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| Glover v Guardian Serv. Indus., Inc. |
| 2021 NY Slip Op 32692(U) |
| December 17, 2021 |
| Supreme Court, New York County |
| Docket Number: Index No. 154758/2021 |
| Judge: Barbara Jaffe |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART 12

Justice

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TAROD GLOVER and KYLE SALTERS,

Plaintiffs,

- v -

GUARDIAN SERVICE INDUSTRIES, INC.,

Defendant.

-----X

INDEX NO. 154758/2021

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3-24 were read on this motion to compel arbitration.

In this action for employment discrimination, defendant moves pursuant to CPLR 7503(a) for an order compelling arbitration of plaintiffs' claims and staying this action pending arbitration. Plaintiffs oppose and cross move pursuant to CPLR 3215 for a default judgment. Defendant opposes.

The issue raised is whether the pertinent collective bargaining agreement (CBA) that governs the employment relationship between plaintiffs, as members of the Local 32BJ Service Employees International Union (NYSCEF 7, 8), and defendant, as a member of The Realty Advisory Board on Labor Relations, Inc. (RAB), mandates arbitration.

I. CBA (NYSCEF 6)

The CBA prohibits discrimination "against any present or future employee by reason of race, creed, color, age, disability, national origin, sex . . . including, but not limited to, claims made pursuant to the Title VII of the Civil Rights Act, . . . the New York State Human Rights

Law, [and] the New York City Human Rights Code.”

Article XVI of the CBA, general clause 30(B)(1), the “No-discrimination Protocol,” provides that in order to “promptly, fairly, and efficiently resolve claims of workplace discrimination, harassment and retaliation,” the union agrees to evaluate discrimination claims and bring them to arbitration where appropriate, and that all such claims are subject to the grievance and arbitration procedure as “the sole and exclusive remedy for violations.” In general clause 30(B)(2), “Mediation,” the parties also agree that:

[w]henver a Covered Claim is brought alleging that an employer has violated the No Discrimination Clause (including, without limitation, claims based on a statute relating to workplace equal opportunities), whether such a Covered Claim is made by the Union or by an individual employee, notice shall be provided by the party seeking to utilize this Protocol of such a Covered Claim (“Notice of Claim”) to the other Parties (for purposes of this section, “Parties” shall be defined as the Union, the RAB, the Employer, and the affected employee(s)), and the matter shall be submitted to mediation, absent prior resolution through informal means.

Pursuant to general clause 30(B)(3) (“Arbitration”), the procedures governing arbitration “apply to those circumstances in which the Union has declined to arbitrate an employee’s individual employment discrimination claim under the No Discrimination Clause of the CBA . . .”

Having established the protocol in order to provide a means of fairly and rapidly resolving claims, the parties to the CBA created a “mandatory prerequisite,” a condition precedent, that must be satisfied before a bargaining unit member or union may attempt to file a claim in court, pursuant to which the RAB and the employer must be notified in writing that the employee “is attempting to bypass the Protocol process.” (General clause 30[B][4]). Details of the claim alleged must be set forth in the notice, along with the court in which the action is to be filed and the reason for attempting to bypass the protocol process. (*Id.*).

II. UNDISPUTED FACTS

It is undisputed, and as alleged in the complaint (NYSCEF 5), that plaintiffs are African American males who worked for defendant as “janitorial cleaners,” that due to COVID-19 service reductions, they, and other African American and dark-skinned males were laid off in or about April 2020, that those workers who were not laid off were Caucasian, and that several of them had less seniority than plaintiffs and the other minorities who were laid off. Plaintiffs thus allege violations of lay-off/seniority provisions of the CBA. Plaintiff Glover claims that due to his complaint to defendant’s human resources department about the racial composition of the layoffs and the seniority rules, he was recalled to work in October 2020, whereas plaintiff Salters and the other minority employees who were laid off in April 2020 have not been recalled to work. Based on these allegations, plaintiffs bring causes of action for race and color discrimination in violation of the New York State Executive Law, the New York City Human Rights Law (NYSHRL), and the New York City Administrative Code § 8-502(a), *et seq.* (NYCHRL). (*Id.*).

By member complaint summary dated September 3, 2020, Salters notified the union that he was being discriminated against based on his race. (NYSCEF 16). By member complaint summary dated September 16, 2020, Glover notified the union that he was being discriminated against based on his race. (NYSCEF 14). By written response dated November 24, 2020, the union advised Glover that based on its investigation, it found insufficient evidence to support a meritorious claim of racial discrimination and thus, it would not arbitrate his claim, adding that he may nonetheless pursue the claim but that if he does so, he must invoke the mediation process administered by the Office of the Contract Arbitrator (OCA), and told him how to do so. (*Id.*).

