

Narcisco v Accentcare, Inc.

2019 NY Slip Op 31941(U)

June 26, 2019

Supreme Court, Kings County

Docket Number: 505296/2019

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

**FRICA NARCISCO, Individually and on Behalf of All
Other Persons Similarly Situated,**

Plaintiff,

-against-

**ACCENTCARE, INC., ACCENTCARE OF NEW YORK,
INC., STEPHAN RODGERS, AND JOHN DOES #1-10,**

Defendants.

DECISION / ORDER

**Index No. 505296/2019
Motion Seq. No. 1
Date Submitted: 6/20/19
Cal No. 55**

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants
Accentcare, Inc., Accentcare of New York, Inc., Stephen Rodgers and John Does #1-10's motion to
dismiss pursuant to CPLR § 3211.*

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>4-11</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>13-14</u>
Reply Memorandum and Affirmation.....	<u>15-16</u>
Memo of Law.....	<u>17</u>

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

In this action for recovery of unpaid wages arising from Frica Narcisco's (hereinafter "Plaintiff") employment by defendant Accentcare, defendants Accentcare, Inc., Accentcare of New York, Inc., Stephen Rodgers and John Does #1-10 (hereinafter "Defendants"), move to dismiss the complaint based upon the mandatory mediation and arbitration clauses within plaintiff's Collective Bargaining Agreement ("CBA") as modified by a Memorandum of Agreement ("MOA") between plaintiff's union and plaintiff's employer.

Oral argument was held on June 20, 2019. For the reasons which follow, the

motion is granted and the complaint is dismissed.

Defendants contend that plaintiff did not follow the steps explicitly laid out in the CBA and MOA – which were signed by the plaintiff’s union – for filing a grievance, and that the union has already filed a similar grievance. The MOA, dated January 4, 2015, states, in relevant part:

“[A]ll claims brought by either the Union or Employees, asserting violations of or arising under the Fair Labor Standards Act (‘FLSA’), the New York Home Care Worker Wage Parity Law, or the New York Labor Law . . . shall be subject exclusively to the grievance and arbitration procedures described in this Article”
[emphasis added] (Ciampaglione Aff., Exhibit B, Page 1).

Further, the MOA provides that “[a]ll such claims if not resolved in the grievance procedure . . . or mediation . . . shall all be submitted to final and binding arbitration before Martin F. Scheinman, Esq.” (*Id.*)

Defendants argue that the arbitration clause must be enforced since it is clear and is contained in a bargained-for agreement (see Federal Arbitration Act, 9 U.S.C. § 1 *et seq*; *Moses H. Cone Mem’l Hosp. v Mercury Constr. Corp.*, 460 US 1, 26 [1983], *14 Penn Plaza LLC v Pyett*, 556 US 247, 256-64 [2009]). Additionally, defendants contend that there is a presumption of arbitrability when a broadly worded agreement exists which can only be defeated by the explicit exclusion of a specific type of grievance, citing *Smith/Enron Cogeneration Ltd. P’ship, Inc. v Smith Cogeneration Int’l, Inc.* (198 F3d 88, 99 [2d Cir 1999]).

Defendants also point to CPLR § 7503 (a), which states that a party that seeks to preclude litigation by showing that there is an enforceable agreement to arbitrate may

be granted a stay of the litigation while the arbitration proceeds. Alternatively, then, defendants request that this litigation be stayed until the arbitrator rules on the matter.

Plaintiff first attempts to overcome defendant's prima facie showing by arguing that the use of the word "may" in the agreement allows the plaintiff to proceed directly to litigation. The Eastern District of New York has held, plaintiff avers, that a contract that uses the word "may" does not explicitly require arbitration (see *Abdullayeva v Attending Homecare Servs., LLC.*, 2018 US Dist LEXIS 35552, 2018 WL 1181644 [ED NY 2018]). Plaintiff argues that the arbitration clause in *Abullayeva* is sufficiently similar to the clause in plaintiff's contract to justify an identical application of the law.

Plaintiff's argument that the language of the MOA is permissive and not mandatory is unavailing. It states, at paragraph 4, in pertinent part, as follows: "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 . . . 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" [emphasis added]. This paragraph must use the word "may," as the union's declination cannot mandate that an individual proceed.

Plaintiff's next argument, that the holding in *Abdullayeva* is also applicable here, is similarly unavailing. In *Abdullayeva*, the court held that the clause was unclear because the agreement did not explicitly mention coverage of employees' grievances (see *Abdullayeva v Attending Homecare Servs., LLC.*, 2018 US Dist LEXIS 35552 *4-*9, 2018 WL 1181644, *2-*4 [ED NY 2018]). Here, the mediation and arbitration

provisions explicitly include individual employees' claims. (See NY St Cts Elec Filing [NYSCEF] Doc No. 7, at 25). Additionally, the MOA here specifically refers to both employees' and union grievances. (See Ciampaglione Aff., Exhibit B, Page 1). The agreement here states "[A]ll claims brought by either the Union or Employees..." (*Id.*) Thus, the plaintiff's interpretation of *Abdullayeva* as being completely on point is erroneous.

As the court (Judge Weinstein) explains in that decision, "[a]rbitration clauses in these agreements must "clearly and unmistakably require Union members to arbitrate" their individual claims, citing *14 Penn Plaza LLC v Pyett* (556 US 247, 274 [2009]). Further, "in order for a mandatory arbitration provision in a CBA to encompass an employee's statutory claims, the inclusion of such claims must be unmistakable, so that the wording is not susceptible to a contrary reading" (*Lawrence v Sol G. Atlas Realty Co.*, 841 F3d 81, 83 [2d Cir. 2016] [emphasis added]). To satisfy this exacting standard, the arbitration clause must specify either that all federal causes of action are subject to mandatory arbitration or name the specific statutory provisions that it intends to cover (see *McLean v Garage Mgmt. Corp.*, No. 10 CIV. 3950 DLC, 2011 U.S. Dist. LEXIS 32760, 2011 WL 1143003, at *5 [SDNY Mar. 29, 2011]). The plaintiff's CBA here does so.

Plaintiff also contends that the cost of arbitration is prohibitively high, and cites *E.E.O.C. v Rappaport, Hertz, Cherson & Rosenthal, P.C.* (448 F Supp 2d 458, 464 [ED NY 2006]). Plaintiff argues that the cost of the arbitrator is too high to be shouldered by a single party making \$12-15 dollars per hour (NY St Cts Elec Filing [NYSCEF] Doc No. 14 at 2-5).

The plaintiff's union apparently did not think that the arbitration and mediation costs would be prohibitively high. The defendant claims (NY St Cts Elec Filing [NYSCEF] Doc No. 15 at 7), that plaintiff's cost argument is based on the belief that the plaintiff would be forced to arbitrate this matter by himself. In fact, the union has already filed this grievance on behalf of its members, and, thus, the plaintiff would not be forced to arbitrate this matter alone. Thereby, the cost of the arbitration is not prohibitively high.

In conclusion, as the plaintiff's union had, prior to plaintiff's suit, signed a CBA and an amendment to it which prevent litigation of plaintiff's claims, the motion must be granted. Plaintiff's contention that the agreement's language implicitly allows litigation based on *Abdullayeva* is erroneous, due to the dissimilarities in the applicable clauses. Additionally, Plaintiff's contention that mediation and then arbitration are not the exclusive forum because the word "may" is used in ¶ 4 is an incorrect reading of the provision.

Accordingly, the motion is granted. The complaint is dismissed.

This shall constitute the decision and order of the court.

Dated: June 26, 2019

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court