

Weinstein v Jenny Craig Operations, Inc.

2014 NY Slip Op 33644(U)

September 2, 2014

Supreme Court, New York County

Docket Number: 105520/11

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

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TAMMY WEINSTEIN, MELISSA PALLINI, individually
and on behalf of all others similarly situated who were
employed by JENNY CRAIG OPERATIONS, INC.,

Plaintiffs,

INDEX NO.
105520/11

-against-

JENNY CRAIG OPERATIONS, INC.,

Defendant

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HON. ANIL C. SINGH, J.:

NEW YORK
COUNTY CLERKS OFFICE

Defendant moves pursuant to CPLR 6301 to exclude from this action individual plaintiffs who signed arbitration agreements containing class action waivers, and to bar them from receiving notices related to this litigation.

Plaintiffs are a class of 751 present and former non-managerial employees of defendant's weight loss centers in New York whose time cards were changed by center directors from May 2005 to the present to reflect they had taken a 30-minute lunch break during their shift when they in fact had worked through that break. These deductions were allegedly made pursuant to a company policy which imposed a mandatory 30-minute lunch break, yet encouraged employees to work during that break. By decision dated October 24, 2013, this court certified this action as a class action pursuant to CPLR 901 *et seq.* (the "prior decision").

The underlying facts are fully set forth in the prior decision, which is incorporated by reference herein, and will be reiterated only as necessary.

Defendant now seeks to exclude a sizable number of plaintiffs from this action, arguing for the first time that the arbitration agreements and class action waivers signed by plaintiffs (at exhibit A to the supporting affidavit of Kimberly K. Matthews [“Matthews”]) are enforceable and limit their remedies to individual arbitrations.

In opposition to defendant’s motion, plaintiffs raise two persuasive arguments: (i) the arbitration agreements at issue are unenforceable and cannot bar this litigation because they were not executed until after the complaint herein was filed (in some cases not until after the motion to certify the class was granted) and were solicited by defendant without telling potential plaintiffs of the suit’s pendency, and (ii) even if the agreements were enforceable, they would not bar this litigation because defendant has waived its right to arbitrate.

“[T]he federal Arbitration Act [“FAA”] ... mandates the enforcement of written arbitration agreements relating to transactions affecting interstate commerce” (*Cantor Fitzgerald Securities v Refco Securities, LLC*, 83 AD3d 592, 600 [1st Dept 2011], citing 9 USC § 2). Such agreements must be enforced according to their terms (see *Dean Witter Reynolds Inc. v Byrd*, 470 US 213, 221 [1985]). However, although both federal and New York public policies strongly favor arbitration, agreements to arbitrate will be enforced only when the parties clearly intend to arbitrate their claims. Class action waivers contained in arbitration agreements are also enforceable (see *American Express Co. v Italian Colors Restaurant*, * US *, 133 S Ct 2304 [2013]). Employment contracts are covered by the FAA (see *EEOC v Waffle House, Inc.*, 534 US 279 [2002]), and wage-and-hour claims are subject to arbitration and class action waivers (see *Lloyd v JP Morgan Chase & Co.*, n.o.r., 2013 WL 4828588, *6 [SDNY 2013]; *Sutherland v Ernst & Young*, 726 F3d 290, 296-298 [2d Cir 2013]; *LaVoice v UBS Financial Services, Inc.*, n.o.r., 2012 WL 124590 [SDNY 2012]).

In *AT&T Mobility LLC v Concepcion*, * US *, 131 S Ct 1740 [2011]), the US Supreme Court held that a California judicial policy of conditioning the enforceability of arbitration agreements on the availability of class-action arbitration must give way to the federal policy of favoring arbitration.

Matthews, defendant's Vice President and General Counsel, avers that she became aware of the US Supreme Court's April 27, 2011 decision in *AT&T Mobility* on April 28, and as a result defendant "decided to implement class action waivers in its arbitration agreements with existing and future employees" (Matthews affidavit, ¶ 3). On May 10, 2011, Matthews "signed a directive requiring [d]efendant's existing and future employees to execute" arbitration agreements with class action waivers, and the agreements began to be collected the very next day. Coincidentally, May 10 was also the date plaintiffs filed their summons and complaint in this action. Matthews argues this coincidence should be discounted because defendant "did not know about the lawsuit at the time it began implementing class action waiver agreements" (*id.*, ¶ 4) because the summons and complaint were served on the Secretary of State rather than defendant directly, and defendant did not receive it until May 27, "by which time 117 non-exempt employees in New York had already executed the class action waiver arbitration agreement" (*id.*)

For defendant to suggest that it could not pursue contractual agreements to arbitrate prior to the US Supreme Court's decision in *AT&T Mobility* is disingenuous. New York did not have a judicial policy of barring arbitration agreements with a class-action waiver. On the contrary, a decade ago the First Department explicitly held that an "arbitration provision is enforceable even though it waives plaintiff's right to bring a class action" (*Tsadilas v Providian National Bank*,

13 AD3d 190, 191 [1st Dept 2004], lv den 5 NY3d 702 [2005], citing *Gilmer v Interstate/Johnson Lane Corp.*, 500 US 20 [1991]). “Under New York law, ‘a contractual proscription against class actions is neither unconscionable nor violative of public policy’” (*Tsadilas, supra*, at 191, citing *Ranieri v Bell Atlantic Mobile*, 304 AD2d 353, 354 [1st Dept 2003], lv den 1 NY3d 502 [2003]).

Clearly, defendant’s endeavor to have its employees sign arbitration agreements was prompted by plaintiffs’ commencement of this action. Arbitration agreements signed after litigation is commenced are deemed unconscionable and thus unenforceable (see *In re Currency Conversion Fee Antitrust Litigation*, 361 F Supp 2d 237, 253 [SDNY 2005]; see also *Carnegie v H&R Block, Inc.*, 180 Misc 2d 67, 70-72 [Sup Ct, NY Co, Gruner Gans, J, 1999] [after litigation is commenced, a defendant may not have “coercive” or “misleading” communications with potential class members or “attempt to affect” their decision to participate in the class”]). Here, the undisputed fact that all of the arbitration agreements were signed after the commencement of this action leads to “the inescapable inference that defendant[] drafted the [agreements and had] ... potential class members [sign them] for the purpose of ... exclud[ing] them[] from the class” (*Alfaro v Vardaris Tech, Inc.*, 69 AD3d 436 [1st Dept 2010]).

The thrust of plaintiffs’ second argument in opposition to defendant’s motion is that even if the arbitration agreements were enforceable, defendant, by its conduct, has waived the right to enforce them. “[W]here the defendant’s participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer[, such as enhanced discovery, those] ... actions are then inconsistent with a later claim that only the arbitral forum is satisfactory” (*De Sapio v Kohlmeyer*, 35 NY2d 402, 405 [1974]). In that context, it is

noteworthy that defendant seeks only to exclude plaintiffs from this action and bar them from receiving any notices related hereto.

Defendant has not asserted arbitration as an affirmative defense and, even after making the instant motion to stay the litigation, has not moved to compel arbitration. Rather, its objection to this court as a forum took the form of removing the action to federal district court, which it espoused as the appropriate forum. When the District Court rejected the case, defendant vigorously litigated it in this court, participating in discovery, preliminary conferences and motion practice. In opposition to plaintiffs' motion for class certification, defendant painstakingly assaulted the merits of plaintiffs' case and even engaged consultants to analyze plaintiffs' work hours and earnings over multiple years, causing plaintiffs and their counsel to expend considerable time, effort and expense. "Parties electing the benefits of arbitration, including freedom from disclosure in accordance with the CPLR, from strict application of substantive principles of law and evidentiary rules, and from judicial review for errors of law and fact ... cannot also draw on the judicial process for a particular advantage, such as pretrial disclosure not generally available in arbitration" (*Sherrill v Grayco Builders, Inc.*, 64 NY2d 261, 273-274 [1985]).

In three years of active litigation and motion practice in two judicial forums, including the one of defendant's own choosing, defendant never alluded to its arbitration agreements with plaintiffs. Such conduct is "clearly inconsistent" with defendant's current claim that plaintiffs cannot maintain this action because they are contractually bound to arbitrate their claims (see *Friedman v CYL Cemetery, Inc.*, 99 AD3d 857, 858 [2d Dept 2012]). In fact, according to plaintiffs' counsel, it wasn't until the parties had been trying to work out the class notice to be

sent to plaintiffs pursuant to this court's prior decision and defendant obtained new counsel that defendant first mentioned the arbitration agreements. A change of counsel does not excuse a three-year delay in evoking arbitration. Defendant's contention that it could not enforce the agreements earlier because the individuals who signed them did not become parties to this action until the plaintiff class was certified in the prior decision is unavailing. The argument that arbitration cannot be raised as a defense until the class is certified has been specifically rejected (*In re Currency Conversion, supra*, 361 F Supp2d at 258).

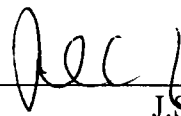
“In determining whether a party has waived its right to arbitration, [the court should] consider such factors as (1) the time elapsed from commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice.... There is no bright-line rule, however[;] ... the determination of waiver depends on the particular facts of each case” (*National Union Fire Insurance Co. of Pittsburgh, P.A. v NCR Corp.*, 376 Fed Appx 70, 71-72 [2d Cir 2010]). As discussed above, these elements have all been met here (see *Com-Tech Associates v Computer Associates International, Inc.*, 938 F2d 1574 [2d Cir 1991]). Given defendant's conduct and the ensuing prejudice to plaintiffs, the court finds defendant has waived any rights it might have had to arbitrate plaintiffs' claims (see *Matter of Guttman [Diamond]*, 42 Misc 3d 1221(A), *3-*4 [Sup Ct, NY Co, Kornreich, J, 2014]; see also *Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66-68 [2007]). “The courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration” (*De Sapio v Kohlmeyer, supra*, 35 NY2d at 406).

Of course, nothing herein shall be construed to prevent any plaintiff who wishes to do so from opting out of the class and pursuing their claims individually through arbitration. Defendant's waiver of its right to compel arbitration does not render it immune from an arbitration proceeding commenced by a plaintiff who wishes to rely on the arbitration agreement drafted by defendant.

Accordingly, defendant's motion is denied in its entirety.

This decision constitutes the order of the court.

DATED: *Sept 2*, 2014



J.S.C.

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**

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