

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ Justice PART 13

JORGE CALVO, Plaintiff, -against- LILIANA ARISTIZABAL, Defendant.

INDEX NO. 156048/16 MOTION DATE 11-16-2016 MOTION SEQ. NO. 001 MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion to dismiss pursuant to CPLR §3211[a] [1],[7], CPLR §7503[a] and 9 U.S. C. §§3 and 4 :

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Answering Affidavits — Exhibits cross motion Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, 1-4, 5-7, 8

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant’s motion pursuant to CPLR §3211[a][1],[7], CPLR §7503[a] and 9 U.S.C. §§ 3 and 4, known as the Federal Arbitration Act (FAA), to dismiss the complaint and to compel arbitration of the claims asserted in the complaint, is granted.

Plaintiff was employed as an account manager at NBC Universal Media, LLC (NBC) and WNJU. During his employment plaintiff consented to arbitrate his claims against his employer under NBC’s alternative dispute resolution (ADR) program called “Solutions”(Mot. Sandak Aff., Exh.1).

Plaintiff alleges that in March of 2014, approximately a month after the defendant was hired as vice-president of sales, she offered to make plaintiff’s work life easier if he agreed to go out for drinks and that after he refused defendant’s demeanor towards him changed. Plaintiff claims the defendant then increased his sales quotas even after a car accident that resulted in FMLA leave. Plaintiff also alleges that a subsequent sexual advance by the defendant involved deliberate touching in an unwanted manner, with his refusal resulting in unsatisfactory performance evaluations with frequent negative assessments, even though he was on track with his sales quotas. On March 27, 2015, plaintiff’s employment with NBC was terminated which he alleges is because of defendant’s fabricated negative evaluations that cite his lack of being a team player and inept management of subordinates.

On December 22, 2015, plaintiff commenced an action in the United States District Court for the Southern District of New York (SDNY), against NBC Universal Media, LLC, and WNJU Broadcasting, LLC d/b/a Telemundo, for damages resulting from alleged sexual harassment, gender discrimination and retaliation (Mot. Sandak Aff., Exh.2). Defendant was named as a party in the SDNY action, with causes of action asserted against her as an aider and abettor, but she was not served with process (Mot. Sandak Aff., Exh.2).

On March 9, 2016 a Stipulation and Order was filed, staying the SDNY action pending submission and resolution of plaintiff’s claims in accordance with the NBC

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Universal LLC “Solutions” program. Plaintiff agreed to and was directed not to serve any defendant with process in the federal action during the pendency of the stay. On July 8, 2016, plaintiff sought Level III - Mediation under NBC Universal Media, LLC’s “Solutions” program pursuant to the Stipulation and Order in the Federal action which names defendant as a party (Mot. Sandak Aff., Exh.5).

Plaintiff commenced this action on July 20, 2016, and served process on the defendant. The complaint asserts claims for gender discrimination, sex discrimination/hostile work environment, and aiding and abetting (Opp. Exh. B).

Defendant’s motion seeks an order pursuant to CPLR §3211[a][1],[7], CPLR §7503[a] and 9 U.S.C. §§ 3 and 4, known as the Federal Arbitration Act (FAA), dismissing the complaint against her in its entirety and to compel arbitration of the claims asserted in the complaint.

Defendant seeks to dismiss this action arguing that the documentary evidence establishes that the claims asserted in this action are subject to resolution by mediation and arbitration under the broad arbitration provision and express coverage of the “Solutions” program. Defendant also argues that because all of plaintiff’s claims against the defendant fall within the scope of the “Solutions” program, and the agreement is enforceable, CPLR §7503[a] and the FAA requires that plaintiff be compelled to arbitrate.

A motion to dismiss pursuant to CPLR §3211[a][1], requires that the party seeking dismissal produce documentary evidence that “utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled (Leon v. Martinez, 84 N.Y. 2d 83, supra). Pleadings that consist of bare legal conclusions and factual assertions which are clearly contradicted by documentary evidence will not be presumed to be true and are susceptible to dismissal (Dragon Head LLC v. Elkman, 102 A.D. 3d 552, 958 N.Y.S. 2d 134 [N.Y.A.D. 1st Dept.,2013]).

Defendant alleges that the plaintiff has a binding obligation to arbitrate. It is defendant’s contention that the complaint fails to state a cause of action because the relief sought, which is essentially identical to the SDNY action relief, is subject to resolution by mediation and arbitration.

The “Solutions” Manual and Agreement at Section II, paragraph H, defines the “Company” as, “NBCUniversal, any subsidiaries, affiliates, joint ventures, and parents thereof that have adopted the procedure, and, as to each of these, their officers, directors, agents, supervisors/managers acting within the scope of their employment and any of its or their successors.” (Mot. Sandak Aff., Exh.1). The “Solutions” Manual and Agreement at Section II, paragraph K, titled, “Covered Claims” includes, “Employment discrimination and harassment claims, based on, for example, age race, sex religion, national origin, veteran status, citizenship, handicap/disability, or other characteristic protected by law.” (Mot. Sandak Aff., Exh.1).

The FAA, “preempts State law on the subject of enforceability of arbitration clauses ...even though the dispute itself may arise under State law” (Fletcher v. Kidder, Peabody & Co., Inc., 81 N.Y. 2d 623, 619 N.E. 2d 998, 601 N.Y.S. 2d 686[1993]). Arbitration provisions as governed by the FAA are strongly favored, even if ambiguous in scope. Any ambiguity as to the scope of the provision, is properly resolved in favor of

arbitration (PricewaterhouseCoopers LLP v. Rutlen, 284 A.D. 2d 200, 726 N.Y.S. 2d 258 [1st Dept.,2001]). A harassment claim against an employer and manager for events occurring during the course of employment, even if a nonsignatory, is subject to an agreement to arbitrate regardless of whether the provision is ambiguous in scope. The statutory nature of the discrimination claims does not affect enforceability of the arbitration provision (Tong v. S.A.C. Capital Management, LLC, 52 A.D. 3d 386, 860 N.Y.S. 2d 94 [1st Dept., 2008] and DiBello v. Salkowitz, 4 A.D. 3d 230, 772 N.Y.S. 2d 663 [1st Dept., 2004]).

Plaintiff's arguments in opposition to the motion that there is no binding agreement to arbitrate between the parties, and that the alleged harassment was outside the scope of employment do not state a basis to sustain this action. Plaintiff fails to establish that the alleged harassment, was outside of the defendant's position as his manager or outside the scope of her employment. He does not deny that the "Solutions" agreement requires his claims of discrimination and harassment be subject to arbitration. The fact that the defendant is not a signatory to the agreement does not avoid enforcement of the arbitration provisions as to the claims asserted against her.

Accordingly, it is ORDERED that the defendants' motion pursuant to CPLR §3211[a][1],[7], CPLR §7503[a] and 9 U.S.C. §§ 3 and 4, known as the Federal Arbitration Act (FAA), to dismiss the complaint and to compel arbitration of the claims asserted in the complaint, is granted, and it is further,

ORDERED that the case is dismissed without prejudice to plaintiff submitting the claims asserted for resolution to arbitration, and it is further,

ORDERED and ADJUDGED, that the clerk shall enter judgment accordingly.

ENTER:



MANUEL J. MENDEZ,
J.S.C.

Dated: January 18, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE