCEF were considered in deciding this motion: Document Numbers 4-16, 19-48, 51-53, 55-59.

Defendant United Jewish Council of the East Side, Home Attendant Service Corp. ("UJC") moves to compel arbitration and to stay this action. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is denied.

Plaintiffs Epifania Hichez ("Hichez"), Carmen Carrasco ("Carassco") and Seferina Acosta ("Acosta") allege that they were previously employed by UJC as home care aides, paid on an hourly basis. In the complaint, Hichez alleges that she was employed by UJC as a home care aide from May 2002 to April 2014; Carrasco alleges that she was employed in the same capacity from approximately November 2000 to November 2015; and Acosta claims

that she was also employed in that role from approximately 2007 to April 20, 2014. Plaintiffs all worked 24-hour shifts, and often worked for more than 40 hours per week.

Plaintiffs allege that UJC failed to pay them and the class they represent: 1) the statutory minimum wage, in violation of Labor Law § 652 and 12 NYCRR 142-3.1; 2) overtime pay, in violation of Labor Law Article 19 § 650, *et seq.* and 12 NYCRR 142-3.2; spread of hours pay, in violation of Labor Law §§ 190 and 650 and 12 NYCRR 142-3.4f; and all wages due, in violation of Labor Law § 663 (1). Plaintiffs also allege that UJC failed to comply with notification requirements required by Labor Law §§ 195 and 661 and 12 NYCRR § 142-3.8. Further, plaintiffs assert a cause of action for breach of contract between UJC and government agencies to pay wages, as required by the New York Home Care Worker Wage Parity Act, New York Public Health Law § 3614-c, and New York City's Fair Wages for Workers Act, and that plaintiffs are third-party beneficiaries of that contract. Finally, plaintiffs assert a claim for unjust enrichment under the Home Care Worker Wage Parity Act and the City Fair Wage for Workers Act.

Plaintiffs bring this action on their own behalf and on behalf of:

> "[a]ll current and former home care aides, meaning home health aides, personal care aid[e]s, home attendants or other licensed or unlicensed persons whose primary responsibilities include the provision of in-home assistance with activities of daily living, instrumental activities of daily living or health-related tasks,

> employed by Defendant in New York to provide care services to Defendant's elderly and disabled clients in the clients' homes during the period from six years preceding the filing of the Complaint in this case through the present (the 'Class Period')."

Complaint, ¶ 16, NYSCEF Doc. 1.

UJC moves to compel arbitration or for a stay of this action, arguing that plaintiffs are bound by the provisions of a Memorandum of Understanding ("MOA") negotiated and signed by UJC and plaintiffs' union, 1199 SEIU United Healthcare Workers East ("1199"), on December 21, 2015 which mandates mediation and binding arbitration of "all claims brought by either the Union or Employees, asserting violations of or arising under the Fair Labor Standards Act ('FLSA'), New York Home care Worker Wage Parity Law, or New York Labor Law (collectively, the 'Covered Statutes')...." NYSCEF Doc. 10.

After plaintiffs filed their complaint, UJC sent a letter to 1199 notifying the Union that a class action lawsuit had been filed by the plaintiffs, arguing that the claims in the lawsuit were governed by the Alternate Dispute Resolution ("ADR") provisions of the MOA, and indicating that they must be submitted to Arbitrator Martin F. Scheinman ("Scheinman") pursuant to the MOA. NYSCEF Doc. 11. When the parties failed to resolve the dispute, UJC submitted the issues to Scheinman. NYSCEF Doc. 33.

In its brief in support of its motion, UJC, anticipating that plaintiffs would argue that the ADR provisions do not apply to them

because the term "employee", as used in the MOA, does not apply to former employees, asserts that, because plaintiffs were employees at the time that they were allegedly aggrieved, and because there is no temporal limitation within the alternate dispute provisions, plaintiffs are governed by the provisions of the MOA. UJC also argues that, to the extent that there is any ambiguity in the applicability of the 2015 MOA to this case, matters involving contract interpretation are for the arbitrator to determine.

In support of their argument that they are not bound by the MOA, plaintiffs rely on *Chu v Chinese-American Planning Council Home Attendant Program, Inc.* (194 F Supp 3d 221, 228 [SDNY, 2016]), a case similar to this one, brought on behalf of former home care workers. In *Chu*, the court stated that plaintiffs, who were no longer employed by the defendant home care agency, could not be required to arbitrate a claim pursuant to an ADR provision adopted after they left the agency's employ because they "may not be bound by subsequently adopted amendments to a collective bargaining agreement to which they were not parties." The court noted that, "[b]ecause the obligation to arbitrate is created by contract, a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* (internal quotation marks and citation omitted).

UJC contends that the decision in *Chu* should be disregarded as mere dicta because the court was remanding the action to state

court for lack of subject matter jurisdiction, and, in any event, this Court is not bound by the decision of a federal court. Since the *Chu* decision, however, the question of whether plaintiffs can be compelled to arbitrate pursuant to an agreement entered into between the union and an employer who has ceased employment has been addressed by the Supreme Court, New York County. In a carefully reasoned decision citing both *Chu* (194 F Supp 3d 221) and *Safonova v Home Care Servs. For Independent Living, Inc.*, (Sup Ct, NY County, January 17, 2017, Rakower, J., Index No. 150642/2016), this Court (Hagler, J.) held in *Konstantynovska v Caring Professionals, Inc.* (2018 NY Slip Op 31475[U][Sup Ct, NY County 2018]) that "to the extent that they were not employed with defendant at the time the MOA was ratified, [plaintiffs] are not bound by it." *Id.* at *7. As in *Konstantynovska,* here "[t]here is no language in the MOA binding former employees or former union members who left prior to its creation." *Id.* at *9.

While recognizing the "strong federal policy favoring arbitration as an alternative means of dispute resolution" (*Ragone v Atlantic Video at Manhattan Ctr.*, 595 F3d 115, 121 [2d Cir 2010][internal quotation marks and citation omitted]), this Court agrees with the rationale in *Konstantynovska,* and concludes that plaintiffs, who were no longer employed by UJC when the MOA was signed, are not bound by its alternate dispute provisions. Moreover, "'whether the parties have entered into a valid

arbitration agreement and, if so, whether the issue sought to be submitted to arbitration falls within the scope of that agreement'" (*Konstantynovska, id*, *5, quoting *Edgewater Growth Capital Partners, L.P. v Greenstar N. Am. Holdings, Inc.*, 68 AD3d 439, 439 [1st Dept 2010]), is an issue for the court to decide, and is not one to be resolved by the arbitrator, as UJC contends. U J C also argues that, because plaintiffs' class allegations purport to bring this action on behalf of current as well as former home care aides, they are bound by the ADR requirements. However, plaintiffs have not yet moved to certify the class they seek to represent. When and if they do so move, the scope of that class and its implications will be considered by the court.

Further, UJC contends that, in the case of *Chan v Chinese American Planning Council Home Attendant Program* (SDNY, February 3, 2016, 15-cv-9605 [KBF]), which had been removed to federal court, the court directed that the entire case be arbitrated, staying the state proceedings, despite the fact that some of the class included individuals who had left the defendant's employment at some point prior to the effective date of the MOA establishing the ADR procedures. However, there is no indication that the question of the scope of the class, or the applicability of the decision to persons who had left employment prior to the adoption of the arbitration provision was even considered in the remand decision.

Because this Court has concluded that plaintiffs are not bound

by the ADR provisions of the MOA, it need not reach the parties' arguments concerning whether those provisions are unenforceable because they violate the National Labor Relations Act and/or prevent plaintiffs from vindicating their rights due to the cost of arbitration.

Finally, defendant argues that, even if this court concludes that plaintiffs are not bound by the ADR provisions of the MOA, it should stay this action pending arbitration of claims that it referred to Scheinman by letter dated September 8, 2017. NYSCEF Doc. 33. However, since this Court has concluded that plaintiffs are not bound by the MOA, it declines to do so.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion of defendant United Jewish Council of the East Side, Home Attendant Service Corp. to compel arbitration and stay the action is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: September 17, 2018

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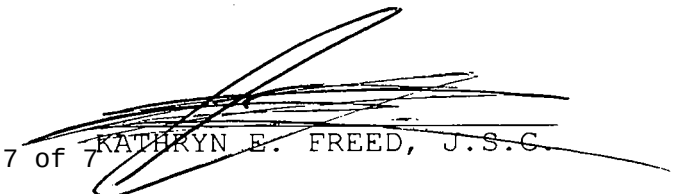

KATHRYN E. FREED, J.S.C.