Acevedo v Silk Corp.
2017 NY Slip Op 30713(U)
April 7, 2017
Supreme Court, New York County
Docket Number: 153421/2016
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

----------X

MELISSA ACEVEDO, individually and on behalf of others similarly situated,

Plaintiffs,

-against-

SILK CORP. D/B/A HEADQUARTERS; ROGER L. MAROLDA; and ANY OTHER RELATED ENTITIES,

Defendants.

----------X

Index No. 153421/2016

DECISION/ORDER

Motion Seq. 001

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this action alleging improper withholding of wages, defendants Silk Corp. d/b/a Headquarters ("Headquarters") and Roger L. Marolda ("Marolda") (collectively, "defendants") move pursuant to CPLR 7503 to compel arbitration of plaintiffs' claims and stay this action.

Factual Background

Plaintiff Melissa Acevedo ("Acevedo"), on behalf of herself and others similarly situated, commenced this suit to recover alleged unpaid minimum wages, improperly retained tips, and improperly withheld wages (collectively "plaintiffs") while employed at Headquarters, an adult entertainment establishment operated by Marolda.

According to the Complaint, Headquarters is engaged in the restaurant and hospitality industry as those terms are defined in the Labor Law and implementing regulations. It is alleged that beginning in approximately April 2010 and continuing through the present, defendants have failed to provide the statutory minimum hourly wage to its employees; engaged in a policy and practice of unlawfully demanding, accepting and retaining gratuities received by its employees;

engaged in a policy and practice of improperly deducting "fines," "fees," and miscellaneous improper surcharges from its employees' wages, and under the direction of Marolda, instituted this practice of depriving their employees of state mandated compensation for work performed.

Defendants now move to compel Acevedo to arbitrate her claims pursuant to a May 10, 2011 "Headquarters Concession Lease Agreement and Release" (the "Agreement"). Defendants argue that the broad arbitration clause requires Acevedo to arbitrate "any controversy dispute or claim" between the parties arising out the Agreement (the "Arbitration Clause") and that the subject matter of the claims herein falls within the scope of the Agreement. Further, under Paragraph 17.1 of the Agreement, entitled "No Class Action" (the "Class Action Waiver"), Acevedo waived her right to proceed in a class action, and thus, is incapable of being a representative of a class.

Acevedo opposes the motion, arguing that no binding agreement to arbitrate exists. Neither Marolda, nor a representative of Silk, the corporate defendant, is a party to the Agreement, or signatories to the Agreement. Instead, the Agreement is between Acevedo and "Landlord," defined as "Headquarters NY/Jamey's Restaurant/Hudson's Steakhouse," which are not listed as parties to this action. And neither Marolda nor Silk initialed critical sections that were initialed by Acevedo.

Further, the Agreement is procedurally and substantively unconscionable, and lacks material terms. Acevedo does not recall signing the Agreement, and claims she was not given an opportunity to read it, or told that she could still work at Headquarters if she declined to sign it. Adult entertainment establishments, such as Headquarters, force young, uneducated female entertainers with no bargaining power, such as Acevedo, to sign agreements that waive rights to

class action status, jury trials, and independent contractor status. These inequitable types of agreements, which subject these entertainers to illegal policies and practices, have been held procedurally and substantively unconscionable. The Agreement is substantively unconscionable because, under the Seventh Circuit Court of Appeals' decision, *Lewis v. Epic Systems Corp.* (823 F.3d 1147 [7th Cir 2016], *cert. granted*, 137 S. Ct. 809, 196 L. Ed. 2d 595 [2017]), the Class Action Waiver in the Agreement violates Sections 7 and 8 of the National Labor Relations Act ("NLRA"). And, the Agreement contains an illusory provision that requires Acevedo to waive all possible claims (including illegal waivers of statutory claims at issue herein), before the entry of any Agreement, for $100.00. The gross omissions as to the identities and parties to the Agreement make the Agreement unreasonably favorable to defendants over Acevedo.

Notwithstanding, the Arbitration Clause does not apply to the unpaid gratuities claim. Unlike the references made to specific statutes such as New York Minimum Wage Law, Article 19 of the Arbitration Clause does not refer to Article 6 of the New York Labor Law under which Acevedo sues for unpaid gratuities. Even so, defendants failed to prove that the work performed by Acevedo falls within the limited beginning and end dates of the Agreement.

In reply, defendants argue that Acevedo does not deny that the Agreement contains her signature or that her signature was obtained by fraud or duress. Defendants are Landlords as defined under the Agreement, and it is undisputed that defendants owned and operated Headquarters. The Agreement was signed by Acevedo, the party to be charged. And, the Agreement is not unconscionable. There is no evidence of high pressure tactics, and the Second and Ninth Circuit Courts of Appeals disagree with the Seventh Circuit Court of Appeals as to class action waivers. And, the Agreement confers benefits upon both defendants and Acevedo.

All of Acevedo's claims fall within the broad Arbitration Clause, which survives the termination date of the Agreement.

Discussion

CPLR 7503(a) provides that a "party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration." Upon a motion pursuant to CPLR 7503, the court's role is to "determine whether the parties agreed to submit their disputes to arbitration, if so, whether the particular dispute comes within the scope of their agreement, and finally whether there has been compliance with any condition precedent to access to the arbitration forum" (*Olympia & York OLP Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 214 A.D.2d 509, 626 N.Y.S.2d 69 [1st Dept 1995], *citing Matter of County of Rockland [Primiano Constr. Co.]*, 51 N.Y.2d 1, 5, 431 N.Y.S.2d 478, 409 N.E.2d 951). As raised by parties herein, the issues are whether there is an enforceable agreement to arbitrate disputes between the parties herein, and if so, whether the claims in this action fall within the scope of any such agreement.

Here, it is uncontested that Acevedo signed the Agreement which contains the following Arbitration Clause and No Class Waiver:

> 15.1. The parties agree that any controversy dispute or claim between Concessionaire and Landlord arising out of this Lease or any other actions between Landlord, Concessionaire, Club Patrons, or any third parties . . . shall be exclusively submitted and resolved by binding arbitration under the Federal Arbitration Act and in conformity with the rules and procedures of the American Arbitration Association. . . .
>
> * * * * *
>
> 17.1 The parties agree that neither party will participate in any class action for the purpose of resolving any disputes between each other instead of individually seeking to litigate or settle such disputes. Without limiting any other provision of this Agreement, this provision shall survive the termination of this Agreement.

Further, that defendants are not named as parties or signatories to the Agreement does

not, in and of itself, deprive defendants of their right to enforce the Agreement including the Arbitration Clause therein.[1] Paragraph 1 of the Agreement, entitled "The Parties," states that "Landlord is the . . . owner and operator of a nightclub including a restaurant and bar located at 552 West 38th Street, New York, New York. . . ." It is undisputed that defendants own and operate the subject nightclub. And the submissions indicate that they have received direct benefits of the Agreement (*see generally, HRH Const. LLC v. Metropolitan Transp. Auth.*, 33 A.D.3d 568, 823 N.Y.S.2d 140 [1st Dept 2006] ("A non-signatory to an agreement containing an arbitration clause that has knowingly received direct benefits under the agreement will be equitably estopped from avoiding the agreement's obligation to arbitrate"); *Oxbow Calcining USA Inc. v. American Indus. Partners*, 96 A.D.3d 646, 948 N.Y.S.2d 24 [1st Dept 2012] ("a nonsignatory may be estopped from avoiding arbitration where it 'knowingly accepted the benefits of an agreement with an arbitration clause'") *citing MAG Portfolio Consultant, GMBH v. Merlin Biomed Group LLC*, 268 F.3d 58 [2d Cir 2001] ("There are five theories 'for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel")). Additionally, the absence of defendants' signatures on the Agreement is inconsequential, given that (1) "[t]here is no requirement [under CPLR 7501] that such a writing must be signed by a party against whom arbitration is sought" *(Rudolph & Beer, LLP v. Roberts*, 260 A.D.2d 274, 688 N.Y.S.2d 553 [1st Dept 1999]) and (2) undisputedly, the Agreement was signed by Acevedo, the party to be charged *(Liberty Management & Const. Ltd. v. Fifth Ave. & Sixty-Sixth Street Corp.*, 208 A.D.2d 73,620 N.Y.S.2d

