SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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ELAINE MCWHINNEY-ST. LOUIS,

Plaintiff,

- v -

CLIFTONLARSONALLEN LLP, SUSAN LENTINI

Defendant.

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INDEX NO. 161602/2023

MOTION DATE 04/12/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for COMPEL ARBITRATION.

In this employment discrimination case defendants, CliftonLarsonAllen LLP ("CLA") and Susan Lentini move pursuant to CPLR § 7503(a) to stay this action and compel plaintiff Elaine McWhinney-St Louis to arbitrate the claims asserted in her complaint.

DISCUSSION

Defendants argue that plaintiff's claims are subject to arbitration pursuant to the parties' employment agreement dated October 26, 2015, which included an arbitration clause NYSCEF Doc No 8 ¶ 16). Plaintiff argues that the arbitration clause is unconscionable and therefore unenforceable.

New York has a "long and strong public policy favoring arbitration … as a means of conserving the time and resources of the courts and the contracting parties" (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007]). "Therefore, New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration" (*id.*). However, "like contract rights generally, a right to arbitration may be modified, waived or abandoned" (*id.*).

CPLR § 7501 states:

> A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

Further CPLR § 7503[a] states "Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate." "In deciding an application to compel arbitration pursuant to CPLR 7503[a], the court is required to first make a determination whether the parties have entered into a valid arbitration agreement and, if so, whether the issue sought to be submitted to arbitration falls within the scope of that agreement" (*Edgewater Growth Capital Partners, L.P. v Greenstar N. Am. Holdings, Inc.*, 69 AD3d 439 [1st Dept 2010]).

Here, section 16 of the parties' October 16, 2015 employment agreement is titled "Settlement of Diffferences by Arbitration" and states in relevant part:

> [a]ny dispute arising under this Agreement, or arising out of the circumstances, terms, conditions or termination of [Plaintiff's] relationship with [CLA] or its officers, directors, members, employees, agents or independent contractors, and any claim by [Plaintiff] against any officer, director, member, employee, agent or independent contractor of [CLA] for any damage or harm, including but not limited to claims arising under any state or federal employment or discrimination laws….

It is undisputed that the issue sought to be arbitrated falls within the scope of the agreement as plaintiff has brought the suit alleging race discrimination and hostile work environment in

violation of the New York State and City Human Rights Laws (NYSCEF Doc No 1). However, plaintiff argues that portions of the agreement are unconscionable and therefore unenforceable.

"A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made" (*Gendot Assoc., Inc. v Kaufold*, 56 AD3d 421, 423 [2d Dept 2008]). "Examples of procedural unconscionability include, but are certainly not limited to, high pressure commercial tactics, inequality of bargaining power, deceptive practices and language in the contract, and an imbalance in the understanding and acumen of the parties" (*Simar Holding Corp. v GSC*, 87 AD3d 688, 689-90 [2d Dept 2011]). "[T]he substantive element looks to the content of the contract" to determine if any terms are unfair (*Eichholz v Panzer-Eichholz*, 188 AD3d 820, 824 [2d Dept 2020]).

Plaintiff argues that the agreement was procedurally unconscionable because she did not have a choice in signing it when accepting the employment offer. However, an arbitration agreement being offered on a "'take it or leave it' basis … is not sufficient under New York law to render the [arbitration] provision procedurally unconscionable (*Ragone v Atl. Video at Manhattan Ctr*., 595 F3d 115, 122 [2d Cir 2010]). The employment contract therefore is not procedurally unconscionable.

As for substantive unconscionability, plaintiff argues that the fee shifting and the forum selection clauses of the parties' employment agreement render the agreement unconscionable. Section 18 of the employment agreement states:

> **Attorneys' Fees/Waiver of Jury Trial/Class Action Waiver.** With respect to any arbitration proceeding or court lawsuit, the Employee agrees to reimburse the Partnership for any attorneys' fees, costs and expenses incurred in the Partnership's successfully enforcing any part of this Agreement and/or in the Partnership's successfully defending all or part of any claim asserted against the Partnership, its Affiliates and/or any individual in their capacity as an agent of the Partnership or its Affiliates.

While "there is nothing inherently unconscionable about a nonreciprocal attorney's fee provision in a commercial contract" (Lansco Corp. v Kampeas, 87 AD3d 421, 422 [1st Dept 2011]), parties "should not be compelled to bear costs which would effectively preclude [them] from pursuing [their] claim" (*Matter of Schreiber v K-Sea Transp. Corp.*, 9 NY3d 331, 341 [2007]; see also *Ragone*, 595 F3d at 120 [because "the defendants agreed to waive the … fee shifting provisions as set out in the arbitration agreement … these provisions do not render the arbitration agreement substantively unconscionable"]). However, since the employment agreement contains a severability clause at Section 15, "the appropriate remedy is to sever the improper provision of the arbitration agreement, rather than void the entire agreement" (*Brady v Williams Capital Group, L.P.*, 64 AD3d 127, 137 [1st Dept 2009]). This approach is "consistent with the state and federal policy favoring arbitration" (*id.*).

As for plaintiff's contention regarding Section 17 of the agreement which states:

> **Governing Law and Personal Jurisdiction**. This Agreement shall be governed by and construed in accordance with the laws of the State of Minnesota, without giving effect to the principles of conflicts of laws thereof. The Employee hereby subjects himself or herself to the jurisdiction nof the state and federal courts located in the State of Minnesota and agrees that Minneapolis, Minnesota shall be the exclusive venue for any court action or arbitration between the Partnership; the Employee and the Partnership agree not to initiate any arbitration or court action elsewhere.

Defendants have already agreed that the arbitration would take place in New York through the American Arbitration Association, that a single arbitrator would preside over the matter, and that plaintiff's claims would be governed by New York Law (*see* Defendant's Memorandum of Law, NYSCEF Doc No 10; *see also* NYSCEF Doc No 9 ["My clients will agree to arbitrate the matter in NYC with AAA in accordance with your arbitration fee cap proposal below. The matter would be arbitrated with a single arbitrator. While the employment

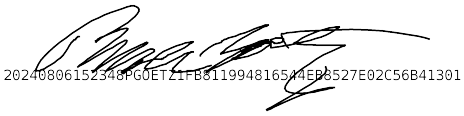
claims asserted in the complaint would be subject to NY/NYC law, the Employment Agreement itself would continue to be interpreted under Minnesota law"]). Accordingly, as in *Ragone* "New York law … allow[s] for the enforcement of the arbitration agreement as modified by the defendants' waivers" (*Ragone*, 595 F3d at 124).

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

ORDERED that plaintiff Elaine McWhinney-St Louis shall arbitrate her claims against defendants in accordance with the arbitration clauses of the parties' employment agreement, subject to the agreed upon waivers, with Section 18 being severed therefrom; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration.



8/6/2024
DATE

PAUL A. GOETZ, J.S.C.

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