UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NORDIA ROSNER,

Plaintiff,

Docket No.: 18-CV-04451 (VEC)

-against-

FORESTERS FINANCIAL HOLDING COMPANY, INC.

Defendants.

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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY THIS ACTION

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PRELIMINARY STATEMENT

Plaintiff, Nordia Rosner ("Rosner" or "Plaintiff"), commenced this action on May 17, 2018, against Defendant, Foresters Financial Holding Company ("Foresters" or "Defendant") alleging discrimination based on her color and/or national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §200-e, *et seq.*, the New York State Human Rights Law, §290, *et seq.*, and the New York City Administrative Code Title 8. Defendant now moves, pursuant to the Federal Arbitration Act, 9 U.S.C. §§1-16 ("FAA"), to stay this action and to compel arbitration. For the reasons set forth in further detail below, it is respectfully submitted that Defendant's motion be denied in its entirety.

STATEMENT OF FACTS

As most of the relevant facts discussed throughout the body of this Memorandum are contained in the Amended Complaint, the Court is respectfully referred to the Amended Complaint for a full recitation of the facts. (ECF Doc. No.15).

ARGUMENT

I. STANDARD OF REVIEW

In determining whether or not a court should stay an action and compel arbitration under the FAA, the Court is to use the following four (4) factors:

> "First [the Court] must determine whether the parties agreed to arbitrate; second it must determine the score of the agreement; third if federal statutory claims are asserts, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all of the claims in the case are abitrable, it must then determine whether to stay the balance of the proceeding pending arbitration.

Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 844 (2nd Cir. 1987)(internal citations omitted). "Because an agreement to arbitrate is a creature of contract, however, the ultimate question of whether the parties agreed to arbitrate is determined by state law." *Bell v. Cendant Corp.*, 293 F.3d 536, 566 (2nd Cir. 2002). Under New York law, a plaintiff will not be compelled to arbitrate absent a "clear, explicit and unequivocal agreement to arbitrate." *Fiveco, Inc. v. Haber*, 11 N.Y.3d 140, 144 (N.Y. 2008). Arbitration "is a matter of consent, not coercion." *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 171 (2nd Cir. 2004)(quoting *Volt Info Scic. V. Board of Trustees of Leland Junior Univ.*, 489 U.S. 468, 479 (1989). Moreover, a court may need to "determine whether arbitration of Title VII claims is appropriate in specific instances" *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, *149 (2nd Cir. 2004).

"In reviewing motions to compel arbitration brought under the FAA, 'the court applies a standard similar to that applicable for a motion for summary judgment.'" *Teach v. Macy's Inc.*, 2011 U.S. Dist. LEXIS 149274, at *9 (E.D.N.Y. 2011)(quoting *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2nd Cir. 2002). The Court is to determine whether Plaintiff has raised a triable issue of fact as to whether the parties entered into a valid arbitration agreement. *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 113 (2nd Cir. 2012). "[A] party is bound by the provisions of a contract that [s]he signs, unless [s]he can show special circumstances that would relive h[er] of such an obligation." *Genesco, Inc.*, 815 F.2d, at 845.

II. PLAINTIFF AND DEFENDANT DID NOT ENTER AN ARBITRATION AGREEMENT DURING HER PERMANENT FULL-TIME EMPLOYMENT

On October 14, 2015, Rosner was hired, by a staffing agency, to perform work for Defendant as an Executive Assistant. On her first day of performing work, as a temporary worker for Defendant, Rosner was required to complete paperwork, including the arbitration agreement

that Defendant relies upon in its motion to compel arbitration. (Def. Ex. B). After performing temp work for Defendant, through the staffing agency, for approximately two (2) months, Rosner applied for and was eventually hired for a full time position directly with Defendant. This position was not obtained through the staffing agency and was wholly different and separate from the temporary position that she was working in previously, through the staffing agency. This position was also not simply a continuation of her prior temp work, but in a more full time role. Rather, Rosner applied for, and was hired, for a job that was separate and independent from her prior temp work. She then ceased working for the staffing agency, and began full time employment with Defendant. From the period that Rosner became employed by Defendant through the present, Defendant never asked or required Rosner to sign an arbitration agreement. As such, she never signed an arbitration agreement for her employment with Defendant.

While Defendant attempts to rely upon their Employee Handbook, to support the claim that the arbitration agreement signed before Rosner became an employee with Defendant was still applicable, the Employee Handbook itself undermines this claim. The Employee Handbook clearly states, "I understand that the Handbook is **not a contract** of employment.... I also understand that the Company [Defendant] has the right, at any time, to change any of its guidelines, policies and procedure." (Def. Ex. C.)(emphasis added). As such, under contract law, it cannot be said that the Employee Handbook creates a contract binding Rosner to arbitration. Accordingly, Rosner and Defendant did not enter into an agreement to arbitrate for her employment with Defendant. As Rosner did not enter into a clear, explicit and unequivocal agreement to arbitrate during her employment with Defendants, this matter should proceed.

To the extent that the Employee Handbook is a contract or created or reinforces any arbitration agreement, the arbitration agreement should then be deemed unenforceable as it is

unconscionable because its terms would unreasonably favor Defendant. Pursuant to the Employee Handbook, Plaintiff had to agree that "I also understand that the Company [Defendant] has the right, at any time, to change any of its guidelines, policies and procedure." (Def. Ex. C.). Should this Employee Handbook reinforce the arbitration agreement or create a new obligation to arbitrate, then pursuant to the Employee Handbook, Defendant, and Defendant alone, could change or alter any of its procedures, including, it would appear based upon this language, Defendant's obligation to arbitrate. As such, it would create such unequal terms, to the detriment of Rosner, the agreement to arbitrate would be unconscionable, and thus void. *See Brennan v. Bally Total Fitness,* 198 F.Supp. 2d 377, 384 (S.D.N.Y.2002)(holding that an agreement to arbitrate was void as unconscionable where the employer the right to unilaterally modify the agreement at any time).

Lastly, Rosner should not be compelled to proceed to arbitration due to special circumstances. Pursuant to the arbitration agreement at issue, any arbitration, in the first instance, is to proceed through the Financial Industry Regulatory Authority ("FINRA"). However, neither Rosner nor Defendant is governed by FINRA. Rosner has never been a member of FINRA. According to FINRA's own website, Defendant is also not regulated by FINRA. (See Ricotta Declaration Ex. A). As such, it is illogical that two (2) parties, neither of whom is regulated by FINRA, would be required to proceed to arbitration with an organization that does not regulate them.

At a minimum, Plaintiff has established triable issues of fact that a hearing should be held to determine whether this matter should be stayed and proceed to arbitration.

CONCLUSION

Based on the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' motion to stay this action and compel arbitration in its entirety.

Dated: Long Island City, New York
December 10, 2018

Respectfully submitted,

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