Belabarodaya v Personal-Touch Home Care of N. Y., Inc.
2018 NY Slip Op 33337(U)
December 21, 2018
Supreme Court, New York County
Docket Number: 152051/2018
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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INDEX NO. 152051/2018

MOTION DATE 04/23/2018

MOTION SEQ. NO. 001

NELA BELABARODAYA, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED WHO WERE EMPLOYED BY PERSONAL-TOUCH HOME CARE OF N. Y., INC., PERSONAL TOUCH HOME CARE IPA, INC., PERSONAL TOUCH HOME AIDES OF NEW YORK INC., AND PERSONAL TOUCH HOME CARE AGENCY, LLC D/B/A,

Plaintiff,

- v -

PERSONAL-TOUCH HOME CARE OF N. Y., INC., PERSONAL TOUCH HOME CARE IPA, INC., PERSONAL TOUCH HOME AIDES OF NEW YORK INC., PERSONAL TOUCH HOME CARE AGENCY, LLC, AND/OR ANY OTHER RELATED ENTITIES

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36

were read on this motion to/for COMPEL ARBITRATION.

Upon the foregoing documents:

Defendants Personal Touch Home Care of N.Y., Inc. d/b/a Personal Touch Home Care, Personal Touch Home Care IPA d/b/a Personal Touch Home Care, and Personal Touch Home Care Agency. LLC d/b/a Personal Touch Home Care (together Defendants) move, pursuant to Article 3 of the Federal Arbitration Act, 9 U.S.C. § 3, and CPLR 7503 (a) and 2201, to compel arbitration and stay this action, and for an order granting defendants their attorney's fees. CPLR 7503 (a) provides, in relevant part:

> "If the application [to compel arbitration] is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration."

This is one of more than 100 cases that have been brought by former care givers, alleging that the companies, for which they worked, underpaid them, in violation of various state and

federal laws. Plaintiff, here, alleges that Defendants violated Labor Law §§ 191 and 193, and 12 NYCRR §§ 142-2.1, 142-2.2, and 142-2.4, and breached their employers' contracts with New York City agencies, of which plaintiff claims to be a third-party beneficiary, by failing to pay her, and the putative class members, overtime for hours worked in excess of 40 per week, failing to pay the "spread of hours" premium for an additional hour at the minimum wage, for hours worked in excess of 10 in any day, and failing to reimburse them for purchases that they made on behalf of those for whom they cared.

A party seeking to compel arbitration bears the burden of proving a valid and applicable agreement to arbitrate, which covers the matter at issue (*Matter of Pictet Funds (Europe) S.A. v Emerging Mgrs. Group, L.P.,* 147 AD3d 669 [1st Dept 2017]; *Eiseman Levine Lehrhaupt & Kakayoannis, P.C. v Torino Jewelers, Ltd.*, 144 AD3d 581, 583 [1st Dept 2017]). The agreement (Agreement) that Defendants adduce is between defendant Personal Touch Home Care of N.Y., Inc. (PT), and Local 1199SEIU United Health Care Workers East (the Union), creating a new article in a collective bargaining agreement between those parties, providing for the mediation and 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." Spielberger aff, exhibit B at ¶ 1. Plaintiff was a member of the Union, and she was employed by PT. The Agreement is presented solely in the form of an email, dated March 7, 2016, and addressed to the executive vice president of the Union. A first collective bargaining agreement between PT and the Union, which expired in 2009, was replaced by a second agreement (the CBA), which expired on December 31, 2013, and was succeeded by a "Memorandum of Agreement" (MOA), executed by the parties on July 23, 2014. The MOA provided, among other things, that PT and the Union would, thereafter,

"meet in good faith to negotiate ... an alternative dispute resolution procedure." Spielberger aff, exhibit D at ¶ 23. Presumably, the Agreement is the result of that effort. There is no similar general provision in any of the prior agreements between PT and the Union. The dispositive issues, here, are whether the Agreement is valid, and, if it is, whether plaintiff is bound by it.

