

**Matter of Crystal Window & Door Sys., Ltd. v
Barbara**

2007 NY Slip Op 32530(U)

August 8, 2007

Supreme Court, New York County

Docket Number: 0107517/2007

Judge: Shirley W. Kornreich

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

PRESENT: KORNREICH
Justice

PART 54

CRYSTAL WINDOW + DOOR SYSTEMS,
LTD.

INDEX NO. 107517/07

MOTION DATE 7/12/07

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

JAMES A. BARBANA

The following papers, numbered 1 to 5 were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2, 3

4, 5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

FILED
AUG 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/16/07

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

-----X
Application of CRYSTAL WINDOW & DOOR
SYSTEMS, LTD.,

Petitioner,

Index No.:107517/07

For an Order Pursuant to Article 75 of the CPLR
Staying Arbitration of a Certain Controversy

-against-

JAMES A. BARBARA,

Respondent.

**DECISION and
ORDER**

FILED

AUG 16 2007

NEW YORK
COUNTY CLERK'S OFFICE

-----X
KORNREICH, SHIRLEY WERNER, J.:

Petitioner Crystal Window & Door Systems, Ltd. ("Crystal") brings an Order to Show Cause against its former at-will employee, James A. Barbara, and petitions the Court, pursuant to CPLR 7503 (b), to stay the arbitration proceeding instituted by Mr. Barbara upon the ground that his discrimination claims are not arbitrable. Mr. Barbara contends that Crystal's petition should be denied.

I. Facts

A. Movant's Proof

Crystal, a New York business corporation engaged in the manufacture and sale of aluminum and vinyl windows and doors, requires its staff to sign a Confidentiality Agreement ("Agreement") in order to protect and preserve its trade secrets, proprietary information and secret manufacture processes. It contends that the Agreement's arbitration clause, which it drafted, is limited to disputes concerning the corporation's "confidences," and that when Mr. Barbara signed a copy of the

Agreement, he agreed to be bound by its terms and acknowledged that he was an at-will employee. Crystal did not sign the Agreement.

Crystal avows that it eliminated Mr. Barbara's position and terminated his employment after he spent too much time promoting his patent project instead of focusing on his work-related duties. Following his termination, Crystal insists that Mr. Barbara attempted to convert his Agreement into an "employment agreement" containing an "employment arbitration provision" so he could arbitrate his "discrimination claims" before the American Arbitration Association ("AAA"). Crystal argues that Mr. Barbara lacks a basis for his "Request for Arbitration" because he was an at-will employee who had no personnel manual or employment agreement. It further postulates that Mr. Barbara was aware that employment discrimination claims were never included in the Agreement's arbitration provision, and that he requested an employment-related arbitration because he failed to timely bring suit within ninety (90) days after the United States Equal Employment Opportunities Commission ("EEOC") issued him a "Right to Sue" letter on January 18, 2007. It claims that, "[a]s no proper basis was included in the 'Request for Arbitration' [Mr. Barbara] submitted, [his] arbitration attempt is barred by application of CPLR § 7502 (b)."

Crystal also avers that even if employment claims were intended to be included in the Agreement's arbitration provision, Mr. Barbara evidently waived and/or abandoned arbitration by electing to pursue his discrimination claims before the EEOC and in court. Accordingly, it requests that this Court stay arbitration.

B. Respondent's Proof

Mr. Barbara asserts that he joined Crystal in October 2002 as Vice President of National Sales and experienced "persistent harassment, disparate treatment, and [a] hostile work environment" for the

next thirty-two months of his employment because of his race (Caucasian) and gender. He contends that when he complained about the discriminatory treatment in June 2005, Crystal, whose upper-level managers are mostly Asian, terminated him. As a result of Crystal's "abusive, demeaning and belittling conduct," Mr. Barbara claims he suffered "pain, humiliation and emotional distress ... as well as economic damages," including approximately \$70,000 in unpaid compensation.

