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

PRESENT: _____ Justice

PART 56

Index Number : 603698/2006
MESH, DANA
VS
MESTEL & CO., INC.
Sequence Number : 001
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE 6/15/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

is 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

FILED
AUG 15 2007
COUNTY CLERK'S OFFICE
NEW YORK

[illegible] IS DECIDED IN ACCORDANCE
[illegible] ACCOMPANYING MEMORANDUM DECISION

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

Dated: 8/6/07

[illegible] HON. FRANCIS A. LOWE, III
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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DANA MESH,

Index No: 603698/06

Plaintiff

-against-

DECISION AND ORDER

MESTEL & COMPANY, INC.,

Defendant

----------x

RICHARD B. LOWE, III, J:

Plaintiff Dana Mesh ("Mesh") brings the instant action against Defendant Mestel & Company, Inc. ("Mestel") for breach of contract.

In Motion Sequence 001, Plaintiff Mesh moves for leave to amend the complaint pursuant to CPLR 3025 and to compel arbitration pursuant to CPLR 7503(a).

BACKGROUND

Mestel is a permanent staffing service, which specializes in the placement of attorneys. In or around February 2003, Mesh was hired by Mestel as a Director in the Partners, Groups & Mergers division of Mestel. When Mesh was hired, she was given several documents to sign, including an "Employment Agreement," and an "Acknowledgment Form and Agreement to Arbitrate" (the "Arbitration Agreement"). The Employment Agreement made no provision for arbitration and made litigation in this Court the parties' exclusive remedy. It expressly stated

that this Agreement would supersede all prior agreements between the parties with respect to Mesh's employment. The Arbitration Agreement which Mesh signed was dated February 11, 2003, whereas the Employment Agreement which Mesh also signed was dated February 13, 2003. On or about October 28, 2004, Mestel terminated Mesh's employment.

Mesh claims that she was entitled to be compensated for work she had performed prior to termination, and that Mestel refuses to pay. Mesh proceeded to file a Demand for Arbitration with the American Arbitration Association ("AAA"), pursuant to the Arbitration Agreement. The AAA informed the parties that there was a discrepancy between the National Rules for the Resolution of Employment Disputes of the AAA (the "Employment Rules") and the Arbitration Agreement, regarding the taking of depositions. The AAA requested that Mestel waive the restriction on depositions, which Mestel refused to do. Upon their refusal to comply, the AAA declined to administer the case and furthermore, they refused to administer subsequent employment disputes involving Mestel.

However, Mestel contends that the Arbitration Agreement is not enforceable. Mestel claims that the Employment Agreement, which replaced the Arbitration Agreement, makes no mention of an arbitration agreement; thereby it was not required to waive any of its rights. Mesh informed Mestel that she intended to move to compel arbitration.

In the Complaint filed in this action, Mesh did not include a count to compel arbitration under the Arbitration Agreement. Rather, Mesh brought the action alleging causes of action for breach of the Employment Agreement and for employment discrimination. Thus, the Plaintiff has filed this motion to amend the complaint to add this cause of action pursuant to CPLR 3025 and to compel arbitration pursuant to CPLR 7503(a).

DISCUSSION

I. *Order to Compel Arbitration Pursuant to CPLR 7503(a)*

CPLR 7503(a) states:

> A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. 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. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

Mesh seeks an order from the court to compel arbitration between the parties. Mesh avers that the parties entered into a valid and binding Arbitration Agreement. The Arbitration Agreement had been drafted by the Defendant and presented to the Plaintiff at approximately the same time as the Employment Agreement. Moreover, Mesh contends that it appeared that Mestel intended for the Arbitration Agreement to be enforceable when it presented the Agreement to Mesh and required her signature as a condition for employment. Thus, the Plaintiff maintains that this court should "generously construe[]" the Defendant's intentions as to issues of arbitrability and find this Agreement enforceable. In further support of her contention, Mesh argues that public policy under state and federal law prefers arbitration because it is "a means of conserving the time and resources of the courts and the contracting parties." (*Glickenhaus & Co. v Taylor*, 558 N.Y.S.2d 20, 22 [1st Dep't 1990], quoting *Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of America*, 37 N.Y.2d 91, 95 [1975].)

Mestel, in the converse, objects to the enforceability of the Arbitration Agreement in the instant action because it was explicitly superseded by the Employment Agreement. (*Affirmation of Joel A. Klarreich* ¶ 6.) The Arbitration Agreement had been signed by the Plaintiff on

February 11, 2003, whereas the Employment Agreement was signed on February 13, 2003. The Defendant avers and the Court agrees that the Employment Agreement contained no provision for arbitration and served to replace the earlier document. Furthermore, the Employment Agreement expressly stated that the right to seek resolution to legal disputes would be limited to this Court and the United States District Court for the Southern District of New York (*Id.* at ¶ 7.) Therefore, the Court concludes that there was no valid arbitration agreement as it applies to the causes of action in this Complaint.

However, Mesh responds that even if the Employment Agreement is found to be subsequent in time, an order to compel arbitration can still be upheld because "where, as here, the parties have entered into a valid contract containing a broad arbitration clause, 'subsequent acts or documents purporting or claimed to terminate an agreement containing a broad arbitration clause, if in dispute, raise issues for the arbitrators and not for the court.'" (*Popular Publications, Inc. v McCall Corp.*, 36 A.D.2d 927, 928 [1st Dep't 1971], quoting *Stein-Tex, Inc. v Ide Manufacturing Co.*, 9 A.D. 288, 289 [1st Dep't 1959].) Moreover, Mesh avers that such a merger clause in the Employment Agreement which served to supersede the earlier agreement, does not infer a waiver of the right to arbitrate. The court has held that absent an explicit intent to abandon the rights provided by earlier agreements, the merger clause does not constitute a waiver of the arbitration clauses in the earlier agreement. (*Albanese v Albanese, et al*, 798 N.Y.S.2d 342 [2004].) Additionally, in the instant case, the Plaintiff argues that the Arbitration Agreement and Employment Agreement were executed simultaneously and thus Mesh had a right to rely on Mestel's promise to arbitrate any claims.

However, it has been held that "where the party against whom the waiver [of a right to arbitrate] would operate contests the merits of the dispute or seeks affirmative relief through the

judicial process, that party waives the right to compel arbitration." (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 29 A.D.3d 481, 485 [1st Dep't 2006]; *Oklahoma Pub. Co. v Parsons & Whittemore, Inc.*, 255 A.D. 589, 591 [1st Dep't 1938] ("It is our opinion that plaintiff irrevocably waived and abandoned its rights under the arbitration clause by commencing its action at law for breach of contract.")) Thus, the Court must deny an order compelling the parties to arbitration because the Plaintiff waived her right to compel arbitration when she brought this action to the Court. After Mesh filed a Demand for Arbitration with the AAA and was informed that the Defendant refused to comply with the AAA, Mesh told Mestel that if it continued to hinder arbitration that she would move to compel. However, instead of moving to compel arbitration, the Plaintiff decided to file a Summons and Complaint in this Court, which did not include such a claim. The Court finds that these actions demonstrate Mesh's compliance with the express terms of her Employment Agreement. Accordingly, the order to compel arbitration must be denied.

II. *Leave to Amend Complaint Pursuant to CPLR 3025*

"A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." (*CPLR 3025*). Courts have consistently held that leave to amend a pleading is freely given in the absence of prejudice or surprise resulting directly from this delay. (*Seda v New York City Housing Authority*, 581 N.Y.S.2d 20, 21 [1st Dep't 1992]; *The Aetna Casualty & Surety Co. v LFO Construction Corp.*, 615 N.Y.S.2d 389, 392 [1st Dep't 1994]; *McCaskey, Davies and Associates, Inc. v New York City Health & Hospitals Corp.*, 59 N.Y.2d 755 [1983].) However, it is also well-established in New York courts that "leave to amend

should not be granted where the proposed amendment is palpably insufficient as a matter of law." (*Bank Leumi Trust Co. of N.Y. v D'Evori Int'l, Inc.*, 163 A.D.2d 26, 28 [1st Dep't 1990].)

Mesh also seeks leave to amend her Complaint to add an arbitration cause of action. In support of her claim, Mesh contends that no prejudice to the Defendant has occurred because the instant case is in its initial stages. Here, no discovery between the parties has transpired and court conferences have not been held. Furthermore, the Defendant itself has not claimed prejudice if the Plaintiff was to be granted the relief sought.

However, Mestel argues that Plaintiff's leave to amend the complaint should not be granted because the cause of action that Mesh wishes to add is deficient as a matter of law. In support of its contention, Mestel asserts that there was no Arbitration Agreement between the two parties because the Employment Agreement served to supersede the Arbitration Agreement, and the Employment Agreement does not contain an arbitration provision at all.

The Employment Agreement expressly states, "This Agreement herewith embodies the entire agreement and understanding of the parties hereto in respect of the subject matter contained herein or therein . . .. This Agreement supersedes all prior agreements and the understandings between the parties with respect to the employment of the EMPLOYEE by the COMPANY." (*Affirmation of Joel A. Klarreich* ¶ 6.) The Agreement also contained a provision that specifically limited the right to seek legal relief through the "exclusive jurisdiction of the Supreme Court of the State of New York, County of New York and the United States District Court for the Southern District of New York." (*Id. at* ¶ 7.) Therefore, Mestel concludes that there was no valid arbitration agreement. Furthermore, since Mesh's Complaint is based on the terms of the Employment Agreement, it is that contract's terms which apply and therefore, Mesh has no cognizable cause of action for arbitration. The Agreement explicitly stated that it was to

embody the entire agreement between the parties and the four corners of the Employment Agreement do not show a provision for arbitration but rather for the jurisdiction of New York courts. (*Id. at* ¶ 6.) In further support, as discussed above, Plaintiff's motion for leave to amend the complaint is moot because she waived her right to arbitration by bringing forth this action in this Court. Therefore, the motion for leave to file an amended complaint is denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Mesh's motion for leave to amend the complaint is denied and the motion to compel arbitration is denied.

Dated: August 6, 2007

ENTER:

RICHARD B. LOWE, III, J.S.C.

HON. RICHARD B. LOWE, III

FILED
AUG 15 2007
NEW YORK
COUNTY CLERK'S OFFICE