Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES **PART 17**
Justice

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DEAN MUSTAPHALLI,

Plaintiff,

-against-

Index No. 2473/11
Motion Date: 8/3/11
Motion Cal. No. 34

CITIGROUP GLOBAL MARKETS, INC. and JAMES MAGUIRE,

Defendants.

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The following papers numbered 1 to 11 read on this motion by defendants CITIGROUP GLOBAL MARKETS, INC. ("Citi") and JAMES MAGUIRE, for an order pursuant to CPLR 3211(a)(7) and 7503, compelling Plaintiff to arbitrate his claims in this case, and dismissing, or in the alternative staying, this action pending the outcome of arbitration proceedings.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1- 4
Memorandum of Law.....	5
Affidavit of Service.....	6
Affirmation & Memo in Opposition-Exhibits.....	7-8
Reply Brief-Exhibits.....	9-10
Exhibit.....	11

Upon the foregoing papers it is ordered that the motion by defendants for an order pursuant to CPLR 3211(a)(7) and 7503, compelling Plaintiff to arbitrate his claims in this case, and dismissing, or in the alternative staying, this action pending the outcome of arbitration proceedings, is granted to the following extent:

In his complaint, plaintiff , a former employee of Citi, alleges that defendant Citi discriminated against him on the basis of his race, creed, or national origin in violation of the New York State Human Rights Law ("NYSHRL") § 296 and the New York City Human Rights Law ("NYCHRL") § 8-107. Plaintiff further alleges retaliation, breach of contract, tortious interference with contract, and other causes of action. Defendants now move for the instant relief based upon plaintiff's claims being subject to arbitration pursuant to the language contained in Citi's Principles of Employment and Dispute Resolution Policy that plaintiff received and agreed to abide by on May 10, 2007 (as modified by the 2009 Principles of Employment and Employment Arbitration Policy, which plaintiff agreed to abide by on December 22, 2008). Plaintiff has opposed this motion, claiming the arbitration policy is not binding on plaintiff and defendants have not satisfied their burden of proof on this motion.

Defendants have submitted the following in support of their motion: copies of Citi's 2007 Principles of Employment signed by plaintiff, 2007 Dispute Resolution Policy signed by

plaintiff, the 2009 Principles of Employment, Employment Arbitration Policy, and the 2009 Employee Handbook, as well as the acknowledgment form signed by plaintiff, a copy of defendant's Employment Arbitration Policy, a copy of plaintiff's acknowledgment and acceptance of defendant's Principles of Employment, including the arbitration policy, with plaintiff's signature, a copy of defendant's Principles of Employment, with Plaintiff's signature, a copy of defendant's Employment Arbitration Policy, a copy of plaintiff's acknowledgment and acceptance of defendant's 2009 Employee Handbook, and a copy of plaintiff's complaint.

Defendants claim that this evidence shows plaintiff executed a valid agreement to arbitrate. In 2007, and again in December 2008, Citi provided plaintiff with numerous documents, including its Employment Arbitration Policy, and Plaintiff executed acknowledgments of those documents on May 10, 2007 and December 22, 2008. They also claim that having acknowledged his receipt of Defendant's Employment Arbitration Policy with his signature and with his digital acceptance, and by continuing employment with the Company, plaintiff agreed to use Citi's Employment Arbitration Policy to resolve any employment related disputes through binding arbitration. Specifically, this policy provides that plaintiff agreed to arbitrate "all employment disputes based on legally protected rights," including claims under any "state or local statute [or] regulation" "regarding employment discrimination, conditions of employment [and] termination of employment." Defendants claim that this provision covers plaintiff's employment discrimination causes of action under the NYSHRL, the NYCHRL, and the common law in the present case.

Plaintiff opposes this motion claiming that two of the agreements to arbitrate are illegible, and other documents cannot be independently connected to other documents and thus there is no proof of the plaintiff's agreement to arbitrate. Plaintiff also claims that Citi's Arbitration Policy is not binding because it is not incorporated by reference under New York Law's "beyond all reasonable doubt" standard. This is based upon the illegible nature of 2 documents and that the others do not unequivocally describe the Employment Arbitration Policy, which is allegedly referenced. Plaintiff also claims that Citi's arbitration policy is not binding because it lacks a clear and unequivocal waiver of litigation rights, which renders the entire policy merely permissive rather than mandatory. Plaintiff also claims the arbitration policy is not binding because the rules under the Financial Industry Regulatory Authority, Inc. or "FINRA", a self-regulatory organization) govern this case, and under FINRA Rule 1320, arbitration is not mandatory. Plaintiff also claims that the arbitration policy is not binding because under th policy, plaintiff was entitled to a proper internal dispute resolution after his initial complaint fo employment discrimination by his supervisor and only if such internal dispute resolution failed, arbitration would follow. Finally, plaintiff claims defendants have not met their burden of proof.

It is well settled that on a motion to compel or stay arbitration, the court must determine, whether the parties made a valid agreement to arbitrate, whether the agreement has been complied with, whether the dispute at issue falls within the agreement to arbitrate, and whether the claim is time-barred. Matter of Smith Barney, Harris Upham & Co. v Luckie, 85 NY2d 193, (1995.) *See also*, Levkoff-Sennet Partnership v Levkoff, 154 AD2d 352 (2d Dept

1998.) Once it is determined that the parties have agreed to arbitrate the subject matter in dispute, the court's role has ended and it may not address the merits of the particular claims. *See*, Matter of Praetorian Realty Corp, 40 NY2d 897(1976.) In fact, this Court's concern is limited to whether the parties made a valid agreement to arbitrate and not whether the contract as a whole was unenforceable. Wagner Acquisition Corp. v. Giove, 250 A.D.2d 857 (2d Dept 1998) In fact, Courts have recognized a strong federal and state policy favoring arbitration as an alternative means of dispute resolution. Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 76 (2d Cir1998.) As such, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); *see also* League of American Theatres & Producers, Inc. v. Cohen, 270 A.D.2d 43 (1st Dept 2000.) In addition, CPLR 7503(a) directs that "where there is no substantial question whether a valid agreement was made or complied with . . . the court shall direct the parties to arbitrate." Id. Here, applying these factors and reviewing the arguments presented in opposition to the motion, it is clear that plaintiff's claims are subject to arbitration.

Initially, it is significant that plaintiff has not submitted an affidavit in which he states that he did not actually acknowledge in writing Citi's arbitration policy. Plaintiff instead rests his opposition on the claim that Citi's evidence of his execution is illegible or that the multiple arbitration policies over the years of his employment do not clearly set forth a mandatory arbitration policy or that he did not know such existed. These claims are without merit. Additionally, as Plaintiff alleges that he was constructively discharged on December 4, 2009, and he initiated this action on January 31, 2011, the operative arbitration policy is the Citi 2009 Employment Arbitration Policy. Contrary to plaintiff's claim, he clearly acknowledged receipt of the 2009 Handbook Acknowledgment Receipt by online "click," on December 22, 2008, which produced an acknowledgment receipt. The acknowledgment Plaintiff received contained the following statement:

> Appended to the Handbook is an Employment Arbitration Policy as well as the "Principles of Employment" that require you to submit employment-related disputes to binding arbitration (see Appendix A and Appendix D). You understand that it is your obligation to read these documents carefully, and that no provision in this Handbook or elsewhere is intended to constitute a waiver, nor be construed to constitute a waiver, of Citi's right to compel arbitration of employment-related disputes.

This plain and unambiguous language of the signed Certification Agreement, along with the Employee Handbook, evidences an objective manifestation of assent, rendering plaintiff's subjective understanding unnecessary. Plaintiff's assertion that the prior Arbitration agreements somehow eliminate the 2009 Employment Arbitration Policy agreement because the copies Citi maintained in its files are not legible is both legally irrelevant and factually untrue. The actual copies contain legible signatures and defendants' claim that the signatures are plaintiff's, has not been refuted by plaintiff. In addition, Plaintiff's 2006 Employee Handbook acknowledgment receipt form, dated March 20, 2006, which is not denied by plaintiff, shows that plaintiff had been acknowledging, agreeing to, and working under Citi's

arbitration policy for years.

Moreover, plaintiff's contention that the 2009 Employment Arbitration Policy was not "incorporated by reference." is also without merit. The acknowledgment Plaintiff electronically signed is entitled "2009 U.S. Employee Handbook Acknowledgment Receipt." This contained the arbitration policy which specifically informed plaintiff that "[y]ou understand that it is your obligation to read these documents carefully;" "You understand that it's your obligation to read the Handbook and become familiar with its terms;" and "Appended to the Handbook is an Employment Arbitration Policy as well as the 'Principles of Employment' that require you to submit employment-related disputes to binding arbitration." On its face, this language is mandatory and perfectly clear. Plaintiff continued his employment with Citi for almost a year after acknowledging the 2009 Handbook with his electronic acknowledgment. Consequently, the Court finds that plaintiff has accepted the Citi 2009 Employee Handbook and the attached Arbitration Policy.

This finding also defeats plaintiff's claim that Citi's Arbitration Policy is not binding, but instead is merely permissive, because it lacks a "clear and unequivocal waiver of litigation rights." The Policy makes arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment based on legally protected rights that may arise between an employee or former employee and Citi or its current and former parents, subsidiaries, and affiliates and its and their current and former officers, directors, employees and agents …including, without limitation, claims, demands, or actions under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Rehabilitation Act of 1973, the Americans With Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, the Employee Retirement Income Security Act of 1974, the Worker Adjustment and Retraining Notification Act, the Sarbanes-Oxley Act of 2002, and all amendments thereto and any other federal, state or local statute, regulation or common-law doctrine regarding employment, employment discrimination, the terms and conditions of employment, termination of employment, compensation, breach of contract, defamation, retaliation, whistle-blowing, or any claims arising under the Citi Separation Pay Plan. Thus, contrary to plaintiff's claim the policy clearly states that arbitration is the required and exclusive forum for the resolution of his disputes as set forth in this action.

Plaintiff's argument that the Arbitration Policy is not enforceable because he was never able to engage in an internal dispute resolution process is also without merit. The Arbitration Policy in pertinent part states that "Citi believes that the resolution of such disagreements will be best accomplished by internal dispute resolution and, where that fails, by external arbitration." That statement in no way sets forth a requirement that as a condition to arbitration, a party must utilize an internal dispute resolution. Nor does it render the arbitration policy permissive.

Plaintiff's claim that under FINRA Rule 13201, an employment discrimination claim "is not required to be arbitrated under" FINRA rules, is also misplaced. While FINRA rules do

not require arbitration of this claim, FINRA Rule 13201 permits this claim to be arbitrated "if the parties have agreed to arbitrate it." Here, the Court has found that the parties have agreed to arbitrate this claim, and such an agreement is therefore not barred by the FINRA rule.

Based on the above, the motion by defendant is granted. The action is stayed and the parties are directed to proceed to arbitration, pursuant to the Employment Agreements set forth above. The Court finds it would be inappropriate to dismiss the action at this time. Accordingly, the parties are directed to proceed to arbitration, pursuant to the contract. The Court denies defendants' request for costs related to having to make the instant motion as not being authorized in any agreement between the parties.

A copy of this decision is being sent to the parties by means of facsimile transmission on August 9, 2011.

Dated: August 9, 2011 **.....**

ORIN R. KITZES, J.S.C.