

<b>Hichez v United Jewish Council of the E. Side</b>
2020 NY Slip Op 31676(U)
May 27, 2020
Supreme Court, New York County
Docket Number: 653250/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

*Justice*

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**INDEX NO.** 653250/2017

PIFANIA HICHEZ, CARMEN CARRASCO, SEFERINA ACOSTA,

Plaintiffs,

**MOTION SEQ. NO.** 004 and 005

- v -

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

Defendant.

**DECISION + ORDER ON MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 127, 128, 129, 130, 131, 132, 147

were read on this motion to/for STAY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 138, 139, 140, 141, 142, 143, 144, 145, 146

were read on this motion to/for VACATE STAY.

In this putative class action commenced by plaintiffs Pifania Hichez, Carmen Carrasco, and Seferina Acosta and other similarly situated individuals against defendant United Jewish Council of the East Side Home Attendant Service Corp. seeking to recover, inter alia, unpaid wages, plaintiffs move, by order to show cause (“OSC”) (motion sequence 004), for: 1) a temporary restraining order (“TRO”) prohibiting arbitration of plaintiffs’ claims asserted in this action including, but not limited to, the January 15, 2020 global arbitration of the claims of the plaintiffs named in the captioned action as well as the claims of the putative

class; 2) a preliminary and permanent injunction against arbitration of plaintiffs' claims, including the claims of the putative class; and 3) such other and further relief as this Court deems just and proper. Doc. 124. Defendant opposes the application. Plaintiff also moves, pursuant to CPLR 2201 (motion sequence 005), for an order vacating the stay of all proceedings pursuant to the order of this Court entered July 1, 2019. Doc. 138.<sup>1</sup> Defendant opposes this motion as well. After considering the positions of the parties, and after a review of the relevant statutes and case law, the motions are decided as follows.

#### **FACTUAL AND PROCEDURAL BACKGROUND:**

The facts of this matter are set forth in detail in the orders of this Court entered September 18, 2018 (the 9/18/18 order") (Doc. 60), which decided motion sequence 001, and July 1, 2019 ("the 7/1/19 order") (Docs. 111-112), which decided motion sequence numbers 002 and 003. Any additional relevant facts are set forth below.

In brief, in the 9/18/18 order, this Court denied defendant's motion to compel arbitration and to stay this action (thereby resolving motion sequence 001).

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<sup>1</sup> Although plaintiff states that the order was entered on June 24, 2019, it was actually entered on July 1, 2019. Doc.111.

Doc. 60. Defendant filed a notice of appeal from the 9/18/18 order on October 12, 2018. Doc. 74.

In the 7/1/19 order, this Court denied defendant's motion to reargue the application it filed under motion sequence 001 (thereby resolving motion sequence 002) and granted defendant's motion "for a stay pending the determination of its appeal" from the denial of its motion to compel arbitration and to stay this action (thereby resolving motion sequence 003). Docs. 111-112.<sup>2</sup>

On December 24, 2019, plaintiffs' counsel received email correspondence from Martin F. Scheinman, Esq., the contract arbitrator for plaintiffs' union, 1199 SEIU United Healthcare Workers East ("1199"), who was identified in the 2015 memorandum of agreement ("the 2015 MOA"), advising that a global arbitration was scheduled for January 15, 2020 to resolve all unpaid wage and benefit claims filed against various home health care agencies which had collective bargaining agreements ("CBA") with 1199, including the claims by plaintiffs against defendant. Doc. 121. In his email, Scheinman stated, inter alia, that "[1199] has determined [that] it represents all of the employees' claims and wishes to pursue those claims promptly in arbitration [and that] the Agencies agree this is now the proper course." Doc. 121. Additionally, Scheinman stated that he would be

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<sup>2</sup> Although the 7/1/19 order states that defendant's appeal was from an order of this Court dated October 12, 2018, the appeal was clearly taken from the 9/18/18 order. Doc. 74.

deciding whether "the claims encompassed by the wage and hour related grievances involving current and former [1199] bargaining unit members, including those arising under federal, state and local law, [are] arbitrable" and whether he "ha[s] jurisdiction to adjudicate the claims asserted in the wage and hour grievances, arising under federal, state and local law, filed by the parties to the [CBA] which encompass all claims arising under the federal, state and local laws named in the [CBA], as well as any pending litigation...irrespective of whether employees' terminated prior to the effective date of the [2015 MOA]." Doc. 121.

During a telephone conference on April 7, 2020, counsel for the parties advised this Court that they appeared before Scheinman on January 15, 2020, at which time plaintiffs' counsel provided him with a copy of this Court's order holding that plaintiffs could not be compelled to arbitrate given that they were no longer employed by defendant at the time the 2015 MOA became effective.

By order entered January 23, 2020, the Appellate Division, First Department unanimously affirmed the 9/18/18 order. Doc. 135.<sup>3</sup> The Appellate Division held that, although the 2015 MOA required arbitration of the claims in the complaint,

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<sup>3</sup> Although the Appellate Division stated that the order appealed from was entered on September 30, 2018, it was actually entered on September 18, 2018 and served with notice of entry on September 30, 2018. Docs. 60-61, 135.

plaintiffs were no longer employees of defendant at the time the 2015 MOA was executed and thus were not bound by its terms. Doc. 135.

By OSC filed January 13, 2020, plaintiffs moved (motion sequence 004): 1) for a TRO prohibiting arbitration of plaintiffs' claims asserted in this action including, but not limited to, the January 15, 2020 global arbitration of the claims of the plaintiffs named in the captioned action as well as the claims of the putative class; and 2) issuing a preliminary and permanent injunction against arbitration of plaintiffs' claims, including the claims of the putative class; and 3) for such other and further relief as this Court deems just and proper. Doc. 124. The OSC also granted plaintiffs a TRO pending the hearing of the motion.

In support of the motion, plaintiffs argue that they are entitled to a preliminary injunction because they are likely to succeed on the merits, they are likely to sustain irreparable harm in the absence of a preliminary injunction, and that the balance of the equities weighs in their favor. Doc. 123. They further assert that Labor Law section 807 does not preclude them from obtaining injunctive relief. Doc. 123.

In opposition to the motion, defendants argue that: plaintiffs are not entitled to a stay of arbitration pursuant to CPLR 7503(b); plaintiffs do not satisfy the criteria necessary to obtain a TRO or preliminary injunction; Labor Law 807 and CPLR 6313 prevent plaintiffs from obtaining injunctive relief; plaintiffs cannot be

awarded the relief sought because they failed to join 1199 as a necessary party; federal law bars the relief sought; and the injunctive relief sought is overbroad since it seeks relief on behalf of members of a putative class despite the fact that the class has yet to be certified. Doc. 132.

On January 24, 2020, plaintiff moved (motion sequence 005), pursuant to CPLR 2201 (motion sequence 005), for an order vacating the stay of all proceedings pursuant to the 7/1/19 order. Doc. 138.<sup>4</sup> In support of the motion, plaintiff asserts that, since the 7/1/19 order stayed the action “pending the determination of defendant’s appeal”, which appeal has since been decided, the stay was automatically terminated. Docs. 111-112. Plaintiffs further assert that they would be prejudiced if this case were delayed any further since they left the employ of defendant prior to December 2015 and still have not recovered monies allegedly owed to them by the latter.

In opposition to the motion, defendant argues that it is entitled to a continued stay of the action pursuant to CPLR 5519(e) since it filed a motion to extend the stay within five days after being served with the order of the Appellate Division with notice of entry.

In reply, plaintiffs argue that CPLR 5519(e) does not entitle defendant to a further stay.

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<sup>4</sup> See footnote 1, *supra*.

## LEGAL CONCLUSIONS:

### Plaintiff's Motion for Injunctive Relief (Motion Sequence 004)

To the extent that January 15, 2020, the date for the conference scheduled with Scheinman, has passed, the branch of plaintiffs' motion seeking a stay of that proceeding is denied as moot. Additionally, this Court's order of 9/18/18 is binding only on plaintiffs, and not on any of the putative class members. *See Astil v Kumquat Props., LLC*, 125 AD3d 522, 523 (1<sup>st</sup> Dept 2015). Thus, the putative class members are not entitled to the injunctive relief sought. However, plaintiffs are otherwise entitled to the injunctive relief they seek.

"A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing. Accordingly, a preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of the equities tipping in favor of the moving party." *1234 Broadway LLC v. West Side SRO Law Project*, 86 AD3d 18, 23 (1st Dept 2011). "Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. To prevail, the movant must establish not a mere possibility that it will be irreparably harmed, but that it is likely to suffer irreparable harm if equitable relief is denied' (*Bank of Am., N.A. v. PSW NYC LLC*, 29 Misc 3d 1216[A], 918 NYS2d 396, 2010 NY Slip Op 51848[U] [Sup Ct, NY County 2010])." *Moore Freres & Co., LLC v. Mercury Partners GMBH*, 2018 NY Slip Op 31979[U] [Sup Ct, NY County 2018]).



*Guzman v. First Chinese First Chinese Presbyterian Cmty. Affairs Home Attendant Corp.*, 2020 NYLJ LEXIS 147, \*6-7 (Sup Ct New York County 2020).

Here, plaintiffs have established that they are likely to succeed on the merits of their claims. Plaintiffs maintain that their wage and hour claims must be determined by this Court, rather than by an arbitrator, since they left the employ of defendant before the 2015 MOA became effective. Since this Court has already held that plaintiffs are not required to arbitrate pursuant to the terms of the 2015 MOA, they have established the likelihood that they will succeed on their argument regarding the arbitrability of their claims.

Plaintiffs also establish that they would suffer irreparable harm in the event that they were denied injunctive relief.

"[A] party that has not agreed to arbitrate a dispute will suffer irreparable harm if it is forced to submit to arbitration." *Int'l. Trust Co. of Bermuda, Ltd. v. Fahnestock & Co., Inc.*, 1995 U.S. Dist. LEXIS 15050, 1995 WL 606275 at \*3 (SDNY 1995). This Court has already determined that plaintiffs' dispute is not arbitrable and, thus, plaintiffs would be irreparably harmed in the event they were forced to arbitrate. Specifically, if the arbitration is not enjoined and plaintiffs choose to participate, they "will have waived [their] objections to the [a]rbitration." *Int'l. Trust Co. of Bermuda, Ltd. v. Fahnestock & Co., Inc.*, citing *Halley Optical Corp. v. Jagar Int'l. Marketing Corp.*, 752 F Supp 638, 639-40 (SDNY 1990). "On the other hand, if [plaintiffs refuse] to [arbitrate], the claims against [them] may be adjudicated in [their] absence, and any award would be subject to 'very limited review' by [this] [C]ourt." *Int'l. Trust Co. of Bermuda, Ltd. v. Fahnestock & Co., Inc.*, quoting *Folkways Music Publishers, Inc. v. Weiss*, 989 F2d 108, 111 (2d Cir 1993).

*Guzman, supra.*

Since plaintiffs would be prejudiced if they were forced to arbitrate, this Court also finds that the equities weigh in their favor and that they be granted the injunctive relief they request. The equities also warrant this relief because Scheinman, in his December 24, 2019 email, advised plaintiffs, with virtually no advanced notice, that "[1199] has determined [that] it represents all of the employees' claims and wishes to pursue those claims promptly in arbitration" regardless of whether plaintiffs' employment terminated prior to the effective date of the 2015 MOA, and that a preliminary hearing would be held before him on January 15, 2020. Doc. 120. Such late notice of 1199's position and the January 2020 hearing was prejudicial and unacceptable.

Additionally, the 9/18/18 order denying defendant's motion to compel arbitration is law of the case and thus binding on the parties herein. See *Smyczynski v. Genesis Mktg. Group, Inc.*, 185 AD2d 58 (4th Dept 1992) (citations omitted).

Contrary to defendant's argument, Labor Law section 807 does not preclude this Court from awarding plaintiffs a preliminary injunction because such relief cannot be granted in connection with a "labor dispute", defined by Labor Law §807(10)(c) as "any controversy concerning terms or conditions of employment." As discussed by this Court in *Guzman, supra*, the Court of Appeals has stated

that "[t]he effect of that statute is to prevent courts from enjoining peaceful picketing. It was never intended to deprive the Supreme Court of jurisdiction to enjoin dangerous, illegal acts which constituted disorderly conduct and breach of the peace." *Guzman, supra, quoting Busch Jewelry Co. v. United Retail Employees' Union*, 281 NY 150, 156 (1939). Since that statute does not apply to the facts herein, defendant's reliance on it is misplaced and it does not preclude the award of injunctive relief herein.

#### **Plaintiff's Motion to Vacate the Stay (Motion Sequence 005)**

As noted above, this Court's 7/1/19 order granted defendant's motion "for a stay pending the determination of its appeal" from the denial of its motion to compel arbitration and to stay this action. Doc. 112. Although the Appellate Division has now determined that appeal, thereby terminating the stay of this action *pursuant to the terms of the 7/1/19 order*, defendant moved for permission to appeal the order of the Appellate Division to the Court of Appeals on January 28, 2020, within five days after the order of the Appellate Division was served with notice of entry. Appellate Division, First Department Docket Number 2018-4284, Docs. 13 and 15. Defendant seeks leave to appeal to the Court of Appeals based on what it characterizes as "important questions of law that have broad,

industry-wide and statewide consequences.” Appellate Division, First Department Docket Number 2018-4284, Doc.15, Memo. of Law, at 7.

CPLR 5519(e) provides, in pertinent part, that:

If an appeal is taken, or a motion is made for permission to appeal, from such an order before the expiration of five days, the stay shall continue until five days after service of the entry of the order determining such appeal or motion. When a motion for permission to appeal is involved, the stay, or any other stay granted pending determination of the motion for permission to appeal, shall:

(i) if the motion is granted, continue until five days after the appeal is determined; or

(ii) if the motion is denied, continue until five days after the movant is served with the order of denial with notice of its entry.

To date, defendant’s motion seeking leave to appeal has not been decided. Thus, this Court is constrained to deny plaintiff’s motion to vacate the stay since CPLR 5519 (e) renders the continuation or termination thereof contingent upon the decision on defendant’s pending motion seeking leave to appeal.

The parties' remaining arguments are without merit or need not be addressed given the findings above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of plaintiffs' motion (motion sequence 004) seeking a preliminary injunction, pursuant to CPLR 6301, on behalf of members of the putative class, is denied; the branch of plaintiffs' motion seeking to prevent the hearing before Arbitrator Martin F. Scheinman from proceeding on January 15, 2020 is denied as moot; and the motion for injunctive relief is otherwise granted, provided that an undertaking in the fixed sum of \$250, in the form of a surety bond or a deposit of cash, money order, or bank check be deposited by plaintiffs with the County Clerk of the County of New York, and remain in effect until further order of this Court; and it is further

ORDERED that, within 10 days of the entry of this order, plaintiffs' counsel is directed to serve this order, with notice of entry, by email, on counsel for defendant, on counsel for 1199 SEIU United Healthcare Workers East, and on Arbitrator Martin F. Scheinman, Esq.; and it is further

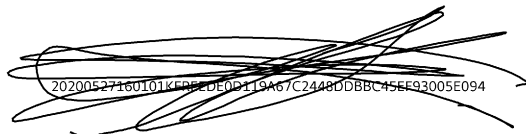
ORDERED that plaintiffs' motion (motion sequence 005) to vacate the stay of this action pursuant to CPLR 2201 is denied; and it is further

ORDERED that, although the parties were scheduled to appear for a previously scheduled preliminary conference on June 2, 2020 at 2 p.m., the conference is hereby adjourned until November 17, 2020 at 2:15 p.m. at 80 Centre Street, Room 280; and it is further

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

5/27/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE