

Sum v Tishman Speyer Properties, Inc.

2005 NY Slip Op 30371(U)

November 30, 2005

Supreme Court, New York County

Docket Number: 110079-2005

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

Justice

PART 35

Sum, LYLANE

INDEX NO.

110079/05

MOTION DATE

11/7/05

MOTION SEQ. NO.

001

MOTION CAL. NO.

TISHMAN SPEYER PROPERTIES

The following papers, numbered 1 to _____ were read on this motion to/for compel arbitration

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

FILED

DEC 02 2005

NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendants' motion pursuant to CPLR 7503 (a) to compel arbitration of plaintiff's claims and for a stay of this action pending the outcome of such arbitration is granted; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 11/30/05



HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
LYLANE SUM,

Plaintiff,

Index No. 110079-2005

-against-

TISHMAN SPEYER PROPERTIES, INC.,
666 FIFTH, L.P., and DOE CORPORATIONS, 1-5,

Defendants.

-----X
HON. CAROL EDMEAD, J.S.C.

FILED
DEC 02 2005
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

In this action brought under New York City Human Rights Law for gender discrimination and unlawful retaliation, defendants Tishman Speyer Properties, Inc. ("Tishman Inc.")¹ and 666 Fifth, L.P. ("666 Fifth") (collectively "defendants") move pursuant to CPLR 7503 (a) to compel arbitration of plaintiff's claims and for a stay of this action pending the outcome of such arbitration.

Plaintiff alleges that she began her employment with defendants in 1996 as a porter, and became a full-time, permanent employee in 2002. It is claimed that on July 16, 2004, when plaintiff was proceeding to the women's locker room in defendants' building, she was sexually assaulted by one of defendants' employees, Enver Osa. When plaintiff advised her superiors of the incident, she was threatened and told that she could be fired if she asserted her rights. The attack allegedly affected plaintiff's ability to perform her job, and made her frightened, nervous

¹ Tishman Inc. is the general partner of Tishman Speyer, L.P., which is a limited partnership and property manager for the subject building. Tishman Inc, the entity sued herein, has no managerial or other role in the day-to-day operations of the subject building or the supervision of 666 Fifth's employees. Defendants assert that defendant Tishman Inc. is not a proper party and should be dismissed from this action.

and fearful to be in defendants' workplace, since Mr. Osa continued to work in the same facility as plaintiff. Plaintiff reported the attack to defendants and the New York City Police Department. Plaintiff alleges that upon learning of the attack, defendants failed to take any action to ensure the safety of her work environment and merely suspended Mr. Osa for a few days and directed him to take a vacation. Plaintiff further claims that defendants began retaliating against plaintiff after she reported the attack, by *inter alia*, threatening to take her job "away," reducing her hours, directing her to report to the supervisor for no reason, subjecting plaintiff to searches at the end of her shift, and changing her schedule and permitting Mr. Osa to retain his. After two months, on September 18, 2004, plaintiff was forced to take medical leave because of the emotional and related injuries she suffered. Defendants also refused to pay plaintiff for the period of her medical leave. When she was medically able to do so, plaintiff attempted to return to work on December 8, 2004, and defendants refused to permit her to do so. Defendants thereafter conditionally offered to permit plaintiff to return to her position, but only under conditions effectively requiring her to waive her claims against defendants. On May 17, 2005, defendants' termination of plaintiff's employment was confirmed.

Defendants contend that plaintiff's employment was pursuant to successive collective bargaining agreements, and the conduct complained of occurred during periods of time covered by two successive bargaining agreements (the "CBA"). Defendants argue that the terms of a collective bargaining agreement are enforceable until a new agreement is reached. Defendants point out that Article XIX ¶ 24 prohibits discrimination based on sex and any other characteristic protected by New York City Human Rights Law, and that all such claims "shall be subject to the grievance and arbitration procedure (Articles VII and VIII) as the sole and exclusive remedy for

violations.” Article VII ¶¶ 5-6 of the CBA requires that any matter submitted to arbitration be simultaneously submitted to a Joint Industry Grievance Committee established pursuant to the CBA. On July 21, 2005, plaintiff filed the instant complaint against defendant, instead of following the mandatory grievance and arbitration procedures. Defendants argue that there is a valid agreement to arbitrate plaintiff’s statutory discrimination claims, that plaintiff’s claim fall within the scope of the CBA, and that plaintiff’s claims must be arbitrated pursuant to the CBA.

Plaintiff opposes arbitration, arguing that union-negotiated collective bargaining agreements to arbitrate discrimination claims are unenforceable, and cannot bar union members from bringing human rights claims to court. Also, a union-negotiated waiver is subject to stricter scrutiny than an individually executed waiver. Discrimination matters pertain specifically to the human rights of the individual person asserting that claim. However, the collective bargaining agreement serves the interests of the body of union employees in general, and is not always consistent with the individual interests of the member. Plaintiff further argues that contrary to defendant’s claims, the arbitration clause of the CBA is not “clear and unmistakable” where plaintiff never knew or understood any aspect of, or received a copy of the CBA. Furthermore, the procedures of the arbitration reflect that it was not intended to encompass human rights claims. If this case is submitted to arbitration, pursuant to the CBA, the claim will become the union’s and not plaintiff’s. In fact, under the CBA, plaintiff does not even need to be present during the arbitration process. Thus, compelling arbitration would deprive plaintiff of her right to a jury and to be represented by counsel of her choosing.

In reply, defendants argue, *inter alia*, that there is a clear and unmistakable waiver of plaintiff’s right to a judicial forum. Further, binding First Department caselaw has held that a

plaintiff employed pursuant to the very same CBA at issue herein is required to arbitrate his New York Human Rights Law claims. Unlike the cases cited by plaintiff, the CBA here contains a clear and unmistakable waiver, warranting enforcement. There is a clear and unmistakable waiver because the CBA here specifically references the statutory provisions that form the basis of plaintiff's claims. Furthermore, whether plaintiff received a copy of the CBA is irrelevant on the issue of waiver, and plaintiff in fact knew she had to arbitrate her claims since she complained to the union, and the union brought her complaints to arbitration. The union then filed a grievance on plaintiff's behalf, which was scheduled for arbitration. However, the arbitration never occurred because it was rescheduled, and ultimately cancelled, at plaintiff's request. Even if plaintiff believes she is not being adequately represented by the union, her recourse is a complaint involving the union's statutory duty of fair representation and has no bearing on whether the CBA contains an enforceable waiver.

Analysis

Pursuant to CPLR § 7503 (a), where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. The question presented here is whether the arbitration clause contained in the parties' CBA is enforceable with respect to plaintiff's claims under the New York State Human Rights Law.

It is uncontested that plaintiff is a member of Local 32B-32J, Service Employees International Union, AFL-CIO, which is a party to the CBA with Realty Advisory Board on Labor Relations Incorporation, of which defendants are members.

Articles XIX ¶24 of the CBA provides that:

There shall be no discrimination against any present or future employee by reason of . . . sex, . . . or any characteristic protected by law All claims arising under this provision shall be subject to the grievance and arbitration procedure (Articles VII and VIII) as the sole and exclusive remedy for violations of this provision. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination. (This shall include claims made pursuant to Title VII of the Civil Rights Act,the New York State Human Rights Law, the New York City Human Rights Code,)

Article VIII further provides:

A Contract Arbitrator shall have the power to decide all differences between the parties as to interpretation, application or performance of any part of this agreement, and such other issues as are expressly required to be arbitrated before him

An agreement to arbitrate a statutory claim of employment discrimination must be "particularly clear." "A union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination" must be "clear and unmistakable" (*Wright v Universal Maritime Service Corp.*, 525 US 70 [1998]). Although the United States Supreme Court in *Wright (supra)* found it "unnecessary to resolve the question of the validity of a union-negotiated waiver" since "no such waiver had occurred," the First Department in *Garcia v Bellmarc Prop. Mgt.*, 295 AD2d 233 [1st Dept 2002] has answered this question in the affirmative. "[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum" (*Garcia v Bellmarc Prop. Mgt.*, 295 AD2d 233 [1st Dept 2002], citing *Circuit City Stores, Inc. v Adams*, 532 US 105, 123).

In *Garcia v Bellmarc Property Management, supra*, plaintiff, a building doorman, commenced an action for age discrimination under the Human Rights Law (Executive Law § 296) against the building's managing agent and others. The defendants' motion to compel

arbitration was granted and affirmed on appeal to the First Department. The Court held that the collective bargaining agreement governing plaintiff's employment contained an arbitration agreement that expressly covered age discrimination claims under the Human Rights Law. Unlike the plaintiff herein, the plaintiff in *Garcia* conceded that the arbitration provision was clear and unmistakable in its waiver of the employee's right to a judicial forum with respect to age-based Human Rights Law claims.

Conde v Yeshiva University (16 AD3d 185, 792 NYS2d 387 [1st Dept 2005]) is also instructive, and does not require a different result. There, the First Department concluded that the plaintiffs were not obligated to arbitrate their employment discrimination claims because the collective bargaining agreement did not clearly and unmistakably waive their statutory right to a judicial forum. The collective bargaining agreement's general arbitration clause provided for arbitration of "Any dispute, difference, or controversy related to wages, hours and working conditions," which could be understood to mean only disputes concerning matters under the contract. Further, although another portion of the collective bargaining agreement required the agreements to be subject to all applicable laws in effect, it lacked the necessary explicit incorporation of statutory anti-discrimination requirements to presume arbitrability.

Contrary to plaintiff's claim, the arbitration clause at issue contains a clear and unmistakable waiver of her right to a judicial forum of the discrimination claims raised in her complaint. Plaintiff's complaint alleges claims under New York State Human Rights Law, which are expressly referred to in the parties' CBA. The CBA contains a no-discrimination provision prohibiting discrimination against any employee on the basis of "sex" and plaintiff's complaint falls within the CBA's no-discrimination provision. Plaintiff has also failed to

arbitrate her claims pursuant to the CBA, and has instead sought to pursue her claims in Court.

Contrary to plaintiff's contention, *Alexander v Gardner-Denver Co.* (415 US 36, 94 S Ct 1011 [1974]) is not controlling (*see Fletcher v. Kidder, Peabody & Co., Inc.*, 184 AD2d 359, 584 NYS2d 838 [1st Dept 1992] [the Supreme Court, in *Gilmer v Interstate/Johnson Lane Corp.*, (500 US 20) ~~out~~ to rest any argument that its prior decisions, in *Alexander v. Gardner-Denver Co.*, (citations omitted) and its progeny, precluded arbitration of statutory employment discrimination claims. . . The United States Supreme Court's decisions in *Gilmer (supra)* and post-*Gilmer* case law are controlling and arbitration of plaintiff's racial discrimination claim should have been compelled]).

Therefore, since there is no substantial question that plaintiff's claims are subject to the CBA's arbitration clause, and plaintiff failed to arbitrate her claims, this Court grants defendants' motion to compel arbitration and stays this action pending the outcome of the arbitration. However, defendants' request for costs is denied. Dismissal of this action as against Tishman Speyer Properties, Inc. is denied, at this juncture, without prejudice.

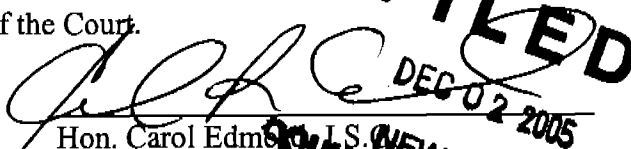
Accordingly, it is hereby

ORDERED that defendants' motion pursuant to CPLR 7503 (a) to compel arbitration of plaintiff's claims and for a stay of this action pending the outcome of such arbitration is granted; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 30, 2005


 Hon. Carol Edmeades, J.S.
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