UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOELLEN DONNER,

Plaintiff,

-v-

No. 16 Civ. 9581 (CM)

GFI CAPITAL RESOURCES GROUP, and
VINCENT M. VIENI, individually,

Defendants.

DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION

Plaintiff Joellen Donner ("Donner") brings this action against Defendant GFI Insurance Brokerage, Inc. ("GFI") and Defendant Vincent M. Vieni ("Vieni") (collectively, "Defendants").

Before the Court is Defendants' motion to compel arbitration, pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3. In the alternative, Defendants move under Fed R. Civ. P. 12(b)(6) to dismiss Donner's common-law claims against Vieni.

For the reasons set forth below, Defendants' motion to compel arbitration is GRANTED.

BACKGROUND

In ruling on the instant motion, the Court relies upon the allegations set forth in Donner's Complaint (Dkt. No. 1 ("Complaint" or "Compl.")), as well as the terms set forth in Donner's employment agreement with GFI (Rosen Decl., Ex. B, Dkt. No. 16 (the "Agreement")).

I. Nature of the Dispute

Donner began working for GFI in February 2016. (Compl. ¶ 11.) Her title was Client Consultant, and she was responsible for growing GFI's Employee Benefits Division. (*Id.* ¶¶ 11, 13.) Vieni was Donner's direct supervisor throughout her employment. (*Id.* ¶ 1.)

When Donner was hired, Vieni allegedly told her that GFI would give her twelve months to prove her ability to generate revenue. (*Id.* ¶ 14.) Despite this, GFI terminated Donner's employment in September 2016 because, according to Vieni, she was not generating enough revenue. (*Id.* ¶¶ 63–64.)

Donner alleges that she was the object of unlawful gender discrimination throughout her employment, and that is why Defendants fired her. She asserts that Vieni required her to perform tasks that her male counterparts were not required to perform, and told her that he did so precisely because she is a woman. For example, Vieni required Donner to cold-call potential clients. When Donner asked why one of her male counterparts was not also required to do so, Vieni allegedly responded, "Men can't make those types of calls. Men are just different than women; women can talk to people easier because women are more domesticated." (*Id.* ¶¶ 40–41.) Another example: Vieni required Donner to track leads by hand and to take minutes during meetings, but did not require Donner's male coworkers to do the same. He allegedly tried to justify this by telling Donner, "You're a woman, so taking notes and keeping track of things isn't hard for you. It's natural for women to organize things. You're used to it from being home raising kids." (*Id.* ¶ 43.)

Donner alleges that one time, when she arranged to meet a new client in Brooklyn, Vieni mocked her in front of her male coworkers, stating that riding the subway would be "too much" for her because she was a "princess." (*Id.* ¶ 38.)

Allegedly, GFI's other Client Consultants had lunch meetings every afternoon but Donner was not invited until her last week of employment, when another employee told her, "We are going to lunch and feel it would be discriminatory to continue not inviting you." (*Id.* ¶¶ 58–59.)

Donner further alleges that GFI's male employees, including Vieni, engaged in lewd conversations and behavior that made her uncomfortable, including circulating pictures of women they found attractive and openly discussing their sex lives. (*See id.* ¶¶ 16–32.) On one occasion, a sales representative from LinkedIn visited GFI's offices to pitch LinkedIn's services. During the presentation, one of Donner's male coworkers made a comment about the physical appearance of a woman pictured onscreen, and other male employees imitated him with their own lewd comments. (*Id.* ¶¶ 30–31.) When Donner complained about the incident to Vieni, Vieni allegedly laughed in response and ignored her complaint. (*Id.* ¶¶ 34–35.) Donner asserts that Defendants, in retaliation for this complaint, harassed her further and, ultimately, fired her.

Donner also asserts that one of her male counterparts made more money than she did, despite their identical job titles and responsibilities. (*Id.* ¶¶ 54–56.)

Donner claims that her performance was not an issue: her work was never criticized and she consistently brought in more revenue than one of her male counterparts who was not fired. (*Id.* ¶¶ 67–68.) She notes that a man replaced her. (*Id.* ¶ 69.)

II. The Agreement and Its Arbitration Clause

Before starting at GFI, Donner entered into the Agreement, which sets forth the terms and conditions of Donner's employment. It contains an arbitration clause (the "Arbitration Clause") providing that:

> Any disputes, differences or controversies arising under this Agreement shall be settled and finally determined by arbitration before a panel of three arbitrators in New York, New York, according to the rules of the American Arbitration Association (or any other alternative dispute resolution organization at [GFI's] discretion) now in force and hereafter adopted.

(Agreement at 3.)

