SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100073/2014
CUSHMAN & WAKEFIELD NATIONAL
vs
NOVA, FERNANDO
Sequence Number : 001
ARTICLE 78

PART _____

INDEX NO. _____
MOTION DATE 2/27/14
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2, 3
Replying Affidavits _____ | No(s). 4, 5

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION, ORDER & JUDGMENT

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 4/25/14

_____, J.S.C.
JOAN B. LOBIS

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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CUSHMAN & WAKEFIELD NATIONAL CORPORATION,

Petitioner,

Index No. 100073/2014

-against-

Decision, Order, and Judgment

FERNANDO NOVA and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

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JOAN B. LOBIS, J.S.C.:

Petitioner Cushman & Wakefield National Corporation (Employer or Cushman) brings this proceeding seeking an extraordinary writ of prohibition against the Respondent New York State Division of Human Rights (Agency or DHR) pursuant to Section 7803(2) of the Civil Practice Law and Rules. Cushman claims that the DHR is exceeding its jurisdiction in pursuing its probable cause determination that Cushman discriminated against a union laborer, Fernando Nova. Mr. Nova, a 51-year old Dominican man, alleges that he was fired from his position as the superintendent of two of Cushman's buildings after he sought a transfer to a building with an elevator based on Mr. Nova's physical disabilities. The Agency opposes the petition. For the following reasons, the petition is denied.

Fernando Nova began working as a porter in 1996. In October 2005, he was promoted to superintendent of buildings located at 625 and 641 West 169th Street, here in New York City. The following year, he was named employee of the year. Cushman took over management of these buildings in 2011.

Mr. Nova is a member of the local chapter 32BJ of the union, Service Employees International Union (the Union or Local 32BJ). As a union employee, he was covered under a collective bargaining agreement between Local 32BJ and his employer, covering the period April 21, 2010, to April 20, 2014 (the Agreement or CBA). Article XVII(23) of that Agreement contained a mandatory arbitration clause for all discrimination claims, providing that arbitration was the "sole and exclusive remedy" for the parties arising out of the Employer's discrimination violations.

In November 2012, Mr. Nova was treated in the emergency room for back pain and symptoms of vertigo. He alleges that on November 27, 2012, he requested in writing a transfer to a superintendent's position in a building with an elevator, but was denied the transfer. He claims that he met with his supervisor and another Cushman representative regarding the request.

It is undisputed that following these alleged incidents, Mr. Nova received numerous written warnings, including those of January 10, 2013, January 18, 2013, and January 21, 2013. The following month, he was given a performance improvement plan. Mr. Nova met with his union delegate to complain of these actions, and a letter from his delegate was sent to his employer on February 13, 2013. Despite his 17 years of service, on May 1, 2013, Mr. Nova was terminated.

Two days after he was fired, Mr. Nova filed a verified complaint with the DHR, alleging unfair employment practices. The case was assigned a state agency case number and a federal charge number. At the same time that Mr. Nova pursued his complaint at the DHR, the

Union, through its president, also grieved Mr. Nova's termination as arbitrary.

Cushman opposed Mr. Nova's unfair employment practice charges. It claimed, among other things, that the Agency lacked jurisdiction in light of the CBA's mandatory arbitration clause for any discrimination violations by the Employer. Notwithstanding Cushman's response, the DHR, upon completing its investigation, determined on October 29, 2013, that it had jurisdiction and probable cause existed to believe that in Case No. 10161972/Federal Charge No. 16GB303187, Cushman engaged in unlawful discrimination (Determination). In pertinent part, the Agency's final report accompanying the Determination found factual disputes existed whether Cushman failed to reasonably accommodate Mr. Nova based on his physical disabilities. The case was referred for an evidentiary hearing before an administrative law judge. In issuing the Determination, the Agency advised that if Mr. Nova did not appear with legal representation, the Agency would send a legal representative, but as its own representative, not the complainant's. See 9 N.Y.C.R.R. § 465.13(d)(1).

Following the issuance of the DHR's Determination, Cushman moved to reopen the proceeding. See 9 N.Y.C.R.R. § 465.20(b). That application to reopen remains pending. At a January 8, 2014, pre-hearing conference, the administrative law judge represented that she would schedule an evidentiary hearing on the Determination should Cushman's application to reopen be denied.

As the Agency investigated the unfair employment practice allegations, the Union grievance proceeded. Following unsuccessful mediation, the Union and Nova's employer prepared

to have the issue heard in arbitration. After the Agency issued its Determination, the Union amended its grievance on behalf of Mr. Nova to include the allegations of state and federal unfair employment practices, as well. The arbitration on Mr. Nova's termination was conducted on January 6, 2014, and the decision is pending.

Cushman now petitions this Court in this Article 78 proceeding. It prays that the Court enjoin the Agency from adjudicating the administrative case because Mr. Nova's sole remedy under the CBA is to arbitrate any discrimination violations by his employer. In response, the Agency asserts that it is not a party to the CBA and, therefore, it is not bound by any clause limiting a union member's means of enforcing a member's right to be treated non-discriminatorily. It further contends that Cushman's petition is premature, noting Cushman's pending request to reopen the Determination, and the Agency contends that the petition should be denied for failure to exhaust administrative remedies. In reply, Cushman contends that any exhaustion of administrative remedies would be futile.

Cushman's petition claiming that the DHR is acting in excess of its jurisdiction is a non sequitur. A writ of prohibition pursuant to Section 7803(2) is an extraordinary remedy. E.g., Perry v. Barrett, 113 A.D.3d 536, 536 (1st Dep't 2014). It lies only to prevent a body or officer from acting "without or in excess of jurisdiction." C.P.L.R. § 7803(2). That remedy, moreover, lies in this Court's discretion. Schumer v. Holtzman, 60 N.Y.2d 46, 51 (1983) (writ lies only when a "clear right to relief appears, and, in the court's discretion, the remedy is warranted"). It simply does not logically follow that the DHR loses its powers under this state's Human Rights Law because an

employer has successfully negotiated a mandatory arbitration clause for employees' sole remedy for discrimination violations against those employees by the employer.

The DHR is broadly empowered with general jurisdiction as an agent of the State of New York with police power to protect the public welfare and fulfill this state's constitutional civil rights provisions as well as to act to assure equal opportunity, including the elimination and prevention of discrimination in employment. See Exec. Law §§ 290(2)-290(3). That power includes the mandate to receive, investigate, pass upon, and hold hearings upon complaints of unfair employment practices. See id. §§ 295(6)-295(7). And the law provides a myriad of sanctions that are available to the Agency qua Agency to rectify any showing of unlawful discrimination by employers: it can pursue a cease and desist order; it can enjoin an employer to act without discriminatory animus in its employment decisions; it can impose civil penalties and fines; it can require compliance reporting, etc. See id. § 297(c); see also 9 N.Y.C.R.R. § 465.9 (injunctions); id. §465.13(f) (parties shall consult with Agency regarding any proposed settlement for purpose of preserving public interest); id. § 465.13(h)(i) (Agency shall appear at hearing where substantial public interest exists); id. § 465.15(g)(5) (in settlement negotiations, DHR may consider whether public interest requires continuation of proceedings); id. § 465.16(b) (settlements post-determination of probable cause should include agreement by respondent to refrain or cease and desist from unlawful discriminatory practices); id. § 465.18 (DHR shall investigate compliance with stipulation or order resolving probable cause determination within one year after entry).

In this case, Cushman's request to enjoin the Agency from prosecuting the administrative case is contrary to public policy. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 266

(2009) (agreements to arbitrate do not allow employers to forego their obligations under fair employment laws). An employer cannot subvert fair employment law simply because employees have agreed to limit their means of enforcing their rights under those laws. A fair employment agency's panoply of obligations and rights to protect and promote equal opportunity remains unfettered notwithstanding CBA provisions limiting private parties' rights. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (individuals who agree to arbitrate discrimination claims may still file charge with federal fair employment agency); cf. Preston v. Ferrer, 552 U.S. 346, 359 (2008) (arbitration clause preempts state law proceeding regarding licensing issue where agency would act as impartial arbiter rather than as advocate advancing a cause). Moreover, the CBA limits the arbitrator's authority to differences "arising between the parties" of the CBA. CBA Article VI(1). It is silent regarding any arbitral authority extending to investigations by government agencies enforcing state and federal fair employment laws against putative violators. A contract cannot bind a nonparty. EEOC v. Waffle House, Inc., 234 U.S. 279, 294 (2002).

Cushman's citation to Justice MacDonald's decision in Board of Managers v. Price, Index. No. 715/12 (N.Y. S. Ct. March 15, 2012), is inapposite. In that case, the Agency stipulated to stay its enforcement action pending the parties' arbitration. The Court did not decide whether the Agency had jurisdiction to proceed.

Nor has Cushman shown that exhaustion of remedies would be futile. Watergate II Apartments v. Buffalo Sewer Auth., 46 N.Y.2d 52, 57 (1978). Cushman admits that the DHR has not refused Cushman's request to reopen its probable cause investigation. Indeed in Price, the

parties resolved to have the Agency stay the administrative proceedings pending arbitration. This Court notes that the administrative law judge expressly represented at the pre-hearing conference that any evidentiary hearing would not be scheduled until disposition of the Employer's motion to reopen. Moreover, should the motion be denied, DHR rules provide for a settlement calendar of matters to be heard, presenting a further opportunity for resolution of this dispute prior to any judicial involvement. See 9 N.Y.C.R.R. § 465.10. Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: April 25, 2014

JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).