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

PRESENT: JEFFREY K. OING JUDGE, SUPREME COURT PART 48

Justice

Index Number : 652093/2010
BRIAN MANSBERGER, AN
vs.
ERNST & YOUNG LLP
SEQUENCE NUMBER : 004
COMPEL OR STAY ARBITRATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the annexed decision and order of the Court.

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Dated: 7/1/11

JEFFREY K. OING
JUDGE, SUPREME COURT
J.S.C.

Check one: ☒ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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BRIAN MANSBERGER, an individual, on behalf of himself and others similarly situated,

Plaintiff,

-against-

ERNST & YOUNG LLP, ERNST & YOUNG U.S. LLP, and DOES 1 through 10,

Defendants.

----------x

Index No.: 652093/10

Mtn. Seq. No. 004

DECISION AND ORDER

FOR PLAINTIFF:

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FOR DEFENDANTS:

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JEFFREY K. OING, J.:

Background

Plaintiff, Brian Mansberger, a former employee of defendant, Ernst & Young LLP ("E&Y"), commenced this class action, on behalf of himself and others similarly situated, against E&Y for its alleged failure to pay overtime wages in violation of New York Labor Law, 12 NYCRR § 142-2.2. Plaintiff claims that he and other E&Y employees were improperly classified as exempt from state overtime laws. He alleges that E&Y employed plaintiff from September 7, 2005 to November 3, 2006. As a condition of his employment, plaintiff signed a Confidentiality Agreement, dated

December 20, 2004 (the "Confidentiality Agreement"). That agreement expressly incorporates E&Y's Common Ground Dispute Resolution Program (the "Program," or the "Arbitration Agreement"). The Arbitration Agreement expressly requires that any dispute between plaintiff and E&Y be submitted to arbitration in accordance with the Program terms. The Confidentially Agreement states:

> I further agree that any dispute, controversy or claim (as defined in Attachment A) arising between myself and the Firm will be submitted first to mediation and, if mediation is unsuccessful, then to binding arbitration in accordance with the terms and conditions set forth in Attachment A, which describes the Firm's Common Ground Dispute Resolution Program. I acknowledge that I have read and understand Attachment A and that I shall abide by it.

(Becca Aff., Ex. B, ¶ 6).

The Confidentiality Agreement further provides:

> I HAVE READ THIS AGREEMENT AND ATTACHMENT AND FULLY UNDERSTAND THE TERMS. I ACKNOWLEDGE THAT I HAVE AGREED TO WAIVE ANY RIGHT I MAY HAVE TO HAVE A DISPUTE BETWEEN MYSELF AND THE FIRM DETERMINED BY A COURT OF LAW AND THAT ALL SUCH DISPUTES SHALL BE RESOLVED THROUGH MEDIATION AND ARBITRATION.

(Id.).

The Arbitration Agreement clearly states that the Program is the "sole method for resolving disputes within its coverage" (Becca Aff., Ex. D, ¶ I). It applies to "all claims, controversies or other disputes" between Ernst & Young and its employees," with limited exceptions not applicable here (Id., ¶

II.B.1). The Arbitration Agreement lists examples of covered disputes, including, inter alia, claims: (1) "based on federal statutes such as ... the Fair Labor Standards Act ['FLSA'];" (2) "based on state statutes;" and (3) any claims "concerning wages, salary, and incentive compensation programs" (Id., ¶ II.C).

The Arbitration Agreement does not provide for class arbitration and expressly states that covered disputes pertaining to different employees must be brought in separate, individual arbitration proceedings (Id., ¶ IV.K).

Relief Sought

Defendants move, pursuant to CPLR 7503(a) and the Federal Arbitration Act, 9 USC §§ 1-16, to stay the instant action and compel plaintiff to proceed to arbitration.

Discussion

E&Y argues that the Federal Arbitration Act ("FAA") and New York law mandate arbitration of this action because the dispute is plainly within the scope of the Arbitration Agreement.

Plaintiff argues that the Arbitration Agreement, specifically, its prohibition on class actions, is unenforceable and void as against public policy. Plaintiff argues that he should not be compelled to arbitrate his claims because (1) the Arbitration Agreement did not contain an explicit class action waiver; and (2) the Agreement's prohibition on class action claims is unconscionable as it requires each employee to

arbitrate their wage claim separately, a process which effectively shields E&Y from liability arising from procedural mechanisms available under the Fair Labor Standards Act ("FLSA") and New York Labor Law.[1]

With respect to plaintiff's first argument, the Arbitration Agreement plainly states, in a paragraph titled "Separate Proceedings," that "[c]overed disputes pertaining to different employees will be heard in separate proceedings" (Becca Aff., Ex. D, ¶ IV.K). To the extent that plaintiff relies on Tran v Tran, 54 F3d 115 (2d Cir 1995) to support his argument that the Arbitration Agreement does not apply to his Labor Law claim, that case is distinguishable. Tran addressed the issue of whether an arbitration provision in a collective bargaining agreement precluded an individual union member from bringing an FLSA claim in court. Courts, however, have consistently declined to apply Tran to individual arbitration agreements to hold that FLSA claims are non-arbitrable as "different prudential considerations apply to collective bargaining," i.e., that "the union might not pursue the individual member's FLSA claims through the arbitration process for strategic reasons" (Ciago v Ameriquest Mortg. Co., 295 F Supp 2d 324, 332 [SD NY 2003]; Sinnett v

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[1] Plaintiff does not assert an FLSA claim as that claim would be barred by the statute of limitations. There is no limitations period issue with respect to New York Labor Law.

Friendly Ice Cream Corp., 319 F Supp 2d 439, 445 [SD NY 2004] [distinguishing collective bargaining agreement from situation where individual voluntarily enters arbitration agreement covering FLSA claims]).

As to the unconscionability argument, supra, plaintiff contends that the inability of an employee to bring claims for violations of 12 NYCRR § 142-2.2 as a class action proceeding undermines that statute and has the practical, chilling effect of implicitly encouraging employers to violate the statute given the unlikelihood of individual actions being asserted due to the relatively high cost of bringing such actions compared to the relatively small recoveries associated with individual wage and hour claims. For the reasons set forth below, plaintiff's argument is unavailing.

By its terms, the Arbitration Agreement is governed by the FAA (Becca Aff., Ex. D, ¶ V.G). The FAA's central purpose is to ensure that "private agreements to arbitrate are enforced according to their terms" (Volt Info. Sciences, Inc. v Board of Trustees of Leland Stanford Jr. Univ., 489 US 468, 479 [1989]). As such, the FAA "establishes an 'emphatic' national policy favoring arbitration which is binding on all courts, State and Federal" (Singer v Jefferies & Co., 78 NY2d 76, 81 [1991] [quotation marks and citation omitted]).

In deciding a motion to compel arbitration under the FAA, a court must only determine: (1) whether a valid agreement to arbitrate exists; and, if so, (2) whether the dispute falls within the scope of that agreement (Hartford Acc. and Indem. Co. v Swiss Reins. Am. Corp., 246 F3d 219, 226 [2d Cir 2001]); Matter of Verizon N.Y., Inc. v Broadview Networks, Inc., 5 Misc 3d 346, 349 [Sup Ct, New York County 2004]).

Here, plaintiff does not dispute that he entered into an arbitration agreement with E&Y, or that his wage claim expressly falls within the scope of that agreement. "[A] contractual proscription against class actions, such as contained in [plaintiff's agreement] is neither unconscionable nor violative of public policy (Ranieri v Bell Atlantic Mobile, 304 AD2d 353, 354 [1st Dept 2003]) (relying on the "strong public policy favoring arbitration and the absence of a commensurate policy favoring class actions [internal citations omitted]").

Moreover, as the United States Supreme Court recently held, "[r]equiring the availability of classwide arbitration [would] interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA" (AT&T Mobility LLC v Concepcion, 563 US ___, *9, 131 S Ct 1740, 1748 [2011]). In light of the Supreme Court's decision in AT&T Mobility, which held that the FAA preempts California's judicial rule regarding the unconscionability of class action waivers, plaintiff's

reliance on Sutherland v Ernst & Young LLP (__ F Supp 2d __, 2011 WL 838900 [SD NY 2011]) is misplaced. In any event, the Sutherland decision, although dealing with a substantially similar arbitration agreement, is not binding on this Court.

To the extent that plaintiff argues that enforcement of the arbitration agreement would prevent the vindication of his rights because arbitration would be too cost-prohibitive, E&Y's counsel during the June 7, 2011 oral argument represented to this Court that E&Y will pay all administrative fees and costs of the arbitration, and also represented that plaintiff may recover in arbitration any other fees and costs, e.g., attorneys' fees, that he could have recovered in court. These clear and binding representations eliminate any potential concern that arbitration would be so prohibitively costly for plaintiff as to prevent him from vindicating his rights (see e.g. In re Currency Conversion Fee Antitrust Litigation, 265 F Supp 2d 385, 411-12 [SD NY 2003]).

Accordingly, it is

ORDERED that defendants' motion to compel arbitration and stay this action is granted; and it is further

ORDERED that plaintiff Brian Mansberger shall arbitrate his claims against defendants Ernst & Young, LLP, and Ernst & Young U.S. LLP, in accordance with the parties' Arbitration Agreement; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 7/1/11

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING J.S.C.

JEFFREY K. OING J.S.C.