Teshabaeva v Family Home Care Servs. of Brooklyn & Queens, Inc.
2021 NY Slip Op 32623(U)
December 10, 2021
Supreme Court, New York County
Docket Number: Index No. 158949/2017
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER TISCH** **PART** **18**

Justice

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MAKTUMMA TESHABAEVA, AND JIAN HUA DENG INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED WHO WERE EMPLOYED BY FAMILY HOME CARE SERVICES OF BROOKLYN AND QUEENS, INC.,

Plaintiffs,

- v -

FAMILY HOME CARE SERVICES OF BROOKLYN AND QUEENS, INC., CARE AT HOME - DIOCESE OF BROOKLYN, INC.,

Defendants.

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INDEX NO. 158949/2017

MOTION DATE 05/28/2021

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 197[1]

were read on this motion to/for RENEWAL.

Upon the foregoing documents, defendant moves for leave to renew motion sequence no. 3, which was plaintiffs' motion to permanently enjoin arbitration and defendant's cross-motion to compel arbitration. The Court's July 16, 2020 decision and order granted plaintiffs' motion and denied defendant's cross-motion (NYSCEF Doc No. 99 [Order]), and was recently affirmed in a October 14, 2021 Appellate Division, First Department decision and order (NYSCEF Doc No. 193 [hereinafter App Div Order]).

Defendant's motion for leave to renew is premised upon a February 18, 2021 decision and order from the U.S. District Court for the Southern District of New York, 1199SEIU United

[1] Defendant's letter dated October 19, 2021, plaintiff's letter dated October 25, 2021, and defendant's letter responding to plaintiff's letter, also dated October 25, 2021 (NYSCEF Doc Nos. 194, 195, 197) are improper and will not be considered. The letters discuss the recent affirmance by the First Department Appellate Division of this Court's decision and order, but the remittitur is readily available on NYSCEF and the decision and order speaks for itself.

Healthcare Workers E. v PSC Community Services (520 F Supp 3d 588 [SD NY 2021]), wherein the federal court allegedly "held that the parties had clearly and unmistakenably [*sic*] delegated the gateway question of arbitrability to the arbitrator and the arbitrator was correct to assume jurisdiction" (NYSCEF Doc No. 131, defendant's mem at 2-3). Defendant contends that this Court is divested of jurisdiction and the claims in this action are exclusively before the arbitrator (id.). Defendant also claims that "[t]he First Department decisions on which this Court relied in denying Defendants' cross-motion are a house of cards which have been decimated by the district court's decision confirming the arbitral award which held that the gateway question of arbitrability was clearly and unmistakably delegated to Arbitrator Scheinman" (id. at 5-6).

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]). A change in the law may include "a new statute taking effect or a definitive ruling on a relevant point of law issued by an appellate court that is entitled to stare decisis" (Vincent Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C2221:9). A lower federal court decision is not entitled to such stare decisis consideration (see generally People v Garvin, 30 NY3d 174, 221, n 6 [2017] [noting that a lower federal court decision might be useful and serve as persuasive authority; but "we do not abandon our jurisprudence in response to every new lower federal court decision"]). Additionally, "an intervening ruling that merely clarifies existing law does not afford a basis for renewal attributed to a change in the law" (D'Alessandro v Carro, 123 AD3d 1, 7 [1st Dept 2014]).

The Court finds that defendant is not entitled to renewal based on the 1199SEIU decision because the federal court was interpreting the CBA with the 2015 MOU (see 1199SEIU, 520 F

Supp 3d at 595-596). This Court held, and the First Department affirmed, that the 2015 MOU did not apply to the plaintiffs here, whose employment ceased prior to 2015. Thus, the federal court's decision or reasoning is not necessarily applicable to the same factual framework as the case here.

In any event, there is nothing "new" about the 1199SEIU decision. Both this Court's order and the federal court's order referenced the *same* legal principles (compare 1199SEIU United Healthcare Workers E. v PSC Community Services, 520 F Supp 3d 588, 606-07 [SDNY 2021] ["Although 'the question of whether the parties have submitted a particular dispute to arbitration, i.e., the question of arbitrability,' is presumptively 'an issue for judicial determination,' the matter may be committed to the arbitrator if 'the parties clearly and unmistakably so provide.'"] [alterations omitted], quoting Howsam v Dean Witter Reynolds, Inc., 537 US 79, 83 [2002] with Order at 3, citing Zachariou v Manios, 68 AD3d 539 [1st Dept 2009] ["Whether a dispute is arbitrable is generally an issue for the court to decide unless the parties clearly and unmistakably provide otherwise"]).

