UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 14-21244-CIV-GOODMAN
[CONSENT CASE]

JASZMANN ESPINOZA, et al.,

Plaintiffs,
v.

GALARDI SOUTH
ENTERPRISES, INC., et al.,

Defendants.
_____/

ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL ARBITRATION

Plaintiffs Shavone Moore, Jordan Hargraves, Krystall Wright and Ashley Delgado ("Plaintiffs") move to compel Defendants to arbitrate the legal claims asserted against them. [ECF No. 229]. Defendants responded in opposition to Plaintiffs' motion, and Plaintiffs replied to Defendants' response. [ECF Nos. 235; 239]. This topic seems familiar because the Court has already ruled on this *exact* motion. The only difference, and a significant one at that, is that previously it was ***Defendants*** who were moving to compel these same Plaintiffs to arbitration. Now, the parties have swapped positions.

I. BACKGROUND

After this FLSA collective and class action was filed, Defendants began requiring all dancers, including Plaintiffs, at Defendants' strip club to sign arbitration agreements.

[ECF Nos. 78, pp. 23-24; 89-1, pp. 4-5]. Plaintiffs signed these identical agreements. [ECF No. 229-1].

The agreement encompassed all claims against Fly Low, Inc., as well as claims against "its owners, officers, directors, [and] managers[.]" [ECF No. 229-1]. The Agreement provides that the AAA would conduct the arbitration pursuant to its employment arbitration rules. [ECF No. 229-1].

Defendants filed motions to compel arbitration of Plaintiffs' claims. [ECF Nos. 166; 168]. The Court denied those motions, on the ground that Defendants' unilateral imposition of the agreement on Plaintiffs after they filed an FLSA collective action "was clearly coercive and admittedly designed to undermine this litigation." [ECF 191, p. 11].

Defendants appealed the Court's Order denying the motion to compel arbitration. [ECF 197]. The Court granted Defendants' motion to stay all proceedings pending Defendants' appeal. [ECF No. 216].

While the appeal was pending, Plaintiffs agreed to arbitrate their claims and sought to dismiss the appeal as moot. [ECF No. 229-4]. The Eleventh Circuit dismissed the appeal as moot. [ECF No. 218].

Plaintiffs then filed demands for arbitration with the AAA. [ECF No. 229-6]. The AAA requested that Defendants pay their share of the filing fees. [ECF No. 229-7].

After Defendants paid the initial filing fees, the AAA notified Defendants that the arbitrators in each case had requested that Defendants pay various deposits towards

their compensation. [ECF No. 229-9]. Defendants failed to pay, and each of the arbitrations was suspended. [ECF No. 229-10].

LEGAL STANDARD

The Federal Arbitration Act ("FAA") "places arbitration agreements on equal footing with all other contracts and sets forth a clear presumption—'a national policy'—in favor of arbitration." *Parnell v. CashCall Inc.*, 804 F.3d 1142, 1146 (11th Cir. 2015) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). Section 4 of the FAA permits a party to seek assistance from a district court where the other party refuses to proceed under a written agreement to arbitrate. *Parm v. Nat'l Bank of Cal., N.A.*, 835 F.3d 1331, 1334 (11th Cir. 2016) (citing 9 U.S.C. § 4). The district court must treat an arbitration agreement as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at § 2; *see Parnell*, 804 F.3d at 1146 ("Arbitration provisions will be upheld as valid unless defeated by fraud, duress, unconscionability, or another 'generally applicable contract defense.'"(quoting *Rent–A–Center v. Jackson*, 561 U.S. 63, 67–68 (2010)).

ANALYSIS

There is no dispute that the parties entered into the arbitration agreements, which are currently suspended because Defendants did not pay the arbitrator deposits. Defendants argue that Plaintiffs are judicially estopped from compelling arbitration

based on Plaintiffs' previous position opposing arbitration. Defendants also argue that because they can no longer afford to pay for the arbitration, Plaintiffs' motion is futile. [1]

First, the Court does not agree that Plaintiffs are judicially estopped from seeking relief. The Eleventh Circuit "employs a two-part test to guide district courts in applying judicial estoppel: whether (1) the party took an inconsistent position under oath in a separate proceeding, and (2) these inconsistent positions were calculated to make a mockery of the judicial system." *Slater v. United States Steel Corp.*, No. 12-15548, 2017 WL 4110047, at *5 (11th Cir. Sept. 18, 2017) (*en banc*) (internal quotation omitted).