[1] The Agreement is "By and Between 'Landlord': Headquarters NY/Maney's Restaurant/Hudson's Steakhouse And 'Concessionaire: 'Melissa Acevedo' . . . ." and such named landlord is not a party to this action.

827 [1st Dept 1995] ("There is no requirement that the writing be signed 'so long as there is other proof that the parties actually agreed on it' [citation omitted]")).

To the degree the Agreement is dated May 10, 2011, and addresses claims between the parties "arising out this Lease or any other actions between Landlord," it cannot be said at this juncture that the Agreement does not apply to period of Acevedo's employment that is the subject of her claims. It is noted that Acevedo's Complaint alleges that she was employed by defendants "in or around Fall 2011" (complaint ¶9) when defendants allegedly violated rights under New York's Labor Law. And, the Arbitration Clause states that " . . . [t]his provision shall survive the termination of this Agreement."

Therefore, the record establishes that the parties have entered into an agreement to arbitrate.

Acevedo failed to establish that the Agreement is unenforceable as unconscionable.

Caselaw defines an "unconscionable contract" as "one which is so grossly unreasonable as to be unenforcible [sic] because of an absence of meaningful choice on the part of one ... part[y] together with contract terms which are unreasonably favorable to the other" (*Gillman v Chase Manhattan Bank, NA.*, 73 NY2d 1, 537 NYS2d 787, 534 NE2d 824, 828 [1988]).

"A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made-i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Dabriel, Inc. v. First Paradise Theaters Corp.*, 99 A.D.3d 517, 952 N.Y.S.2d 506 [1st Dept 2012] *citing Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10, 537 N.Y.S.2d 787, 534 N.E.2d 824 [1988]).

Even accepting as true Acevedo's allegations in her Complaint and affidavit in opposition, as required (*see Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]), Acevedo failed to show that the Agreement is procedurally unconscionable.

> Acevedo attests that when she first interviewed at Headquarters, she was asked for her identification to confirm her age and then she auditioned for the job (¶¶4-5). Acevedo continues: "As soon as my audition was complete, the manager told me I was hired, and told me I could start dancing for Headquarters as soon as I wanted to. After I was officially hired, I spoke to the house mom . . .who explained to me the rules of the club, including the proper dress attire and how many shifts per week I needed to work, and other similar details. The house mom also mentioned to me that I needed to be fingerprinted before I left Headquarters . . . I provided my fingerprints, and left for the evening." . . . I have no recollection of signing the Agreement" . . . .
> (¶¶6-9, 11)

Although Acevedo does not recall signing the Agreement, her affidavit is silent as to any tactics employed by defendants to secure her signature on the Agreement. Contrariwise, her statements that defendants explained the rules and gave her the option to commence working at her own discretion "as soon as" she wanted to are at variance with the notion that high-pressure or deceptive tactics were used during her employment process.

Acevedo claims that she was not given an opportunity to review the Agreement on her own or with counsel and she was unaware that she had signed away any rights. Acevedo also claims that she was not provided an explanation of the purpose of the document, and was not told that she could decline signing it if she still wished to work for defendants. Such claims are insufficient to show that she signed the Agreement under deceptive or high-pressured tactics, or that the Agreement contains fine print, or that Acevedo lacked experience and education, or that there was a disparity in bargaining power (*see Gillman*, 73 N.Y.2d at 11, 537 N.Y.S.2d 787, 534

N.E.2d 824; *see also, Dabriel, Inc. v. First Paradise Theaters Corp.*, 99 A.D.3d 517, 952 N.Y.S.2d 506 [1st Dept 2012] ("[p]laintiffs were free to walk away from the lease negotiations at any time and rent space elsewhere")). Additionally, Acevedo cites to no legal authority indicating that defendants were required to provide her with any certain length of time to review the Agreement or that they were required to instruct her to consult with an attorney before signing the Agreement. Plaintiff does not attest that she requested additional time to do either, or that she did and was denied.

Nor can it be said that the Agreement contains terms that were "unreasonably favorable" to defendants or violative of the NLRA so as to render the Agreement substantively unconscionable. It is noted that both parties are bound to arbitration, and thus it cannot be said to unreasonably favor defendants (*see Desiderio v National Ass'n of Sec. Dealers*, 191 F3d 198, 207 [2d Cir. 1999], *cert denied,* 531 U.S. 1069, 121 S. Ct. 756, 148 L. Ed. 2d 659 [2001] ("arbitration agreements that bind both parties to arbitration may not be said to favor the stronger party unreasonably.")). And, plaintiff always had the option to walk away from Headquarters.

Further, the remaining terms of the Agreement Acevedo highlights do not render the Agreement unconscionable. Pursuant to the Agreement, Acevedo pays $60 per day in "rent" to "sell dances" (¶4.1) in "All public areas except for the customer bathrooms" (¶3.1) and has "use of a private dressing area" (¶3.2). Acevedo "shall be entitled to all revenues generated from the Dances during the term of this Agreement (¶6.1) and agreed to "accept any tokens issued by the Landlord *in addition to cash from Club customers* for Dances sold." (¶6.2) (Emphasis added)

That Defendants charge a fee at an amount they alone decide for customers to enter the premises does not make the Agreement favorable to defendants over her. And, the Agreement's

inclusion of an indemnification and hold harmless clause which requires Acevedo to "indemnify, defend, and hold harmless" Headquarters from "any act or omission by [Acevedo] or any default hereunder" (¶10.1) is not unconscionable. Such clauses commonly appear in leases and are routinely upheld. The same is true as to releases of previous and future claims.

Further, Acevedo's waiver of "possible" claims for $100.00 is not unconscionable.

And, the Class Action Waiver does not render the Agreement unconscionable. The First Department has held that an arbitration provision is enforceable even though it waives a plaintiff's right to bring a class action (*Tsadilas v. Providian Nat. Bank*, 13 A.D.3d 190, 786 N.Y.S.2d 478 [1st Dept 2004]). And, the Second Circuit in *Mumim v Uber Technologies, Inc.* (--- F. Supp. 3d- - -, 2017 WL 934703 [2017]) more recently compelled class action plaintiffs therein to arbitrate, individually, claims alleging violation of New York's Labor Law's wage and overtime provisions pursuant to an arbitration agreement. Plaintiffs in *Mumim* alleged that the transportation network Uber misclassified its drivers as independent contractors to avoid New York Labor Law's minimum wage, overtime pay, and expense reimbursement requirements. The driving agreements at issue in *Mumim* contained arbitration clauses requiring that "all disputes" between the parties arising out of or related to the agreement be resolved by "arbitration on an individual basis"; the parties also agreed to resolve "any dispute that is in arbitration on an individual basis only and not on a class or collective action basis ('Class Action Waiver.')." In deciding Uber's motion to compel arbitration, the Second Circuit first determined that the parties "agreed to arbitrate arbitrability." (*Id.* *10), and then determined that the agreement was not procedurally unconscionable. As relevant herein, the Second Circuit then addressed whether the Court should compel "individual arbitration. . . ." in light of the class action waiver provision in

the agreement (emphasis in the original). Citing to *Sutherland v Ernst and Young LLP* (726 F. 3d 290 [2d Cir. 2013]) and *Patterson v Raymours Furniture Co.*, 659 Fed. Appx. 40, 42 [2d Cir. 2016]), the Second Circuit rejected the argument that the class action waiver violated the federal protections of an employee's right to engage in "concerted activities" under the Norris-La Guardia Act.[2] Consequently, the Second Circuit granted the motion to compel arbitration.

Thus, Acevedo's reliance on the Seventh Circuit decision in *Lewis* is misplaced.

It is noted that the Seventh Circuit in *Lewis* found that the arbitration provision therein included two parts: (1) a requirement that wage and hour disputes be submitted to arbitration rather than pursued in court, and (2) employees waive their right to participate in any class or representative proceeding. To the Seventh Circuit, the arbitration provision "combined" two rules, the latter of which ran "straight into the teeth of Section 7" of the NLRA, which the Court interpreted broadly to protect employees' "concerted activities," such as representative and class legal remedies. Thus, the Seventh Circuit held that "*insofar as* [the arbitration provision] prohibits collective action, [the employer's] arbitration provision violates Sections 7 and 8 of the NLRA." (*Lewis*, 823 F.3d at 1156) (Emphasis added).

A fair reading of the Seventh Circuit decision does not necessarily render the Agreement or the Arbitration Clause herein unconscionable or unenforceable. Even assuming this Court were to interpret the Seventh Circuit decision as invalidating waivers of class action activities, such interpretation does not invalidate the Arbitration Clause herein, as such Clause does not purport to interfere with any class action rights or activities protected by the NLRA (or the like).

---

[2] The Norris-La Guardia Act "protects an individual employee's right to engage in 'concerted activities for the purpose of . . . mutual aid or protection."

As the stand-alone Arbitration Clause makes no reference to class or concerted activities, the presence of the Class Action Waiver clause herein does not render unconscionable or unenforceable the entire Agreement or the Arbitration Clause therein.

In sum, as none of the provisions cited to by Acevedo render the Agreement fundamentally unfair, procedurally deficient, or substantively unenforceable, Acevedo must arbitrate her claims.

And, that the Arbitration Clause does not expressly refer to Article 6's "Payment of Wages" statute governing gratuities, and only references New York's "Minimum Wage Law," is insufficient to overcome defendants' motion to compel arbitration of all of Acevedo's claims. "Where the arbitration clause is broad, 'there arises a presumption of arbitrability" and arbitration of even a collateral matter will be ordered if the claim alleged "implicates issues of contract construction or the parties' rights and obligations under it.'" (*Gerling Global Reinsurance Corp. v. Home Ins. Co.*, 302 A.D.2d 118, 752 N.Y.S.2d 611 [1st Dept 2002]). The Arbitration Clause broadly applies to "any controversy dispute or claim" between Acevedo and defendants "arising out of this Lease or any other actions between Landlord . . . ." (¶15.1). And, in paragraph 20, the parties broadly "acknowledge that disputes have and currently exists" regarding exotic dancers "under various federal and state statutory and common laws, including but not limited to . . . the New York Minimum Wage Law . . . and cases such as . . . Diaz v Scores Holding Co., No. 07 Civ. 8718, 2008 U.S. Dist. LEXIS 38248, at *6 (S.D.N.Y. May 9, 2008)," which case involves alleged violations of New York Labor Law Article 6. Thus, contrary to Acevedo's contention, her Article 6 claim falls within the scope of the Agreement.

In light of the above, the Court is constrained to conclude that Acevedo waived her right

to pursue her claims as a class action. Although the Seventh Circuit's decision in Lewis is pending appeal to the United States Supreme Court, the Court is guided by the Second Circuit and First Department caselaw noted above.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion pursuant to CPLR 7503 to compel arbitration of plaintiff's claims and stay this action is granted; and it is further

ORDERED that the parties shall proceed to arbitration, where plaintiff shall arbitrate her claims individually, and this matter is stayed pending further order of the Court; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 7, 2017

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.