Wilson v PBM, LLC
2017 NY Slip Op 33262(U)
June 29, 2017
Supreme Court, Kings County
Docket Number: 515620/15
Judge: Bernard J. Graham

At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of June, 2017.

P R E S E N T:

HON. BERNARD J. GRAHAM,
Justice.

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RONNIE WILSON,

Plaintiff,

- against -

Index No. 515620/15

PBM, LLC d/b/a PERFECT BUILDING MAINTENANCE CORP., JEFFREY EDELSTEIN, MARK SULLIVAN, DENISE COUGHLIN and LUAN MEHEDI,

Defendants.

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The following papers numbered 1 to 5 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavit (Affirmation)	3
Reply Affidavit (Affirmation)	4-5

Upon the foregoing papers in this employment discrimination action, defendants PBM, LLC d/b/a Perfect Building Maintenance Corp. (PBM), Jeffrey Edelstein (Edelstein), Mark Sullivan (Sullivan), Denise Coughlin (Coughlin) and Luan Mehedi (Mehedi) move,

pursuant to CPLR 3211 (a) (1), (a) (7) and 7503,[1] for an order dismissing the complaint of the plaintiff Ronnie Wilson (Wilson) and/or compelling arbitration of Wilson's employment discrimination claim.

Background

Wilson's Employment By PBM

PBM is "a privately held janitorial and related services company providing best in class services for single and multi-tenant Class A properties throughout the North East including New York City."[2] The individual defendants were management-level employees of PBM and Mehedi was the night supervisor at 80 Broad Street in New York.

Wilson, a former employee of PBM, is an African-American male who was employed by PBM as a building porter/freight operator from 2002 until he was fired on August 4, 2014. Wilson worked at 80 Broad Street from 2002 through February 6, 2014, at which time Wilson was transferred to 342 Park Avenue South. Five months later, in July 2014, Wilson was transferred to 32 Old Slip, where he worked until his termination the following month.

Wilson claimed that he was the victim of a hostile work environment and that PBM terminated him based on his race. Wilson filed a number of grievances with his Union,

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[1] While defendants' notice of motion only references CPLR 7503, their May 16, 2016 memorandum of law (at page 6) references both CPLR 3211 (a) (1) and (a) (7). Since Wilson has not been prejudiced by this omission, having responded to defendants' CPLR 3211 motion, it will be disregarded, pursuant to CPLR 2001.

[2] *See* ¶ 2 of the May 16, 2016 affirmation of Mark E. Spund, submitted in support of defendants' motion (Spund Affirmation).

Service Employees International Union Local 32BJ (Union). The Union arbitrated Wilson's unjust termination claim, but declined to arbitrate Wilson's racial discrimination claim.

The CBA And The Reserved Question

The terms of Wilson's employment were governed by the 2012 Contractors Agreement between the Union and The Realty Advisory Board on Labor Relations, Inc. (RAB), effective January 1, 2012 through December 31, 2015 (CBA).

The CBA addresses the arbitration of discrimination claims in Article XVI, Section 30, which provides, in relevant part, that:

> "(A) There shall be no discrimination against any present or future employee by reason of race . . . or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act . . . 42 U.S.C. § 1981 . . . the New York State Human Rights Law, the New York City Human Rights Code . . . or any similar laws, rules or regulations. *All such claims shall be subject to the grievance and arbitration procedures* (Article V and VI) *as the sole and exclusive remedy for violations*. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination."[3]

Of particular relevance, the CBA addresses the "reserved question" of whether arbitration of all discrimination claims (including statutory claims) is required, despite the Union's refusal to arbitrate such claims (Reserved Question):

> "(B) No-Discrimination Protocol
>
> (1) Protocol
>
> "The parties to this Agreement, the Union and RAB, believe that it is in the best interests of all involved . . . to promptly, fairly and efficiently resolve claims of workplace discrimination, as covered

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[3] Spund Affirmation, Exhibit D at 112 (emphasis added).

above (collectively 'claims'). . . . The RAB, on behalf of its members, maintains that it is committed to refrain from unlawful discrimination. The Union maintains it will pursue its policy of evaluating such claims and bringing those claims to arbitration where appropriate. To this end, the parties, *notwithstanding the continuing disagreement between them described below, establish the following system of mediation and arbitration applicable to all such claims, whenever they arise*. . . .

"As background, following the decision of the Supreme Court in 14 Penn Plaza, 556 U.S. 247 (2009), the RAB and the Union have had a dispute about the meaning of the 'no discrimination clause' and the grievance and arbitration clauses in the collective bargaining agreements ('CBAs') entered into between these parties. The Union contends that the CBAs do not make provision for arbitration of any claims that the Union does not choose to take to arbitration, including statutory discrimination claims, and therefore, individual employees are not barred from pursuing their discrimination claims in court where the Union has declined to pursue them in arbitration. The RAB contends that the CBAs provide for arbitration of all individual claims, even where the Union has declined to bring such claims to arbitration.

"The parties agree that, should either the Union or the RAB deem it appropriate or necessary to do so, that party may bring to arbitration the question so reserved. The parties intend that the reserved question may only be resolved in an arbitration between them and not in any form of judicial proceeding. The outcome of the reserved question hinges on collective bargaining language and bargaining history, which are subjects properly suited for arbitration. . . .

"Notwithstanding the above disagreement, in 2010, the parties initiated the pilot program provided for in this section (Agreement and Protocol, February 17, 2010, the 'No-Discrimination Protocol') as an alternative to arbitrating their disagreement. The parties have now agreed to include the No-Discrimination Protocol as part of this Agreement, as set forth below. The Union and the RAB agree that the provisions of this Protocol do not resolve the reserved question. Neither the inclusion of this Protocol in the CBAs nor the terms of the Protocol shall be understood to advance either party's contention as to the meaning of the CBAs with regard to the reserved question, and neither party will make any representation to the contrary."

* * *

"(3) Arbitration

(a) *The undertakings described here with respect to arbitration apply to those circumstances in which the Union has declined to take an individual employee's employment discrimination claim under the no discrimination clause of the CBA (including statutory claims) to arbitration and the employee is desirous of litigating the claim. . . .*"[4]

Thus, a February 17, 2010 Agreement and Protocol between the Union and the RAB (No-Discrimination Protocol) was adopted to address, yet not resolve, the Reserved Question. Under the No-Discrimination Protocol,[5] a pilot program was set up for discrimination claims where the Union declines to arbitrate. The No-Discrimination Protocol provides, in relevant part:

"5. The protocol the parties shall implement is as follows:

I. MEDIATION

A. Whenever it is claimed that an employer has violated the no discrimination clause (including claims based in statute) of one of the CBAs, whether such claim is made by the Union or by an individual employee, notice shall be provided of such claim to the parties and *the matter shall be submitted to mediation . . .*

"II. ARBITRATION

A. *The undertakings described here with respect to arbitration apply to those circumstances in which the Union has declined to take an individual employee's employment discrimination claim under the no discrimination clause of the CBA (including statutory claims) to arbitration and the employee is desirous of litigating the claim. . . .*

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[4] *Id.* at 112-118 (emphasis added).

[5] *See* Spund Affirmation, Exhibit D.

> D. The Union will not be a party to the arbitration described above and the arbitrator shall not have authority to award relief that would require amendment of the CBA or other agreement(s) between the Union and the RAB or conflict with any provision of any CBAs or such other agreement(s). Any mediation and/or arbitration outcome shall have no precedential value with respect to the interpretation of the CBAs or other agreement(s) between the Union and the RAB.
>
> "6. The Union and the RAB agree that the provisions in this Agreement and Protocol do not resolve the dispute between them and do not advance either party's contention as to the meaning of the CBAs, and will not make an representation to the contrary. . . ."[6]

Thus, according to the No-Discrimination Protocol, if the Union declines to arbitrate an employee's discrimination claim, the claim *shall* be submitted to mediation. If the mediation is unsuccessful, the employee shall then submit the claim to arbitration without the Union.

The Instant Employment Discrimination Action

After the Union declined to arbitrate Wilson's racial discrimination claims, Wilson submitted the claim to mediation. When mediation proved unsuccessful, Wilson commenced this plenary action against defendants on or about December 23, 2015, by filing a complaint, verified by counsel, asserting nine causes of action for discrimination, hostile work environment and retaliation under 42 U.S.C. § 1981, New York Executive Law § 296 and New York City Administrative Code, Title 8. The complaint also asserts three causes of action for negligence, negligent supervision and retention and negligent training, all of which are based on Wilson's factual allegations of racial discrimination.

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[6] *See* Spund Affirmation, Exhibit E (emphasis added).

The complaint alleges that, starting on or about December 5, 2012, Wilson was "subjected to an unlawful hostile work environment on the basis of his race."[7] The complaint further alleges that Wilson filed grievances with his Union, but the Union "declined to arbitrate Mr. Wilson's claim of racial discrimination."[8]

Defendants' Instant Motion

Defendants move, pursuant to CPLR 3211 (a) (1), (a) (7) and 7503, for an order dismissing the complaint and/or compelling arbitration on the ground that Wilson's discrimination claims were improperly instituted as a plenary action in court, contrary to the plain terms of the CBA and the No-Discrimination Protocol. Defendants contend that "[t]he 2012 CBA, following the [No-Discrimination] Protocol, requires that the 'sole and exclusive remedy' for statutory claims of discrimination shall initially be mediation and if mediation should not be successful mandatory arbitration."[9] Defendants note that Wilson proceeded with mediation prior to commencing this action.[10]

Wilson, in opposition, argues that the No-Discrimination Protocol "merely permits, but does not require, the arbitration of discrimination claims by Union members whose

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[7] Complaint at ¶ 22.

[8] *Id.* at ¶ 73.

[9] Spund Affirmation at ¶ 13.

[10] *See* Spund Affirmation, Exhibit F.

discrimination claims the Union declines to bring to arbitration."[11] Wilson further argues that "[t]he CBA at issue here does not clearly, explicitly, and unequivocally require union members to arbitrate their statutory discrimination claims after the Union has declined to do so."[12]

Discussion

CPLR 3211 (a) (1) provides, in pertinent part, that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense is founded upon documentary evidence." A defendant seeking dismissal, pursuant to CPLR 3211 (a) (1), has the burden of demonstrating that "the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2012]; *see Galvan v 9519 Third Ave. Rest. Corp.*, 74 AD3d 743, 743-44 [2010]). "In order to be considered documentary evidence within the meaning of CPLR 3211 (a) (1), the evidence must be unambiguous and of undisputed authenticity (*Rabos v R & R Bagels & Bakery, Inc.*, 100 AD3d 849, 851 [2012] [internal quotations omitted]). A collective bargaining agreement can constitute documentary evidence for purposes of CPLR 3211 (a) (1) (*see, e.g., Sheridan v Town of Orangetown*, 21 AD3d 365 [2005]).

"There is a longstanding public policy favoring the arbitration of disputes, particularly with respect to broad arbitration clauses set forth in collective bargaining agreements"

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[11] *See* ¶ 46 of the July 6, 2016 affirmation of Ameer Benno, Esq., submitted in opposition to defendants' motion (Benno Opposition Affirmation) (underline in original).

[12] Benno Opposition Affirmation at ¶ 52.

(*Ibarra v 101 Park Rest. Corp.*, 140 AD3d 700, 702 [2016] [internal citations omitted]). "Generally, arbitration must be preferred unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" (*id.* at 702 [internal quotations omitted]; *see also Town of Ramapo v Ramapo Police Benev. Ass'n*, 17 AD3d 476, 477 [2005] [same]; *Local Union 1567, Int'l Bhd. of Elec. Workers, AFL-CIO v Orange & Rockland Utilities, Inc.*, 104 AD2d 413, 414 [1984] [holding that "[t]he rule, in the field of labor relations, is that controversies arising between the parties to a collective bargaining agreement fall within the scope of a broad arbitration clause unless the parties have employed language which clearly manifests an intent to exclude a particular subject matter"]).

Here, Wilson's racial discrimination claims (including statutory claims) fall squarely within the scope of the CBA's arbitration provision and the No-Discrimination Protocol incorporated therein. The CBA expressly and unambiguously provides in Article XVI, Section 30 (A), without exception, that "[a]ll [discrimination] claims *shall* be subject to the grievance and arbitration procedures . . . *as the sole and exclusive remedy* for violations."[13] Article XVI, Section 30 (B) (1), which incorporates the No-Discrimination Protocol into the CBA, explicitly states that the Union and the RAB "establish the following system of mediation and arbitration *applicable to all* [discrimination] claims, whenever they arise."[14] Article XVI, Section 30 (B) (3) (a), states, in no uncertain terms, that "[t]he undertakings described here with respect to arbitration apply to those circumstances in which the Union

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[13] Spund Affirmation, Exhibit D at 112 (emphasis added).

[14] *Id.* at Exhibit D at 113 (emphasis added).

has declined to take an individual employee's employment discrimination claim under the no discrimination clause of the CBA (including statutory claims) to arbitration and the employee is desirous of litigating the claim."[15]

Based on the plain language in the CBA, the No-Discrimination Protocol requires that *all* discrimination claims filed by employees proceed to mediation and, if unsuccessful, then proceed to arbitration, despite the fact that the Union declined to proceed with the claim. Given the clear provisions outlined above, Wilson's contention that the No-Discrimination Protocol only provides for "permissive arbitration by individual employees for claims that the Union declined to bring to arbitration . . ." is unavailing.[16] For the foregoing reasons, dismissal of Wilson's complaint is warranted because arbitration of all discrimination claims is mandated by the CBA according to its unambiguous terms. Accordingly, it is

ORDERED that the branch of defendants' motion to dismiss the complaint, pursuant to CPLR 3211 (a) (1), is granted, and the complaint is hereby dismissed; and it is further

ORDERED that the branch of defendants' motion to compel arbitration, pursuant to CPLR 7503, is granted.

This constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.

HON. BERNARD J. GRAHAM

NANCY T. SUNSHINE
Clerk

KINGS COUNTY CLERK
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[15] *Id.* at Exhibit D at 118.

[16] Benno Opposition Affirmation at ¶ 65.