IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JENNIFER SEME Plaintiff, v. GIBBONS P.C. Defendant.	:	CIVIL ACTION No. 2:19-cv-00857

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT GIBBONS P.C.'S MOTION TO COMPEL ARBITRATION AND TO STAY THIS ACTION

HOLLAND & KNIGHT LLP
Sara A. Begley
William J. Delany
Dana E. Feinstein
Cira Centre
2929 Arch Street, Suite 800
Philadelphia, PA 19104
(215) 252-9600

Attorneys for Defendant, Gibbons P.C.

Dated: April 16, 2019

FILED
MAY 08 2019
KATE BARKMAN, Clerk
By Dep. Clerk

Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Defendant Gibbons P.C. ("Defendant" or "Gibbons") hereby submits this Reply Memorandum in further support of its Motion to Compel Arbitration and to Stay this Action.

As an initial matter, there can be no dispute that this Court should compel Plaintiff to arbitration and stay this action. Plaintiff's Opposition consists of a lengthy dissertation on her contention that arbitration is generally an imperfect and improper forum, but that ship has sailed. The Supreme Court of the United States, the Third Circuit, and the District Court for the Eastern District of Pennsylvania have already litigated the suitability of arbitration and found it to be effective and efficient for all involved, as well as clearly mandated under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*.

Aside from Plaintiff's critiques of arbitration—and her irrelevant musings about the Seventh Amendment—Plaintiff's sole argument is that her Arbitration Agreement with Gibbons is procedurally and substantively unconscionable. However, Plaintiff cannot sustain her burden of establishing both procedural and substantive unconscionability. Plaintiff was a sophisticated party with six years of experience as an attorney when she signed the Arbitration Agreement; surely, if she is as skilled an attorney as she claims to be in her Opposition, she clearly understood the terms of the Arbitration Agreement and the consequences of signing it. And Plaintiff has wholly failed on a substantive unconscionability challenge, because this agreement is imminently fair and balanced.

In accordance with this Court's prior rulings, because Plaintiff cannot satisfy her burden to establish procedural and substantive unconscionability, the Court should immediately compel arbitration or dismiss this lawsuit pursuant to the undisputed agreement of the parties to arbitrate.

I. ARGUMENT

A. The Arbitration Provisions Are Not Unconscionable and Should Be Enforced.

Plaintiff's argument that the Arbitration Agreement is procedurally unconscionable because it was a form document given to her in a "take it or leave it" fashion falls short. The facts here are distinguishable from those where courts have found procedural unconscionability based on "take it or leave it" form documents given to low level employees at the start of, or during, employment. At the time Plaintiff joined Gibbons, she was a sophisticated, experienced attorney. The Arbitration Agreement is a thoroughly written document that fully explained the terms under which Plaintiff would be required to proceed in arbitration, should she choose to accept employment with Gibbons. The process here was completely fair and transparent.

The circumstances here are in stark contrast to those of the case Plaintiff relies upon extensively in her Opposition, Porreca v. Rose Group, No. 13-1674, 2013 U.S. Dist. LEXIS 173587 (E.D.Pa. 2013). In Porreca, the plaintiff was a college drop-out who was presented with and signed many documents—including the arbitration agreement, which he later did not recall signing—on his first day working at Applebee's Neighborhood Grill and Bar, a fast food restaurant franchise. In contrast to the circumstances in Porreca, Plaintiff admits in her Opposition that she recognized that she was signing an arbitration agreement and understood its terms. Rather than seek employment at any of the myriad of other prestigious law firms in Philadelphia, Plaintiff chose to work at Gibbons and accordingly signed the Arbitration Agreement and worked for Gibbons for many years, reaping the benefits of the bargain.[1] Plaintiff's Arbitration Agreement was not procedurally unconscionable, as she signed willingly and knowingly with a lawyer's sophisticated understanding of the terms.

[1] Although the validity of the Arbitration Agreement should be determined at the time of contracting, Plaintiff's procedural unconscionability argument simply does not hang with the fact that she continued to work for Gibbons for many years with full knowledge of her obligation to arbitrate disputes with her employer. Her total disregard of that obligation now after having reaped the benefit of the employment relationship for eight plus years rings hollow, much like complaining to a restaurant about the quality of a steak dinner after having consumed the meal.

Even if the arbitration provision here were procedurally unconscionable, Plaintiff nonetheless cannot forestall dismissal of her lawsuit because she cannot establish that the arbitration agreement was substantively unconscionable. In order to do so, Plaintiff must demonstrate that the contractual terms are "unreasonably or grossly favorable to one side and to which the disfavored party does not assent." Harris v. Green Tree Fin. Corp., 183 F.3d 173, 181 (3d Cir. 1999). Plaintiff cannot do so here, and no discovery or further proceedings in this Court are necessary to reach that conclusion.

Plaintiff cites no case in which a court found unconscionable any provision in the Arbitration Agreement at issue here. Instead, Plaintiff makes a baseless attack on the AAA and its arbitration rules. Specifically, Plaintiff argues that the Arbitration Agreement confers unfair advantage on the employer based on its contentions that: (1) it mandates submission of Plaintiff's claims to an "inherently unfair and biased arbitral forum;" (2) it substantially limits the discovery to which Plaintiff would be entitled in Court; (3) it includes language that "unreasonably favors" Gibbons; and (4) the "unconscionable provisions of the Arbitration Agreement cannot be severed because these provisions demonstrate a systematic effort to create a pro-employer forum."

Plaintiff's blanket attack on the alleged unfairness of the arbitration process itself is misplaced, as both the Supreme Court and the Third Circuit have affirmed the use of arbitral forums to resolve disputes. See, e.g., MacDonald v. CashCall, Inc., 883 F.3d 220, 226 (3d Cir. 2018) ("[C]ourts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes."); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (holding that the FAA requires courts to "rigorously enforce agreements to arbitrate"); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) (noting that the U.S. Supreme Court has "often observed that the Arbitration Act requires courts to rigorously enforce arbitration agreements according to their terms"). Notably, Plaintiff's Arbitration Agreement designates the American Arbitration Association ("AAA"), a leading and highly

respected arbitral forum, to administer arbitration. The AAA is not biased toward the employer, despite Plaintiff's accusations to the contrary. In fact, the Arbitration Agreement even provides that the parties will mutually select an arbitrator through the AAA procedures, further ensuring that the process is fair. (See Exhibit A, Paragraph 6 of Exhibit A to the Certification of June Inderwies filed in support of Gibbons' Memorandum of Law In Support of Motion to Compel Arbitration and to Stay this Action). Given that both parties will have a say in the selection of the arbitrator, Plaintiff's argument that the arbitrator may "have direct ties to Defendant" is illogical.[2]

Plaintiff's argument that submitting to arbitration will limit her ability to take discovery is likewise inaccurate; as Plaintiff notes, the AAA provides in its "Employment Arbitration Rules and Mediation Procedures," publicly available on www.adr.org, that the arbitrator may order discovery necessary for a "full and fair exploration of the issues in dispute." (See Exhibit B, AAA Employment Arbitration Rules and Mediation Procedures.). Moreover, the arbitrator's authority to order discovery is entirely consistent with the Court's direction in *Epic* that arbitration agreements be honored, including with respect to matters of rules and procedures. 138 S.Ct. at 1622-23.

Plaintiff also complains that she did not understand that the AAA Employment Arbitration Rules would apply to her. This is a surprising contention from a purportedly seasoned attorney, given that one need only access the AAA website to see that the AAA has specific rules applicable to employment disputes. (See Exhibit B, AAA Employment Arbitration Rules and Mediation Procedures; Exhibit C, Screenshot of Rules and Procedures page on ADR.org). See, e.g., Knepper v. Ogletree, No. 18-00303, 2019 U.S. Dist. LEXIS 4980, at n.7 (N.D. Cal. 2019) (noting, in a matter in

[2] Further deflating Plaintiff's argument that the AAA is somehow unfair to her is the fact that the AAA Employment Arbitration Rules and Mediation Procedures, which govern the arbitration between Gibbons and Plaintiff according to the terms of the Arbitration Agreement, provide a robust process by which to disqualify any arbitrator who fails to be impartial and act in good faith. (See Exhibit B, AAA Employment Arbitration Rules and Mediation Procedures, Section 16).

which an attorney claimed her firm's arbitration provision did not apply to her employment dispute, that she is held to a higher standard of comprehension as an attorney)[3].

Equally misplaced is Plaintiff's argument that she be entitled to limited discovery in federal court before a decision can be made to refer this matter to arbitration. Discovery would serve only to prolong the pendency of this matter in the improper venue of federal court. There is absolutely no legal or practical justification for allowing discovery at this stage of the litigation, and in fact, no discovery is needed to determine that Plaintiff's claims fall squarely within the Arbitration Agreement that she knowingly signed. Plaintiff's argument regarding discovery runs directly counter to this Court's pronouncement in Dabney v. Option One Mortgage Corporation that if the court determines that the arbitration agreement is valid and covers the scope of the dispute, "the court must either stay or dismiss the proceeding in favor of arbitration." No. 00-5831, 2001 U.S. Dist. LEXIS 4949, at *3 (E.D.Pa. 2001) (Padova, J.).

It is clear that none of the provisions in the Arbitration Agreement are unreasonably or grossly favorable to Gibbons. As the Arbitration Agreement is neither procedurally nor substantively unconscionable, the Court should enforce it and compel arbitration and stay this action.

B. Even If Certain of the Arbitration Provisions Are Unconscionable, the Court Should Sever Them and Enforce the Remainder of the Agreement To Arbitrate.

Plaintiff also overplays her hand by contending that if some or all of the above noted provisions are determined to be unconscionable, this Court must invalidate the entirety of the Arbitration Agreement. Rather, under Pennsylvania law, if a court determines that specific provisions of the agreement to arbitrate must be stricken, then the court may sever them from the agreement provided they are not an essential part of the agreed upon exchange. Spinetti v. Service Corp. Int'l, 324 F.3d 212, 214 (3d Cir. 2003). This is particularly so where, as here, the agreement at

[3] The Knepper court entered its ruling and opinion after Gibbons filed its motion but before Plaintiff filed her response memorandum.

issue expressly provides for severing of offending contractual terms. (See Exhibit A, Paragraph 14 of Exhibit A to the Certification of June Inderwies filed in support of Gibbons' Memorandum of Law In Support of Motion to Compel Arbitration and to Stay this Action). Since the essence of the agreement here is to arbitrate disputes between the employer and employee, the provisions about which Plaintiff complains may be severed while still adhering to the intent of the parties and enforcing the remainder of the arbitration provisions. Spinetti, 324 F.3d at 214 (severing arbitration costs and fees provisions and enforcing arbitration); Clymer v. Jetro Cash and Carry Enterprises, 334 F. Supp. 3d 683, 696-97 (E.D. Pa. 2018) (severing cost provision and one-year temporal provision "without disturbing the central goals of the agreement or the parties' mutual obligation to arbitrate). Accordingly, the Court should compel arbitration so that the claims herein may be arbitrated.

II. CONCLUSION

For the forgoing reasons, and those set forth in Gibbons' Memorandum of Law, Gibbons respectfully requests that the Court compel arbitration and stay this action.

Dated: April 16, 2019

/s/ Sara A. Begley

Sara A. Begley
William J. Delany
Dana E. Feinstein
HOLLAND & KNIGHT LLP
2929 Arch Street, Suite 800
Philadelphia, PA 19104

Attorneys for Defendant
Gibbons P.C.