Plaintiff argues that Defendants have not shown when, if ever, the Agreement was ratified by the members of the Union. Unless provided for, in a collective bargaining agreement, however, or by statute, union ratification is not a prerequisite to the effectiveness of a contract (*Safanova v Home Care Servs. for Ind. Living, Inc.* 165 AD3d 482, 483 [1st Dept 2018], citing *Granite Rock Co. v International Bhd. Of Teamsters,* 561 US 287, 296 n 4. [2010]). Here, neither the Agreement, nor the MOA, requires ratification of the Agreement as a condition of its effectiveness. By its own terms, the Agreement "is hereby created." Spielberger aff, exhibit B at 1. Accordingly, it became effective as of the date on which it was announced, to wit, March 7, 2016. The complaint, here, alleges that plaintiff was employed by defendants "from approximately October 22, 2014 through approximately June 2016." Ekelman aff, exhibit A ¶ 27. Accordingly, plaintiff is bound by the Agreement.

Chu v Chinese-American Planning Council, Home Attendant Program, Inc., (194 F Supp 3d 221 [SD NY 2016]), on which plaintiff relies, is distinguishable, because that case held that a person who, unlike plaintiff, ended her employment before a requirement to mediate and arbitrate became effective, was not bound by that agreement. Plaintiff also relies upon *Abdullayeva v Attending Homecare Servs., LLC* (2018 U.S. Dist. LEXIS 35552 [ED NY, Mar. 5, 2016]), in which the court considered an agreement almost identical to the one here. This court respectfully disagrees with the reasoning of that case. While paragraphs two to and three of the

Agreement, indeed, refer solely to the parties that entered into it, that is, the Unions and the employers, paragraph one of the Agreement explicitly provides that:

> "To ensure the uniform administration and interpretation of this Agreement in connection with federal, state, and local wage-hour and wage parity statutes, all claims brought by either the Union or Employees, asserting violations of or arising under the Fair Labor Standards Act. . . New York Home Care Wage Parity Law, or New York Labor Law . . . , in any manner shall be subject exclusively, to the grievance and arbitration procedures described in this Article."

Spielberger aff, exhibit B, ¶ 1. Accordingly, while paragraph four of the Agreement provides, in relevant part:

> "In the event an employee has requested, in writing, that the Union process a grievance alleging violations of the Covered Statutes, and the Union declines to process a grievance . . . an Employee solely on behalf of herself, may submit her individual claim to mediation, or following the conclusion of mediation, to arbitration."

The optative phrase, "in the event that," does not give employees a choice between initiating a grievance and filing a lawsuit, but solely provides for the procedures to be followed, in the event that an employee files a grievance, of the kind described. Paragraph one provides that any claim under the enumerated statutes "shall be subject exclusively" to those procedures. The *Abdullayeva* court noted that employees are not required to use the grievance and arbitration procedures provided for, however, the Agreement bars employees from commencing lawsuits to vindicate their rights under the enumerated statutes.

Defendants provide no basis for their request for attorney's fees and that request is denied. Finally, plaintiff does not argue that the imposition of a specific mediator, and arbitrator, violates a would-be grievant's right to due process, but she notes that the *Abdullayeva* court so held. That court cited no case in support of that holding, and *Lewin v Allied Maintenance Corp.* (1981 WL 2318 [US Dist Ct SD NY Jan.14,1981]) is to the contrary.

Accordingly, it is hereby

ORDERED that the motion of defendants Personal Touch Home Care of N.Y. Inc., Personal Touch Home Care IPA, Inc., Personal Touch Home Aids of New York Inc and Personal Touch Home Agency LLC d/b/a Personal Touch Home Care to compel arbitration is granted; and it is further

ORDERED that this action is stayed pending the conclusion of such arbitration; and it is further

ORDERED that Defendants' request for attorney's fees is denied.

12/21/2018
DATE

DAVID BENJAMIN COHEN, J.S.C.

HON. DAVID B. COHEN
J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
	X	GRANTED	DENIED	GRANTED IN PART		OTHER	
APPLICATION:		SETTLE ORDER		SUBMIT ORDER			
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT		REFERENCE	