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

PRESENT: HON. MILTON A. TINGLING J.S.C. PART 44
Justice

Index Number : 113902/2007
VELASQUEZ, NEREIDA
vs.
40 CENTRAL PARK SOUTH INC.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO.
MOTION DATE 4/23/08
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 is decided in accordance with annexed decision.

FILED
OCT 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/7/08

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: PART 44

----------X

NEREIDA VELASQUEZ,

Index No.113902/07

Plaintiff,

- against -

40 CENTRAL PARK SOUTH, INC.,
ATCO PROPERTIES & MANAGEMENT, INC.,
H. DALE HEMMERDINGER and DESMOND BEGLIN,

Defendants.

----------X

MILTON TINGLING, J.:

Defendants move to dismiss the action or, in the alternative, to compel arbitration and stay this action.

Background

The complaint alleges as follows: defendant ATCO Properties & Management, Inc. (ATCO), which manages the apartment building located at 40 Central Park South/41 West 58th Street, New York, New York (Building), employed plaintiff Nereida Velasquez as a concierge beginning in May 1995. Defendant 40 Central Park South, Inc. (40 CPS), the owner of the Building, purports to have been plaintiff's employer. Defendant H. Dale Hemmerdinger controls 40 CPS and ATCO. Defendant Desmond Beglin is the superintendent of the Building, and was plaintiff's immediate supervisor.

As a concierge, plaintiff was responsible for greeting building tenants and visitors, screening guests, arranging assistance for tenants, and helping to secure the Building entrance. During her 11 years of employment at the Building, plaintiff never received any negative employment evaluations, and there were no other women working on the Building's staff.

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As soon as Beglin arrived as superintendent, in June 2004, however, he made it clear to plaintiff that he did not want her working at the Building as a concierge because she was a woman. During the following two years, Beglin repeatedly mocked plaintiff because of her gender, and he refused to help when she complained of harassment by her co-workers, and he sought to have plaintiff removed as union shop steward because she was a woman. Plaintiff was often criticized for taking certain action, although the male workers were permitted to take the same action, such as, for example, permitting residents to speak directly with the Building's handyman.

In April 2005, plaintiff observed Beglin and other co-workers removing items from the Building, and placing them in Beglin's car, including plumbing fixtures and air conditioners. After plaintiff mentioned to a male co-worker that she suspected Beglin of stealing from the Building, she was told to ignore it, and, afterwards, the harassment against her escalated. Once plaintiff complained to Beglin about a co-worker who had exposed himself to her, but Beglin refused to discuss the matter, and he told her that she could find another job. On other occasions, male co-workers refused to assist plaintiff when intruders breached the Building's security, and they were never disciplined for permitting such breaches to occur.

The complaint alleges further that, by December 2005, the harassment of plaintiff had grown unbearable, her health was suffering, and, on the advice of her physician, she went out on short-term disability. Thereafter, when she needed to contact Beglin about paperwork relating to her disability claim, Beglin failed to keep an appointment to meet with her and failed to return her phone calls, and then falsely accused her of not contacting him for more than a month. Beglin also refused her request to return to work on restricted duty while she was recovering.

Eventually, plaintiff returned to work, at the end of her disability leave, in July 2006. Shortly thereafter, plaintiff was falsely accused of exposing her breasts to a building resident and the package room attendant, and her employment was terminated. Plaintiff alleges that the corporate defendants, and defendant Hemmerdinger approved of and ratified her sexual harassment and unlawful discharge.

The complaint contains six causes of action. The first and second causes of action allege that defendants violated the Human Rights Law, New York Executive Law § 290, *et seq.*, and the New York City Human Rights Law, Administrative Code of the City of New York (Administrative Code) § 8-101, *et seq.*, respectively, both of which prohibit discrimination in employment on account of sex, including sexual harassment.

The third and fourth causes of action again allege that defendants violated the Human Rights Law, New York Executive Law § 290, *et seq.*, and the New York City Human Rights Law, Administrative Code § 8-101, *et seq.*, respectively, both of which prohibit discrimination in employment on account of disability.

The fifth and sixth causes of action also allege that defendants violated the Human Rights Law, New York Executive Law § 290, *et seq.*, and the New York City Human Rights Law, Administrative Code § 8-101, *et seq.*, respectively, both of which prohibit retaliation against employees who engage in protected activity.

Plaintiff seeks reinstatement to her former position, back pay, lost benefits, front pay, and compensatory and punitive damages.

Defendants contend that this action should be dismissed because plaintiff's sole remedy is to pursue arbitration pursuant to the terms of the collective bargaining agreement (CBA) between

the Realty Advisory Board on Labor Relations Incorporated (RAB) and the Service Employees International Union, Local 32B-32J (Local 32B-32J), in that, during the time that plaintiff was employed by 40 CPS as a concierge, she was a member of Local 32B-32J. RAB is a multi-employer association that serves the real estate industry in the New York City area, and negotiates collective bargaining agreements on behalf on owners and operators of real property with unions that represent their maintenance and operating employees. Allegedly, 40 CPS is a member of RAB, and subject to the collective bargaining agreement negotiated by RAB and Local 32B-32J (Affidavit of Peter L. DiCapua, Chief Operating Officer of 40 CPS and ATCO, sworn to December 5, 2007).

Article XVII, § 23, of the CBA provides:

"23. *No Discrimination.*

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, sexual orientation, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, 42 U.S.C. Section 1981, Family and Medical Leave Act, the New York State Human Rights Law, the New York City Human Rights Code, or any other similar laws, rules or regulations. *All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as sole and exclusive remedy for violations.* Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.
>
> The parties will create a Committee to study recruitment and retention issues for all underrepresented groups in the residential industry." (Emphasis added.)

According to defendants, plaintiff's allegations of unlawful discrimination fall within the scope of this section which makes arbitration her "sole and exclusive remedy."

Plaintiff argues that she is not required to arbitrate her claims because (1) federal law invalidates any waiver of her right to proceed in court on her state law claims, (2) she was not a

union member at the time of her alleged unlawful discharge and, thus, is not subject to the CBA, and (3) she elected not to file a grievance in the CBA, but to employ her judicial remedies. Plaintiff also argues that, to the extent that defendants are not members of RAB, they are not parties to the CBA, and no arbitration is required.

Discussion

As a preliminary matter, it is unclear from the papers as to which entity plaintiff was employed - 40 CPS (as asserted by defendants) or ATCO (as asserted by plaintiff on information and belief). Neither side has submitted documentation resolving this issue. Nevertheless, plaintiff purports to have claims against both entities. As against 40 CPS, which is a member of RAB, and subject to the CBA to which plaintiff's union is a party, plaintiff must pursue her claims through arbitration as set forth in the CBA. As stated recently by the First Department:

> "The collective bargaining agreement governing plaintiff's employment contains an arbitration agreement that specifically includes within its scope gender discrimination claims under the New York City Human Rights Law. This union-negotiated waiver of plaintiff's right to a judicial forum to pursue the statutory claims here at issue is 'clear and unmistakable' and enforceable [citations omitted]"

(*Sum v Tishman Speyer Props., Inc.*, 37 AD3d 284 [1st Dept], *lv granted* 9 NY3d 817 [2007]).

Thus, a union-negotiated waiver of an employee's right to a judicial forum regarding Human Rights Law claims is enforceable if the union could waive such right on the employee's behalf (*Garcia v Bellmarc Prop. Mgt.*, 295 AD2d 233 [1st Dept 2002] [at issue were age-based Human Rights Law claims]). Such is the case here. To be sure, by so agreeing, "'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' (citation omitted)" (*id.* at 234).

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Although an employee is not obligated to arbitrate an employment discrimination claim where the collective bargaining agreement does not "clearly and unmistakably" waive the statutory right to a judicial forum (*Conde v Yeshiva Univ.*, 16 AD3d 185, 186 [1st Dept 2005]), here, as against 40 CPS, the claims at issue are clearly and unmistakably waived.

The arbitration provision (Article XVII, § 23 of the CBA) pertains to alleged discrimination against any employee by reason of "race, creed, color, age, disability, national origin, sex, sexual orientation, union membership, or any characteristic protected by law" and pertains to "claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, 42 USC Section 1981, Family and Medical Leave Act, the New York State Human Rights Law, the New York City Human Rights Code, or any other similar laws, rules or regulations."

Plaintiff alleges violation of the Human Rights Law, New York Executive Law § 290, *et seq.*, and the New York City Human Rights Law, Administrative Code § 8-101, *et seq.*, respectively, both of which prohibit discrimination in employment on account of sex, including sexual harassment, and on account of disability, and prohibit retaliation against employees who engage in protected activity.

As a policy matter, arbitrators are deemed to be in a better position than courts to interpret the terms of a CBA (*Wright v Universal Maritime Serv. Corp.*, 525 US 70, 78 [1998]). Moreover, in arguing that the arbitration provision is unenforceable, plaintiff relies primarily upon federal decisions involving claims of the violation of federal statutes, and which provide no basis for not following controlling New York State appellate authority.

Plaintiff also argues that she was no longer a union member when she commenced this

action, thereby rendering the terms of the CBA inapplicable. Plaintiff states that during the time that she was out on disability she could not afford to pay her union dues, which she last paid in April 2006. Thus, plaintiff opines, by the time that she was discharged, three months later, her union membership had lapsed, and therefore, she was no longer bound by the CBA. Assuming the accuracy of her statements as to the last payment in April 2006, this, by itself, does not establish that she was no longer a union member, nor that she would not be bound by the arbitration provisions contained in the CBA. Even if it did, however, the bulk of the complaints concern conduct occurring during the period when plaintiff stated that she had continued to pay her union dues.

Plaintiff argues persuasively, however, that the arbitration provision is not enforceable by defendants ATCO, Beglin, and Hemmerdinger, because they are not signatories to the CBA. As stated above, the obligation to arbitrate an employment discrimination claim is not present where the collective bargaining agreement does not "clearly and unmistakably waive their statutory right to a judicial forum" (*Conde v Yeshiva Univ.*, 16 AD3d at 186). Because defendants ATCO, Beglin, and Hemmerdinger do not claim to be parties to the CBA, and they do not articulate any other basis upon which to afford them the benefit of the mandatory arbitration provision, they cannot compel plaintiff to forgo her judicial remedies as against them (*see Matter of Lubin v Board of Educ. of City of N.Y.*, 119 AD2d 497 [1st Dept 1986]; *see also Matter of Gonzalez v County of Orange Dept. of Social Servs.*, 250 AD2d 849 [2d Dept 1998]; *Matter of Metamorphosis Constr. Corp. v Glekel*, 247 AD2d 231 [1st Dept 1998]).

Accordingly, it is

ORDERED that the motion by defendants 40 Central Park South, Inc., ATCO Properties

& Management, Inc., H. Dale Hemmerdinger, and Desmond Beglin pursuant to CPLR 7503 (a) to compel arbitration of the claims of plaintiff Nereida Velasquez is granted only as to defendant 40 Central Park South, Inc. and this action is stayed as against that defendant and plaintiff is directed to proceed to arbitration; and it is further

ORDERED that the remaining defendants are directed to serve their answers to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: 10/7/08

ENTER:

J.S.C.

HON. MILTON A. TINGLING
J.S.C.

FILED
OCT 09 2008
COUNTY CLERK'S OFFICE
NEW YORK