At the beginning of his employment, Mr. Barbara avows that Crystal presented him with a written Agreement and explained that it was a standard form required of all management employees. He insists that the Agreement's arbitration clause is unlimited to the scope of claims subject to arbitration, as it states:

The Parties agree to submit the [sic] *any and all disputes* to binding arbitration at New York. The arbitration shall be conducted on a confidential basis pursuant to the Commercial Arbitration Rules of the [AAA].

(emphasis added). He also contends that after his termination, he filed a charge of discrimination against Crystal with the EEOC because he believed that the procedures set forth in the anti-discrimination statutes and regulations, which required discrimination charges to be filed initially with the EEOC, superseded the Agreement's arbitration clause. In a "statement of position" letter dated November 14, 2005, Crystal challenged the EEOC's jurisdiction, stating:

Perhaps more importantly, there remains a question concerning this Commission's jurisdiction over some if not all of the issues as the Complainant had agreed in his employment contract to ARBITRATE all if not most of these issues he raises in his charge through binding arbitration. Attached as Exhibit A is a copy of the Agreement signed by the Complainant and our client. Paragraph "10" of Exhibit A sets forth the binding arbitration requirement agreed to by all the parties.

In electing to commence an arbitration rather than a civil action, Mr. Barbara avers that he not only relied on the language of the arbitration clause, but also on Crystal's stated interpretation of that

language. He contends that Crystal is now estopped from asserting that his discrimination and retaliation claims are outside the scope of the arbitration clause due to the position it took before the EEOC in November 2005. Also, he claims that the EEOC mailed him a "Right to Sue" letter on January 18, 2007, and that he commenced arbitration on April 18, 2007, *i.e.*, within ninety (90) days of the issuance and his receipt of the letter.

II. *Conclusions of Law*

CPLR § 7501 confers jurisdiction on the New York courts to enforce a written arbitration agreement. In determining the effect of such an agreement, "the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute." *Fener Realty Co. v. NICO Constr. Co.*, 182 A.D.2d 436, 437 (1st Dept. 1992) (quoting CPLR 7501). Nevertheless, a court may issue an order compelling arbitration upon application by a party aggrieved by another party's failure to arbitrate. CPLR 7503 [a]. A court also may stay arbitration "on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation..." CPLR 7503 [b].

Public policy favors arbitration as an expeditious and economical alternative to the judicial forum for the resolution of disputes. *See Weinrott v. Carp*, 32 N.Y.2d 190, 199 (1973). As such, "where there is no substantial question whether a valid agreement was made or complied with ... the court shall direct the parties to arbitrate." *Liberty Mgmt. & Constr. v. Fifth Ave. & Sixty-Sixth St. Corp.*, 208 A.D.2d 73, 77 (1st Dept. 1995) (quoting CPLR 7503 [a]). Thus, it is for the courts to determine, in the first instance, whether the parties have entered into a binding agreement to arbitrate. *Id.* Judicial inquiry ends once the court determines that a valid agreement to arbitrate exists and that the matter in controversy falls within the scope of the agreement. *Id.* at 80.

Here, it is clear that Crystal and Mr. Barbara entered into an enforceable Confidentiality Agreement, and that Mr. Barbara's discrimination claims are within the scope of the arbitration clause. The clause unequivocally states: "The Parties agree to submit the [sic] *any and all* disputes to binding arbitration at New York." (emphasis added). See *Gangel v. DeGroot, PVBA*, 41 N.Y.2d 840, 841 (1977) ("The agreement to arbitrate must be express, direct, and unequivocal as to the issues or disputes to be submitted to arbitration."). Having drafted an arbitration clause that covers "any and all disputes" with its at-will employee, Crystal is precluded from now arguing that the clause is limited to disputes concerning "confidences." See *Cheng v. Modansky Leasing Co.*, 73 N.Y.2d 454, 460 (1989) (to extent agreement is ambiguous, it must be construed against the drafter). In fact, an extremely broad arbitration clause, such as this one, should be given the full effect of its wording in order to implement the intention of the parties. *Weinrott*, 32 N.Y.2d at 199. Because Crystal failed to insert exceptions or restrictions within the clause for certain types of allegations, Mr. Barbara's discrimination claims should be arbitrated, regardless of his former at-will employee status. See *Nationwide Gen. Ins. Co. v. Investors Ins. Co.*, 37 N.Y.2d 91, 96 (1975).

