UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN IOAN RESTEA,	:	
	:	
Plaintiff,	:	REPORT AND RECOMMENDATION
-v.-	:	17 Civ. 4801 (VEC) (GWG)
BROWN HARRIS STEVENS LLC,	:	
	:	
Defendant.	:	

GABRIEL W. GORENSTEIN, United States Magistrate Judge

Pro se plaintiff John Ioan Restea brings this employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 ("Title VII"), the New York State Human Rights Law, N.Y. Exec. Law §§ 290-97 ("NYSHRL"), and the New York City Human Rights Law, N.Y. City Admin. Code §§ 8-101 to -31 ("NYCHRL"), alleging that defendant Brown Harris Stevens LLC ("BHS") discriminated against him because of his Romanian national origin and retaliated against him for engaging in protected activity. See Complaint, filed June 23, 2017 (Docket # 2) ("Compl."), at 3-5.

BHS has moved to dismiss Restea's claims and to compel arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.[1] Def. Mem. at 9. If the motion to compel

[1] Notice of Motion, filed Nov. 20, 2017 (Docket # 17); Affirmation in Support of Defendant's Motion to Dismiss, filed Nov. 20, 2017 (Docket # 18) ("Mazzola Aff."); Defendant's Memorandum of Law in Support of Its Motion to Dismiss or Compel Arbitration, filed Nov. 20, 2017 (Docket # 19) ("Def. Mem."); Defendant's Reply Memorandum of Law in Further Support of Its Motion to Dismiss or Compel Arbitration, filed Dec. 11, 2017 (Docket # 21); Reply to Motion to Dismiss or Compel Arbitration, filed Dec. 12, 2017 (Docket # 23) ("Pl. Mem."); Reply to Motion to Dismiss or Compel Arbitration, filed Jan. 5, 2018 (Docket # 24) ("Pl. Supp. Mem."); Affirmation in Further Support of Defendant's Motion to Dismiss, filed Jan. 19, 2018 (Docket # 26); Defendant's Reply Memorandum of Law in Further Support of Its Motion to Dismiss or Compel Arbitration, filed Jan. 19, 2018 (Docket # 27).

arbitration is not granted, BHS seeks dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure of any claims arising from conduct that occurred prior to September 1, 2015. See Def. Mem. at 1, 13.

For the following reasons, the motion to compel arbitration should be granted and the case dismissed.

I. BACKGROUND

The following facts are not in dispute unless otherwise noted.

A. Restea's Employment and Termination

Restea is a former doorman and elevator operator at a luxury co-operative apartment building (the "Co-op") in New York City managed by defendant BHS. Compl. ¶¶ 2-3, 15.[2] Restea was employed by the Co-op from June 1988 until he was fired in February 2016. Id. ¶¶ 2, 21. While employed there, he was a member of Service Employees International Union, Local 32BJ (the "Union"), a union that represents building cleaners, doorpersons, and porters throughout the greater New York region. See 2014 Apartment Building Agreement, dated Apr. 21, 2014 (annexed as Ex. A to Mazzola Aff.) ("CBA"), at 1; Mazzola Aff. ¶ 3; see also Pl. Mem. at *1-2.[3] The Union is the exclusive bargaining representative of its members, see CBA at 1, and may bargain on their behalf over their "rates of pay, wages, hours of employment, or other conditions of employment," 29 U.S.C. § 159(a). Under that authority, it entered into the CBA with the Realty Advisory Board on Labor Relations, Inc. ("RAB"), a

[2] The paragraphs appear in unnumbered pages attached at the end of the Complaint. The first seven pages of the Complaint are numbered and citations to these numbered pages are identified by "Compl. at ___."

[3] Page numbers identified by "*__" refer to pagination provided by the Court's ECF system.

multi-employer bargaining association of which the Co-op was a member. See CBA at 1; Stipulation of Settlement, dated Sept. 1, 2015 (annexed as Ex. D to Mazzola Decl.) ("Settl. Stip.").

Restea alleges that he was subject to discrimination and unlawful retaliation at the Co-op on account of his Romanian national origin. Compl. at 3, 5. He claims that the discrimination started in earnest in 2005 when BHS "brought in a new supervisor," George Hayden, who "is of Irish descent." Id. ¶¶ 5-6. Hayden, he claims, immediately began to divide the staff at the Co-op along ethnic lines, "targeting those of Eastern European descent" for mistreatment. Id. ¶¶ 6-7. Restea, for example, was "overtly mocked and taunted" for his Romanian origin. Id. ¶ 7. He was also "harassed . . . in the lunch room," id. ¶ 14; told to perform cleaning duties beneath his job description, id. ¶ 15; directed to take a shorter lunch break than non-Romanian and non-Hungarian employees, id. ¶ 18; and asked to display the contents of his bag "before and after every shift" unlike other employees, id. ¶ 20. Restea alleges that on several occasions he was given improper and inconsistent work instructions and deficient supplies by Hayden, who would then berate and harass him for failing to perform up to Hayden's ever-changing standards. Id. ¶¶ 15-17, 19. He asserts that other employees of Hungarian and Romanian descent were subject to the same treatment though workers of other national origins were not. Id. ¶¶ 16-19. He alleges that six other workers of Hungarian and Romanian descent "were either fired or resigned due to the discrimination they felt in the workplace" and were replaced by workers of Filipino, Irish, and Mexican descent. Id. ¶ 8.

Restea alleges he was fired on June 2, 2015, though he was ultimately reinstated after he filed a complaint with the Equal Employment Opportunity Commission. Id. ¶¶ 10-12. According to BHS, Restea pursued his claim through the Union, which grieved his termination

under the procedures in the CBA. See Def. Mem. at 6. Restea was reinstated pursuant to a stipulation entered into by Restea, the Union, the Co-op, and an RAB representative. See Settl. Stip. at *2. As part of that settlement, Restea executed a General Release. Id. The Release provided that within seven days from the execution date Restea could "revoke his acceptance solely and exclusively with respect to any and all claims under the Age Discrimination in Employment Act." Id. at *5. Four days later, Restea revoked his acceptance with respect "to all claims under the Age Discrimination in Employment Act" through a handwritten notarized letter sent to an attorney at RAB. See Letter from John Restea, dated Sept. 5, 2015 (attached to Pl. Supp. Mem.). He returned to work two days later. Compl. ¶ 12.

On February 23, 2016, Restea was fired again. Id. ¶ 21. His termination letter asserts that Restea allowed an unauthorized person into the building. See Letter from Eamon Early, dated Mar. 4, 2016 (annexed as Ex. E to Mazzola Decl.). Restea filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), see Compl. at 6, and the Union, but the Union declined to take action, see Pl. Supp. Mem. at *1-2, *4, *6. The EEOC issued a Notice of Right to Sue letter on March 24, 2017. Compl. at 6, 8. Restea subsequently filed the instant lawsuit, alleging discrimination and unlawful retaliation in violation of Title VII, the NYSHRL, and the NYCHRL. See id. at 1, 3, 4.

B. The CBA

The CBA governs employer-employee relations for all Union members and RAB member employers. CBA at 1. It provides that an arbitrator "shall have the power to decide all differences arising between the parties to this Agreement as to interpretation, application or performance of any part of this Agreement . . . ." CBA at 15. Under the CBA, a "no discrimination" clause prohibits discrimination "against any present or future employee by

reason of . . . national origin . . . or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, . . . the New York State Human Rights Law, [and] the New York City Human Rights Code . . . ." Id. at 106-07. The CBA states that the "grievance and arbitration procedure[s]" provided for in the CBA form an employee's "sole and exclusive remedy for [such] violations." Id. at 107; see also id. at 17 (stating that arbitration "shall be the sole and exclusive method for the determination of all [] issues [over which a Contract Arbitrator has jurisdiction].").

II. GOVERNING LAW

Section 2 of the FAA provides in pertinent part:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The FAA reflects "a strong federal policy favoring arbitration as an alternative means of dispute resolution." Ross v. Am. Express Co., 547 F.3d 137, 142 (2d Cir. 2008) (internal quotation marks and citation omitted).

The Second Circuit has held that a court considering a motion to compel arbitration of a dispute first must

> determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, 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 arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration.

JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 169 (2d Cir. 2004) (citation omitted). "Under the FAA, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language

itself or an allegation of waiver, delay, or a like defense to arbitrability.'" Id. (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)).

In determining whether an issue must be arbitrated, courts apply the same standard used at summary judgment. See Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003) ("the summary judgment standard is appropriate in cases where the District Court is required to determine arbitrability . . . ."). In this case, BHS has characterized its motion as a motion seeking dismissal under Fed. R. Civ. P. 12(b)(6). Because there is no dispute as to the relevant facts, the standard of review is of no significance here.[4]

III. DISCUSSION

A. Enforceability of the Arbitration Clause

Before addressing the requirements of JLM Industries, Inc., 387 F.3d at 169, we note that Restea argues that the CBA is not binding on him, because "[it] represents a general guideline and the members can and should take appropriate action as it befits a concrete situation/claim." Pl. Supp. Mem. at *6. To the extent Restea is arguing that the CBA does not bind individual members of the Union, we reject this argument. Under the National Labor Relations Act, 28 U.S.C. § 159, the Union is the "exclusive bargaining representative of employees within the building-services industry in New York City," 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 251

[4] BHS also asserts that the complaint must be dismissed for "lack of subject matter jurisdiction" under Fed. R. Civ. P. 12(b)(1). Def. Mem. at 8, 13. But there is plainly subject matter jurisdiction under 28 U.S.C. § 1331, given that plaintiff's lawsuit raises federal discrimination claims, notwithstanding the agreement to arbitrate. See generally Consol. Precision Prods. Corp. v. Gen. Elec. Co., 2016 WL 2766662, at *2 (S.D.N.Y. May 12, 2016) (in case seeking to compel arbitration court would not dismiss for lack of subject matter jurisdiction where diversity jurisdiction existed). Accordingly, the motion to dismiss for lack of subject matter jurisdiction must be denied.

(2009), and in that role, it may enter into contracts that bind its members, even if a particular member disagrees with the contract terms, id. at 257, 270-71.

As to the four requirements listed in JLM Industries, Inc., 387 F.3d at 169, the first is satisfied because the contract binds both Restea and BHS to arbitrate. Restea notes that his Union failed to pursue his discrimination claims and suggests that this failure — along with his mistrust of the arbitration process — justifies his pursuing his claims in federal court. See Pl. Supp. Mem. at *4. Restea is correct that the CBA requires that a member submit any grievance to the Union. See CBA at 107, 110. The CBA also recognizes that there is a "continuing disagreement" between RAB and the Union over the question of whether employees may pursue their discrimination claims in court if the Union declines to pursue the claim in arbitration under the CBA. See id. at 108-09. Nonetheless, the parties to the CBA ultimately agreed to a "No-Discrimination Protocol" that governs this question. See id. at 109-10. Should the Union decline to pursue an employee's discrimination claim, the protocol provides that the employee has the power to pursue the claim in arbitration without the Union. Id. at 113 ("The undertakings described here with respect to arbitration apply to those circumstances in which the Union has declined to take an individual employee's employment discrimination claim under the no discrimination clause of the CBA (including statutory claims) to arbitration and the employee is desirous of litigating the claim."). As reflected in case law, this protocol binds a member to arbitrate a discrimination claim even if the Union declines to pursue the claim. See, e.g., Duraku v. Tishman Speyer Props., Inc., 714 F. Supp. 2d 470, 474 (S.D.N.Y. 2010) (holding that "arbitration is mandated under the protocol").

Restea contends that a different passage of the "No-Discrimination Protocol" supports his view that "a Discrimination case can be, at the election of the Plaintiff, followed in Court and

outside an Arbitration." See Pl. Supp. Mem. at *4 (quoting CBA at 108). The passage Restea quotes from, however, merely summarizes the Union's view on the question of whether employment discrimination lawsuits may be brought by individuals in court without the Union. The protocol notes, however, that this summary is provided only "[a]s background," CBA at 108, for why the parties adopted the binding No-Discrimination Protocol, see id. at 107-110. Indeed, the same paragraph also summarizes the RAB's contrary view on the same issue. Id. at 109. Ultimately, the text of the "No-Discrimination Protocol" controls and it plainly mandates arbitration of all discrimination claims. Id. at 113.

Second, as to the scope of the arbitration clause, a collective bargaining agreement clearly and unmistakably waives a plaintiff's right to pursue his or her statutory claims in federal court when "the wording is not susceptible to a contrary reading." Lawrence v. Sol G. Atlas Realty Co., Inc., 841 F.3d 81, 83 (2d Cir. 2016). The Second Circuit has explained this "exacting standard" means that the CBA must contain "specific references . . . either to the statutes in question or to statutory causes of action generally." Id. at 84. Here, the CBA meets this standard. It contains an arbitration clause that explicitly provides that all causes of action arising out of the employee's employment must be submitted to arbitration. CBA at 15-17, 107. The CBA also prohibits discrimination "against any present or future employee by reason of . . . national origin . . . or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, . . . the New York State Human Rights Law, [and] the New York City Human Rights Code . . . ." Id. at 107. Courts in this Circuit, applying the clear and unmistakable standard to this same or a substantially similar version of the same CBA, have repeatedly reached the conclusion that it requires arbitration of statutory discrimination claims. See, e.g., Cox v. Perfect Bldg. Maint. Corp., 2017 WL 3049547, at *4

(S.D.N.Y. July 18, 2017) (same CBA at issue here "clearly and unmistakably requires arbitration of [plaintiff's] statutory discrimination claims"); accord Bouras v. Good Hope Mgmt. Corp., 2012 WL 3055864, at *4 (S.D.N.Y. July 24, 2012); Pontier v. U.H.O. Mgmt. Corp., 2011 WL 1346801, at *3 (S.D.N.Y. Apr. 1, 2011); Duraku, 714 F. Supp. 2d at 474.

Third, as to the question of whether Congress intended the statutory claims at issue to be arbitrable, case law has repeatedly held that the FAA reflects a congressional intent to arbitrate statutory discrimination claims. See, e.g., Hamzaraj v. ABM Janitorial Ne. Inc., 2016 WL 3571387, at *4 (S.D.N.Y. June 27, 2016) (citing cases); see also Cox, 2017 WL 3049547, at *3-4 (claims under the NYSHRL and NYCHRL are subject to mandatory arbitration); Germosen v. ABM Indus. Corp., 2014 WL 4211347, at *6 (S.D.N.Y. Aug. 26, 2014) ("claims arising under Title VII, the ADA, the NYSHRL and the NYCHRL . . . are equally susceptible to mandatory arbitration agreements" and citing cases); accord Veliz v. Collins Bldg. Servs., Inc., 2011 WL 4444498, at *3 (S.D.N.Y. Sept. 26, 2011); Pontier, 2011 WL 1346801, at *3; Duraku, 714 F. Supp. 2d at 474; Borrero v. Ruppert Hous. Co., 2009 WL 1748060, at *2 (S.D.N.Y. June 19, 2009).

The fourth requirement of JLM Industries, Inc., 387 F.3d at 169, is not at issue inasmuch as all of plaintiff's claims are arbitrable. Thus, we conclude that Restea is bound to arbitrate his discrimination claims.

Restea appears to contend that BHS should be precluded from moving to compel arbitration because it declined to do so after it received notice of his EEOC complaint. Pl. Mem. at *1-2; Pl. Supp. Mem. at *1-2, *5. To the extent that Restea is arguing that BHS waived its right to arbitrate by not raising the issue earlier, this argument is rejected. Because of the strong federal policy in favor of arbitration, waiver of the right to arbitrate "is not to be lightly

inferred." Leadertex v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 25 (2d Cir. 1995) (citation omitted). A party does not waive its right to arbitration unless "it engages in protracted litigation that prejudices the opposing party." PPG Indus., Inc. v. Webster Auto Parts, Inc., 128 F.3d 103, 107 (2d Cir. 1997). A party's mere delay in seeking arbitration following the filing of a federal court complaint has not, by itself, resulted in a finding of waiver. See, e.g., id. ("[A] five-month delay, by itself, is not enough to infer waiver of arbitration."); Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 122 (2d Cir. 1991) ("delay [of three years] standing alone is an insufficient basis to support waiver"); Sweater Bee by Banff, Ltd. v. Manhattan Indus., 754 F.2d 457, 461 (2d Cir. 1985) (right to arbitrate not waived despite two year delay). Here, BHS immediately sought to compel arbitration once Restea filed this lawsuit. Thus, BHS did not waive its right to compel arbitration.

In sum, Restea is bound to arbitrate the discrimination claims raised in this lawsuit.

B. Stay or Dismissal

As to whether this case should be dismissed or stayed, in Katz v. Cellco P'ship, 794 F.3d 341 (2d Cir.), cert. denied, 136 S. Ct. 596 (2015), the Second Circuit held that "the text, structure, and underlying policy of the FAA mandate a stay of proceedings when all of the claims in an action have been referred to arbitration and a stay requested." Id. at 347 (emphasis added). The governing statute also refers to a stay being granted "on application of one of the parties." 9 U.S.C. § 3. Here, no party has requested a stay. Accordingly, the case should be dismissed. See Bensemann v. Citibank N.A., 622 F. App'x 16, 18 (2d Cir. 2015) (because plaintiff "did not request a stay before the district court entered judgment[,] . . . Section 3 did not require the district court to stay the proceedings when it entered judgment against [the plaintiff]."); Valdez-Mendoza v. Jovani Fashion Ltd., 2017 WL 519230, at *4 (E.D.N.Y. Feb. 8,

2017) (dismissing case under court's "inherent authority to manage its own docket" and noting "Section 3 does not apply if a stay is not requested") (citation omitted); see also McNeill v. Raymour & Flanigan Furniture, 2016 WL 7048712, at *7 (N.D.N.Y. Dec. 5, 2016) ("A stay is not mandatory in this case because Plaintiff has not requested one, and Defendant requests dismissal in the first instance.").

IV. CONCLUSION

For the foregoing reasons, the motion to compel arbitration (Docket # 17) should be granted and the case dismissed.

PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file any objections. See also Fed. R. Civ. P. 6(a), (b), (d). A party may respond to any objections within 14 days after being served. Any objections and responses shall be filed with the Clerk of the Court, with copies sent to the Hon. Valerie E. Caproni at 40 Centre Street, New York, New York 10007. Any request for an extension of time to file objections or responses must be directed to Judge Caproni. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report and Recommendation on appeal. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; Fed. R. Civ. P. 6(a), 6(b), 6(d); Thomas v. Arn, 474 U.S. 140 (1985); Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., 596 F.3d 84, 92 (2d Cir. 2010).

Dated: March 23, 2018
New York, New York

GABRIEL W. GORENSTEIN
United States Magistrate Judge

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