SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

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RICHARD BERGER

Petitioner,

- v -

NEW YORK UNIVERSITY,

Respondent.

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INDEX NO. 152610/2019

MOTION DATE 11/15/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 42, 43, 44, 45, 46, 47, 48, 49, 50, 55, 56, 57, 58, 59, 60, 61

were read on this motion to STAY ARBITRATION.

ORDER

Upon the foregoing documents, it is

ORDERED that the Order of April 27, 2020 resolving motion sequence 002 in this action is VACATED, RESETTLED AND CORRECTED AS PURSUANT TO CPLR 5019 [see Kiker v Nassau County, 85 NY2d 879 (1995)]; and it is further

ORDERED that the motion by petitioner Richard Berger to stay arbitration is granted.

DECISION

In this proposed class action, petitioner, Richard Berger, moves by order to show cause, pursuant to CPLR 7503 (b), for an order staying the arbitration demanded by respondent, New York University, on the ground that there is no agreement to

arbitrate the controversy forming the basis for petitioner's claims against respondent and that, therefore the American Arbitration Association (AAA) lacks jurisdiction to entertain such arbitration demand.

For the reasons set forth below, the motion is granted.

Background

Petitioner is employed by respondent as a security guard. On December 11, 2018, petitioner filed an action in New York State Supreme court, New York County (Index No.: 161553/2018) (underlying action) on behalf of himself and a putative class consisting of individuals, who performed work as security guards and in other related trades for respondent from December 2012 to the present, to recover for underpayment of wages pursuant to certain delineated provisions of the New York Labor Law (NYLL) and the New York City Rules and Regulations. Petitioner seeks to recover wages for hours they worked but were not paid, and unpaid overtime compensation at the rate of one and one-half times their regular rate of pay for hours they worked in excess of 40 hours for which they were not paid. In the underlying action, petitioner asserts two causes of action: unpaid overtime compensation (under NYLL § 663 and 12 NYCRR 142-2.2) and failure to pay wages (under NYLL §§ 663 and 190).

Respondent removed the underlying complaint to federal court pursuant to § 301 of the Labor Management and Relations

Act, 29 USC § 185, which provides exclusive federal jurisdiction over disputes arising from a collective bargaining agreement (Berger v New York University, US Dist Ct, SD NY, 1:19-cv-00267-JPO) (Federal Action). On February 21, 2019, respondent served petitioner with a notice of demand for arbitration concerning the claims currently the subject of the underlying action. Petitioner submits the instant motion in response asserting, among other things, that that there is no valid arbitration agreement to arbitrate the underlying claims.

According to respondent, petitioner and the purported class he seeks to represent are all NYU employees and members of Local One Securities Officers Union (the Union) whose employment is governed by the parties' collective bargaining agreement (CBA).

The Collective Bargaining Agreement

On July 1, 2012, respondent and the Union, "representing all full-time, and regular part-time, Security Officers and Security Specialists, . . . except for those Security Officers employed at the NYU Medical Center" entered into a collective bargaining agreement (CBA) (NYSCEF Doc. No 5).[1]

Article 5 of the CBA, entitled "Hours of Work", provides:

"A. The regular work week shall consist of forty (40) hours divided into five (5) days of eight hours each. All

[1] The most recent CBA was effective as of July 1, 2012 and expired on June 30, 2018. The parties subsequently extended the CBA to October 31, 2018. The Union and NYU are currently negotiating a successor agreement.

> shifts will be scheduled over [8.5] hours with one half hour unpaid meal break. The first [15] minutes of each shift will be used for the purpose of roll call. Employees will not be required to perform any duties during the last [15] minutes of their shift, but will be permitted to return to the locker room to change their clothes and return equipment. At any time during said [15] minutes, [e]mployees will be permitted to leave the premises but will be credited with the full [15] minutes. During the [30] minute unpaid meal break, the employees may leave the premises or their post.
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> * * *
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> D. Overtime shall be paid at the rate of time and one-half for all hours worked by Employees covered by this Agreement in excess of eight (8) hours per day and forty (4) hours per week. . . ."

Article 6, of the CBA, entitled "Grievance Procedure" provides:

> "A. In the event of any labor dispute or difference between the Employer and the Union respecting *any of its members* employed by the Employer or the Employer and the Union as to the meaning, application, or operation of any provision of this Agreement, such dispute or difference shall be processed in accordance with the following procedures."

These procedures include the aggrieved employee or union representative request a meeting with the employer's representative, with a meeting taking place between them within 10 working days of the request (step 1) (see CBA, art. 6 at 10-11). If the meeting does not take place or NYU does not respond within said time frame, the union and employee shall meet with the Director of Labor Relations within 10 days following the referral of the grievance (step 2), with a response to step 2

being made within 10 days (id. at 11). If the parties are still not satisfied, the parties are to "request arbitration by giving notice to that effect to the American Arbitration Association with a copy to the other party" (id.). The parties may then proceed to arbitration within 30 days of the receipt of the step 2 response (id.). The parties are to choose an arbitrator within five days of a request to arbitrate; and if they fail to designate an arbitrator within said timeframe, the selection is to "be made in accordance with the Voluntary Labor Arbitration Rules of the American Arbitration Association" (CBA, art. 6, B at 11).

Article 14, entitled "Wages" sets forth all applicable wage scales (*see* CBA at 25-29, Appendix A). Subsection J provides that "[p]aychecks shall include overtime earned during the period covered by the check" (id. at 29).

Article 42, entitled "Entire Agreement" provides:

> "The parties, in consideration of the benefits, privileges and advantages provided in this Agreement, and as a condition to the execution thereof, agree that that [sic] no term of the Agreement may be modified in any respect except by a writing executed by each of the parties hereto. The parties further acknowledge that they have had a full and unfettered right to bargain over the wages and benefits payable to employees covered hereunder, and waive their right to bargain concerning such wages and/or benefits during the term of this Agreement."

The Motion at Bar

Respondent argues that if petitioner's remand motion pending in federal court, is denied, the result will be that the NYLL claims in the federal action will be dismissed with prejudice on LMRA preemption grounds, leaving nothing for this court to decide. Even if the underlying complaint is remanded back to this court, respondent argues that the result will be the same in that petitioner must arbitrate his federal action claims as required under the CBA, CPLR 750 and the Federal Arbitration Act (FAA), and the complaint should be properly dismissed.

Federal Action

After the filing of the instant motion, the Honorable J. Paul Oetken, in the Federal Action, issued an opinion and order wherein petitioner's motion to remand the Federal Action back to state court was granted. There, the district court found that neither of Berger's claims required an interpretation of the CBA. Rather, the issue of whether NYU has paid its security "guards for time and whether they have worked additional, uncompensated hours beyond this" "require[s] inquiry into the facts . . ., not the terms of the CBA" (August 2, 2019 opinion and order at 5, NYSCEF Doc. No. 39). Additionally, the district court held that whether New York statutory law creates a right to compensation for the time a worker spends on any task, regardless of the terms of his or her employment contract, is a

state law matter and does not require interpretation of the CBA (id.). As to the remaining arguments, the district court held that NYU had not rebutted the argument that state law creates an independent right, and therefore would not be preempted by the LMRA.

Further, the court, in dicta, found that petitioner's case involves a claim that petitioner "was required to work without any pay at all" which does not trigger preemption even if the "court will need to consult the CBA to determine the appropriate rate of pay for any periods as to which liability is found" (*id.* at 9).

Related Union Federal Action and Decision

After NYU filed a grievance and demand for arbitration against the Union pursuant to the CBA's dispute resolution process, the Union filed an action in the Southern District of New York seeking to enjoin NYU from proceeding with the arbitration (Local One Security Officers Union v New York University, US Dist Ct, SD NY 1:19-cv-03143-JPO) (Union Action). The Union moved for a preliminary injunction. On September 9, 2019, the district court, in an opinion decided by the Honorable Judge Oetken, denied the motion.

There, the district court found that the CBA "clearly reflects the parties' agreement to arbitrate *some* disputes;" however, "the critical question is whether the arbitration NYU

has initiated pertains to a dispute that falls within the scope of that agreement" (September 9, 2019 opinion and order at 5, NYSCEF Doc. No. 52). The district court found that the Union and NYU "have clearly and unmistakably assigned to the arbitrator the question of whether NYU's claims set out an arbitrable dispute" (id. at 6). Relying on federal case law, the district court was unpersuaded by the Union's argument that "the CBA places a meaningful limitation on the scope of arbitrable disputes by requiring that they be 'labor disputes which involve the "meaning, application, or operation" of the CBA'" (id. at 7). Finally, the district court held that since it found that the CBA reflects an argument to arbitrate what is an arbitrable matter, the union failed to demonstrate the likelihood of success on the merits; and the motion was denied (id. at 7-8).

