SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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KURT DECKER and MICHAEL CIMINO,

Plaintiffs,

-against-

NBCUNIVERSAL MEDIA, LLC, and AHMIR KHALIB THOMPSON p/k/a QUESTLOVE,

Defendants.

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DECISION AND ORDER
Index №.: 150719/18
Motion Seq. Nos. 003 and 004

CAROL R. EDMEAD, J.S.C.:

In an action alleging racial discrimination against cameramen at the Tonight Show, defendants Ahmir Khalib Thompson p/k/a Questlove (Questlove) and NBCUniversal Media, LLC (NBC) move separately, pursuant to CPLR 3211, the Federal Arbitration Act, and CPLR 7503 (a), to compel arbitration and to dismiss the amended complaint.[1] The motions are consolidated for disposition.

BACKGROUND

This action arises out of a text message. For the purposes of these motions, the text message functions as MacGuffins do in film: it animates the action, but we never learn the nature of its actual substance. That is, neither defendants nor plaintiffs submit the text message in support or opposition of these motions. Whatever the contents of the text, all sides agree that it conveyed a racist message.

The court should pause here to be more specific and to parse a few issues. The text message directed racial animus against African Americans. Plaintiffs Kurt Decker and Michael

[1] While they move separately, Defendants rely a joint memorandum of law, as well as a joint memorandum of law in reply.

Cimino are both Caucasian and Questlove is African American. Or, for the sake of plainspokenness, Plaintiffs, who were cameramen for NBC's Tonight Show, are white, and Questlove, who is the musical director for the Tonight Show, is black. Aside from being the musical director of the Tonight Show, Questlove is the drummer for and co-founder of the Roots, a hip hop band from Philadelphia. Nonparty Mark Kelly (Kelly) is a member of The Roots, as well as a musician on the Tonight Show. Along with Plaintiffs, Kelly received the racist text, which was allegedly sent by a Tonight Show stagehand (*see* Amended Complaint, ¶ 4, NYSCEF doc No. 16).

The gravamen of Plaintiffs' claims is that they were treated disparately from Kelly on the basis of their race. In short, they were fired, while Kelly retained his position. More specifically, Plaintiffs—who were daily hires, although they had each been hired daily for over a decade—were suspended in June 2017 and fired in August 2017. Plaintiffs claim that the alleged discriminatory treatment is exacerbated by the fact they did not break NBC policy with respect to the message, while Kelly did. Pursuant to NBC's human relations training manual, "[s]haring an inappropriate meme at work is a breach of company policy. If you did not solicit the content, it is not your fault that you received it" (*id.*, ¶ 25). Plaintiffs maintain that they neither solicited nor shared the content, and allege that Kelly violated the policy by sharing the message with his bandmates (*id.*, ¶ 24).

However, while Kelly may have violated the letter of this policy, it is less clear whether he violated NBC's anti-racist intent in promulgating the policy, as he appears to have shared the message in disgust rather than approval. In fact, according to Plaintiffs, Questlove's disgust upon seeing the text caused him to demand that any white people who were on the text-thread be fired (*id.*, ¶ 44). This demand, according to Plaintiffs, was buttressed by an ultimatum: either they

were fired, Plaintiffs' allege, or Questlove threatened to quit the show (*id.*, ¶ 48). Plaintiffs maintain that this demand, rather an investigation that they characterize as pretextual and substantially unfair, was the reason for their firing (*id.*). That investigation culminated on August 3, 2017, when they were fired (*id.*, ¶ 65, 73). During the investigation, nonparty Mary Beth Scalici (Scalici), an NBC executive, allegedly appeared at a Tonight Show staff meeting to explain why Decker and Cimino had been absent from work (*id.* at 50).

Plaintiffs do not know the specific date when this meeting took place, but they do allege that Scalici stated Decker and Cimino were being fired for violating the policy, quoted above, which prohibits employees from sharing racist memes. Plaintiffs also allege that Scalici failed to share the following with Tonight Show staff:

> "that (i) the Text Message was not solicited by Plaintiffs; (ii) Plaintiffs had not responded or otherwise replied to the Text Message; (iii) Plaintiffs reported the Text Message to management within twenty-four hours of its receipt; (iv) Plaintiffs had not violated NBC's Company Policy; (v) Kelly did violate [the policy]; (vi) the real reason Plaintiffs were being terminated was because [Questlove] had unlawfully demanded that NBC executives terminate Plaintiffs employment because they were [white] and had received the Text Message; and (vii) the reason Kelly was not being terminated … was because he was [black] and [Questlove] did not also demand his termination"

(*id.*, ¶ 53).

