

Konstantynovska v Caring Professionals, Inc.
2018 NY Slip Op 31475(U)
June 29, 2018
Supreme Court, New York County
Docket Number: 159883/2016
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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LYUDMYLA KONSTANTYNOVSKA and NATASHA
SEVERIN, individually and on behalf of all other persons
similarly situated who were employed by CARING
PROFESSIONALS, INC.,

Plaintiffs,

Index No.: 159883/2016

- against-

DECISION AND ORDER

CARING PROFESSIONALS, INC.,

Defendant.

-----X
HON. SHLOMO S. HAGLER, J.S.C.:

In this class action complaint, plaintiffs Lyudmyla Konstantynovska (“Konstantynovska”) and Natasha Severin (“Severin”), on behalf of themselves and other similarly situated home health care attendants, allege that they were not paid the wages and benefits that they were entitled to while working for their former employer, defendant Caring Professionals, Inc. (“Caring Professionals”). Defendant now moves, pursuant to Article 3 of the Federal Arbitration Act, 9 USC § 3, CPLR 7503 (a) and 2201, for an order compelling arbitration and staying the action. In the alternative, defendant argues that the proceedings should be stayed so that an arbitrator can rule on whether plaintiffs’ claims are appropriate for arbitration.

BACKGROUND AND FACTUAL ALLEGATIONS

Konstantynovska initiated this class action by filing a complaint on November 23, 2016.¹ Plaintiffs are home health care attendants formerly employed by Caring Professionals, a business

¹ On March 31, 2017, a second amended complaint was filed, adding Severin as a plaintiff.

that provides “nursing and home health aide services at the residences of its clients.” Second amended complaint (“Complaint”), ¶ 6. The Complaint states that all of the plaintiffs in the putative class ceased working for defendant on or before December 1, 2016. *Id.*, ¶ 9.

Specifically, it indicates that Konstantynovska worked as a home health care attendant from October 24, 2012 through November 7, 2016, and that Severin worked for defendant from August 2011 through June 2016. *Id.*, ¶¶ 16, 17.

The first four causes of action in the Complaint allege that defendant violated various provisions of the New York Labor Law (“NYLL”) and the New York Codes, Rules, and Regulations (“NYCRR”) when it failed to pay plaintiffs the statutory minimum wage, overtime compensation, “spread of hours” compensation, and full wages due and when it failed to reimburse plaintiffs for supplies purchased for defendant’s benefit. The fifth cause of action, grounded in breach of contract, alleges that plaintiffs, “as third party beneficiaries of Defendant’s contract(s) with government agencies to pay wages as required by the NY Health Care Worker Wage Parity Act, are entitled to relief for the breach of this contractual obligation, plus interest.” *Id.*, ¶ 100. In the sixth cause of action, plaintiffs allege that defendant breached the “City Service Contract(s)” by not paying plaintiffs the living wages, health benefits or health benefit supplements, which were incorporated into this contract for plaintiffs’ benefit. *Id.*, ¶¶ 104, 104.

In response to the Complaint, defendant sent a letter to the president of plaintiffs’ union, Local 713 I.B.O.T.U, U.M.D., I.L.A., AFL-CIO (“Local 713 ”), and plaintiffs’ counsel, requesting that plaintiffs withdraw their complaint and submit their disputes to the mandatory grievance and arbitration procedure set forth in the collective bargaining agreement (“CBA”) as set forth in an “MOA dated December 13, 2016.” Notice of Motion, Affirmation of Noel P.

Tripp in Support [Tripp Affirmation in Support], Exhibit "D". When plaintiffs failed to withdraw the Complaint, defendant made this motion, seeking to compel arbitration.

Defendant states that all putative class action members are or were union members who are represented by Local 713, and that Caring Professionals and Local 713 entered into the CBA, which governs various aspects of plaintiffs' employment with defendant. On December 13, 2016, the parties entered into a modification and amendment of the CBA, entitled memorandum of agreement ("MOA"), requiring employees to submit wage and hour claims, including claims alleging violations of the NYLL and the New York Home Care Worker Wage Parity Law ("Wage Parity Law"), to an exclusive grievance and arbitration process. Defendant argues that the MOA, coupled with the CBA, govern the employment relationship between plaintiffs and defendant, and that the MOA is applicable to all employees covered by the CBA, including plaintiffs.

The record reflects that Local 713 and defendant entered into the CBA on January 1, 2016 ("2016 CBA"). Article XVII, grievances and arbitration, indicates that a grievance is an allegation by an employee regarding the interpretation of a written term in the CBA. This Article sets forth the steps involved in the grievance process. In relevant part, if the grievance is not resolved after two steps, the Union may submit the grievance for final and binding arbitration. The article advises that the arbitrator has no authority to add or modify any provision in the CBA. The relevant language concerning the terms grievance and arbitration, is set forth as follows:

"ARTICLE XVII — GRIEVANCES AND ARBITRATION

Section 1: The term 'grievance' as used in this Agreement is an allegation by an employee or the Union concerning a misinterpretation or misapplication of a specific written term of this Agreement occurring after the effective date of this Agreement and before the expiration date of this Agreement or any written extension thereof. All complaints, disputes and grievances arising between the

parties to this agreement, involving questions of interpretation or application of any clause of this Agreement, or any act or conduct in relation hereto directly or indirectly-shall be presented by the party asserting a grievance to the other party. Both parties shall thereupon attempt to adjust the dispute.

* * *

“Section 4: Arbitration

If the grievance is not resolved in STEP 2, the Union may submit the grievance for final and binding resolution by arbitration. . . . The arbitrator shall have no authority to add to, subtract from or modify any provision of this Agreement, or to rule on any question except those expressly submitted to the arbitrator.”

Tripp Reply Affirmation, Exhibit “A” at 7-8.

On December 13, 2016, the president of Local 713 and defendant executed a MOA to the 2016 CBA. Article XVII, Grievances and Arbitration, as set forth above, was modified and replaced with a new Section 1. The new paragraph explained that a grievance is still an allegation by an employee about the misinterpretation of any term in the CBA. However, any claims brought by the Union or employees, alleging violations or arising under the NYLL, Wage Parity Law or the Fair Labor Standards Act (“FLSA”) (collectively, the “Covered Statutes”), are excluded from this Article. These claims are to be resolved in accordance with a new article, article XXXIX.

Section 1 of the MOA provides, as follows:

“CBA Article XVII, ‘Grievances and Arbitration’ is hereby modified by replacing the existing Section 1 with the following:

“Section 1: The term ‘grievance’ as used in this Article is an allegation by an employee or the Union concerning a misinterpretation or misapplication of a specific written term of this Agreement occurring after the effective date of this Agreement and before the expiration date of this agreement or any written extension thereof. All complaints, disputes and grievances arising between the parties to this agreement, except as specifically excluded below, involving questions or interpretation or application of any clause of this Agreement, or any act or conduct in relation hereto directly or indirectly, shall be presented by the

party asserting a grievance to the other party. Both parties shall thereupon attempt to adjust the dispute. Any claims brought by either the Union or Employees, asserting violations of or arising under the Fair Labor Standards Act (FLSA), New York Home Care Worker Wage Parity Law, or New York Labor Law (collectively, the Covered Statutes), in any manner, are excluded from Article XVII herein, and shall be resolved in accordance with Article XXXIX below.”

Tripp Affirmation in Support, Exhibit “A” at 1.

The MOA provides that Article XXXIX is “New Article XXXIX in the CBA, ‘Alternative Dispute Resolution,’ is hereby created, to read in full as follows.” *Id.*

“Section 1: The parties agree a goal of this Agreement is to ensure compliance with all federal, state, and local wage hour law and wage parity statutes. Accordingly, to ensure the uniform administration and interpretation of this Agreement in connection with federal, state, and local wage-hour and wage parity statutes, all claims brought by either the Union or Employees, asserting violations of or arising under the Fair Labor Standards Act (‘FLSA’), New York Home Care Worker Wage Parity Law, or New York Labor Law (collectively, the ‘Covered Statutes’), in any manner, shall be subject exclusively, to the grievance and arbitration procedures described in this Article. The statute of limitations to file a grievance concerning the Covered Statutes shall be consistent with the applicable statutory statute of limitations. All such claims if not resolved in the grievance procedure, including class grievances filed by the Union, or mediation as described below shall be submitted to final and binding arbitration before Ralph S. Berger. The Arbitrator shall apply appropriate law and shall award all statutory remedies and penalties, including attorneys’ fees, consistent with the FLSA and New York Labor Law in rendering decisions regarding disputes arising under this Article.

“Section 2: Grievance Procedure

STEP 1: All grievances concerning the Covered Statutes shall be reduced to writing by the employee or the Union through its shop steward or business representative and presented to the Administrator. . . .

“Section 3: Mandatory Mediation

Whenever the parties are unable to resolve a grievance alleging a violation of any of the Covered Statutes, under the Grievance Procedure contained in Section 2 of this Article, before the matter is submitted to arbitration, the dispute shall be submitted to mandatory mediation. . . .

“Section 4: Arbitration

No party may proceed to arbitration prior to completion of the mediation process as determined by the Mediator. . . .

“Section 5: In the event an Employee has requested, in writing, that the Union process a grievance alleging a violation of the Covered Statutes and the Union declines to process a grievance regarding alleged violations of the Covered Statutes, through the grievance/mediation process or to arbitration following the conclusion of mediation, an Employee solely on behalf of herself, may submit her individual claim to mediation, or following the conclusion of mediation, to arbitration. . . .”

Id. at 2-3.

In relevant part, the new article advises that all claims brought by the Union or employees, asserting violations of or arising under the NYLL, among other statutes, shall be subject exclusively to the grievance and arbitration procedures described in Article XXXIX. Article XXXIX continues with a similar step 1 and 2 grievance protocol as in the 2016 CBA, however, if the parties are unable to resolve a grievance alleging a violation of any of the Covered Statutes, the dispute shall be submitted to mandatory mediation prior to arbitration. If the mediation process is complete, the Union may demand arbitration. If the Union declines to pursue the grievance for an employee, the employee may use the mediation and arbitration process set forth in the CBA. However, the mediator/arbitrator has no authority to consider a class action or issue a remedy on a class basis.

Although signed on December 13, 2016, the record reflects that the MOA was ratified, at the earliest, on December 28, 2016. On December 28, 2016, counsel for defendant emailed the representatives from Local 713 a “fully executed amendment to our CBA.” Tripp Affirmation in Reply, Exhibit “B” at 1. On January 24, 2017, counsel followed up with an email to Local 713 asking to “confirm that the CBA amendment has been ratified as in full effect.” *Id.* On January 25, 2017, Local 713 responded that it had been ratified.

In its motion, defendant argues that the Federal Arbitration Act (9 USC § 1 *et seq.*) (“FAA”) applies to the arbitration provision in the MOA. Defendant continues that a presumption of arbitrability applies, and that the MOA requires all Local 713 members to submit the types of claims alleged by plaintiffs to final and binding arbitration. According to defendant, Konstantynovska was employed until December 27, 2016 and Severin was employed until July 12, 2016, and both plaintiffs were members of Local 713. Further, defendant argues that the MOA did not have to be ratified to be effective.

According to defendant, as “nothing in the arbitration provision places a temporal limitation on arbitrability,” it can apply retroactively to encompass all of plaintiffs’ statutory claims. Defendant’s Memorandum of Law at 10 (internal citation omitted). As a result, defendant argues that the MOA is controlling, regardless of whether plaintiffs’ claims accrued prior to its execution.

Further, defendant argues that the plain language in the MOA reflects the parties’ intent that all employees, current and former, are required to submit any claims stemming from the Covered Statutes to the mandatory grievance and arbitration process. In support of this contention, defendant cites to the reference of “all claims,” in Section 1 of the new article, coupled with parties’ goal to ensure uniform compliance with pay practices. Defendant states that the court should compel arbitration because the MOA is a binding agreement requiring arbitration of every claim asserted by plaintiffs.

Defendant claims that, pursuant to the MOA, the parties agreed that any dispute about the proper interpretation of the MOA should be left for the arbitrator, not the court. In support of this argument, defendant points to a provision in the MOA stating that any grievances “arising

between the parties to this agreement . . . involving questions or interpretation of application of any claims of this Agreement . . . shall be presented by the party asserting a grievance to the other party.” Defendant’s Exhibit “A” at 2.

In opposition, plaintiffs argue that, as former employees, they cannot be bound to the MOA as it was entered into after they ceased working for defendant. Plaintiffs note that the MOA was executed on December 13, 2016. Even if, as defendant states, Konstantynovska’s last date of employment was December 27, 2016 and not in November 2016, absent ratification, she cannot be bound to the MOA.² Plaintiffs note that the MOA contained new language pertaining to arbitration requirements that had never been included in any prior CBA agreements.

Plaintiffs concede that, in certain situations, claims must be submitted to arbitration even if they pre-date the arbitration agreement. However, they argue that the retroactivity of the MOA is not applicable here, as plaintiffs were never bound to this agreement.

Further, even if the MOA was binding on plaintiffs, plaintiffs argue that their claims fall outside the arbitration provision as it only applies to employees and to the Union. As former employees, they are neither of these parties. In addition, plaintiffs contend that the court, not the arbitrator, must determine arbitrability.

DISCUSSION

Motion to Compel Arbitration

Under New York law, on a motion to compel arbitration brought pursuant to CPLR 7503 (a), the court must address “whether the parties have entered into a valid arbitration agreement and, if so, whether the issue sought to be submitted to arbitration falls within the scope of that

²Plaintiffs argue that the court must accept as true plaintiffs’ allegation that Konstantynovska stopped working for defendant on November 7, 2016.

agreement.” *Edgewater Growth Capital Partners, L.P. v Greenstar N. Am. Holdings, Inc.*, 69 AD3d 439, 439 (1st Dept 2010) (internal quotation marks and citation omitted).

Defendant argues that the FAA should govern the MOA. The FAA is an expression of a strong federal policy favoring the enforcement of arbitration agreements. *Ragone v Atlantic Video at Manhattan Ctr.*, 595 F3d 115, 121 [2d Cir 2010]. As under New York law, a court asked to compel arbitration proceedings under the FAA must “first determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement.” *National City Golf Fin. v Higher Ground Country Club Mgt. Co., LLC*, 641 F Supp 2d 196, 202 [SD NY 2009] (internal quotation marks and citation omitted).

The FAA governs disputes arising out of the arbitration provision of a contract affecting interstate commerce. *Matter of Diamond Waterproofing Sys, Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 [2005]. As “collective bargaining agreements are contracts entailing transactions in commerce,” they fall “within the purview of the [FAA].” *Maryland Cas. Co. v Realty Advisory Bd. on Labor Relations*, 107 F3d 979, 982 [2d Cir 1997]. As such, in the instant matter, the FAA is applicable to the arbitration provisions in the CBA and the MOA.

It is the defendant’s burden to demonstrate that the parties agreed to arbitrate. *See e.g. Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007] (“proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute at issue”). Moreover, “the purpose of Congress in enacting the FAA was to make arbitration agreements as enforceable as other contracts, *but not more so.*” *Cap Gemini Ernst & Young, U.S., L.L.C. v Nackel*, 346 F3d 360, 364 [2d Cir 2003] (internal quotation marks and citations omitted).

In the alternative to compelling arbitration of plaintiffs' claims, defendant argues that the proceedings should be stayed so that an arbitrator can rule on the proper application of the MOA to plaintiffs' claims. Defendant claims that, pursuant to the MOA, the parties agreed that any dispute about the proper interpretation of the MOA should be left for the arbitrator, not the court. However, defendant's arguments are unavailing. It is the court, not the arbitrator, which has the initial authority to determine whether or not the parties are bound to arbitrate pursuant to the agreement. *Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 45 [1997]; *see also AT & T Tech., Inc. v Communications Workers of Am.* 475 US 643, 649 [1986] ("the question of arbitrability--whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination"). Moreover, the parties did not agree to arbitrate the question of arbitrability. *See Duraku v Tishman Speyer Props., Inc.*, 714 F Supp 2d 470, 473 [SD NY 2010] ("Under the FAA, unless parties have unambiguously provided for an arbitrator to decide questions of arbitrability, it is for courts to decide whether the parties agreed to arbitrate the claims at issue").

A court is to apply ordinary contract principles to determine whether an agreement to arbitrate exists. *Wilson v Subway Sandwiches Shops, Inc.*, 823 F Supp 194, 198 [SD NY 1993]; *see also Cap Gemini Ernst & Young, U.S., L.L.C. v Nackel*, 346 F3d at 364 (internal quotation marks and citations omitted) ("[W]hile the FAA creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act, in evaluating whether the parties have entered into a valid arbitration agreement, the court must look to state law principles").

Arbitration Clause Does Not Compel Arbitration

As explained above, to succeed on a motion to compel arbitration governed by the FAA, the first prong to satisfy is whether the parties created a valid agreement to arbitrate under state law. Plaintiffs cite two cases in support of their argument that there was no valid agreement to arbitrate their claims. In *Chu v Chinese-American Planning Council Home Attendant Program, Inc.* (194 F Supp3d 221 [SD NY 2016]), defendant home care agency brought a motion to compel arbitration after former home care aides initiated a class action alleging violations of the NYLL, among other statutes. There was a new MOA, effective after plaintiffs ceased working for defendant, requiring the parties to submit to binding arbitration. The Court found that, as the Labor Management Relations Act (“LMRA”) preemption did not apply, it lacked subject matter jurisdiction over the claims and remanded them to state court. The motion to compel was denied as moot. Nevertheless in its discussion regarding LMRA preemption, the Court noted that the plaintiffs are not bound by the MOA, because it became effective after their employment with defendant ended. The Court stated the following, in pertinent part:

“[Defendant] contends that plaintiffs’ claims are inextricably tied to and require interpretation of the CBA with respect to certain (1) wage provisions and (2) grievance and arbitration provisions set forth therein. At the outset, in order to determine whether any provision in the CBA will have to be interpreted to adjudicate plaintiffs’ claims, the parties raise a threshold issue as to which agreement(s) actually applies. [Defendant] contends that the 2015 MOA, made effective December 1, 2015, govern [defendant’s] employment relationship with plaintiffs—who each ceased working at [defendant] prior to that date—on the ground that the 2015 MOA was made retroactive. This argument lacks merit. Regardless of the purported retroactivity of the 2015 MOA, and 1199’s authority to bargain on behalf of then-current employees, plaintiffs may not be bound by subsequently adopted amendments to a collective bargaining agreement to which they were not parties.”

Id. at 228.

Further, plaintiffs also discuss a recent lower court decision, *Safonova v Home Care Servs. For Independent Living, Inc.* (Sup Ct, NY County, January 17, 2017, Rakower, J., index No. 150642/2016), where a home care agency moved to compel arbitration after a former home health care aide initiated a complaint alleging violations of the NYLL and the Wage Parity Law. Similar to the instant situation, after that plaintiff ceased working for defendant, plaintiff's union entered into and ratified an amendment to the CBA, whereby all statutory claims were now subject to the mandatory arbitration and grievance process. There too, plaintiff may have still been an employee when the MOA was entered into, but was not when it was ratified.

During oral argument held for *Safonova*, the court denied the motion to compel arbitration, concluding that plaintiff was not an employee at the time of ratification and did not have the opportunity to agree to arbitration, and noting that "one is not a party to an arbitration agreement unless they have agreed to it." See Affirmation of LaDonna M. Lusher in Opposition [Lusher Affirmation in Opposition], Exhibit "A", *Safonova* Tr of Oral Argument at 16. The court further noted that the new arbitration provision was a "new article, not a modification of an old article that addressed alternative dispute resolution." *Id.* at 15. In addition, the new provision "makes no references to any prior CBA." *Id.* at 26.

This Court agrees with the relevant holdings in *Chu* and *Safonova* that plaintiffs, to the extent that they were not employed with defendant at the time the MOA was ratified, are not bound to it.³ "[P]laintiffs may not be bound by subsequently adopted amendments to a collective

³ Defendant contrasts the instant situation with the one in *Safonova*, where the CBA, "on its face, says it is effective December 1, 2015, subject to the ratification by the union and its membership and by the board of directors of the employer . . ." Lusher Affirmation in Opposition, Exhibit "A", *Safonova* Tr of Oral Argument at 2. However, the court does not agree that *Safonova* is distinguishable on this basis.

bargaining agreement to which they were not parties.” *Chu v Chinese-American Planning Council Home Attendant Program, Inc.*, 194 F Supp 3d at 228. While the MOA was signed on December 13, 2016, the record reflects that, at the earliest, the MOA was ratified on December 28, 2016.⁴ At that time, the union was not negotiating on plaintiffs’ behalf. *See e.g. Cox v Subway Surface Supervisors Assn.*, 69 AD3d 438, 438 [1st Dept 2010] (Addressed in the context of a breach of duty of fair representation claim, Court noted that, “[a]t the time defendants negotiated and ratified the collective bargaining agreement at issue, plaintiffs . . . were neither members of, nor represented by, the Association’s bargaining unit, so the Association owed them no duty of fair representation”).

Further, the parties’ communications in the record indicate that, after December 28, 2016, defendant was relying on the ratification of the MOA for it to be in full effect. *See e.g. In re AMR Corp.*, 477 BR 384, 403 n 9 [SD NY 2012] (“Notwithstanding any meeting of the minds on a particular issue, the parties have no agreement on a collective bargaining agreement until such time as a union sends out a specific proposed agreement for a vote and it is ratified by the union membership”).

Defendant argues that “this Court should not allow Plaintiffs to evade mandatory grievance and arbitration provisions of the MOA appropriately negotiated on their behalf” Defendant’s Reply Memorandum of Law at 1. This Court agrees that, had plaintiffs not ceased their employment with defendant, plaintiffs, as union members whose union bargained on their behalf as current employees, would be subject to the MOA. “Under the National Labor Relations

⁴ Although there is a question as to when Konstantynovska ceased working, the record reflects that she was no longer an employee on December 28, 2016. The record suggests that the MOA was ratified in late January 2017.

Act . . . the union is the exclusive bargaining representative of employees.” See *14 Penn Plaza LLC v Pyett*, 556 US 247, 251 [2009]. However, the relevant issue herein is not whether plaintiffs opted out of the union prior to commencing litigation, but whether plaintiffs can be bound to a new arbitration provision that completely changed the substantive grounds for mandatory arbitration, and that was executed after plaintiffs ceased employment with defendant.

The cases set forth by defendant in support of the argument that there is no temporal limitation to the grievance and arbitration provisions in the MOA, and that it applies to plaintiffs’ claims, are distinguishable from the present situation.⁵ For example, in *Matala-De Mazza v Special Touch Home Care Servs., Inc.* (2016 WL 6459623, *1, 2016 US Dist Lexis 150559, *2 [ED NY 2016]), the Court granted defendant home care agency’s motion to compel arbitration of plaintiffs’ claims, pursuant to a similar MOA that was added to the CBA. However, those plaintiffs consisted of current and former employees and, although the Court granted the motion to compel arbitration, the Court did not address the temporal scope of the arbitration agreement, holding that “[t]he parties may argue the proper construction of the temporal limitation clause before the arbitrator.” 2016 WL 6459623, *2, 2016 US Dist Lexis 150559, *7.⁶

⁵ See e.g. *Arrigo v Blue Fish Commodities, Inc.*, 408 Fed Appx 480, 481-482 (2d Cir. 2011) (internal citation omitted) (“[Plaintiff’s] argument that the arbitration provision does not apply to claims that accrued prior to his signing of the employment agreement was not raised below and is therefore waived. In any event, nothing in the arbitration provision places a temporal limitation on arbitrability”).

⁶ Further, the dispute in *Matala-de Mazza* was limited to “whether 1199 and Special Touch intended this period to extend back to the effective date of the original CBA signed between 1199 and Special Touch, or to apply only from the effective date of the 2016 MOA forward.” 2016 WL 6459623, *2, 2016 US Dist Lexis 150559, *5. Here, plaintiffs allege that they all ceased working for defendant by Dec 1, 2016. Plaintiffs do not necessarily dispute that the MOA would be retroactive to claims that predate the MOA, but argue that they are not subject to the terms of the MOA as they left prior to when it became binding.

Similarly in, *Lai Chan v Chinese-American Planning Council Home Attendant Program, Inc.* (180 F Supp 3d 236 [SD NY 2016]) Judge Forrest granted defendant's motion to compel arbitration when current, not former, employees argued that their claims accrued prior to the execution of a MOA.^{7 8}

Konstantynovska initiated this action even prior to when the MOA was first executed.⁹ “[T]hough the presumption in favor of arbitration is strong, the law still requires that parties actually agree to arbitration before it will order them to arbitrate a dispute.” *Opals on Ice Lingerie, Designs by Bernadette, Inc. v Bodylines Inc.*, 320 F3d 362, 369 [2d Cir 2003]. In addition, under different circumstances, courts have addressed the rights of putative class members and declined to enforce arbitration agreements that were signed by putative class

⁷ As previously discussed, in *Chu v Chinese-American Planning Council Home Attendant Program, Inc.* (194 F Supp3d at 228), when faced with the same MOA against the same defendant, Judge Forrest found that former employees were not bound.

⁸ Finally, in *Rodriguez v New York Foundation for Senior Citizens Home Attendant Servs., Inc.*, (US Dist Ct, SDNY, 15 Civ 9187, Caproni, USDJ, 2016), referenced in defendant's reply, the Court applied a MOA retroactively to compel arbitration of plaintiff's potential class action claims, even when plaintiff stopped working for defendant prior to the ratification of the MOA, holding “[p]laintiff cannot point to any temporal limit on arbitrability in either the 2001 CBA or the 2015 MOA.” *Id.* at 6 (Tripp Affirmation in Reply, Exhibit “D”). However, the instant situation is distinguishable, for the same reasons as set forth in *Safonova*. In *Safonova*, Judge Rakower distinguished *Rodriguez* stating that, “unlike those articles which are modified, restated, deleted or replaced, here we have what is called a new article hereby created. So, it makes no reference to a prior article. It makes no reference to any prior CBA.” *Safonova* Tr of Oral Argument at 25-26.

⁹ The court will not speculate as to whether the MOA was created in response to the class action. Nonetheless, during oral argument, defendant noted that the arbitration clause in the 2016 CBA was not as thorough as the MOA, “[s]o what would have or not been required to be arbitrated was less clear. Part of the goal of labor stability and transparency was to make that clear.” Tr of Oral argument dated Oct 23, 2017 at 19. Prior to the MOA, an employee “arguably” might have been able to bring a direct action against defendant for violations of the Covered Statutes because “there would have been a dispute based on the wording of the prior provision.” *Id.* at 20.

members after the commencement of the class action litigation. *Weinstein v Jenny Craig Operations, Inc.*, 132 AD3d 446, 446-447 [1st Dept 2015] (In considering a new arbitration agreement implemented the day after commencement of class action litigation, and given to putative class members who were unaware of the litigation, the Appellate Division found that the “court properly exercised its discretion by drawing the inference that that agreements had been implemented in response to this litigation and to preclude putative class members”).

Defendant argues that the intent of the parties was for the MOA’s arbitration provisions to apply to current or former employees who are alleging violations of the Covered Statutes. “A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties’ intent is what they express in their written contract.” *Goldman v White Plains Ctr. for Nursing Care, LLC*, 11 NY3d 173, 176 [2008]. The language in the MOA makes substantive modifications to the former CBA and encompasses an entirely new set of statutory violations that, when alleged by the union or employee, are subject to the mandatory grievance process. There is no language in the MOA binding former employees or former union members who left prior to its creation.

The arbitration provision applicable to plaintiffs, found in the 2016 CBA, limited the grievance and arbitration process to disputes about the misinterpretation or misapplication of a specific written term in the CBA. Plaintiffs’ complaint does not concern allegations about the interpretation of the CBA, but alleges various statutory violations and breach of contract. Despite the presumption in favor of arbitration, it is well settled that Courts will not compel arbitration of statutory claims where the CBA in question did not effectuate a “clear and unmistakable” waiver of those claims. *See e.g. Tamburino v Madison Sq. Garden, LP*, 115

AD3d 217, 222-223 [1st Dept 2014] (citation omitted) (“A CBA cannot preclude a lawsuit concerning individual statutory rights unless the arbitration clause in the agreement is ‘clear[] and unmistakable[]’ that the parties intended to arbitrate such individual claims”); *see also Lawrence v Sol G. Atlas Realty Co., Inc.*, 841 F3d 81 [2d Cir 2016] (Court vacated the district court’s granting of defendant’s motion to compel arbitration, allowing plaintiff to pursue his statutory claims in federal court, holding that, based on the language in the CBA, the CBA did not contain a “clear and unmistakable” waiver). Here, as the terms in the 2016 CBA do not specifically provide that plaintiffs’ claims alleging violations of the NYLL and Wage Parity Law, among others, are subject to arbitration, the 2016 CBA does not effectuate a “clear and unmistakable” waiver as to these claims.^{10 11}

Without a valid and compulsory arbitration provision, plaintiffs cannot be compelled to arbitrate. *See Eiseman Levine Lehrhaupt & Kakoyiannis, PC v Torino Jewelers, Ltd.*, 44 AD3d at 583. Accordingly, as the court finds that the parties did not have a valid agreement to arbitrate plaintiffs’ claims in this class action, defendant’s motion to compel is denied.

CONCLUSION AND ORDER

Accordingly, it is hereby

¹⁰ It is doubtful that, pursuant to the 2016 CBA, any grievance regarding the terms of the CBA that is not resolved in the initial grievance process is subject to mandatory arbitration. Although the Union may submit the grievance for final and binding resolution by arbitration, there is no language limiting an employee’s ability to initiate an action in a judicial forum.

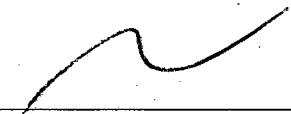
¹¹ There is no question that plaintiffs’ claims can be arbitrated and are the types of claims that would subject to the MOA’s mandatory arbitration and grievance procedure if the MOA was binding on plaintiffs. *See e.g. Gjoni v Orsid Realty Corp.*, 2015 WL 4557037, *3, 2015 US Dist LEXIS 97687, *8 [SDNY 2015] (Congress does not prohibit federal and state labor law claims from being arbitrated).

ORDERED that the motion of defendant Caring Professionals, Inc. to compel arbitration and stay the action is denied in its entirety; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: June 29, 2018

ENTER:



J.S.C.

SHLOMO HAGLER
J.S.C.