Newton v LMVH Moët Hennessy Louis Vuitton Inc.
2020 NY Slip Op 32290(U)
July 10, 2020
Supreme Court, New York County
Docket Number: 154178/2019
Judge: Louis L. Nock

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 38

----------X

ANDOWAH NEWTON, : Index No. 154178/2019

Plaintiff, : **DECISION AND ORDER**
(Motion Seq. No. 001)

-against- :

LVMH MOËT HENNESSY LOUIS VUITTON INC., :

Defendant. :

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LOUIS L. NOCK, J.

The defendant, a Delaware corporation authorized to do business in the State of New York, moves for an order, pursuant to section 7503 of the New York Civil Practice Law and Rules ("CPLR"), to stay this action and to compel arbitration of the claims asserted by the plaintiff, Ms. Andowah Newton, in this action, alleging sexual harassment in the workplace and related retaliation against her. The motion is denied for the reasons set forth hereinbelow.

BACKGROUND

Per the complaint, Ms. Newton was, and is, a vice president of defendant LVMH Moët Hennessy Louis Vuitton Inc. (the "Company"). The complaint alleges that Ms. Newton suffered persistent and pervasive sexual harassment at the hands of a senior management employee of the Company. The complaint further alleges that plaintiff's attempts within the Company hierarchy to have the situation addressed were ultimately met with scorn, and with retaliation in the form of adverse employment treatment. Per the complaint, all factual instances alleged by Ms. Newton occurred in defendant's offices in New York City. The complaint asserts causes of action under the New York State Human Rights Law (New York Executive Law § 290, *et seq.*)

and under the New York City Human Rights Law (New York City Administrative Code § 8-101, *et seq.*), and seeks damages for past injury, as well as prospective injunctive relief.

The Company moves to stay this action and to compel arbitration of plaintiff's instant sexual harassment claims on the force of an arbitration clause found in plaintiff's employment agreement with the Company, dated December 17, 2014 (New York State Courts Electronic Filing ["NYSCEF"] Doc. No. 5) (the "Employment Agreement"). The Employment Agreement first sets forth the terms of employment, such as salary, bonuses, vacation, benefits, and business expense reimbursement; and continues with a provision titled "Agreement to Arbitrate Disputes," which states that "any disputes of any nature" between Ms. Newton and the Company "will be submitted to binding arbitration pursuant to the Arbitration Agreement attached hereto as Exhibit A and incorporated herein by this reference" (*id.*, at 4). That Arbitration Agreement, in turn, provides, in pertinent part, the following:

> [A]ll disputes and claims of any nature that Employee may have against Company, or any of its . . . employees . . . in their capacity as such, . . . including any and all statutory, contractual, and common law claims **(*including all employment discrimination claims*)** . . . will be submitted exclusively to mandatory arbitration in New York. . . . Absent agreement to the contrary, the mandatory arbitration will be conducted under the JAMS Employment Arbitration Rules & Procedures ("JAMS Rules") and will be submitted before a single arbitrator selected in accordance with the JAMS Rules. The arbitrator shall have the same authority to award remedies and damages as a judge and/or jury under state or federal law.
>
> . . . ***Company will pay the arbitrator's fee as well as all filing and administrative fees in connection with the arbitration.***

(*Id.*, at 7 [emphasis added].)

Ms. Newton commenced this sexual harassment action in this court by summons and complaint filed April 23, 2019, making demand for trial by jury. The Company is asking this court to stay this action and compel arbitration pursuant to the Arbitration Agreement. Were this court to stay this action and remit the parties to binding arbitration, Ms. Newton would lose her

right to trial by jury. She would also be unable to avail herself of the rules of evidence governing actions at law in this state, by virtue of Rule 22 of the JAMS Rules which provides that "[s]trict conformity to the rules of evidence is not required . . . ."[1]

POINT ONE

THE ARBITRATION AGREEMENT PREPARED BY THE COMPANY AND SIGNED BY THE PARTIES IS NULL AND VOID INSOFAR AS IT SEEKS TO COMPEL ARBITRATION OF EMPLOYMENT DISCRIMINATION CLAIMS

A. Clauses Mandating Arbitration of Discrimination Claims are Invalid in the State of New York

In 2018, our State Legislature enacted section 7515 of the CPLR (L. 2018, ch 57, § 1 [Part KK, Subpart B]), and titled it "Mandatory arbitration clauses; prohibited." Its essential purpose, as clearly manifested by its express definitional and substantive language, is to render "null and void" any contractual provision mandating arbitration of "any allegation or claim of discrimination" (CPLR 7515 [a] [2], [b] [iii]; s*ee, id., passim*). The arbitration clause underlying the instant motion is precisely such a contractual provision.

Our state has a "a well-defined and dominant public policy" "against sexual harassment in the work place" (*Phillips v Manhattan & Bronx Surface Transit Operating Auth.*, 132 AD3d 149, 155 [1st Dept 2015] [vacating an arbitration award reinstating an employee accused of sexual harassment because the arbitrator interpreted the employee's collective bargaining agreement "in a manner that conflicts with a well-defined and dominant public policy. The public policy against sexual harassment in the workplace"], *lv denied* 27 NY3d 901 [2016]). It is against this public policy backdrop that our Legislature enacted CPLR 7515 in 2018, eradicating

[1] JAMS is the acronym for "Judicial Arbitration and Mediation Services, Inc.," now known as "JAMS, Inc.," a Delaware business corporation authorized to do business in the State of New York. The defendant is also a Delaware business corporation authorized to do business in the State of New York. Pursuant to the Arbitration Agreement, defendant pays the arbitrator.

mandatory arbitration of sexual harassment claims. It did so by prohibiting such arbitration clauses "entered into on or after the effective date" of the statute (*i.e.*, July 11, 2018) (CPLR 7515 [b] [i]),[2] and also, per this court's interpretation discussed hereinbelow, by declaring then-existing mandatory arbitration clauses, such as the one underlying the instant motion, "null and void" (*id.*, [iii]).[3]

CPLR 7515 was enacted among other provisions of Part KK, Subpart B, of the 2018-19 New York State Budget Bill, sharing a place among various other protections afforded by our Legislature in that bill to victims, and potential victims, of sexual harassment. During state senate floor debates of the bill prior to its enactment, it was hailed as "sweeping legislation that deals with the scourge of sexual harassment" (New York State Senate Record, 241st Leg., Reg. Sess., at 1855 [Mar. 30, 2018]).

Notably inconsistent with the Company's position on this motion, it has, itself, included in its published "Non-Discrimination and Anti-Harassment Policy" of November 2018 a section detailing "[a]venues" in which victims can "lodge complaints," including the option to "file a complaint in state court," just as Ms. Newton has done in this very case (*see*, NYSCEF Doc. No. 22 ["Revisions to Employee Handbook," dated Nov. 26, 2018]).

B. ***The Court Determines the Threshold Question of Arbitrability in this Case***

> [C]ourts play the "gatekeeping" role of deciding certain "threshold" issues before compelling or staying arbitration (*Merrill Lynch, Pierce, Fenner & Smith v. Benjamin*, 1 A.D.3d 39, 766 N.Y.S.2d 1 [2003]). Among such threshold issues is "whether public policy precludes arbitration of the subject matter of a particular dispute" (*id.* at 43–44, 766 N.Y.S.2d 1, citing *Matter of City of New York v. Uniformed Fire Officers Assoc.*, 95 N.Y.2d 273, 281, 716 N.Y.S.2d 353, 739 N.E.2d 719 [2000]).

[2] That statutory subdivision is titled "Prohibition."
[3] That statutory subdivision is titled "Mandatory arbitration clause null and void."

(*D'Agostino v Forty-Three E. Equities Corp.*, 16 Misc 3d 59, 60 [App Term 1st Dept 2007]; s*ee also, Associated Teachers of Huntington, Inc. v Board of Educ.*, 33 NY2d 229, 235 [1973] [finding that the issues before the court were "so interlaced with strong public policy considerations" that they must be "placed beyond the reach of the arbitrators' discretion"]; *Rackmyer v Gates-Chili Central School Dist.*, 48 AD2d 180, 183 [4th Dept 1975] ["where rights depend on the interpretation of a statute, . . . the courts will determine the matter notwithstanding that another procedure for settling the controversy is available."].)

Because of the profound policy interest underlying the enactment of CPLR 7515, touched on above, this court concludes that the threshold question of arbitrability of the claims in this lawsuit rests within the exclusive province of this New York State court, and is not referable to JAMS or any other arbitral forum that is not a constitutionally established court of record of the State of New York (*see also, generally, Dr. Alex Greenberg, DDS, PC v SNA Consultants, Inc.*, 55 AD3d 418, 418 [1st Dept 2008] ["In New York, any threshold issue of arbitrability is a matter for the court"], *appeal denied* 12 NY3d 707 [2009]).

Defendant's counsel draws the court's attention to a decision rendered by a court of concurrent jurisdiction herewith, in *Altman v Salem Media of N.Y., LLC* (2019 WL 4323944 [Sup Ct, NY County, Sept. 9, 2019]),[4] which remitted the threshold question of arbitrability to an arbitrator in a gender disability discrimination case. This court respectfully disagrees with said holding, as it relied on a First Department case having nothing to do with discrimination and, by all reasonable accounts, did not involve any grave public policy issues such as sexual harassment and workplace discrimination.[5]

[4] Per Hon. Robert D. Kalish, Justice.

[5] The referenced First Department case is *Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's* (66 AD3d 495 [1st Dept 2009], *affd* 14 NY3d 850, *rearg denied* 15 NY3d 769, *cert denied* 562 US 962 [2010]), inadvertently mis-cited in *Altman v Salem Media of N.Y., LLC,* as 68 AD3d 495.

C. The Federal Arbitration Act Does Not Apply to the Claims Asserted in this Action

CPLR 7515 prefaces its prohibition of future mandatory discrimination-related arbitration clauses, and its nullification of then-existing discrimination arbitration clauses, with the qualifier, "[e]xcept where inconsistent with federal law" (CPLR 7515 [b] [i], [iii]). Based on that language, defendant asserts that the instant claims must be arbitrated per the language found in Arbitration Agreement, by force of the Federal Arbitration Act (the "FAA") (9 USC § 1, *et seq.*), which generally requires enforcement of arbitration clauses and, concomitantly, warrants a stay of litigation commenced concerning the arbitrable dispute and an order compelling the parties to proceed to arbitration (*see, id.*, §§ 3, 4). However, defendant's haste in citing the FAA overlooks a key limitation set forth in that very statute; to wit, that it only applies to "a transaction involving commerce" (*id.*, § 2). Specifically, section 2 of the FAA provides as follows, in pertinent part:

> A written provision in . . . a contract evidencing ***a transaction involving commerce*** to settle by arbitration a controversy thereafter ***arising out of such contract***, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy ***arising out of such a contract*** . . . or refusal, 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 [emphasis added].) Because claims for sexual harassment, or other discrimination-based claims, cannot reasonably be characterized as claims concerning or "arising out of" "a transaction involving commerce," and additionally because the instant case involves purely intrastate activity, the FAA cannot reasonably be said to apply to the Arbitration Agreement's reference to arbitration of sexual harassment or other discrimination-based claims. Nor can the Arbitration Agreement itself be reasonably characterized as "a contract evidencing a transaction involving commerce," particularly insofar as it seeks application to sexual harassment or other

discrimination-based claims. Thus, we are left with the express and unambiguous provisions of CPLR 7515, which prohibit and nullify clauses mandating arbitration of such claims.

Indeed, the United States Supreme Court itself, in *United States v Morrison* (529 US 598, 613 [2000]), noted that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." As noted hereinabove, at the outset, the acts of sexual harassment and related retaliation alleged in the complaint occurred intrastate – in defendant's New York City offices. Nothing relating to that conduct could possibly be cast as "interstate" or "economic in nature." Absent such variables, there can be no possible application of the FAA to the prohibited and nullified arbitration provisions which defendant champions in its motion now before the court.

Defendant's counsel draws the court's attention to one federal court decision which has considered CPLR 7515 since its enactment in 2018, and which appears to have applied the FAA to an arbitration clause mandating arbitration of sexual harassment claims: *Latif v Morgan Stanley & Co. LLC* (2019 WL 2610985 [SDNY June 26, 2019]).[6] However, no treatment is accorded in that decision to the observation of this court hereinabove, that the FAA explicitly limits its scope to "a transaction involving commerce" (9 USC § 2) or to other considerations noted hereinabove. This court, therefore, respectfully disagrees with the holding of the federal district court in that case, and holds, instead, that the FAA, by its very own terms, does not apply to the types of claims asserted in this action, which are undeniably not "transaction[s] involving commerce" and which have no interstate qualities.[7] Indeed, this court is inclined to conclude

[6] Per Hon. Denise Cote, District Judge.

[7] Clearly, the myriad of other clauses in the Employment Agreement, involving terms of employment, such as salary, bonuses, vacation, benefits, and business expense reimbursement, would reasonably fall within the category of "transaction[s] involving commerce," and could potentially be subject to the FAA; but not matters relating to sexual harassment and related retaliation or other forms of discrimination.

that such was the understanding and intent of our Legislature itself when it enacted CPLR 7515 in the face of the FAA, which preceded it.[8] The court in *Latif* stressed the qualifier "[e]xcept where inconsistent with federal law," suggesting that such language rendered CPLR 7515 preempted by the FAA. Such a construction implausibly suggests that the New York State Legislature knowingly engaged in a futile exercise by enacting its statute nullifying mandatory arbitration for discrimination claims and then, in the same breath, eviscerated it with the words "[e]xcept where inconsistent with federal law." This court is fully authorized to engage such statutory analysis, as the Appellate Division, First Department, has declared on the basis of abundant Court of Appeals authority:

> . . . "[T]he question is one of pure statutory reading and analysis, dependent only on an accurate apprehension of legislative intent . . . ." (*Kurcsics,* 49 N.Y.2d at 459, 426 N.Y.S.2d 454, 403 N.E.2d 159; *see also Matter of Belmonte v. Snashall,* 2 N.Y.3d 560, 565–566, 780 N.Y.S.2d 541, 813 N.E.2d 621 [2004]). On such occasions, the courts are free to ascertain the proper interpretation from the statutory language and intent and may undertake the function of statutory interpretation . . . .
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> . . . [T]he well settled principle that in interpreting a statute, it is fundamental that a court "ascertain and give effect to the intention of the Legislature" (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 92[a], at 177; *see Riley v. County of Broome,* 95 N.Y.2d 455, 463, 719 N.Y.S.2d 623, 742 N.E.2d 98 [2000]; *Matter of Astoria Gas Turbine Power, LLC v. Tax Commn. of City of N.Y.,* 14 A.D.3d 553, 557, 788 N.Y.S.2d 417 [2005]), and, "[a]s the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*Majewski v. Broadalbin–Perth Cent. School Dist.,* 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 696 N.E.2d 978 [1998]; *see also Flores v. Lower East Side Serv. Ctr., Inc.,* 4 N.Y.3d 363, 367, 795 N.Y.S.2d 491, 828 N.E.2d 593 [2005]). Moreover, "new language cannot be imported into a statute to give it a meaning not otherwise found therein" (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 94, at 190; *see Matter of Raritan Dev. Corp. v. Silva,* 91 N.Y.2d 98, 104-105, 667 N.Y.S.2d 327, 689 N.E.2d 1373 [1997], quoting § 94), **and a court, in discerning the meaning of statutory language, must "avoid objectionable, unreasonable or absurd consequences"** (*Long v. State of New York,* 7 N.Y.3d 269, 273, 819 N.Y.S.2d 679, 852 N.E.2d 1150 [2006]; *Ryder v. City*

[8] The FAA was first enacted February 12, 1925 (Pub. L. 68-401, 43 Stat. 883), and re-enacted (ch 392, 61 Stat. 670) and codified (9 USC § 1, *et seq.*) July 30, 1947.

> *of New York*, 32 A.D.3d 836, 837, 821 N.Y.S.2d 227 [2006], *lv. dismissed* 8 N.Y.3d 896, 832 N.Y.S.2d 899, 865 N.E.2d 8 [2007]).

(*Roberts v Tishman Speyer Properties, L.P.*, 62 AD3d 71, 80-81 [1st Dept] [emphasis added], *affd* 13 NY3d 270 [2009]. *See also, People ex rel. Weber & Heilbroner, Inc. v Graves*, 249 AD 49, 54 [3d Dept 1936] ["We are concerned here with the interpretation of a State law, the exclusive province of the State courts . . . ."].)

Thus, to suggest that the Legislature toiled to promulgate the general rule of CPLR 7515 only to have it immediately swallowed up by a "federal law" exception, would be to suggest an "objectionable, unreasonable or absurd consequence[]" (*Roberts, supra*, at 81). So, to be clear: it is the opinion of this court (which this court firmly believes is shared by our state Legislature) that a plain and proper reading of the FAA does not support the notion that CPLR 7515 was preempted from the moment of its inception, by the FAA.[9]

This court's holding is not inconsistent with the holding of the United States Supreme Court in *Equal Employment Opportunity Commission v Waffle House, Inc.* (534 US 279 [2002]). That case involved a corporate defendant's application to stay litigation and to compel arbitration based on "an agreement between an employer and an employee to arbitrate employment-related disputes" (*id.*, at 282). The Equal Employment Opportunity Commission ("EEOC") had filed an action on behalf of the employee, who claimed to have been wrongly discharged by the employer on account of his disability. The Court granted the defendant's motion, stating that "[e]mployment contracts, except for those covering workers engaged in transportation, are covered by the FAA" (*id.*, at 289). The critical distinction between that case and the one

[9] The court also takes note of the closing paragraph of the Arbitration Agreement, which, immediately after its reference to "the Federal Arbitration Act," cautions that: "To the extent that state law is applicable, the statutes and common law of New York shall apply . . . ." As explained at length in the text of this decision hereinabove, New York's CPLR 7515 most certainly applies to this non-commercial, intrastate, sexual harassment case; and not the Federal Arbitration Act.

presently before this court is that the gravamen of the dispute in that case revolved exclusively around a quintessential incident of "employment," i.e., the loss, by an employee, of his job, and the salary and benefits that go with it, resulting in the employee's attempt, through EEOC, to pursue a judgment for backpay and reinstatement (*see, id.*, at 282). The employee's discharge was, by its very nature, an issue central to his "[e]mployment contract[]" (*id.*, at 289). It was within that specific employment-centric context that the Court in that case emphasized that "***[e]mployment contracts*** . . . are covered by the FAA" (*id.* [emphasis added]).

In stark contrast to the job-related circumstance in *EEOC v Waffle House, Inc., supra*, the instant case now before this court involves alleged activity more akin to tortious conduct unrelated to the employer/employee contractual relationship, and alleged complicity therein; *i.e.*, allegations of sexual harassment and retaliatory acts reactionary to Ms. Newton's internal complaints about such harassment. As discussed hereinabove, the New York State Legislature in CPLR 7515 has focused on such wrongdoing, having little to do with the commercial aspects, or contractual aspects, of the ordinary employer-employee relationship – the incidents of ***the job***. Rather, they have everything to do with wrongful acts entirely extrinsic of such contractual relationship. In such cases, the New York State Legislature was free to enact CPLR 7515, which, understood properly, and understanding the parameters of the FAA properly, does not conflict with the FAA's policy of encouraging arbitration regarding the economic incidents of contractual relationships.

D. CPLR 7515 Applies Retroactively

The provision in CPLR 7515 titled "Mandatory arbitration clause null and void" (CPLR 7515 [b] [iii]) is reasonably construed to apply retroactive to the time prior to its enactment in 2018, such as in 2014 when the Arbitration Agreement came into existence. CPLR 7515 (b) (i)

provides that "no written contract, entered into on or after the effective date of this section [*i.e.*, July 11, 2018] shall contain a prohibited clause." Thus, under that subdivision, contracts entered into on or after July 11, 2018, may not include "prohibited clauses" mandating arbitration of discrimination claims. In a separate subdivision, CPLR 7515 (b) (iii), the statute provides that "the provisions of such prohibited clause as defined in paragraph two of subdivision (a) of this section shall be null and void." Paragraph 2 of subdivision (a), in turn, defines "prohibited clause" as "any clause or provision in any contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment."

Thus, unlike subdivision (b) (i) of the statute, where the language specifically provides that the prohibition applies only to contracts "entered into on or after the effective date," subdivision (b) (iii) of the statute contains no such limitation. Rather, that subdivision broadly states that "any clause or provision in ***any*** contract" (emphasis added) that forces sexual harassment victims to arbitrate their claims "shall be null and void." Thus, the statute's plain language indicates that the "null and void" clause also applies to arbitration clauses already in existence (*see, Friedman v Connecticut Gen. Life Ins. Co.*, 9 NY3d 105, 115 [2007] ["A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent, and, where possible, should harmonize all parts of a statute with each other and give effect and meaning to the entire statute and every part and word thereof."]; *Matter of OnBank & Trust Co.*, 90 NY2d 725 [1997] [applying statute retroactively even in the absence of express language to that effect, because a prospective-only interpretation rendered other statutory provisions superfluous and meaningless]).

Defendant's counsel draws the court's attention to a decision rendered by a court of concurrent jurisdiction herewith, in *Rodriguez v Perez* (2020 WL 888485 [Sup Ct, NY County, Feb. 19, 2020]),[10] which held that CPLR 7515 "is not to be applied retroactively." The holding in that case was based solely on that court's focus on subdivision (b) (i) – the "Prohibition" subdivision of the statute, without targeted analysis of subdivision (b) (iii) – the "null and void" subdivision of the statute. As noted above, no prospective-only language was inserted by the Legislature with regard to nullification of "prohibited clauses" then in existence. This court, therefore, respectfully disagrees with the holding *in Rodriguez v Perez, supra,* and, in doing so, this court holds that the "null and void" subdivision of CPLR 7515 (b) is to be applied retroactively.[11]

Based on all the foregoing, it is the court's opinion that the parties' Arbitration Agreement is null and void, insofar as it seeks to remit the parties to binding arbitration in connection with the claims asserted in this lawsuit. Therefore, on this distinct basis, the defendant's motion to stay this action and to compel arbitration is denied.

[10] Per Hon. Margaret A. Chan, Justice.

[11] Defendant's counsel makes reference to language found in a segment of the New York State government website titled "Combating Sexual Harassment: Frequently Asked Questions," under the rubric "Mandatory Arbitration" (https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions), Question and Answer No. 4, which mentions the prospective nature of the "Prohibition" subdivision of CPLR 7515 (subdivision [b] [i]). Apart from the somewhat doubtful implication proffered by defendant's counsel that such entries enjoy the force of law, this court observes that said question and answer do not address the "null and void" subdivision of CPLR 7515 (subdivision [b] [iii]).

POINT TWO

THE 2014 ARBITRATION AGREEMENT, INSOFAR AS IT RELATED TO DISCRIMINATION CLAIMS, WAS SUPERSEDED BY THE COMPANY'S 2018 REVISED EMPLOYEE HANDBOOK, PUBLISHED AND DISTRIBUTED AFTER THE ENACTMENT OF CPLR 7515, AND CONTAINING AN EXPRESS NEW YORK ADDENDUM

Apart from all the foregoing analyses regarding non-application of the FAA and the proper interpretation of CPLR 7515, it is this court's separate and distinct observation that in November 2018 – subsequent to the parties' 2014 Arbitration Agreement – the Company published and distributed to all its employees, including Ms. Newton, a "Non-Discrimination and Anti-Harassment Policy," which includes a section detailing "[a]venues" through which victims can "lodge complaints," including, significantly, the option to "file a complaint in state court," just as Ms. Newton has done in this very case (*see*, NYSCEF Doc. No. 22 ["Revisions to the Employee Handbook," dated Nov. 26, 2018]).

The chronology of relevant events is telling. The Arbitration Agreement was executed December 17, 2014. Then, New York's policy against mandatory arbitration of discrimination claims, embodied in CPLR 7515, came into effect July 11, 2018. Not long afterward, the Company published and distributed a revised Employee Handbook, dated November 26, 2018 (NYSEF Doc. No. 22). Significantly, the revised handbook deals solely and exclusively with "Non-Discrimination and Anti-Harassment Policy" in general, and "New York Sexual Harassment Prevention Policy" in particular (*id.*). Here is what it says, most notably, for purposes of this discussion:

Under the General Subtitle "Non-Discrimination and Anti-Harassment Policy":

- "Effective immediately, the following policies ***supersede and fully replace***" all prior policies relating to workplace discrimination;
- "***All Company employees*** and applicants are covered under this policy"; and

- "**[E]mployees** and applicants ***may file formal complaints of discrimination, harassment, or retaliation*** with federal or state agencies. . . . ***You may also file a complaint in state court.***"

Under the Particular Subtitle "New York Sexual Harassment Prevention Policy":

- "***Employees can also file a complaint*** with a government agency or ***in court under*** federal, ***state or local antidiscrimination laws.*****"**;
- "The . . . Policy ***applies to all employees*** . . . .";
- "***The Human Rights Law (HRL), codified as N.Y. Executive Law, art. 15, § 290 et seq., applies to all employers in New York State with regard to sexual harassment, and protects employees*** . . . . ***A complaint alleging violation of the Human Rights Law may be filed*** either with the Division of Human Rights (DHR) or ***in New York Supreme Court***."

(NYSCEF Doc. No. 22 [emphasis added].) The last page of that revised handbook is titled "Employee Policy Acknowledgment Form" regarding which Ms. Newton was asked to, and did, sign and date. The Acknowledgment Form expressly repeats the handbook's similar textual proviso to the effect that "[t]hese policies ***fully replace and supersede any and all*** written Company policies on these subjects . . . ." (*Id.* [emphasis added].)

This court finds that the foregoing circumstances, involving the timing and promulgation of the Company's November 2018 policy, allowing – indeed, encouraging – an option of plenary New York State Supreme Court litigation of sexual harassment and workplace discrimination claims, compel the conclusion that the 2014 Arbitration Agreement's mandate of arbitration of such claims became nullified of the Company's own accord.

Isaacs v Westchester Wood Works, Inc. (278 AD2d 184 [1st Dept 2000]), cited by defendant's counsel, merely recites the general principle that when two clauses in one contract contradict each other, we choose the more specifically worded clause as the controlling clause. That has no application to our circumstance, where the 2014 Arbitration Agreement is followed, in time, by a new, separate, and distinct 2018 Employment Handbook which, on its very face, clearly and unequivocally changes the rules for resolution of discrimination claims in a manner

different from that set forth in the parties' prior, 2014, agreement. Indeed, nothing in the 2014 Arbitration Agreement provides that it would remain effective even in the face of a future official Company policy expressly designed to address the very matter that was at stake in the prior Arbitration Agreement, vis-à-vis sexual harassment and workplace discrimination. By the same token, nothing in the 2018 Employee Handbook provides that it will not apply in the face of a prior arbitration agreement addressing the very matter at stake in that subsequent policy document – again, relating specifically to sexual harassment and workplace discrimination. Quite to the contrary, the 2018 policy document clearly and unequivocally makes it known that all prior inconsistent provisions are "superseded and fully replace[d]," by the new policy, which keeps the door wide open for plenary litigation of discrimination claims in state court, just as Ms. Newton has freely chosen to do by way of this lawsuit.

In the same vein, *Gadelkareem v Blackbook Capital LLC* (46 Misc 3d 149 [App Term 1st Dept 2015]), further cited by defendant's counsel, is also unavailing to defendant because it relied on *Isaacs, supra,* which, as observed, dealt with conflicts within one contract – not our circumstance. Moreover, *Edgewater Growth Capital Partners, L.P. v Greenstar North American Holdings, Inc.* (69 AD3d 439 [1st Dept 2010]), cited in *Gadelkareem, supra*, similarly deals with conflicts within one contract. Even more significantly, none of those cases cited by defendant has any relevance to the Revised 2018 Employment Handbook in our case which was, on its very face, deliberately created to come within consistency with New York's newly enacted policy against mandatory arbitration of discrimination claims, promulgated just months earlier – and embodied in CPLR 7515.

Based on the foregoing analysis set forth in this Point Two, it is the court's opinion that the parties' Arbitration Agreement was superseded and replaced by the Company's subsequent

"Non-Discrimination and Anti-Harassment Policy" and "New York Sexual Harassment Prevention Policy" insofar as the prior Arbitration Agreement sought to remit the parties to binding arbitration in connection with the claims asserted in this lawsuit. Therefore, on this distinct basis, the defendant's motion to stay this action and to compel arbitration is denied.

Accordingly, it is

ORDERED that the defendant's motion to stay this action and to compel arbitration of the claims asserted in this action, is DENIED.

This shall constitute the decision and order of the court.

Dated: New York, New York
July 10, 2020

ENTER:

Hon. Louis L. Nock, J.S.C.