Plaintiffs filed their initial Complaint on January 24, 2018. Defendants moved to compel arbitration and dismiss the Complaint in March of this year (motion seq. Nos. 001 and 002), but Plaintiffs amended the Complaint before the court resolved those motions and Defendants made the present motions to compel and dismiss. The Amended Complaint, filed on May 4, 2018, alleges five causes of action: (1) racial discrimination by NBC under the New York Executive Law § 296 (the State Human Rights Law); (2) racial discrimination by NBC under the New York City Administrative Code § 8-101 (the City Human Rights Law); (3) aiding and abetting racial

discrimination by Questlove under the State Human Rights Law; (4) aiding and abetting racial discrimination by Questlove under the City Human Rights Law; and (5) defamation *per se* and defamation by implication against NBC.

Defendants argue that Plaintiffs' sole avenue to pursue these claims, pursuant to the Master Agreement between Plaintiff's union, the NABET-CWA, and NBC (the CBA), is arbitration. Plaintiffs, on the other hand, maintain that they may elect whether to pursue the claims in arbitration or in court. The court held oral argument on these motions on September 25, 2018. After hearing and probing the arguments of all parties, the court advised that the arbitration of these claims is required. This decision memorializes the reasoning behind that ruling.

DISCUSSION

Both Plaintiffs and Defendants agree that this motion to compel arbitration should be decided under the Federal Arbitration Act (the FAA). "In the context of motions to compel arbitration brought under [the FAA], the court applies a standard similar to that applicable for a motion for summary judgment (*Bensadoun v Jobe-Riat*, 316 F3d 171, 175 [2d Cir 2003]). In New York as well as federal court, that means drawing "all reasonable inferences in favor of the non-moving parties" (*Agli v Turner Constr. Co.*, 237 AD2d 173 [1st Dept 1997]; *see Nicosia v Amazon.com*, 834 F3d 220, 229 [2d Cir 2016]).

I. The FAA and Related New York Law

Enacted in 1925, the FAA provides:

> A written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"

(9 USC § 2).

A. FAA Applicability to Claims Otherwise Judiciable in State Court

The Supreme Court has held that, through Section 2 of the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration" (*Perry v Thomas*, 482 US 483, 489 [1987]). The Court of Appeals has similarly held that the FAA requires New York courts to compel arbitration when the FAA is applicable (*GAF Corp. v Werner*, 66 NY2d 97, 105 [1985]). Moreover, the general policy in favor of arbitration promulgated by the FAA has been reflected in New York caselaw (*see, e.g.*, Singer v Jeffries & Co., 78 NY2d 76, 85). Through court decisions since 1925, the scope of the FAA has grown; as Judge Weinstein, the rightfully lionized federal judge, has observed: "the FAA's reach has expanded to permit or require arbitration of many federal and state claims" (*Abdullayeva v Attending Homecare Services, LLC*, 2018 WL 1181644, *4 [EDNY 2018], citing *More Than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 Berkeley J. Emp. & Lab. L. 31). [2]

As to collective bargaining agreements, New York Courts have adopted the standard developed in federal court for evaluating whether arbitration is mandatory. In *McClellan v Majestic Tenants Corp.* (68 AD3d 574 [1st Dept 2009]) and *Sum v Tishman Speyer Props., Inc.* (37 AD3d 284 [1st Dept 2007]), the First Department upheld trial court decisions dismissing discrimination claims and compelling arbitration. In both cases, the First Department cited to the Supreme Court's decision in *Wright v Universal Maritime Services Corp.* (525 US 70 [1998]),

[2] While the parties thrust and parried over the impact of *Abdullayeva* on the present case at oral argument, the court and counsel for all parties stipulated as to the greatness of Judge Weinstein.

which held that "a union waiver of employee rights to a federal judicial forum for employment discrimination claims must be clear and unmistakable" (*id* at. 82 n 2). In both *McClellan* and *Sum*, the First Department, applying the standard from *Wright* held that the waiver of the employees' rights to a judicial forum in New York were "clear and unmistakable" (*McCllellan*, 68 AD3d at 574-575; *Sum,* 37 AD3d at 284).

For an example of what the First Department finds to be "clear and unmistakable," the subject waiver in *McClellan* provided:

> "There shall be no discrimination against any … employees … by reason of … any characteristic protected by law, including, but not limited to, claims made pursuant to …[the State Human Rights], [the City Human Rights Law], or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure [outlined in another part of the agreement] as sole and exclusive remedy for violations"

(*McCllelan v Majestic Teants Corp*, 20 Misc3d 1110[A] at *2 [Sup Ct, Bronx County 2008, Hunter, J.]).

Similarly, the subject waiver in *Sum* provided that "[t]here shall be no discrimination against … any … employee by reason of … any characteristic protected by law" (*Sum v Tishman Speyer Properties, Inc.*, 2005 WL 6229793 [NY Sup Ct, NY County 2005]). Similar to the waiver in *McClellan*, the waiver in *Sum* provided that "[a]ll claims arising under this provision shall be subject to the grievance and arbitration procedure [outlined in another part of the agreement] as the sole and exclusive remedy for violations of this provision" (*id.*). Finally, *Sum*, like *McClellan*, references specific laws, albeit parenthetically: "(This shall include claims made pursuant to … [the State Human Rights Law], [the City Human Rights Law].

B. CPLR Article 75

New York's statutory framework around arbitration, embodied in CPLR Article 75, largely overlaps with and echoes the FAA. CPLR 7501, entitled "Effect of arbitration agreement," provides:

> "A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute"

Generally, the Court of Appeals has made clear that the New York Legislature, like Congress, has shown a policy preference for arbitration: "The CPLR arbitration provisions (CPLR 7501 *et seq*) evidence a legislative intent to encourage arbitration" (*Weinrott v. Carp*, 32 NY2d 190, 199 [1973]).

However, by adopting and applying the Supreme Court's standard of "clear and unmistakable" for cases involving statutory rights and collective bargaining agreements, New York has also shown that it is sensitive to the special circumstances of union-negotiated agreements and the effects of those agreements on individual workers. Finally, the Legislature, through CPLR 7511, provided a mechanism for vacating or modifying arbitration awards. While this mechanism is "limited to instances where the award is violative of a strong public policy, is irrational, or clearly exceeds a specific limitation on an arbitrator's power," it is more than a mere rubber stamp and New York courts do not hesitate to use it in appropriate circumstances (*Matter of New York City Tr. Auth. v Phillips*, 162 AD3d 93 [1st Dept 2018] [internal citation

and quotation marks omitted]; *see also Matter of Wright v New York City Tr Auth* (2018 N.Y. Slip Op 28293 [NY Sup Ct, NY County 2018]).

C. The CBA

1. The Discrimination Claims

Section 2.1 of the CBA is entitled "No Discrimination." It provides, in relevant part, that neither the union nor NBC will "discriminate against any employee because of race ..." or "color ... in violation of [anti-discrimination laws], including [the State Human Rights Law]" and "[the City Human Rights Law]." Article 20 of the CBA is entitled "Grievances and Arbitration." Its first subsection describes the grievance process and states that an employee "may request that the Union file a grievance ... alleging that [NBC] has violated [the antidiscrimination provision] of Section 2.1 (NYSCEF, doc No. 9, ¶ 20.1). The CBA goes on to say that, if the union does not timely file a "grievance" alleging a violation of section 2.1, then the employee "may submit his or her claim to the Company's mandatory dispute resolution program (currently called 'Solutions')." The double use of "may" might have created a situation where employees were free to address violations of section 2.1 through arbitration, or in court, if the CBA did not follow them up with explicit waiver language:

> "The process described in this paragraph shall provide the sole and exclusive procedure for resolution of such claims, and neither the Union nor any aggrieved employee may file an action or complaint in court on any claim that arises under Section 2.1, having expressly waived the right to so file"

(*id.*).

This language is on par with what the First Department found "clear and unmistakable" in *McClellan* and *Sum*. Plaintiffs, however, seek to avoid arbitration and pursue a plenary action

in court, under the precedent of *Lawrence v Sol G. Atlas Realty Co., Inc.*, a recent Second Circuit case applying the "clear and unmistakable standard (841 F3d 81 [2d Cir 2016]).

In *Lawrence*, the plaintiff, a porter, claimed that his employer, a management company, discriminated against him on the basis of race and national origin in violation of federal law, as well as the State Human Rights Law (*id.* at 82).[3] The Court held that, under *Wright*, a waiver of the right to pursue statutory discrimination claims must be so clear that "the wording is not susceptible to a contrary reading" (*id.* at 84). The Second Circuit found that the language in the subject collective bargaining agreement was, in fact, subject to a reading contrary to the defendant's preferred reading barring access to federal court (*id.* at 85). Crucial to this determination was an ambiguity between contractual rights and statutory rights (*id.*).

That is, the Second Circuit held that the subject "No Discrimination" provision

> "may plausibly be interpreted to require arbitration of contractual disputes only. It makes no mention of 'claims' or 'causes of action' It cites no statutes. It refers to disputes under 'this provision,' not under statutes. The references to 'law' do no more than define the characteristics on which discrimination is contractually forbidden under the CBA. They do not suggest that statutory discrimination claims based on those characteristics are subject to arbitration"

(*id.*).

The CBA here, in contrast to its counterpart in *Lawrence*, does refer to specific statutes, including the ones Plaintiffs allege violation of in the Amended Complaint, and the CBA here does refer to "claims." While Plaintiffs point to the use of "grievance" in the portion of section 20.1 of the CBA that delineates the process for addressing a violation of section 2.1, the portion of section 20.1 that specifically addresses the issue of waiver uses the term "claims" (NYSCEF,

[3] The plaintiff in *Lawrence* also claimed that his employer retaliated against him for complaining about the alleged discrimination in violation of various laws, including the State Human Right's Law and the New York Labor Law.

doc No. 9, ¶ 20.1). Finally, the CBA here does suggest that claims based on the State Human Rights Law and the City Human Rights Law are subject to arbitration, as it states that "any claim that arises under Section 2.1, having expressly waived the right to so file" (*id.*).

Plaintiffs urge a reading of this waiver that limits it to contractual claims "arising" out of section 2.1, and excludes statutory claims. Under this reading, section 2.1 provides protections that are coextensive with the State Human Rights Law and the City Human Rights Law and other anti-discrimination laws, and allows employees to seek redress of those rights through a grievance system whose final stop is arbitration, while also allowing employees, if they choose, to seek redress for statutory violations in either federal and state court.

Such a reading is consistent with Judge Weinstein's decision *Abdullayeva*. In that case, a home health worker alleged that her employer violated the Fair Labor and Standards Act (the FLSA) and New York law by failing to pay her overtime (2018 WL 1181644). The employer defendant moved to compel arbitration based on a collective bargaining agreement which, in the introductory clause to its arbitration provision, "specifically mention[ed] the FLSA, New York Home Care Worker Wage Parity Law, and New York Labor Law" (id.). Moreover, and like the CBA here, the agreement in *Abdullayeva* provided that "'all claims' brought under these statutes 'in any manner' shall 'be subject exclusively' to the grievance and arbitration procedures'" (*id.* [internal quotation marks refer to the subject collective bargaining agreement]).

Moreover, the grievance procedure in the *Abdullayeva* CBA, like the NBC/NABET-CWA CBA, used permissive "may" language (*id.*). Based on this permissive language and the absence of a requirement that an employee file a union grievance, Judge Weinstein held that the "the arbitration clause is 'susceptible to a contrary reading'; namely, that the employee can choose whether to arbitrate" (*id.*, citing *Lawrence*, 841 F3d at 83).

However, while it is clear that Plaintiffs' reading of the CBA is consistent with *Abdulleyeva*, it equally clear that it is inconsistent with *McClellan* and *Sum*, which dealt with agreements substantially similar to the CBA and the agreement in *Abdulleyeva*. In these circumstances, this court must follow the First Department's example in applying the Supreme Court's "clear and unmistakable" test. Thus, *McClellan* and *Sum* control.

Accordingly, the CBA's clear and unmistakable waiver, as those terms are construed by *McClellan*, *Sum*, and *Lawrence*, requires that arbitration is the sole and exclusive forum for Plaintiff's discrimination claims. This includes Plaintiffs' claims against Questlove, who is not, as Plaintiffs' claim, a third-party with respect to NBC. Finally, for two reasons the court rejects Plaintiffs' argument that the CBA does not govern, as it expired: first, the CBA was in force when the complained of conduct took place; second, the CBA was renewed.

2. Defamation

Plaintiffs make no individualized arguments as to why their defamation claims, as opposed to their discrimination claims, should not be compelled into arbitration.[4] Accordingly, the court leaves the question of the arbitrability of the defamation claims to the arbitrator (*see generally ACE Capital Re Overseas Ltd. v Cent. United Life Ins. Co*, 307 F3d 24, 34 [2d Cir 2002] ["when parties use expansive in drafting an arbitration clause, presumably they intend all issues that touch matters within the main agreement to be arbitrated, while the scope of a narrow arbitration clause is obviously more limited"] [internal quotation marks and citation omitted]).

[4] Plaintiffs do make arguments as to why their defamation claims should survive a motion to dismiss. Defendants argue in the alternative that, if the court does not grant the motion to compel arbitration, it should dismiss the defamation claims. As the court is granting the motion to compel, it does not reach the issue of the merits of the defamation claim.

CONCLUSION

Accordingly, it is

ORDERED that Defendants' motions to compel arbitration and dismiss Plaintiffs' Amended Complaint (motion seq. Nos. 003 and 004) are granted; and it is further

ORDERED that counsel for NBCUniversal Media, LLC shall serve a copy of this order, along with notice entry, on all parties within 15 days of entry.

Dated: October 5, 2018

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.