Discussion

At the outset, the court notes that in light of Judge Oetken's August 2, 2019 opinion and order, Respondent's arguments that the instant action should be dismissed pursuant to CPLR 3211 (a) (4), or in the alternative, that the court should stay the instant action pursuant to CPLR 2201, as there was a pending federal action, are deemed moot, as the Federal Action was closed, and the case was remanded back to this court.

Likewise, with respect to the timeliness of the petition, the court finds that petitioner timely filed the initial

petition as required under CPLR 7503, in that it was filed on March 12, 2019 after being served with the arbitration demand on February 21, 2019, within the 20-day requirement (Matter of Auto One Ins. Co. v Lopez, 88 AD3d 701, 701 [2d Dept 2011] ["(T)he timeliness of a proceeding for a stay of arbitration is measured with respect to the earlier filing of the petition, not with respect to its later service"] [internal quotation marks and citation omitted]). Here, the petition was not rejected but the proposed order to show cause was denied due to missing working copies as required by Part 59.

Turning to the heart of the matter, on a motion to CPLR 7503 (b) states:

> "a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made . . .."

"[A] party seeking to avoid arbitration on the ground of no agreement to arbitrate can raise such objection only when it has not participated in the arbitration" (Stone v Noble Constr. Mgt., Inc., 116 AD3d 838, 839 [2d Dept 2014] [internal quotation marks and citation omitted]). In determining whether to stay arbitration, courts consider three issues: "(1) whether the parties made a valid agreement to arbitrate; (2) if so, whether

the agreement has been complied with; and (3) whether the claim sought to be arbitrated would be time-barred if it were asserted in State court." (Matter of Smith Barney, Harris Upham & Co. v Luckie, 85 NY2d 193, 201-202 [1995]). A party may apply to stay arbitration on the ground that the arbitration agreement violates public policy (Larrison v Scarola Reavis & Parent LLP, 11 Misc 3d 572, 579 [Sup Ct, NY County 2005).

If the parties dispute "whether an obligation to arbitrate exists, the general presumption in favor of arbitration does not apply" (Matter of TBA Global, LLC v Fidus Partners, LLC, 132 AD3d 195, 202 [1st Dept 2015] [internal quotation marks and citation omitted]). "[T]he party seeking to stay arbitration ha[s] the burden of showing the existence of sufficient evidentiary facts to establish a genuine preliminary issue' which would serve as a justification for the stay" (New Hampshire Indem. Co. v Flores, 2002 NY Slip Op 40024[U] [Sup Ct, NY County 2002] [internal quotation marks and citation omitted]).

Petitioner argues that the CBA is not a valid arbitration agreement with respect to the state statutory claims, as there is no evidence that the "parties expressly agreed to arbitrate their disputes" (Shah v Monpat Constr., Inc., 65 AD3d 541, 543 [2d Dept 2009] [internal quotation marks and citation omitted]). Specifically, petitioner argues that under the "Grievance

Procedure" in the CBA, the Union never agreed that petitioner would forego his statutory rights to sue in court for statutory violations, or to be paid the wages lawfully owed to him. Respondent counters that the CBA refers all disputes about its "meaning, application, or operation" to arbitration (CBA, art. 6).

To determine the issue of whether it was the parties' intent to arbitrate the dispute, the court must first assess whether the CBA contains a "clear and unmistakable" waiver by petitioner to pursue his rights in a judicial forum (Alderman v 21 Club Inc., 733 F Supp 2d 461, 469 [SD NY 2010]). "A 'clear and unmistakable' waiver exists where one of two requirements is met: (1) if the arbitration clause contains an explicit provision whereby an employee specifically agrees to submit all causes of action arising out of his employment to arbitration; or (2) where the arbitration clause specifically references or incorporates a statute into the agreement to arbitrate disputes" (Tamburino v Madison Sq. Garden, L.P., 115 AD3d 217, 223 [1st Dept 2014], quoting Alderman, 733 F Supp 2d at 469-470).

Generally, a collective bargaining agreement entered into between the employer and union; establishing a grievance procedure subjects the employee to the terms of the collective bargaining agreement (Ambrosino v Village of Bronxville, 58 AD3d 649 [2d Dept 2009]). Where there are individual statutory rights

at issue, however, a collective bargaining agreement bears no preclusive effect to those claims absent a specific reference to the statute (Tamburino, 115 AD3d 217; Valentin v State Is. Univ. Hosp., 23 Misc 3d 1128[A]; 2009 NY Slip Op 50977[U] [Sup Ct, Richmond County 2009] [where CBA broadly defined grievance as "a dispute or complaint arising between the parties …under … this Agreement or interpretation, application, performance, termination, or any alleged breach thereof," court held such language did not constitute "clear and unmistakable language" purporting to waive employee's discrimination claims]; Lawrence v Sol G. Atlas Realty Co., Inc., 841 F3d 81, 85 [2d Cir 2016] [holding "a contractual dispute is not the same thing as a statutory claim, even if the issues involved are coextensive"]).

Here, the court finds that the CBA does not effectuate a "clear and unmistakable" waiver of petitioner's NYLL and NYCRR claims, as the terms of the CBA do not specifically provide that the NYLL and NYCRR claims are subject to arbitration (Markasevic v 241 East 76 Tenants Corp., 2017 NY Slip Op 30493[U], ** 12 [Sup Ct, NY County Mar. 17, 2017]; cf. Troshin v Stella Orton Home Care Agency, Inc., 66 Misc 3d 1209[A], 2020 NY Slip Op 50036[U] [Sup Ct, NY County 2020]). Many courts have found that the same NYLL claims asserted by petitioner do not give rise to a dispute "as to the meaning, application or operation of any provision" of a collective bargaining agreement, because they

assert independent statutory rights that fall outside of a collective bargaining agreement's purview (Diaz v Amedeo Hotels Ltd. Partnership, 2016 WL 1254243, *8-9, 2016 US Dist LEXIS 41453, *17-19 [ED NY Mar. 26, 2016]; see also Severin v Project OHR, Inc., 2011 WL 3902994, *4 2011 US Dist LEXIS 99839, * 12 [Sept. 1, 2011] [holding, among other things, that "no provision of the CBA needs to be interpreted to decide either of" the plaintiff's claims for unpaid overtime and compensation under NYLL]; McLean v Garage Mgt. Corp., 2011 WL 1143003, *3, 2011 US Dist LEXIS 32760, *7-8 [SD NY Mar. 29, 2011] [rejecting the defendant's argument that the plaintiff's NYLL claims for unpaid wages and overtime should be governed by the collective bargaining agreement, and holding the NYLL "claims arise wholly under state law"]; Polanco v Brookdale Hosp. Med. Ctr., 819 F Supp 2d 129, 134 [ED NY 2011] [NYLL claims are independent statutory rights, and are not subject to provisions of the CBA]).

To the extent the parties raise a preemption argument under LMRA sec 301, said arguments are moot given the August 2, 2019 opinion and order in the Federal Action. The court notes, however, that while LMRA § 301 applies to causes of action that require interpretation of a collective bargaining agreement, as respondent argues, claims that can be resolved independently of the agreement are not preempted (Tamburino v Madision Sq.

Garden, LP, 115 AD3d at 221 [LMRA "however, does not preempt state claims when state law confers an independent statutory right to bring a claim"]; see also Dawkins v Campbell-Robinson, 72 AD3d 534 [1st Dept 2010]).

Petitioner argues that even if he and the purported class have additional claims brought under the CBA, petitioner has chosen only to seek remedy for their claims under NYLL and the NYCRR (see Lai Chan v Chinese-American Planning Council Home Attendant Program, Inc., 50 Misc 3d 201, 210 [Sup Ct, NY County 2015] [petitioners may to choose to "assert state law causes of action without reliance on the CBA] [internal quotation marks and citation omitted]).

Further, the arbitration provision applicable herein, provides that "[i]n the event of any labor dispute or difference between [NYU] and the Union respecting any of its members employed by [NYU] or [NYU] and the Union as to the meaning, application or operation of any provision of [the CBA], such dispute or difference, shall be processed in accordance" with the parties' three-step grievance procedure. Here, petitioner's complaint does not concern allegations about the interpretation of the CBA, rather petitioner alleges statutory violations. "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" (Konstantynovska v Caring Professionals, Inc., 2018 NY Slip Op 31475[U], **16-17 [Sup Ct, NY County 2018], *affd as modified*, 172 AD3d 486 [1st Dept 2019], citing Tamburino, 115 AD3d at 222-223 ["(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"]). Here, as the CBA terms do not specifically provide that petitioner's claims alleging violations of the NYLL and NYCRR are subject to arbitration, the court finds the CBA does not establish a "clear and unmistakable" waiver as to these claims.

The court considers the remainder of the arguments and finds them without merit.

7/9/2020
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE