

<b>Teshabaeva v Family Home Care Servs. of Brooklyn &amp; Queens, Inc.</b>
2020 NY Slip Op 32327(U)
July 16, 2020
Supreme Court, New York County
Docket Number: 158949/2017
Judge: Alexander M. Tisch
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**SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY**

PRESENT: HON. ALEXANDER M. TISCH  
*Justice*

PART IAS MOTION 18EFM

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INDEX NO. 158949/2017

MAKTUMMA TESHABAEVA, AND JIAN HUA DENG  
INDIVIDUALLY AND ON BEHALF OF ALL OTHER  
PERSONS SIMILARLY SITUATED WHO WERE EMPLOYED  
BY FAMILY HOME CARE SERVICES OF BROOKLYN AND  
QUEENS, INC.,

MOTION DATE 04/26/2020

MOTION SEQ.  
NO. 003

Plaintiff,

- v -

FAMILY HOME CARE SERVICES OF BROOKLYN AND  
QUEENS, INC., CARE AT HOME - DIOCESE OF  
BROOKLYN, INC.,

**DECISION + ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 87, 88, 89, 90, 91, 92, 93, 95, 96, 97 were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing papers, it is ORDERED that the plaintiffs' motion by order to show cause is granted and the defendant's cross-motion is denied.

Named plaintiffs, home health attendants, brought this putative class action seeking to recover wages and damages arising from defendant's alleged violations of state and local labor laws (see NYSCEF Doc. No. 25 [second amended complaint]). Specifically, the complaint asserts that defendants failed to pay minimum wages, overtime, "spread of hours" compensation, and that defendants breached contracts with government agencies (see id.).

At all relevant times, plaintiffs were members of 1199SEIU United Healthcare Workers East (Union), which filed a class-wide grievance in January 2019 to submit wage and hour claims, including those asserted here, to arbitration. Plaintiffs now move to permanently enjoin the arbitration and defendant's cross-moves to compel arbitration.



It is undisputed that the employment of the named plaintiffs Teshabaeva and Deng ceased in June 2012 and May 2014, respectively, prior to the execution of a 2015 memoranda of agreement (MOA). As such, this Court is constrained by recent case law of the First Department to hold that the mandatory arbitration provisions in the MOA (which undoubtedly compel the arbitration of the statutory claims in the complaint) are not binding on the named plaintiffs<sup>1</sup> (see Hichez v United Jewish Council of the E. Side, 179 AD3d 576, 577 [1st Dept 2020], citing Konstantynovska v Caring Professionals, Inc., 172 AD3d 486, 487 [1st Dept 2019]; see Lorentti-Herrera v Alliance for Health, Inc., 173 AD3d 596, 596 [1st Dept 2019]; Chu v Chinese-American Planning Council Home Attendant Program, Inc., 194 F Supp 3d 221, 228 [SD NY 2016]).

It is undisputed that the underlying 2012 Collective Bargaining Agreement (CBA) is applicable to the named plaintiffs. The relevant provisions from the CBA concerning arbitration are found in Article XXV, entitled “Grievance and Arbitration Procedure”:

1. A grievance is defined as any dispute between the Union (on its behalf and/or on behalf of any Employee) with the Employer involving the proper application, interpretation, or compliance with the specific written provisions of the Agreement based on facts and circumstances occurring during the term of this Agreement. A grievance is subject to arbitration.
2. Grievances will be resolved in accordance with the following procedure:

\* \* \* If the grievance is not resolved at Step 3, the Union may within ten (10) days thereafter request that the matter be submitted for final and binding arbitration under the Labor Arbitration Rules of the American Arbitration Association (NYSCEF Doc. No. 60).<sup>2</sup>

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<sup>1</sup> Or those plaintiffs whose employment similarly ceased prior to the execution of the MOA, as this is a putative class action.

<sup>2</sup> The 2000 CBA (NYSCEF Doc. No. 80) contains substantially similar arbitration language to that in the 2012 CBA.



Again, this Court is bound by recent First Department case law, which held that the exact same language did not prohibit plaintiffs from bringing this type of action in state court (see Hichez, 179 AD3d 576, 576-77 [1st Dept 2020]). In Hichez, the appellate court reasoned that the arbitration provision in the CBA limited mandatory arbitration to disputes “concerning the interpretation or application of [a specific] term of the CBA” and that plaintiffs’ statutory claims, like those asserted in this case, fall outside of the CBA (see id., quoting Lorentti-Herrera, 173 AD3d at 596). Indeed, defendant concedes the same (see NYSCEF Doc. No. 85 [defendant’s memorandum of law in opposition to plaintiffs’ motion and in support of its cross motion] [that “the 2012 CBA’s grievance and arbitration agreement itself does not compel arbitration of Plaintiff’s statutory wage and hour claims” is “a point not disputed by Defendants”]).

The Court rejects defendant’s argument that the threshold issue of whether the claims are arbitrable is for the arbitrator to decide, as that, too, has been upheld by the appellate courts as an issue for the trial court (see Zachariou v Manios, 68 AD3d 539 [1st Dept 2009] [“Whether a dispute is arbitrable is generally an issue for the court to decide unless the parties clearly and unmistakably provide otherwise”]; Konstantynovska v Caring Professionals, Inc., 2018 NY Slip Op 31475[U], 10 [Sup Ct, New York County 2018], affd Konstantynovska, 172 AD3d 486). Additionally, here, the CBA does not clearly and unambiguously delegate the question of arbitrability to an arbitrator (see Zachariou, 68 AD3d 539). Given the findings above, the Court need not address the plaintiffs remaining contentions.

Accordingly, it is hereby ORDERED that the motion by plaintiffs for a permanent injunction against arbitration is granted; and it is further



ORDERED that the cross-motion by defendants to compel arbitration is denied. This constitutes the decision and order of the Court.



7/16/2020

DATE

ALEXANDER M. TISCH, 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