Besides the Arbitration Clause, the Agreement contains provisions governing the following aspects of Donner's employment:

> "Duties and Responsibilities," which provides that Donner is expected to, among other things, cold-call potential clients, consistently meet weekly and quarterly sales and revenue goals, and attend sale meetings (*id.* at 1);
>
> "Compensation," which establishes Donner's salary and commission payments (*id.*);
>
> "Term of Agreement," which provides that Donner's employment is at-will and terminable with or without cause (*id.* at 2);
>
> "Business Conduct," which provides that Donner must comply with all rules, regulations, policies, and procedures of GFI (*id.*); and
>
> "Termination of Employment," which provides the various grounds on which Donner may be fired and the effect of termination on her employment status and compensation (*id.* at 3).
>
> In the preamble to the Agreement, Vieni is identified as Donner's supervisor. (*Id.* at 1.)

III. Procedural History

In December 2016, Donner filed the Complaint, which sets forth seven causes of action. Donner asserts that GFI violated: 1) the Fair Labor Standards Act and 2) the New York Labor Law by paying her less than her male coworkers, solely because of her sex. She asserts that Defendants violated the New York City Human Rights Law by: 3) unlawfully terminating her employment because she is a woman; 4) fostering a hostile work environment; and 5) harassing and firing her in retaliation for complaining about her male coworkers' misbehavior. Finally, Donner asserts claims against Vieni for: 6) tortious interference with business relations and 7) negligent misrepresentation.

Currently before the Court is Defendants' motion to compel arbitration, pursuant to the Arbitration Clause.

DISCUSSION

"The threshold (that is, logically prior) question is who should decide the very question of who decides—sometimes called the 'the question of arbitrability.'" *Alstom v. General Electric Co.*, No. 16 Civ. 3568, 2017 WL 95277, *3 (S.D.N.Y. Jan. 10, 2017) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). "Unless the parties *clearly and unmistakably* provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) (emphasis added).

Here, the Arbitration Clause does not explicitly provide that an arbitrator will decide the arbitrability of disputes, and Defendants fail to present clear and unmistakable evidence that the parties intended for an arbitrator to decide the issue of arbitrability. Thus, the Court will decide whether Donner's claims are subject to arbitration.

"Whether a dispute is arbitrable under the FAA comprises two questions: '(1) whether there exists a valid agreement to arbitrate at all under the contract in question . . . and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement.'" *Ferrari North Am., Inc. v. Ogner Motor Cars, Inc.*, No. 02 Civ. 7720, 2003 WL 102839, at *2 (S.D.N.Y. Jan. 9, 2003) (quoting *Harford Accident & Indem. Co. v. Swiss Reins. Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001)). The existence of the Agreement and the Arbitration Clause, and the parties' consent thereto, are not disputed, so we turn to the scope of the Arbitration Clause.

Since the FAA establishes "a liberal federal policy favoring arbitration agreements," it is a general rule that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d

218, 223 (2d Cir. 2001) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)).

To decide whether a dispute falls within the scope of an arbitration clause, the Court must first classify the clause as broad or narrow. *Id.* at 224. It is broad if "the language of the clause, taken as a whole, evidences the parties' intent to have arbitration serve as the primary recourse for disputes connected to the agreement containing the clause." *Id.* at 225. A broad clause gives rise to a "presumption of arbitrability." *Id.* at 224. This presumption "is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Holick v. Cellular Sales of N.Y., LLC*, 802 F.3d 391, 395 (2d Cir. 2015) (internal quotation marks omitted).

The Arbitration Clause provides that "any disputes, differences or controversies arising under [the] Agreement shall be" arbitrated. This is a broad clause, mandating ("shall") arbitration of all claims arising under Donner's employment agreement. Therefore, Donner's claims are presumptively arbitrable. *See, e.g.*, *ACE Capital Re Overseas Ltd. v. Central United Life Ins. Co.*, 307 F.3d 24, 31–34 (2d Cir. 2002); *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 854 (2d Cir. 1987); *S.A. Mineracao Da Trindade-Samitri v. Utah Int'l, Inc.*, 745 F.2d 190, 194–95 (2d Cir. 1984).

Donner's claims unquestionably arise under the Agreement. Her first and second causes of action, which allege gender-based discrimination in the payment of wages, clearly implicate the "Compensation" provision of the Agreement. Her third cause of action, which alleges wrongful termination, clearly implicates the provisions "Term of Agreement" and "Termination of Employment." These provisions are also implicated by Donner's fifth cause of action, which asserts that Donner was fired in retaliation for complaining about her male coworkers'

misbehavior. *See Oldroyd v. Elmira Sav. Bank, FSB*, 134 F.3d 72, 77 (2d Cir. 1998). Donner's fourth cause of action, which alleges that Defendants fostered or otherwise failed to abate a hostile work environment, implicates the provision "Business Conduct," which incorporates GFI's Employee Handbook and prohibits sexual harassment of the sort alleged in the Complaint. (*See* Rosen Decl., Ex. C, Dkt. No. 16.) Donner's sixth cause of action asserts that Vieni sabotaged her career by discriminating against her, contributing to a hostile work environment, and ultimately causing GFI to terminate her employment. This claim is premised upon factual allegations that implicate at least three provisions, namely, "Duties and Responsibilities," "Business Conduct," and "Termination of Employment." Finally, Donner's seventh cause of action alleges that Vieni negligently misrepresented to Donner that GFI would employ her for at least twelve months. This obviously implicates the provision "Term of Agreement."

In short, given the operative presumption of arbitrability, the Arbitration Clause is impossible of an interpretation that excludes any of Donner's claims.

Donner unsuccessfully disputes this analysis, arguing that the Arbitration Clause is narrow and exclusive of her claims. In so arguing, she relies on *In re Kinoshita & Co.*, 287 F.2d 951 (2d Cir. 1961), an ancient and disfavored decision in which the Second Circuit held that the phrase "arising under" in an arbitration clause indicated an intent to construe the clause narrowly. The Second Circuit has not formally overruled *Kinoshita*, but it has since confined its authority to "its precise facts," noting that *Kinoshita* conflicts with the federal policy favoring arbitration. *See ACE Capital*, 307 F.3d at 33; *Louis Dreyfus Negoce S.A.*, 252 F.3d at 225–26; *Genesco, Inc.*, 815 F.2d at 854 n.6. *Kinoshita* is, therefore, inapposite.

Even though Vieni is not a signatory to the Agreement, the claims asserted against him – the sixth and seventh causes of action – are arbitrable. It is well-settled that a signatory may be

bound to arbitrate claims brought against a nonsignatory based on the "tight relatedness of the parties, contracts and controversies." *Choctaw Generation Ltd. P'ship v. Am. Home Assur. Co.*, 271 F.3d 403, 406 (2d Cir. 2001); *see also Astra Oil Co., Inc. v. Rover Navigation, Ltd.*, 344 F.3d 276, 279–81 (2d Cir. 2003). The claims brought against Vieni are closely intertwined with the claims brought against GFI; and, as explained above, all of these claims are closely intertwined with the Agreement and its implementation. Furthermore, Vieni has a close relationship with the Agreement itself: it identifies him as Donner's supervisor. Given the nexus between the underlying claims, the Agreement, and Vieni, it is clear that Vieni may join GFI in compelling arbitration, despite his being a nonsignatory to the Agreement. *See Hong v. Belleville Development Group, LLC*, No. 15 Civ. 5890, 2016 WL 4481071, at *4 (S.D.N.Y. Aug. 17, 2016).

The last issue to be addressed is Donner's argument that the Court should invalidate and sever the following terms of the Arbitration Clause, on the ground that they are substantively unconscionable:

> [I]t is understood and agreed that the arbitrators are not authorized or entitled to include as part of any award rendered by them, special, exemplary or punitive damages or amounts in the nature of special, exemplary or punitive damages regardless of the nature or form of the claim or grievance that has been submitted to arbitration. The arbitrators shall award all costs of the arbitration, including reasonable attorneys' fees, to the prevailing party. Employee hereby irrevocably consents to the service of process outside the territorial jurisdiction of such arbitrators in any such action or proceeding by mailing copies thereof by registered U.S. mail, postage prepaid, to her address as set forth herein. Notwithstanding the foregoing, company may seek injunctive relief, where applicable, in any court that it determines will have jurisdiction.

(Agreement at 3; *see* Pl.'s Mem of Law at 14, Dkt. No. 22.)

Defendants have agreed to waive the terms of this clause that: 1) prohibit an award of punitive damages and 2) award attorneys' fees to the prevailing party. (*See* Def.'s Reply. at 4.)

Accordingly, these provisions are disregarded, along with any effect they may have had on the enforceability of the Arbitration Clause. Thus, there is no need to address Donner's arguments as to their unconscionability. *See Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 124–25 (2d Cir. 2010). As to the other challenged terms, Donner fails to show that they are "outrageous" enough to fit within the "exceptional cases" where substantive unconscionability alone is sufficient to warrant invalidation. *See id.* at 122.

Since all of Donner's claims are arbitrable, the Court grants Donner's request that they be stayed, rather than dismissed. *See Katz v. Cellco P'ship*, 794 F.3d 341, 342 (2d Cir. 2015).

CONCLUSION

For the foregoing reasons, the Court concludes that all of Donner's claims against Defendants are arbitrable. Defendants' motion to compel arbitration is, therefore, GRANTED, along with Donner's request for a stay.

The Clerk is instructed to remove the motion at Dkt. No. 14 from the Court's list of pending motions.

Dated: May 2, 2017

U.S.D.J.

BY ECF TO ALL COUNSEL