Additionally, the interim arbitration award was already known to the Court and was pending when the prior motion was decided; the fact that the interim award was confirmed adds nothing new (see Troshin v Stella Orton Home Care Agency, Inc., 70 Misc 3d 1223 [A], 2021 NY Slip Op 50196 [U], *5 [Sup Ct, NY County Mar. 12 2021] [Lebovits, J.] ["Nor does [defendant] explain why (either as a matter of law or common sense) this court should withdraw an order that rejected an arbitrator's arbitrability determination . . .merely because a federal district court later agreed with the arbitrator."]).

"Because the law in this Department remains what it was when the original order was issued, the predicate for a motion to renew is lacking" (D'Alessandro, 123 AD3d at 3).[2] To this Court's knowledge, nothing has changed the holdings of the appellate division decisions that were cited in issuing the Order (to wit, the cases that defendant improvidently labeled as a "house of cards"), all of which this Court is obligated to follow (see D'Alessandro, 123 AD3d at 6).

Defendant's argument concerning preemption is meritless as there is no conflict of state and federal law (see supra).[3] The simple difference between this case and the federal case is that the facts are different.[4]

Defendant also argues, albeit tersely, that the federal court's decision should have the effect of res judicata. However, defendant failed to make the requisite showing to invoke that doctrine (see generally Kaufman v Eli Lilly and Co., 65 NY2d 449, 455-56 [1985]; Gomez v Brill Sec., Inc., 95 AD3d 32, 35-36 [1st Dept 2012]).[5] In any event, it is another meritless

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[2] The motion is, then, essentially one to reargue but it was not identified as such, nor would such motion have been timely (CPLR 2221 [d] [3]).

[3] The Court will not consider any new arguments improperly raised on a purported motion to renew such as LMRA.

[4] It appears that the law was applied in a consistent manner with respect to the distinguishing fact here, namely that if a plaintiff was not bound by the 2015 MOU, then s/he is similarly not bound by the broad, mandatory and exclusive arbitration provision contained therein (see 1199SEIU, 520 F Supp 3d at 598 [noting that Arbitrator Scheinman "carved out" plaintiffs Hichez, Carrasco, and Acosta from the scope of the Award based on the First Department's decision and order in Hichez v United Jewish Council of the E. Side, 179 AD3d 576, 577 (1st Dept 2020)]).

[5] Gomez appears to be the only case in this jurisdiction cited in support of defendant's res judicata argument (see NYSCEF Doc No. 131, defendant's mem at 10-11). Aside from defendant's failure to cite the standard of law on the doctrine, defendant cited the case with the explanatory parenthesis stating "where federal District Court makes determination on the merits as to the state law claims, it has *res judicata* effect on state court action" (id. at 10). However, that is **not** what Gomez held. Rather, the First Department held that "since the order issued by the District Court did not make any determination on the merits as to the state law claims, it has no res judicata effect on this action" (95 AD3d at 35). It further held "the District Court's order cannot have a preclusive effect in this action insofar as the issue decided

argument (see App Div Order at 2 [stating in dicta that "the decision in [1199SEIU], which confirmed an interim arbitration award does not have the res judicata effect urged by defendants. The court made no findings that affect the merits of the issues raised by plaintiffs here, and the federal proceeding and the present state court action do not involve the same parties"], citing City of New York v Welsbach Elec. Corp., 9 NY3d 124, 127 [2007]).

Defendant's alternative relief to stay proceedings pending the disposition of the appeal before the First Department is denied as moot in light of the App Div Order.

Plaintiffs' request for legal fees for opposing this motion pursuant to 22 NYCRR 130-1.1 is granted. Pursuant to 22 NYCRR Rule 130-1.1 (c), "conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." The Court finds that this motion for leave to renew is meritless. Given defendant's persistent course of conduct in flagrant disrespect for this Court's decisions, as well as for those of the First Department, as well as attempting to mislead the Court with the ruling of at least one case (see supra, n 5), sanctions are warranted. Defendant failed to oppose the request in its reply memorandum. The determination of the exact amount of the sanction shall be set forth upon further order as indicated below.

Accordingly, it is hereby ORDERED that defendant's motion for leave to renew is denied; and it is further

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there—that plaintiffs must arbitrate their claims pursuant to the FLSA because under federal law those claims could not be brought by class action and were therefore not exempt from arbitration by the agreement—has no applicability here since nothing bars plaintiffs from bringing their *state* claims" (id. at 36).

ORDERED that plaintiffs' request for sanctions is granted without opposition, and plaintiffs' counsel shall e-file an attorneys' affirmation and provide supporting proof of "actual expenses reasonably incurred and reasonable attorney's fees" (22 NYCRR 130-1.1 [a]) for opposing this motion within 45 days, and e-mail SFC-Part18-Clerk@nycourts.gov to notify the Court when the same has been e-filed on NYSCEF.

This constitutes the decision and order of the Court.

12/10/2021
DATE

ALEXANDER TISCH, J.S.C.

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