III. CONTENTIONS

Defendant relies on the CBA as authority for issuing an order compelling arbitration and staying this action. In anticipation that plaintiffs will cite the no-discrimination protocol, it argues that the protocol provides no end-run around arbitration. It cites authority for the proposition that arbitration is mandated even when an employee prefers to litigate his or her statutory discrimination claims and the union has declined to arbitrate his or her claim to arbitration. (NYSCEF 9).

In opposition, plaintiffs argue that defendant waived its right to compel arbitration, having failed to provide notice pursuant to clause 30(B)(2) of the protocol that it was invoking it. They emphasize that as notice is to be provided “by the party seeking to utilize this Protocol,” defendant was obliged to provide such notice. (NYSCEF 21). They also maintain that defendant failed to object or seek to initiate or compel arbitration after they had notified it in writing of their intent to bypass the protocol in March 2021 (NYSCEF 20), pursuant to clause 30(B)(4) of the protocol. Nor, plaintiffs allege, did defendant ever mention arbitration or seek to confer with them before filing the instant motion.

According to plaintiffs, defendant’s failure to move timely to compel arbitration after plaintiffs filed this action is fatal to this motion, relying on CPLR 3211. Even absent a waiver, plaintiffs additionally argue that the arbitration protocol is not mandatory, and thus, individual employees cannot be forced to arbitrate their discrimination claims where, as here, the union declined to pursue arbitration on the employees’ behalf. (NYSCEF 21).

In reply, defendant argues that common sense and a plain reading of the mediation protocol demonstrates that plaintiffs must provide a notice of claim because they are the claimants here, and are bound by the CBA to follow its mediation and arbitration provisions by

first providing defendant with a notice of claim. Defendant relies on the November 20, 2020 letter in which Glover was advised of the need for him to invoke the mediation process in order to pursue his claim on his own, and on the arbitration section of the CBA, article XVI, 30(B)(3)(a), providing for instances, like here, where the union declines to take an employee's employment discrimination claim under the no discrimination clause of the CBA (including statutory claims) to arbitration and the employee wants to litigate the claim. Thus, defendant asserts, plaintiffs have as their sole and exclusive remedy for the asserted violations the arbitration and mediation procedure. (NYSCEF 24).

IV. ANALYSIS

General clause 30(B)(2) (“notice shall be provided by the party seeking to utilize this Protocol of such a Covered Claim (“Notice of Claim”) to the other Parties . . .”) places no burden on defendant to provide a notice of claim to the other parties. Rather, as plaintiffs are the claimants, they bear the burden of providing such notice. Similarly, general clause 30(B)(4) assigns to the employee who attempts to bypass the protocol, as occurred here, the burden of notifying the employer of his or her attempt to do so. Plaintiffs’ arguments to the contrary border on the frivolous.

The arguments set forth in *Espada v Guardian Serv. Indus., Inc.*, 2019 WL 530996 (ED NY 2019), which plaintiffs rely on for the proposition that the CBA’s arbitration and mediation procedures are permissive and not mandatory are not only contrary to the wording of the CBA, but have been rejected by the Court in *Wilson v PBM, LLC*, 193 AD3d 22 (2d Dept 2021), which binds me absent authority on the issue in this department. Moreover, the weight of authority compels reliance on the authorities cited by defendant.

Plaintiffs also mistakenly rely on CPLR 3211(a)(5), which permits a party to seek a

judgment dismissing one or more causes of action on the ground that it may not be maintained because of, *inter alia*, arbitration and award. Here, defendant does not seek dismissal and there has been no award granted, and plaintiffs inexplicably fail to acknowledge that the instant motion is aimed solely at compelling arbitration.

V. CONCLUSION

Given this result, there is no need to address plaintiffs' motion for a default judgment.

Accordingly, it is hereby

ORDERED, that defendant's motion to compel arbitration is granted and this action is stayed pending arbitration; and it is further

ORDERED, that plaintiffs' motion for a default judgment is denied as academic.

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12/17/2021
DATE

BARBARA JAFFE, J.S.C.

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| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | SUBMIT ORDER | |
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| | | | <input type="checkbox"/> | DENIED | |