

Rodriguez v Newmark & Co. Real Estate, Inc.

2021 NY Slip Op 30862(U)

March 18, 2021

Supreme Court, New York County

Docket Number: 158325/2019

Judge: Richard G. Latin

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This opinion is uncorrected and not selected for official publication.

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

PRESENT:	<u>HON. RICHARD G. LATIN</u>	PART	IAS MOTION 46
	<i>Justice</i>		
-----X		INDEX NO.	<u>158325/2019</u>
MICHAEL RODRIGUEZ,		MOTION DATE	<u>March 16, 2021</u>
Plaintiff,		MOTION SEQ. NO.	<u>001 002</u>

- v -

NEWMARK & COMPANY REAL ESTATE, INC.,GFP REAL ESTATE LLC,MUSART ASSOCIATES, LLC,SAMUEL GONZALEZ

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 40 were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ordered that defendants' motions to dismiss plaintiff's complaint, or, in the alternative, stay this action and compel arbitration of plaintiff's claims, are determined as follows:

Plaintiff commenced this employment discrimination action concerning claims of gender discrimination, harassment, retaliation, and aiding and abetting in violation of, inter alia, the New York City Human Rights Law stemming from his employment as a porter at a commercial property located at 119 West 57th Street, New York, New York. The plaintiff maintains that he was sexually harassed and subjected to a hostile working environment by his supervisor, the building

superintendent, and that when he objected to the supervisor's conduct he was retaliated against by, among other things, being removed from a shift in favor of a non-union probationary employee who was assigned a full-time schedule. Plaintiff further alleges that on or about October 19, 2018 he sought his union's intervention and ultimately filed a grievance on or about May 8, 2019, however, the union declined to arbitrate and even discouraged him from advancing his claims. Plaintiff then commenced this action on or about August 27, 2019. Defendants now move to dismiss his complaint, or in the alternative, to stay the action and compel arbitration.

At the heart of this matter is whether the collective bargaining agreement ("CBA") in effect between plaintiff's union and his employer requires mandatory arbitration of plaintiff's discrimination claims even though his union declined to arbitrate them, or whether this Court is a permissible forum.

Here, it is undisputed that the plaintiff is a member of the Service Employees International Union, Local 32BJ ("union") and that the union entered into a 2016-2019 CBA with the Realty Advisory Board on Labor Relations, Inc. ("RAB"), to which defendant Musart Associates, LLC is a member.

In pertinent part, the CBA states as follows:

24. No Discrimination (A) There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, sexual orientation, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, 42 U.S.C. § 1981, the Family and Medical Leave Act, or any other similar laws, rules or regulations. All claims shall be subject to the grievance and arbitration procedure (Articles VII and VIII) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination...

(B) No-Discrimination Protocol (3)(a) The undertakings described here with respect to arbitration apply to those circumstances in which the Union has declined to arbitrate an employee an employee's individual employment discrimination claim under the No Discrimination Clause of the CBA, including statutory claims (i.e., a Covered Claim), to arbitration. The arbitration forum described here will be available to employers and employees, both those who are represented by counsel and those who are not represented by counsel.

ARTICLE VII Grievance Procedure . . . 4. All Union claims are brought by the Union alone and no individual shall have the right to compromise or settle any claim without the written permission of the Union.

In this action, the plaintiff, largely citing to *Espada v Guardian Serv. Indus.*, contends that the No-Discrimination Protocol makes arbitration permissive as opposed to mandatory for individual employees, should be excised from the CBA and court's analysis, and, that as a result, the courts must be available to the individual employee claims where the union declines to arbitrate, otherwise there would be a substantive waiver of their statutory rights (2019 WL 5309963, [ED NY, Oct.18, 2019,18-CV-5443]). The crux of the defendants' arguments are that the CBA makes arbitration the sole and exclusive remedy for discrimination claims and that the No-Discrimination Protocol expressly makes arbitration available to an individual whose union declined to arbitrate on the individual's behalf, thus, the terms of the CBA should stand where there would be no substantive waiver of the individual's statutory rights.

In the seminal cases of *14 Penn Plaza LLC v Pyett*, the Supreme Court held that a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate is enforceable as a matter of law (556 US 247 [2009]). In that case, the Court examined a nearly identical arbitration clause that was contained within a prior version of the CBA between RAB and the union. This prior CBA, however, did not yet contain the No-Discrimination Protocol at

issue in this case. There, the Court reinforced the strong public policy in favor of arbitrating disputes and the policy of the freedom to contract (*id.*). Additionally, although the Court did note that “a substantive waiver of federally protected civil rights will not be upheld,” it did so without addressing the claim set forth by the union employees that the CBA would allow the union to prevent them from enforcing their statutory rights if it declined to arbitrate their claims, as they were not permitted to seek arbitration individually and were without judicial remedy.

This issue of whether a waiver of judicial remedies was still enforceable where the union declined to arbitrate on behalf of the employee became commonly known as the “Reserved Question.” The union maintained that the CBA did not allow for individuals to arbitrate individually, thus, where the union declined to arbitrate on their behalf, individuals were not barred from bringing their discrimination claims to court (*see Wilson v PBM, LLC*, — NYS3d —, 2012 NY Slip Op 00593 [2d Dept 2021]). RAB maintained that the CBA provided for arbitration of individual claims even where the union decided not to arbitrate such that individual employees may not pursue their claims in court (*id.*). In light of this dispute, and in the aftermath of *Pyett*, RAB and the union formulated the No-Discrimination Protocol that was later incorporated into the subject CBA. The “preface” to the No-Discrimination Protocol states in pertinent part:

The parties agree that, should either the Union or the RAB deem it appropriate or necessary to do so, that party may bring to arbitration the Reserved Question. The parties intend that the Reserved Question may only be resolved in arbitration between them and not in any form of judicial or administrative proceeding. The outcome of the Reserved Question hinges on collective bargaining language and bargaining history, which are subjects properly suited for arbitration. . .

In 2010, the parties initiated the No-Discrimination Protocol. The No Discrimination Protocol is applicable to all such claims. This Protocol was intended, and continues, to serve as an alternative to arbitrating the parties’ disagreement on the Reserved Question. The parties agreed to include the No-Discrimination Protocol as part of

the CBAs, as further modified in December 2015. The Union and the RAB agree that the provisions of the No-Discrimination Protocol do not resolve the Reserved Question. Neither the inclusion of the No-Discrimination Protocol in the CBAs nor the terms of the No-Discrimination Protocol shall be understood to advance either party's contention as to the meaning of the CBAs with regard to the Reserved Question, nor will either party make any representation to the contrary. . .

Many U.S. District Courts have encountered substantially similar matters as this one and have ultimately determined that the CBA and No-Discrimination protocol require individual employees to arbitrate their discrimination claims after the union decides not to advance a claim on their behalf, instead of seeking judicial intervention (*see Lobban v Cromwell Towers Apartments, Limited Partnership*, 345 F Supp 3d 334 [SD NY 2018]; *Duraku v Tishman Speyer Props., Inc.*, 714 F Supp 2d 470 [SD NY 2010]; *Restea v Brown Harris Stevens LLC*, 2018 WL 1449183 [SD NY, Mar. 23, 2018, 17-CV-4801]; *see also Hamzaraj v ABM Janitorial Northeast, Inc.*, 2016 WL 3571387 [SD NY, Jun. 27, 2016, 15-CV-2030]; *Glover v Colliers Intl. NY, LLC*, 2014 WL 5410016 [SD NY, Oct. 24, 2014, 13-CV-8843]).


Furthermore, to the extent that the plaintiff here relies on *Morris v Temco Serv. Indus., Inc.* and *Kravar v Trinagle Servs., Inc.* for the proposition that the substantially similar CBA provisions operated as a substantive waiver of the plaintiffs' civil rights where the union did not prosecute the individuals claims, those CBAs predated the subject CBA and did not include the No-Discrimination Protocol allowing individuals the ability to pursue arbitration on their own (2010 WL 3291810 [SD NY, Aug. 12, 2010, 09-CV-6194]; 2009 WL 1392595 [SD NY, May 19, 2009, 1:06-CV-07858-RJH]). Moreover, to the extent that the plaintiff relies on *Espada*, the analysis by that court in excising the No-Discrimination Protocol from the CBA is unpersuasive (*see Wilson v PBM, LLC*, — NYS3d —, 2012 NY Slip Op 00593 [2d Dept 2021]). Just because the parties

stated in the “preface” to the protocol that none of the terms of the protocol should be understood to advance either party’s contention as to the meaning of the CBA with respect to the reserved question, it does not mean that the No-Discrimination Protocol should be excised from the court’s reading and analysis of the CBA (*id.*). “To read the CBA as if the No-Discrimination Protocol was in fact absent flies in the face of case law that requires an agreement to be read in its entirety, so as to give full meaning to intent” (*id.*).

In the instant matter the CBA’s clear and unambiguous language states that all discrimination claims are subject to the grievance and arbitration clauses of the CBA as the “sole and exclusive remedy for violations.” Moreover, plaintiff’s claims here for sexual harassment and hostile work environment are intended claims within the intended scope of the provision. Further, to the extent the union declined to pursue his discrimination claim, the No-Discrimination Protocol clearly provided the employee the power to pursue arbitration on his own, without the union. Additionally, as found in all the cases dating back to *Pyett*, the CBA unmistakably waives the plaintiff’s right to pursue his statutory claims in court by making arbitration the “sole and exclusive remedy” and there is no issue as to Congress’s intent that these statutory discrimination claims are arbitrable. Thus, plaintiff was required to assert his discrimination claims in arbitration if he wished to further assert them. Furthermore, to the extent that the plaintiff sought to resolve the arbitrability issue of the Resolved Question, the parties unmistakably provide in the “preface” that the Resolved Question should be determined at arbitration instead of by the court (*see Zachariou v Manios*, 68 Ad3d 539 [1st Dept 2009]; *Henry Schein, Inc. v Archer and White Sales, Inc.*, 139 S Ct 524 [2019]; *see also Blakaj v Charles H. Greenthal Management Corp.*, 2017 WL 4857817 [Sup Ct, New York County 2017]).

Accordingly, defendants Newmark & Company Real Estate, Inc., GFP Real Estate, LLC, Musart Associates, LLC, and Samuel Gonzalez’s motions are granted solely to the extent that this action shall be stayed pending arbitration and are denied in all other respects.

This constitutes the decision and order of this Court.

3/18/2021					
DATE			RICHARD G. LATIN, J.S.C.		
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE