SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

----------x

CHAYA RUBINSTEIN AND NEW WAY DEVELOPMENT USA, INC.,

Plaintiff, Decision and order

- against - Index No. 522835/18

C & A MARKETING, INC., AKIVA KLEIN, AND CHAIM PIEKARSKI,

Defendants, August 30, 2019

----------x

PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §2221 seeking to reargue a decision and order dated April 29, 2019 dismissing the complaint pursuant to CPLR §3211 on the grounds an arbitration agreement foreclosed the instant lawsuit. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in the prior order the plaintiff was employed by the defendants and the relationship terminated on August 23, 2018 and the plaintiff instituted this lawsuit alleging she is owed commissions pursuant to an agreement signed between the parties. The court held an arbitration clause in the agreement foreclosed an action in this court and granted the motion to dismiss. The plaintiff has now moved seeking to renew and reargue that determination. First, she argues that an Employee Memorandum that she did not discover she possessed until after the prior motion was submitted encourages mediation and not arbitration.

Thus, the arbitration clause of the employment contract should be interpreted as a mediation clause and not an arbitration clause. Moreover, she argues since the arbitration clause is vague it was the burden of the defendants to demonstrate the clause referred to arbitration and it was not the plaintiff's burden to prove it did not.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

It is true that generally, a motion to renew must contain evidence that existed at the time the original motion was filed but was unknown to the moving party (Brooklyn Welding Corp., v. Chin, 236 AD2d 392, 653 NYS2d 631 [2d Dept., 1997]). However, that rule has been defined as 'flexible' and a party may file a motion to renew even if the evidence was known at the time of the original motion provided the party offers a reasonable explanation why the additional facts were not included within the original motion (Progressive Northeastern Insurance Company v. Frenkel, 8 AD3d 390, 777 NYS2d 652 [2d Dept., 2004]).

Therefore, accepting the plaintiff's explanation the court

will address the Employee Memorandum. Section 18 of the Employee Memorandum entitled "Problem Resolution" provides that "if employers disagree with established rules of conduct, policies, or practices, they can express their concerns through the problem resolution procedure" (see, Employee Memorandum, Section 18, second paragraph). The Memorandum then proceeds to detail an elaborate four step process whereby an employee may "express their concern" regarding any of the company's rules, policies or practices. The first three steps involve bringing the problem to various supervisors and senior executives of the organization. The fourth step provides that if the problem cannot be resolved through the first three steps then "mediation will be conducted under the Employment Mediation Rules of the American Arbitration Association" (id, at Step 4). Thus, the plaintiff argues this Memorandum clearly delineates mediation as a source of dispute resolution and the language of the employment contract purporting to require arbitration really required mediation. However, the mediation procedures of the Employee Memorandum clearly only applied to employees, not former employees suing the company for various grievances. First, the opening sentence of the mediation procedures stress that the company is "committed to providing the best possible working conditions for its employees" (id). The Memorandum continues and states that "part of this commitment is encouraging an open and frank atmosphere in which

any problem, complaint, suggestion, or question receives a timely response from C&A supervisors and management. C&A strives to insure fair and honest treatment of all employees" (id). Further, as noted, these procedures only apply "if employees disagree..." (Id). Again, the Memorandum notes that "if a situation occurs when employees believe that a condition of employment or a decision affecting them is unjust or inequitable, they are encouraged to make use of the following steps" (id). The concluding paragraph of the mediation option further supports the plain reading that it only governs current employees. It states that "only through understanding and discussion of mutual problems can employees and management develop confidence in each other. This confidence is important to the operation of an efficient and harmonious work environment" (id).

Thus, the Employee Memorandum does not govern situations like the case at bar where the plaintiff is no longer an employee of the company and has no interest or ability to maintain an "efficient and harmonious work environment" (id). Therefore, the Employee Memorandum does not shed any light upon the employee contract and the clause the court ruled was an arbitration clause.

Next, concerning the clause itself, the court did not impermissibly shift the burden of proof that such clause is an arbitration clause. Indeed, the court did not shift the burden

at all. Rather, the court exercised its own judgement in determining the clause was an arbitration clause. As noted in the prior decision and reiterated here it is the court that must determine as a matter of law whether any part of a contract is ambiguous (Lammas Transportation Corp., v. Golden Touch Transportation of New York Inc., 32 Misc3d 1222(A), 936 NYS2d 59 [Supreme Court of Queens County 2011]).

Therefore, since the court has concluded the arbitration clause valid and enforceable the motion seeking reargument is denied.

So ordered.

ENTER:

DATED: August 30, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC