UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-6178-GW (FFMx)	Date	January 5, 2017
Title	*Food, Industrial and Beverage Warehouse, Drivers and Clerical Employees, Local 630 of the International Brotherhood of Teamsters v. Barton Brands of California, Inc., et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Katie Thibodeaux	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Elizabeth Rosenfeld	Melissa M. Samuel

PROCEEDINGS: **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [29];**

DEFENDANT BARTON BRANDS OF CALIFORNIA, INC.'S MOTION FOR SUMMARY JUDGMENT [25]

Court hears oral argument. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. Plaintiff's Motion is DENIED; Defendant's Motion is GRANTED. Counsel for Defendant will file a proposed judgment forthwith.

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Food, Industrial and Beverage Warehouse, Drivers and Clerical Employees, Local 630 of the International Brotherhood of Teamsters v. Barton Brands of California, Inc., et al., Case No. 2:16-cv-06178-GW-FFM; Tentative Rulings on Cross-Motions for Summary Judgment

Background

On August 17, 2016, Plaintiff Food, Industrial and Beverage Warehouse, Drivers and Clerical Employees, Local 630 of the International Brotherhood of Teamsters, a labor union representing approximately 6,700 members employed in California, sued Defendant Barton Brands of California, Inc., an employer conducting business in California with its principal place of business in Carson, California, essentially seeking to compel arbitration under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185.[1] *See generally* Complaint, Docket No. 1.

On November 17, 2016, Defendant filed a cross-motion for summary judgment. *See* Def.'s Notice of Mot. & Mot. for Summ. J. ("Def.'s Motion"), Docket No. 25; Mem. in Supp. of Def.'s Motion ("Def.'s Opening Br."), Docket No. 28; *see also* Decl. of Ernest R. Malone, Jr. in Supp. of Def.'s Motion, Docket No. 26. On December 1, 2016, Plaintiff filed a reply, which also acted as an opposition to Def.'s Motion according to the parties' joint case management conference statement. *See* Reply Mem. in Supp. of Pl.'s Motion ("Pl.'s Opposition Br."), Docket No. 37; *see also* Pl.'s Response to Def.'s Statement of Undisputed Facts ("Pl.'s SUF"), Docket No. 37-1.

On November 17, 2016, Plaintiff also filed a motion for summary judgment. *See* Pl.'s Notice of Mot. & Mot. for Summ. J ("Pl.'s Motion"), Docket No. 29; Mem. in Supp. of Pl.'s Motion ("Pl.'s Opening Br."), Docket No. 29-1; *see also* Pl.'s Statement of Undisputed Facts ("Pl.'s Opening SUF"), Docket No. 29-10; Decl. of Felix Chavez in Supp. of Pl.'s Motion, Docket No. 29-2. On December 1, 2016, Defendant filed a reply, which also acted as an opposition to Pl.'s Motion according to the parties' joint case management conference statement. *See* Reply Mem. in Supp. of Def.'s Motion ("Def.'s Opposition Br."), Docket No. 34; *see also* Def.'s Response to Pl.'s Statement of Undisputed Facts ("Def.'s SUF"), Docket No. 35.

Legal Standard

Under Federal Rule of Civil Procedure ("Rule") 56, a party may move for summary judgment and the court shall grant it when the pleadings, the discovery and disclosure materials on file, and any affidavits show that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Miranda v. City of Cornelius*, 429 F.3d 858, 860 n.1 (9th Cir. 2005). As to materiality, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

To satisfy its burden at summary judgment, a moving party with the burden of persuasion

[1] Other defendants have since been dismissed with prejudice from the action. *See* Docket No. 23.

must establish "beyond controversy every essential element of its [claim or defense]." *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003); Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Proc. Before Trial* § 14:126 (The Rutter Group 2016). By contrast, a moving party without the burden of persuasion "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos.*, Inc., 210 F.3d 1099, 1102 (9th Cir. 2000); *see also Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc) ("When the nonmoving party has the burden of proof at trial, the moving party need only point out 'that there is an absence of evidence to support the nonmoving party's case.'") (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), and citing *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000) (holding that the *Celotex* "showing" can be made by "pointing out through argument . . . the absence of evidence to support plaintiff's claim")).

> If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment[, but instead] must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial.

T.W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (internal citations and quotation marks omitted) (citing, among other cases, *Celotex*, 477 U.S. at 323).

"A non-movant's bald assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary judgment." *See FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009). In addition, the evidence presented by the parties must be admissible. *See* Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). In judging evidence at the summary judgment stage, however, courts do not make credibility determinations or weigh conflicting evidence at the summary judgment stage, and must view all evidence and draw all inferences in the light most favorable to the non-moving party. *See T.W. Elec.*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)); *see also Motley v. Parks*, 432 F.3d 1072, 1075, n.1 (9th Cir. 2005) (en banc).

Finally, when "parties submit cross-motions for summary judgment, each motion must be considered on its own merits," and courts must consider "the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them." *Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1134-36 (9th Cir. 2001) (internal citations and quotation marks omitted, punctuation altered); *see also Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1043 (9th Cir. 2014).

Discussion

Undisputed Facts

Plaintiff and Defendant are parties to a collective bargaining agreement (the "CBA"). Pl.'s SUF ¶ 1. Article XXIV of the CBA entitled "Grievance and Arbitration Procedure" delineates the mechanism for resolution of all disputes regarding the application or interpretation of any provision of the CBA and includes a final and binding arbitration clause. *Id.* ¶ 2; *see also* Complaint, Ex. 1, Docket No. 1-1 at 5-7. Article XXIV(A) of the CBA states as follows: "Any aggrieved employee or party to this Agreement may present to the other party a grievance, dispute or question individually or through his representative, provided it is presented in writing within six (6) days from the date of the occurrence." Pl.'s SUF ¶ 3. Article XXIV(B) of the CBA further provides as follows: "In the event the parties are unable to adjust any grievance, dispute or question, they shall meet to agree on an arbitrator to whom the grievance, dispute or question shall be presented for final and binding resolution, provided that a notice in writing of a demand to arbitrate be given no later than thirty (30) calendar days after the written grievance is filed." *Id.* ¶ 4.

On July 28, 2015, Defendant suspended Javier Sanchez ("Sanchez"), an employee and a union member, for violation of Defendant's no-smoking policy. *Id.* ¶ 5. On July 30, 2015, Sanchez filed a grievance protesting the suspension ("Grievance No. 1"). *Id.* ¶ 6.

On August 10, 2015, Defendant notified Sanchez that he was discharged for his alleged violation of the no-smoking policy. *Id.* ¶ 7.

On August 17, 2015, Sanchez filed another written grievance challenging the discharge ("Grievance No. 2" or "termination grievance"). *Id.* ¶ 8; *see also* Def.'s SUF ¶ 11 (conceding the fact as undisputed). Plaintiff's and Defendant's representatives then had several meetings attempting to resolve Grievance No. 2, but failed to do so. Pl.'s Opening SUF ¶ 12; Def.'s SUF ¶ 12 (conceding the fact as undisputed).

On October 20, 2015, Plaintiff made a written demand for arbitration of Grievance No. 2. Pl.'s SUF ¶ 9 (disputing only that the written demand for arbitration was made 64 days after the filing of Grievance No. 2). On the same day, Defendant acknowledged the request and advised Plaintiff of the identity of its counsel. *Id.* ¶ 10.

On October 21, 2015, Plaintiff filed a charge with the National Labor Relations Board (the "NLRB"), asserting that Defendant violated Sanchez's rights under Sections 7 (which included *inter alia* an employee's right to union representation at investigatory interviews, also known as *Weingarten* rights) and 8(a)(1), (3) (unlawful dismissal and unfair labor practice charge) of the National Labor Relations Act (the "NLRA"). *Id.* ¶ 11. On January 19, 2016, the NLRB dismissed the allegation that Sanchez was discharged for unlawful, discriminatory reasons in violation of the NLRA – that is, the subject matter of the Grievance No. 2 – refusing to issue a complaint on that allegation. *Id.* ¶ 12. Plaintiff did not appeal that decision. *Id.* ¶¶ 13-14.

On February 3, 2016, Plaintiff continued its effort to obtain arbitration. *Id.* ¶ 15. On February 22, 2016, Defendant's counsel advised Plaintiff that the October 20, 2015 written demand to arbitrate Grievance No. 2 was untimely and therefore Plaintiff did not have a right to arbitration under the CBA. *Id.* ¶ 16.

On May 9, 2016, an administrative law judge ("ALJ") heard the parties with respect to the unfair labor practice charge. *Id.* ¶ 17. On July 13, 2016, the ALJ found that Defendant did not violate the NLRA in any manner alleged in the NLRB's complaint. *Id.* ¶ 18.

On August 17, 2016, a month after the ALJ's final decision, Plaintiff filed this action. *Id.* ¶ 19.

Waiver of the Right to Arbitration by Litigating in Alternative Forum[2]

Defendant contends that Plaintiff waived its right to arbitration by electing to proceed before: (1) the NLRB, which rejected Plaintiff's claim that Sanchez was discharged for unlawful, discriminatory reasons in violation of the NLRA; and (2) the ALJ, who found that Defendant did not violate the NLRA in any manner alleged in the NLRB complaint. Def.'s Opening Br. at 5 (citing *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 921 (9th Cir. 2009) ("To demonstrate waiver of the right to arbitrate, a party must show: '(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.'")); *see also* Pl.'s SUF ¶¶ 11-14, 17-18.

Plaintiff responds that equitable defenses to arbitration, including waiver of the right to arbitration, is for the arbitrator to decide. *See* Pl.'s Opposition Br. at 6 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *Local Union No. 370 of Int'l Union of Operating Engineers v. Morrison-Knudsen Co.*, 786 F.2d 1356, 1357-58 (9th Cir. 1986)). Plaintiff does not offer any undisputed facts that show that the parties unambiguously contemplated that the issue of waiver by litigation conduct is subject to arbitration.

The Court agrees with Defendant, in light of the recent guidance from the Ninth Circuit, that the issue of waiver by litigation is presumptively for this Court to decide unless the parties clearly and unmistakenly provide otherwise. *See Martin v. Yasuda*, 829 F.3d 1118, 1123 (9th Cir. 2016) ("We have made clear that waiver by litigation conduct is part of the first category of gateway issues.") (citing *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1121 (9th Cir. 2008)).

> The first category of gateway issues is a "question of arbitrability" – that is, "whether the parties have submitted a particular dispute to arbitration." *Howsam* [*v. Dean Witter Reynolds, Inc.*], 537 U.S. [79,] 83, 123 S. Ct. 588 [(2002)]. This category includes issues

[2] Defendant alternatively contends that Plaintiff has no right to arbitration because Plaintiff did not demand arbitration according to the express terms of the CBA. See Def.'s Opening Br. at 12-15. On this issue, Plaintiff contends that the evidence shows that it "verbally notified [Defendant] of its intent to arbitrate at a meeting held on August 12, 2015." Pl.'s Opening Br. at 11. The Court does not reach the merits of that argument because waiver-by-litigation-conduct is dispositive on the issue presented.

> that the parties would have expected a court to decide such as "whether the parties are bound by a given arbitration clause" or whether "an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Id.* at 84, 123 S. Ct. 588. These disputes are "for judicial determination unless the parties clearly and unmistakably provide otherwise." *Id.* at 83, 123 S. Ct. 588 [] (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986)).

Yasuda, 829 F.3d at 1123; *see also id.* (stating that in *Cox*, the Ninth Circuit, "[a]ddressing the defendant's argument that the arbitrator should decide the issue, [] concluded that the question whether a party waived its right to arbitrate on the basis of its litigation conduct is a question of arbitrability and is in the first category of gateway issues.") (citations omitted).

The parties do not dispute that Plaintiff was aware of its right to compel arbitration. Indeed, on October 20, 2015, Plaintiff notified Defendant of its intent to arbitrate. Pl.'s SUF ¶ 9. On October 21, 2015, Plaintiff instead elected to proceed before the NLRB and continued to litigate its grievance in that forum through July 13, 2016. *Id.* ¶¶ 11, 17. At some point in January or February 2016, after the NLRB dismissed Plaintiff's first claim that Sanchez was discharged for unlawful, discriminatory reasons in violation of the NLRA, Plaintiff reinitiated its effort to seek arbitration, but continued to seek favorable result in a proceeding before the ALJ on the unfair labor practice charge against Defendant until the ALJ issued an adverse decision finding that Defendant did not violate the NLRA in any manner alleged in the NLRB's complaint. *Id.* ¶¶ 13, 15, 17-18. By doing so, Plaintiff engaged in litigation conduct inconsistent with its purported right to arbitration and indicates a "conscious decision to continue to seek judicial judgment on the merits of [the] arbitrable claims." *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 759 (9th Cir. 1988) (quoting *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons*, 821 F.2d 772, 777 (D.C. Cir. 1987)) (alteration in original); *Yasuda*, 829 F.3d at 1125 (collecting cases).

Indeed, after fully litigating its claim and losing it in the alternative forum, Plaintiff then turned to this Court, asking it to compel arbitration. Pl.'s SUF ¶ 19. Between October 2015 and July 2016, Defendant was forced to litigate before the NLRB, including a hearing before the ALJ, incurring litigation costs and delay, which it would not have incurred had Plaintiff proceeded to compel arbitration at the outset. *Van Ness Townhouses*, 862 F.2d at 759. Were this Court to compel arbitration now, Defendant would be forced to relitigate an issue on the merits, incurring further costs and delay, on which it has already prevailed in the alternative forum (*see id.*) and Plaintiff would receive an advantage from relitigating the case that it would not have received in an earlier arbitration proceeding (*see Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 (9th Cir. 2013)), including being privy to information about Defendant's case that it could not have gained in that proceeding. *See Yasuda*, 829 F.3d at 1127 ("When a party has expended considerable time and money due to the opposing party's failure to timely move for arbitration and is then deprived of the benefits for which it has paid by a belated motion to compel, the party is indeed prejudiced."). The requirements for waiver by litigation conduct have been met. The Court would therefore reject Plaintiff's attempt to manipulate the judicial and arbitral systems to gain an unfair advantage over Defendant. *See Cox*, 533 F.3d at 1125 ("[W]aiver is an equitable doctrine.") (citing *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*,

235 F.3d 1184, 1194 (9th Cir. 2000)).

Conclusion

For the foregoing reasons, the Court grants Defendant's summary judgment motion and denies Plaintiff's motion.