Additionally, Crystal is judicially estopped from declaring that Mr. Barbara's discrimination claims are not subject to arbitration, because it already has asserted that his claims were arbitrable before the EEOC. Cf. *Kalikow 78/79 Co. v. State*, 174 A.D.2d 7, 11 (1st Dept. 1992) ("[A] party [not successful in] taking a position in one proceeding may not thereafter assume an inconsistent position in a subsequent proceeding."). See also *Kimco of New York, Inc. v. Devon*, 163 A.D.2d 573, 575 (2nd Dept. 1990) ("[T]he judicial system cannot tolerate this 'playing fast and loose with the courts.'"). On November 14, 2005, Crystal challenged the EEOC's jurisdiction and expressed in its "statement of position" letter that, "the Complainant [Mr. Barbara] had agreed in his employment contract to

ARBITRATE all if not most of these issues he raised in his charge through binding arbitration.”

Based on this admission, Crystal’s current effort to stay arbitration is disingenuous, especially since Crystal was the one who drafted the broad arbitration clause, and the one who demonstrated a clear intent to be bound by it. *See Rudolph & Beer, LLP v. Roberts*, 260 A.D.2d 274, 276 (1st Dept. 1999); *see also Bogoni v. Friedlander*, 197 A.D.2d 281, 292 (1st Dept. 1994) (“[A] judicial admission is binding and conclusive, ‘unless modified or relieved in the discretion of the court.’”). It is irrelevant whether Crystal signed a copy of Mr. Barbara’s Agreement, as “an arbitration clause in a written agreement is enforceable, even if the agreement is not signed, when it is evident that the parties intended to be bound by the contract.” *God’s Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 6 N.Y.3d 371, 373 (2006); *Rudolph & Beer, LLP*, 260 A.D.2d at 275-76. Crystal’s November 14, 2005 letter to the EEOC indicates such an intention.

Moreover, Mr. Barbara’s claims are *not* barred by his failure to meet the EEOC’s ninety-day deadline to file suit in federal or state court, as Crystal alleged. In fact, the EEOC issued its “Right to Sue” letter on January 18, 2007, and Mr. Barbara received it several days later. According to the letter, Mr. Barbara had “within 90 days of [his] receipt” to file his lawsuit in a federal or state court. Mr. Barbara filed his lawsuit in state court on April 18, 2007, *i.e.*, within ninety (90) days of his receipt of the letter. *Cf. Meadows v. Robert Flemings, Inc.*, 290 A.D.2d 386, 387 (1st Dept. 2002).

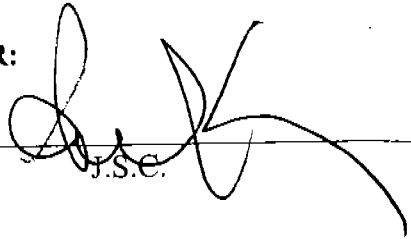
Also, Mr. Barbara’s discrimination claims are not time barred, as suits under 42 U.S.C. §1983 are governed by the three-year limitations period contained in CPLR § 214 (2). *See 423 South Salina St., Inc. v. Syracuse*, 68 N.Y.2d 474, 482 (1986). An employment discrimination claim accrues on the date that an adverse employment determination is made and communicated to the plaintiff. *Cordone v. Wilens & Baker, P.C.*, 286 A.D.2d 597, 598 (1st Dept. 2001). Because Crystal terminated Mr. Barbara

in June 2005, he has until June 2008 to file his discrimination claims. Accordingly, it is

ORDERED that Crystal's petition to stay Mr. Barbara's arbitration proceeding is denied.

August 8, 2007

ENTER:



J.S.C.

FILED
AUG 16 2007
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