Tsoflias v Barclays Capital Inc.
2018 NY Slip Op 31184(U)
June 6, 2018
Supreme Court, New York County
Docket Number: 156559/2017
Judge: Anthony Cannataro

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

KALIOPI COLETTE TSOFLIAS,

Plaintiff, Index No. 156559/2017

against

BARCLAYS CAPITAL INC., **DECISION & ORDER**

Defendant.

Anthony Cannataro, J.:

Plaintiff Kaliopi Colette Tsoflias (Tsoflias) has sued defendant Barclays Capital Inc. (Barclays) for violations of New York City Human Rights Law based on gender and age discrimination and retaliation. Defendant now moves to compel arbitration and stay this action, or to dismiss plaintiff's claims.

Tsoflias was hired by Barclays on December 28, 2011. In an Offer Letter dated December 28, 2011, Tsoflias agreed to individually arbitrate "any dispute or controversy arising under or in connection with [her] employment, including any dispute regarding...the termination of [her] employment" and "any and all claims arising under...municipal discrimination." She also agreed to waive her right to arbitrate class action claims.

Tsoflias was terminated on February 25, 2016. Six months later, Tsoflias filed charges with the New York State Division of Human Rights against Barclays asserting violations of the State Human Rights Law based on gender and age discrimination and retaliation. On February 16, 2017, the Division found no probable cause for the alleged discrimination and no support for her retaliation claim. Thereafter, Tsoflias commenced this action.

On its motion, Barclays argues that Tsoflias' claims are subject to a binding and enforceable arbitration agreement; thus, this action must be stayed pending arbitration. If the Court does not compel arbitration, Barclays contends that Tsoflias' claims should be dismissed because she elected her remedies by pursuing these claims

before the New York State Division of Human Rights. In opposition, Tsoflias contends that the arbitration agreement contained in the Offer Letter is unenforceable solely because it includes an impermissible class action waiver. Tsoflias also maintains that the election of remedies argument fails because her state and municipal law claims rest upon different factual allegations. As such, Tsoflias argues she is not barred from prosecuting her municipal claims in this forum.

Under CPLR § 7503(a), "a party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration" (*Koob v IDS Fin. Servs., Inc.*, 213 AD2d 26, 30 [1st Dept 1995]). The Federal Arbitration Act (FAA) holds that written provisions to arbitrate in contracts "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" (9 USC § 2). The effect of the FAA is "to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the act" (*Moses H. Cone Mem'l Hosp. v Mercury Constr. Corp.*, 460 US 1, 24 [1983]). Accordingly, New York courts are bound to apply the FAA "as interpreted by Supreme Court decision or, absent such, in accordance with the rule established by lower Federal courts if they are in agreement" (*Flanagan v Prudential-Bache Sec., Inc.*, 67 NY2d 500, 505 [1986]).

"Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court" (*AT & T Tech., Inc. v Communications Workers of Am.*, 475 US 643, 649 [1986]). To determine whether a dispute is arbitrable, a court must examine: "(1) whether there exists a valid agreement to arbitrate at all under the contract in question … and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement" (*Hartford Acc. & Indem. Co. v Swiss Reinsurance Am. Corp.*, 246 F3d 219, 226 [2d Cir. 2001]).

The first element the Court must determine is whether the arbitration agreement is valid. Under the FAA, courts are required to enforce arbitration agreements according to their terms, and such agreements are only deemed invalid by "generally applicable contract defenses, such as fraud, duress, or unconscionability" (*Rent-A-Ctr.*,

W., Inc. v Jackson, 561 US 63, 67-68 [2010]). "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue" (*Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 US 614, 628 [1985].

The First Department in *Gold v New York Life Ins. Co.*, held that arbitration agreements "which prohibit class, collective, or representative claims, violate the National Labor Relations Act (NLRA) and thus, that those provisions are unenforceable" (153 AD3d 216, 221 [1st Dept 2017]). Recently, however, the United States Supreme Court held that class action waivers in arbitration agreements do not violate the NLRA and must be enforced as written (*Epic Sys. Corp. v Lewis*, No. 16-285, 2018 WL 2292444 [U.S. May 21, 2018]). Here, as in both *Gold* and *Epic Systems*, plaintiff opposes the motion to compel arbitration, relying on the defense that arbitration provisions that waive class and collective actions are illegal. Tsoflias does not otherwise raise fraud, duress, or unconscionability as a defense. Because the United States Supreme Court has now resolved plaintiff's only defense to compelling arbitration, plaintiff's opposition is unavailing.

The second element, whether the dispute falls within the scope of the arbitration agreement, is also met. Tsoflias agreed to individually arbitrate any employment dispute. The instant claims involve termination from employment based on discrimination, thus the claims fall within the scope of the arbitration agreement.

Under the FAA, a stay of proceedings is necessary after all claims have been referred to arbitration and a has been stay requested (*Katz v Cellco P'Ship*, 794 F3d 341, 345 [2d Cir. 2015]). As such, the Court need not address that part of the motion to dismiss based on election of remedies at this time. Accordingly, it is

ORDERED that defendant's motion to compel arbitration and to stay this action is granted; and it is further

ORDERED that plaintiff Kaliopi Colette Tsoflias shall arbitrate her claims against defendant Barclays Capital Inc. in accordance with the Offer Letter, dated

December 28, 2011; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration.

Dated: 6/6/18

ENTER:

Anthony Cannataro, JSC

HON. ANTHONY CANNATARO
J.S.C.