[* 1].

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

PRESENT: SALIANN SCARPULLA PART 19

Justice

Index Number : 115688/2010

HAYES, DANIEL F.

VS.

BIEDERMANN REIF HOENIG & RUFF

SEQUENCE NUMBER : 001

DISMISS

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 is decided in accordance with the accompanying memorandum decision.

FILED

AUG 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/28/11

Saliann Scarpulla
SALIANN SCARPULLA 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: CIVIL TERM: PART 19

---------- X

DANIEL F. HAYES

Plaintiff,

-against-

BIEDERMANN REIF HOENIG & RUFF, P.C., KURT E. BIEDERMANN, FREDERICK W. REIF, PETER HOENIG, LESLIE F. RUFF, DEBRA TAMA, and PHILIP C. SEMPREVIVO, all individually and as members of BIEDERMANN, REIF, HOENIG & RUFF, P.C.,

Defendants.

---------- X

Index No. 115688/10
Submission Date: 5/18/2011
Sequence Numbers: 001

DECISION AND ORDER

For Plaintiff:
Kaiser, Saurborn & Mair, P.C.
111 Broadway, Suite 1805
New York, New York 10006

For Defendants:
Kaufman, Borgeest & Ryan, LLP
120 Broadway, 14th Floor
New York, New York 10027

Papers considered in review of this motion to compel arbitration:
Notice of Motion..... 1
Mem of Law in Supp..... 2
Mem of Law in Opp:..... 3
Mem of Law in Further Supp..... 4

HON. SALIANN SCARPULLA, J.:

In 1998, the defendant law firm of Biedermann, Reif, Hoenig, and Ruff ("BRHR"), then known as Biedermann, Hoenig, Massamillo & Ruff ("BHMR"), hired plaintiff Daniel Hayes ("Hayes") with the title "of counsel." In 2001, Hayes' title was changed to partner, but he never had an ownership interest in the firm. In 2007, BHMR agreed to merge with another law firm, to form what is now known as BRHR. After the merger, Hayes was informed that his title was again changed to "of counsel."

Hayes alleges that on or about December 23, 2008, he was asked to speak with defendant Peter Hoenig ("Hoenig") and defendant Kurt E. Biedermann ("Biedermann") in Biedermann's office. At that meeting, Hayes alleges that Hoenig and Biedermann encouraged Hayes to retire early and got angry with him when he stated he did not intend to retire. Hayes allegedly told Hayes that he did not do any work for BRHR, but was just brought over to BRHR to do the work that Gene Massamillo, who had left before the merger, would have done. Hayes further alleges that Hoenig told him that he was "too old" to continue working and that Hayes understood the comments to mean that he had to transition to retirement or be terminated.

Hayes then had a series of meetings with defendant Philip C. Semprevivo and defendant Leslie F. Ruff concerning his future, and they agreed that Hayes would work three days a week at a reduced salary between February 1, 2009 and December 31, 2009.

The parties executed an employment agreement on or about February 1, 2009 which memorialized their agreement. The employment agreement provides, in pertinent part, that:

> Any controversy or claim arising out of, or relating to, this agreement or the breach thereof, shall be settled by arbitration in New York City under the commercial rules of the American Arbitration Association and judgment upon any award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof.

In the fall of 2009, Hayes asked BRHR to extend the employment agreement for a year, and it was extended to March 31, 2010 by letter from Reif to Hayes. This letter confirmed that, other than extending the term of the employment contract, all other terms (including the arbitration provision) remained unchanged. In January 2010, the parties

orally agreed to an additional one month extension of Hayes' employment until April 30, 2010. Hayes left BRHR on April 30, 2010.

Hayes commenced this action on December 3, 2010, asserting two causes of action of age discrimination. The first cause of action is pled under New York State law, for violation of Executive Law §296, and the second cause of action is pled under New York City Law, for violation of New York City Administrative Code §8-502(a). Each cause of action is against the firm as a whole and each partner individually.

BRHR and the individual defendants move to stay this action, compel arbitration and also to dismiss the claims against the individual defendants. BRHR and the individual defendants argue that the arbitration provision in the employment agreement requires that Hayes' claims be resolved through arbitration and not through litigation. Further, they contend that the claims against the individual defendants should be dismissed for failure to state a claim. Hayes opposes the motion, arguing that the agreement expired, that the arbitration clause was not meant to cover statutory discrimination claims and that he has adequately pled discrimination claims against the individual defendants under state and local human rights law.

Discussion

New York favors arbitration. *See Lory Fabrics, Inc. v. Dress Rehearsal, Inc.*, 78 A.D.2d 262. 267 (1st Dept't 1980). Once the parties' mutual intention to submit to arbitration and forego access to judicial remedies is clear, the parties are required arbitrate. *Lory Fabrics, Inc*, 78 A.D.2d at 267. If arbitration is mandatory, the obligation to arbitrate extends not only to the contract's signatories but also to those who are

expressly contemplated within the contract and who by their actions consented to it. *See Ranieri v. Bell Atlantic Mobile*, 304 A.D.2d 353, 354 (1st Dep't 2003); *see also Hirschfeld Prods., Inc. v. Mirvish*, 218 A.D.2d 567, 569 (1st Dep't 1995).

Additionally, the obligation to arbitrate extends not only to the type of disputes expressly specified in the arbitration clause, but also to any disputes that were contemplated to be covered. *Fletcher v. Kidder, Peabody & Co.*, 81 N.Y.2d 623 (1993). Broad phrases such as "arising out of" and "relating to" expand the coverage of the arbitration clause to claims not expressly listed. *See Fletcher*, 81 N.Y.2d at 623; *Oldroyd v. Elmira Savings Bank*, 134 F.3d 72 (2d Cir 1998); *Elwell v. Google, Inc.*, 2006 WL 217978 (S.D.N.Y. 2006); *Chisolm v. Kidder, Peabody Asset Management*, 810 F.Supp 479, 481 (S.D.N.Y. 1992).

The arbitration clause at issue here is a typical, broad arbitration clause, and states "any controversy or claim arising out of, or relating to, [the employment agreement] or the breach thereof" must be arbitrated. The phrases "arising out of" and "relating to" are sufficiently broad to encompass Hayes' claims that BRHR violated state and local human rights law. *See Fletcher*, 81 N.Y.2d 623; *see also Oldroyd*, 134 F.2d at 72; *Chrisolm*, 810 F.Supp 479 at 481.[1]

Further, Hayes' oral renewal of the employment agreement was sufficient to bind him to the arbitration provision. During Hayes' final one month extension, the parties all performed pursuant to the terms and conditions of the employment agreement. An oral

[1] *Cf. Cronas v. Willis Group Holdings*, 2007 WL 2739769 (S.D.N.Y. 2007) (where an employment contract contains a narrow arbitration clause, statutory discrimination claims are not covered).

extension of an agreement that contains an arbitration agreement extends the arbitration provision as well. *See Vann v. Kreindler, Relkin & Goldberg*, 54 N.Y.2d 936 (981); *see also Acadia Co. v. Edlitz*, 7 N.Y.2d 348, 349 (1960). Thus, the claims against BRHR, as well as the individuals, are arbitrable.

Finally, Hayes' claim that arbitration may be more expensive than litigation is speculative, and is not a reason to ignore the parties' agreement to arbitrate.

With respect to the individual defendants' motion to dismiss, the merits of a controversy governed by an agreement subject to a binding arbitration provision are exclusively within the province of the arbitrators. *See Olympia v. York OLP Co. v. Merrill Lynch, Pierce, Fennder & Smith, Inc.*, 214 A.D.2d 509, 512 (1st Dep't 1995). Accordingly, the issue of whether Hayes has stated a claim against the individual defendants is to be decided by the arbitrator. *See Olympia*, 214 A.D.2d at 509.

In accordance with the foregoing, it is hereby

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

ORDERED that the parties are directed to arbitrate this dispute in accordance with the employment 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 constitutes the decision and the order of the Court.

Dated: New York, New York
July 28, 2011

ENTER:
Saliann Scarpulla, J.S.C.