Here, it is true that Plaintiffs originally took a different position, opposing arbitration, in this proceeding and at the appellate court level. However, Plaintiffs explain that they switched gears and agreed to arbitrate because the appeal of this Court's Order and the imposition of the stay dramatically changed the circumstances of this action. Plaintiffs state that "[w]hereas Defendants' motions to compel were initially directed to the claims of just four class members, the stay pending appeal had the effect of stalling the prosecution of the claims of potentially thousands of class members who had never signed arbitration agreements." [ECF No. 239, pp. 2-3]. Based on the totality

[1] The Court notes that Defendants never argued that the arbitration agreement is substantively unconscionable because of costs. Rather, they implicitly make this argument by stating that Plaintiffs' motion is futile because, assuming that the Court grants Plaintiffs' motion, "Fly Low, Inc. still cannot pay AAA's [ ] combined $65,650 in requested arbitrator retainers. A court order requiring Fly Low, Inc. to arbitrate will not make Fly Low, Inc. any more able to pay arbitration fees it cannot pay now[.]" [ECF No. 235, p. 6].

of the circumstances, the Court does not find that Plaintiffs' inconsistent position was calculated to make a mockery of the Court, but instead, reflects a well-reasoned litigation strategy to benefit potential class members who were not involved in this arbitration dispute and were stuck waiting by the sidelines.

Defendants' argument that they can no longer pay for the AAA's arbitration costs, even though Defendants drafted the arbitration agreements at issue and also chose AAA as the arbitration vendor, is also unconvincing. The party seeking to avoid arbitration has the burden of establishing that enforcement of the agreement would "'preclude' him from 'effectively vindicating [his] federal statutory right in the arbitral forum.'" *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1259 (11th Cir. 2003) (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000)). Absent such a showing, the agreement may be enforced. *Randolph*, 531 U.S. at 91. Thus, an inability to pay arbitration costs is not a basis to set aside an otherwise valid arbitration agreement unless, because of this, Defendants are somehow unable to vindicate their statutory rights in the arbitral forum.

However, the Court must emphasize that *Randolph*, and the circuit and district court cases applying its holding to analyze whether an arbitration agreement is substantively unconscionable based on excessive fees, all contain *plaintiff* movants. The Court is unsure how a defendant employer, who drafted a mandatory arbitration agreement and picked the arbitration vendor, would somehow not be able to vindicate

its rights in its chosen arbitral forum. Defendants are merely defending against Plaintiffs' claims. Defendants' statutory rights are not at issue.

Even so, the party seeking to invalidate an arbitration agreement must at a minimum present specific evidence of: (1) the costs to arbitrate and (2) why he or she would be financially unable to bear the costs. *Randolph,* 531 U.S. at 91–92; *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840, 846-47 (N.D. Ill. 2001) (noting that plaintiff provided an affidavit "stating that she 'cannot afford to pay' the filing fees and other costs, and that she is in 'severe financial straits[,]'" which was convincing to the district court, "particularly in light of Phillips' inclusion in the 'subprime' market targeted by [defendant] Associates Home Equity.") Indeed, "[t]his evidence must consist of more than conclusory allegations stating a person is unable to pay the costs of arbitration. Rather, parties must show that based on their specific income/assets, they are unable to pay the likely costs of arbitration." *Clark v. Renaissance W., LLC*, 232 Ariz. 510, 513 (App. 2013) (internal citation omitted).

Defendants have not submitted any *evidence* to this Court that they are unable to pay for the arbitrations. As a result, the Court **grants** Plaintiffs' motion to compel arbitration and requires Defendants to pay to the AAA the requested arbitration fees and costs by October 24, 2017. If Defendants fail to timely and fully pay, then Plaintiffs shall immediately notify the Court of this and the Court will hold an evidentiary hearing and require all Defendants, including Ms. Galardi, to provide testimony about

their finances. She and the other Defendants will also be required to produce relevant financial documents, including tax returns, bank account statements, statements reflecting investments in stocks, bonds and mutual funds, records reflecting ownership (of any type) in real estate and records reflecting the amount and timing of payments to the defense lawyers in this case.

Having drafted the arbitration agreements and having sought to have them enforced, Defendants will not be able to dodge arbitration by merely saying, in a wholly conclusory fashion, that they cannot afford to pay the arbitration fees to the arbitration vendor they selected. Instead, they will need to demonstrate it with evidence and they will need to subject themselves to document discovery and cross-examination at an evidentiary hearing.

Given the upcoming trial schedule, the Undersigned will require expedited discovery of financial documents and an evidentiary hearing scheduled on relatively short notice to avoid further delay. If Defendants have no intention to even make an effort to pay the AAA fees, then they shall immediately advise the Court and not wait

until October 24, 2017 to announce their position through the non-payment of the required deposits.

DONE and ORDERED, in Chambers, in Miami, Florida, on October 17, 2017.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
All Counsel of Record