

Konstantynovska v Friendly Home Care, Inc.

2023 NY Slip Op 30557(U)

February 15, 2023

Supreme Court, Kings County

Docket Number: Index No. 523015/2017

Judge: Wavny Toussaint

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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of February, 2023.

PRESENT:

HON. WAVNY TOUSSAINT,

Justice.

-----X
LYUDMYLA KONSTANTYNOVSKA, individually and on behalf of all other persons similarly situated who were employed by FRIENDLY HOME CARE, INC.,

Plaintiff,

-against-

FRIENDLY HOME CARE, INC.,

Defendant.
-----X

Index No.: 523015/2017

Motion Seq #4

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____ 111-120

Opposing Affidavits (Affirmations) _____ 123-135

Reply Affidavits (Affirmations) _____ 138¹

Upon the foregoing papers in this action to recover wages and benefits, defendant Friendly Home Care, Inc., (FHC) moves for an order: (1) compelling the class members hired by FHC after April 14, 2017 to arbitrate their claims, if any;

¹ While the court does not typically number memoranda of law amongst the documents reviewed, as defendant submitted a memoranda of law (NYSCEF Doc No.138) as its reply in further support of its motion, and has not filed an affirmation, said document has been listed amongst the documents reviewed herein.

and (2) severing the claims of those class members from the class members that were certified on or about March 21, 2022 [Motion Seq. 4].

Background

Konstantynovska, a home health aide, commenced this action on April 14, 2017, on behalf of herself and a putative class of FHC employees, to recover wages and benefits pursuant to the New York Labor Law. On December 7, 2017, FHC interposed an answer. Thereafter, the parties engaged in pre-certification discovery, including depositions. On April 12, 2021, Konstantynovska filed a motion for class certification and for leave to file an amended complaint. By decision and order dated March 17, 2022 (the Prior Order), familiarity with which is assumed, the court granted Konstantynovska's motion for class certification and certified a class consisting of:

“All individuals who performed work on behalf of Friendly Home Care, Inc., as non-residential home health aides and/or personal care assistants in the State of New York at any time between April 14, 2011 and today”

(the Class). The court also granted Konstantynovska leave to file an amended complaint, deeming the proposed first amended complaint filed as of the court's order with notice of entry. On April 25, 2022, FHC filed an answer to the first amended complaint.

FHC's Motion to Compel Arbitration

FHC now moves to compel arbitration, on an individual basis, of the claims brought by that portion of the Class hired on or after April 15, 2017. FHC contends

that the claims must be arbitrated because its employee handbook, which was updated in April of 2017, and which FHC gave every new and current employee, included a mandatory arbitration provision and class action waiver. Of relevance here, the employee handbook states:

“Employment Disputes

All claims from potential, current or former employees of the Company accruing at any time pursuant to all Federal, State and Local statutory employment statutes including, but not limited to, any claims for monies that may have been owed for back wages, vacation, overtime, prevailing wage or minimum wage claims, including claims under the Fair Labor Standards Act, the New York State Labor Law or similar law . . . and any claims alleging violations of any state or local law, statute, regulation, executive order, or ordinance, including, but not limited to, the constitution and laws of the State of New York, the New York State Human Rights Law and the New York Executive Law (collectively “Covered Claims”) shall be resolved by arbitration in accordance with the then effective Employment Arbitration Rules of the American Arbitration Association by filing a claim in accordance with the Association’s filing rules, and judgment on the award rendered pursuant to such arbitration may be entered in any court having jurisdiction thereof. The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of this arbitration agreement. There shall be no right or authority for any of the Covered Claims to be arbitrated on a class action basis, nor shall any employee have any right to file or participate in any class or collective action concerning any Covered Claim. The costs charged by the arbitrator shall be borne by the Company and not the employee” (FHC Employee Handbook at 16-17 [emphasis supplied]).

The employee handbook also contains the following acknowledgement of receipt provision, to be signed by FHC’s employees:

"Receipt of Employee Handbook

I have received and read a copy of the Employee Handbook. I understand that the rules, policies, and benefits contained in the Employee Handbook may be updated, modified, or deleted at any time and that it is my responsibility to keep myself apprised of any changes. I also understand that this handbook contains a mandatory arbitration provision with a class action waiver and that by accepting and/or continuing my at-will employment I agree to the binding arbitration provision set forth in this handbook regardless of whether I sign the handbook below. I will comply with the rules and regulations of FHC, and understand that my employment and compensation can be terminated, with or without cause, and without notice at any time at the option of the Company or myself. I also understand that neither this Handbook nor any other communication by a management representative is intended to in any way create a contract of employment or to limit the Company's discretion to discipline or terminate my employment" (FHC Employee Handbook at 28 [emphasis supplied]).

FHC argues that its employees hired after April 14, 2017 are subject to the arbitration provision because (1) they signed the acknowledgement of receipt, which stated that they understood that the employee handbook contained an arbitration provision with a class waiver and (2) by accepting and/or continuing their at-will employment, they agreed to the binding arbitration set forth in the handbook regardless of whether they signed the employee handbook.

Anticipating plaintiffs' argument, FHC contends that it did not waive its right to compel arbitration merely because this case has been pending since 2017. In that regard, FHC points to case law holding that a defendant does not waive its right to arbitrate by pursuing the litigation/discovery or by waiting to move to

enforce an arbitration agreement until after the court certifies a class. FHC also argues that strong federal and state policies favoring arbitration in New York weigh in favor of arbitration.

Plaintiffs' Opposition

In opposition, plaintiffs first contend that the court has already considered and dismissed FHC's arbitration arguments when it granted the motion for class certification in the Prior Order. In that regard, plaintiffs point to FHC's brief in support of their class certification motion, in which they argued that FHC employees who were given and signed the handbook with the arbitration provisions are subject to arbitration. Plaintiffs contend that the court considered this argument and previously rejected it, and that therefore, the Prior Order is the law of the case.

Next, plaintiffs argue that arbitration language in the employee handbook does not create a binding contract. To that end, the handbook states that it is merely a guide for employees, and expressly disavows that it creates contractual rights and duties, and therefore, cannot be enforced against plaintiffs. Plaintiffs also argue that FHC waived its right to compel arbitration since it actively litigated the action for five years before filing the instant motion. Plaintiffs contend that they will be prejudiced if FHC's waiver is not acknowledged.

In addition, plaintiffs contend that in its answer, FHC did not specifically assert that the claims were barred by an arbitration agreement, class action waiver,

or that the FHC employee agreement contained an arbitration clause. FHC merely asserted, in its tenth affirmative defense, that “Plaintiff’s claims are barred for failure to exhaust administrative and/or arbitrable remedies.” Further, plaintiffs contend that enforcement of the arbitration provision should be denied because FHC duplicitously amended the handbook to include the arbitration clause in response to the filing of this lawsuit, and to limit the number of class members. Plaintiffs argue that FHC failed to inform class members of the ongoing litigation and failed to offer them an opportunity to opt out of the arbitration policy, and that FHC’s communications were improper and misleading.

FHC’s Reply

In reply, FHC contends that the court did not necessarily decide the issue of arbitration because it was not addressed in the prior decision. FHC also argues that the issue of whether the employee handbook creates a contract mandating arbitration should itself be decided by an arbitrator. Even if the issue was before the court, FHC contends that the arbitration provision should be enforced because the handbooks were signed by employees, evidencing an express agreement to be bound by the provision. FHC argues that these acknowledgements constitute a separate binding agreement that must be enforced. FHC also contends that case law supports its argument that it did not waive arbitration by waiting to move to compel after the class was certified.

Discussion

Preliminarily, the court rejects plaintiffs' procedural argument that it has already considered and dismissed FHC's arguments in favor of arbitration made in support of its prior motion for class certification. "The doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]; *Carbon Capital Management, LLC v American Exp. Co.*, 88 AD3d 933, 935-936 [2d Dept 2011]). "The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision and to the same questions presented in the same case" (*Ramanathan v Aharon*, 109 AD3d 529, 530 [2d Dept 2013] [internal quotation marks and citations omitted]). "Like claim preclusion and issue preclusion, preclusion under the law of the case contemplates that the parties had a 'full and fair' opportunity to litigate the initial determination" (*id.*). "The doctrine may be ignored in extraordinary circumstances such as a change in law or a showing of new evidence" (*Brownrigg v New York City Housing Authority*, 29 AD3d 721, 722 [2d Dept 2006]).

While FHC did submit a copy of its April 2017 employee handbook in opposition to plaintiffs' motion for class certification, FHC only did so in the context of its argument that the proposed class was overbroad as it included both hourly employees and all employees who have waived their right to participate in the class action due to the arbitration agreement. FHC did not cross-move to

compel arbitration of the claims of employees who acknowledged receipt of the employee handbook after this litigation was commenced. In addition, in opposition to the motion for class certification, FHC only submitted copies of signed acknowledgments of receipt from three FHC employees who signed the acknowledgments in 2017 and 2018, and only one of those individuals signed the acknowledgment after this litigation commenced. This stands in contrast to the evidence submitted in support of the instant motion, where FHC submits dozens of signed acknowledgments of receipt of its employee handbook which contain the arbitration provision and class action waiver.

Given the nature of the record made on the prior certification motion, the court did not previously “necessarily decide” the issue of whether the claims should be arbitrated and whether FHC employees who acknowledged receipt of the employee handbook after this action was commenced waived their rights to pursue litigation (*see Ramanathan v Aharon*, 109 AD3d at 530). Further, the parties did not have a full and fair opportunity to litigate the issues on the prior motion, as the record and the arguments for and against arbitration were not as sufficiently developed as in the instant motion (*id.*).

Turning to the parties’ substantive arguments, “[a]rbitration is a matter of contract, grounded in agreement of the parties” and “the general rule is that only a party to an arbitration agreement is bound by or may enforce the agreement” (*Matter of Northeast & Cent. Contrs., Inc. v Quanto Capital, LLC*, 203 AD3d 925, 927 [2d Dept 2022]; *see also Ashouzadeh v Hedvat*, 210 AD3d 979, 980 [2d Dept

2022]). On a motion to compel arbitration, the court must first determine whether parties have agreed to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement (*see Sisters of St. John the Baptist, Providence Rest Convent v Geraghty Constructor*, 67 NY2d 997, 999 [1986]; *Matter of Northeast & Cent. Contrs.*, 203 AD3d at 927). “The threshold issue of whether there is a valid agreement to arbitrate is for the court and not the arbitrator to determine” (*Matter of Northeast & Cent. Contrs.* 203 AD3d at 928; *see also Henry Schein, Inc. v Archer and White Sales, Inc.*, 139 S.Ct. 524, 530 [2019] [“To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists”]). The party seeking arbitration has the burden of establishing a valid arbitration agreement (*see Allstate Ins. Co. v Roseboro*, 247 AD2d 379, 380 [2d Dept 1998]).

“In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds” (*Laguardia v Brennan Beer Gorman/Architects, LLP*, 175 AD3d 1280, 1281 [2d Dept 2019] [internal quotation marks omitted]; *see also Maffea v Ippolito*, 247 AD2d 366, 367 [2d Dept 1998]). “A party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties’ clear, explicit and unequivocal agreement to arbitrate” (*God’s Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006] [internal quotation marks omitted]; *see also Konstantynovska v Caring Professionals, Inc.*,

172 AD3d 486, 487 [1st Dept 2019]). “Mutual assent is essential to the formation of a contract and a party cannot be held to have contracted if there was no assent or acceptance” (*Maffea*, 247 AD2d at 367).

Here, FHC has not met its burden of demonstrating that the language in the employee handbook regarding mandatory arbitration and a class action waiver was a contract between the parties. In that regard, the first page of the handbook states:

“This handbook briefly describes our policies, benefits, and work rules and is intended to serve as written notice of what we expect from our employees. It is not to be construed as an employment contract” (FHC Employee Handbook at 4 [emphasis supplied]).

The employee handbook also states:

“unless otherwise stated in a written individual employment agreement, all employees of the Company are employees-at-will . . . No employee of FHC should be regarded as having a contract of employment with the Company unless a written contract is entered into by an authorized officer of the Company” (*id.* at 5 [emphasis supplied]).

The handbook further states that FHC “reserves the right to make any revisions, modifications, interpretations, or deletions as it deems necessary in its sole discretion and may do so with or without advance notice to Company employees” (*id.* at 4). The acknowledgement of receipt further emphasizes the fact that it is not a contract by stating:

“neither this Handbook nor any other communication by a management representative is intended to in any way create a contract of employment or limit the Company’s

discretion to discipline or terminate my employment”
(*id.* at 28 [emphasis supplied]).

In a factually similar case, where the employee handbook expressly disavowed an employment contract but also contained an arbitration provision, the court found that the employee handbook did not create an arbitration agreement, despite the employees signing the acknowledgements of receipt (*see Seltzer v Clark Associates, LLC*, 2020 WL 5525590 [US Dist Ct, SD NY, Hellerstein, J., 2020]). Since FHC’s employee handbook “expressly disavows that it creates contractual rights or duties,” “reserves [FHC] the right to unilaterally alter the Handbook at any time, and without any notice,” there is no evidence of mutual assent required for an agreement (*id.*). “[A]n employer cannot rely on the very same terms to snatch away employees’ contractual rights with one hand while imposing asymmetric contractual duties with the other” (*id.*).

In addition, there is no language in FHC’s employee handbook suggesting that the arbitration provision was a condition of employment (*id.*) “An arbitration agreement included in an employee handbook with language providing that the handbook does not constitute a contract of employment or that the arbitration policy may be amended is enforceable when the language of the arbitration agreement is distinct and mandatory and when the employee is advised of the policy and that compliance with it is a condition of employment” (*Isaacs v OCE Business Services, Inc*, 968 F Supp 2d 564 [NY SD 2013] [internal quotation marks and citations omitted]). By contrast, the fact that FHC’s employee handbook

explicitly elevated other policies - such as informing FHC of a drug conviction - to a condition of employment (*see* Employee Handbook at 8) suggests that the arbitration provision and class action was not expressly a condition of employment and should not be interpreted as such.

Accordingly, FHC has failed to meet its burden of demonstrating the existence of a clear, unambiguous agreement to arbitrate based on the language in the acknowledgment of receipt (*see God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d at 374; *Roseboro*, 247 AD2d at 380).

Even if FHC had met its burden of establishing that an agreement to arbitrate existed, FHC has waived its right to enforce any arbitration agreement by waiting to raise the issue for over four years while conducting discovery and litigating the case in this judicial forum. "Like contract rights generally, a right to arbitration may be modified, waived or abandoned" (*Cusimano v Schnur*, 26 NY3d 391, 400 [2015]; *Sherrill v Grayco Builders, Inc.*, 64 NY2d 261, 272 [1985]). "Where a party affirmatively seeks the benefits of litigation, in a manner 'clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration,' the right to arbitrate has been waived" (*Waldman v Mosdos Bobov, Inc.*, 72 AD3d 983 [2d Dept 2010], quoting *Stark v Molod Spitz DeSantis & Stark, P.C.* 9 NY3d 59, 66 [2007]). Whether a party waived its right to arbitrate is for a court to decide (*see Sherrill*, 64 NY2d at 272). "[W]hen addressing waiver, courts should consider the amount of litigation that has occurred, the

length of time between the start of the litigation and the arbitration request, and whether prejudice has been established” (*Cusimano*, 26 NY3d at 400).

This action was commenced on April 14, 2017, but FHC did not move to compel arbitration until May 26, 2022, over five years later. Over the course of five years², FHC engaged in motion practice, attended court conferences, conducted discovery, attended mediation, and deposed Konstantynovska. Similar conduct has been found to constitute a waiver of arbitrable remedies (*see Flores v Lower East Side Service Center, Inc.*, 4 NY3d 363, 371-372 [2005] [waiver of arbitration found where defendant participated in litigation for more than 16 months through discovery and filing a note of issue]; *Bucci v McDermott*, 156 AD2d 328, 328 [2d Dept 1989] [waiver found where defendant moved to compel arbitration over one year after litigation had commenced]; *see also Friedman v CYL Cemetery, Inc.*, 99 AD3d 857, 858 [2d Dept 2012]; *Dembitzer v Chera*, 305 AD2d 531, 532 [2d Dept 2003]). Here, the delay is longer, therefore even more egregious. Even after the class was certified, FHC continued to engage in discovery by responding to requests for judicial admissions prior to moving to compel arbitration (*see* NYSCEF Doc No. 134). FHC has failed to provide an adequate excuse as to why it waited for years to move to compel arbitration.

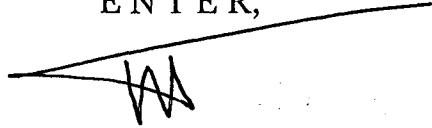
² The court is mindful of the fact that the case was stayed for nearly two years pending the Court of Appeals decision in *Andryeyeva v New York Health Care, Inc.* (33 NY3d 152 [2019]). However, even taking into account the stay, FHC did not move to compel arbitration either initially or during the three years when the case was not stayed.

In addition, given the long length of time that the case has been pending in this forum, and the amount of discovery and motion practice that has taken place to date, plaintiffs and Class members would be prejudiced by being forced to arbitration at this relatively late stage. Not only have the plaintiffs waited five years for a resolution to their claims prior to even receiving a demand for arbitration, the plaintiffs' capacity to develop a litigation strategy with regard to the likelihood of arbitration has diminished over time (*see Gray Holdco, Inc. v Cassady*, 654 F3d 444, 455 [3d Cir. 2011]). For these reasons, the court finds that FHC waived its right to enforce any arbitration agreement and class action waiver, even if such agreement existed.

The court has considered the parties' remaining contentions and finds them to be without merit. Accordingly, it is

ORDERED that defendant's motion to compel arbitration is denied in its entirety.

This constitutes the decision and order of the court.

ENTER,

 J. S. C.
 Hon. Wavny Toussaint
 J.S.C.

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