UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ZEJID SENDEROVIC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CASE NO. 3:18cv250(VLB)
	:	
LASERSHIP, INC.,	:	
	:	
Defendant.	:	

RECOMMENDED RULING ON DEFENDANT'S MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION

Pending before the court is the Defendant's motion to compel arbitration. (Dkt. #17). Plaintiff filed this Fair Labor Standards Act action asserting that defendant, Lasership Inc., (hereinafter "defendant") misclassified Zejid Senderovic, (hereinafter "plaintiff") as an independent contractor instead of as an employee. Plaintiff further alleges the misclassification shielded defendant from paying plaintiff any overtime wages for time worked beyond forty hours per week. For the following reasons the undersigned recommends that defendant's motion to stay the proceedings and compel arbitration be GRANTED.

I. Factual Background

According to the complaint, the defendant is a Virginia corporation in the business of arranging delivery of retail merchandise to consumers on behalf of large companies. In order

to achieve this end in a timely fashion, defendant enters into independent contractor agreements with individuals and companies to deliver merchandise to consumers. (Dkt. #1 at 3-4.) On May 25, 2017, plaintiff and defendant entered into such an independent contractor agreement ("ICA"). (Dkt. #17-1 at 3.) The ICA outlines the parties' duties and obligations regarding package delivery, and contains information relating to such matters as compensation, equipment requirements and the rights of plaintiff to work for other entities.[1] (Dkt. #21-1 at 1-53.)

Of import to the pending motion, however, the ICA also contains a broad and detailed "Dispute Resolution" provision. (Dkt. 21-2 at 18-20.) Under this provision the parties agreed that:

> (a) All disputes, claims, and controversies arising under, out of, in connection with, or relating to this Agreement, any aspect of any relationship between the parties to this Agreement, or arising out of, in connection with or relating in any way to any prior agreements between the parties, any prior relationship between the parties, and any other dealings between the patties, from the beginning of the world until the date of this Agreement, or any other claims of whatever nature between the parties hereto, including any those arising under any federal, state, or local law, statute, ordinance, or regulation, or based on any public policy, contract, tort, or common law or any claims for costs, fees, or other expenses or relief, including attorney's fees or multiple or liquidated damages, and any disputes as to the rights and obligations of the parties, including the arbitrability of such disputes, shall be fully resolved by arbitration in accordance with the

[1] The ICA also contains other information not germane to the pending motion.

> Federal Arbitration Act (with respect to which the parties agree that this Agreement is not an exempt "contract of employment") and the Virginia Uniform Arbitration Act, and as described further below.

Dkt. #21-1 at 18.

The ICA contains a delegation provision granting authority to the arbitrator to determine arbitrability and threshold matters under the ICA. The delegation provision states that

> (e) The arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Dispute Resolution provision including, but not limited to any claim that all or any part of this Agreement is void or voidable, except that any determination as to the enforceability of the class/collective action waiver in Paragraph 16(a) above shall be made solely by a court.

Id. at 19. Defendant's reply brief in support of its motion to compel arbitration attached a fully executed and initialed copy of the ICA. Plaintiff has not denied the accuracy or authenticity of this document. (Dkt. #21-1, Exhibit 1.) Indeed, plaintiff highlights the exact provisions referenced above in his response to defendant's motion. (Dkt. #20-1, 9-10.)

II. Standard of Review

"There is a liberal policy favoring arbitration agreements, but parties cannot submit to arbitration disputes they did not so agree to submit. However, any doubts concerning the scope of an agreement to arbitrate should be resolved in favor of arbitration and courts are required to construe arbitration

clauses as broadly as possible." Deleon v. Dollar Tree Stores, Inc., No. 3:16-CV-00767 (CSH), 2017 WL 396535, at *2 (D. Conn. Jan. 30, 2017)(internal quotation marks and citations omitted).

Under the Federal Arbitration Act ("FAA") a written arbitration provision "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 thereby places arbitration agreements on an equal footing with other contracts and requires courts to enforce them according to their terms." Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67 (2010)(internal citations omitted). In Rent-A-Center, the Court stated that under Section 3 of the FAA "a party may apply to a federal court for a stay of the trial of an action 'upon any issue referable to arbitration under an agreement in writing for such arbitration.'" Id. at 68 (quoting 9 U.S.C. § 3).

When analyzing a motion to compel arbitration courts apply "a standard similar to that applicable for a motion for summary judgment." Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003). "If there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary." *Id.* (citing 9 U.S.C. § 4). When deciding a motion to compel courts within the Second Circuit apply a two-part test to determine if a claim is subject to arbitration. "[A] court must consider (1) whether the parties have entered into a valid

agreement to arbitrate, and, if so, (2) whether the dispute at issue comes within the scope of the arbitration agreement." In re Am. Exp. Fin. Advisors Sec. Litig., 672 F.3d 113, 128 (2d Cir. 2011). When "evaluating whether the parties have entered into a valid arbitration agreement, the court must look to state law principles." Doctor's Associates, Inc. v. Tripathi, No. 3:16CV00562 (JCH)(SALM), 2016 WL 7634464, at *13, (D. Conn. Nov. 3, 2016) report and recommendation adopted, No. 3:16-CV-562 (JCH), 2016 WL 7406725 (D. Conn. Dec. 12, 2016).[2]

Plaintiff has effectively raised two arguments in opposition to defendant's motion to compel. First, plaintiff makes a formation argument, arguing that the contract was void or a legal nullity because there was no meeting of the minds as to material contract terms. Second, plaintiff makes an argument relating to enforceability, arguing that the contract provision regarding arbitration is unconscionable.

III. Discussion

Defendant's argument in favor of arbitration is based on the above quoted delegation provision from the ICA. This language delegates authority to make decisions regarding arbitrability to an arbitrator. Indeed, the plain language of

[2] In this case, while not totally clear, it appears that the parties have agreed that Connecticut law should apply. *See* Dkt. 24-1 at 3-4. This is contrary to the provision in the ICA which calls for the application of Virginia law.

the ICA's delegation provision indicates that the parties have agreed, not only, that issues of arbitrability are left to the arbitrator, but also issues of contract formation. Defendant bases much of its initial argument on the fact that there is a strong public policy favoring arbitration agreements over litigation. The ultimate issues for the Court to determine are whether there is a valid arbitration agreement, and if so, does this dispute falls within the scope of that agreement. *See* In re Am. Express Fin. Advisors Sec. Litig., 672 F.3d 113, 127 (2d Cir. 2011).

Plaintiff does not appear to dispute that the express language of the ICA evinces an agreement to arbitrate or that the scope of that agreement is broad. Rather, plaintiff argues that the ICA is void, due to a lack of mutual assent to the material terms of the ICA, or that the agreement to arbitrate is voidable as unconscionable.

A. The ICA is not Void

Based on the evidence and arguments the Court is convinced that there was mutual assent to the material terms of the contract. Plaintiff, as referenced above, has argued that there was no agreement on the material terms because the defendant described itself as a broker. According to plaintiff, this alleged "tortured mischaracterization" of defendant's business

is sufficient to render the ICA void because no meeting of the minds exists as to who the parties were. (Dkt. 20-1 at 13.)

Plaintiff attempts to support this assertion by discussing the merits of the underlying FLSA case and the evidence that plaintiff would produce to support his underlying claim of misclassification. Based on that evidence, plaintiff contends that the ICA is void and thus a nullity, and as such plaintiff should be entitled to a trial on the contract's arbitrability.

The Court cannot accept plaintiff's invitation to wade into the underlying merits of the FLSA case. "The Supreme Court of the United States and the Court of Appeals for the Second Circuit have stated repeatedly and in plain language that when deciding whether a particular dispute should be submitted to arbitration, the Court is to avoid ruling on the merits of the underlying claims." Holloway v. Gruntal & Co., Inc., No. 89 CIV. 8421 (JFK), 1993 WL 36170, at *1. At the time that the plaintiff signed ICA there was no material misunderstanding as to who the parties were.[3] The parties were Mr. Senderovic and

[3] Plaintiff, in a sur-reply brief, clarified his argument relating to the issue regarding the material terms of the agreement. Plaintiff stated that there are material terms that must be certain to form a contract under Connecticut law and among them is the identity of the parties. Quoting the Connecticut Appellate Court plaintiff notes that in order "[t]o form a contract . . . the identities of the contracting parties must be reasonably certain." (Dkt. 22-1 at 4 (quoting 111 Whitney Ave., Inc. v. Comm'r of Mental Retardation, 70 Conn. App. 692, 698 (Conn. App. Ct. 2002)). Plaintiff's reliance on

Lasership.[4] Whether the business relationship between the parties is mischaracterized, and thus treats plaintiff illegally with respect to overtime compensation, is the precise dispute the parties are seeking to have adjudicated and is not relevant to a determination of whether the ICA is void under basic contract law.

The undersigned finds that the plaintiff has not produced sufficient evidence to show that the ICA was void or a nullity, such that it requires a trial on this matter under Interocean Shipping Co. v. National Shipping and Trading Corp., 462 F.2d 673 (2d Cir. 1972). At issue in *Interocean*, was whether the parties had fully agreed to the terms of a charter party agreement. Id. at 674-75. The plaintiff in that case relied on an unexecuted agreement which had been modified to remove certain negotiated provisions to indicate that an agreement had

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this principle is misplaced. The undersigned certainly agrees that the identity of parties to a contract is a material term, however *how* they identify their business relationship is not. In the *111 Whitney* case the Connecticut Appellate Court was reviewing a trial court's order relating to the formation of an oral contract wherein there were undisclosed parties. The identity of a party as opposed to how a specific party holds himself out to do business are entirely separate issues.

[4] To the extent that the plaintiff argues that the contract mischaracterizes the business relationship between the parties, the Court notes that, by its terms, the arbitration clause purports to cover "all disputes relating to any aspect of any relationship between the parties to this agreement." Dkt. #21-1 at 18 (emphasis added).

been reached. However, the Second Circuit relied on additional communications between the parties indicating that there were ongoing negotiations and an eventual repudiation of any agreement by the defendant. Id. at 676. The court determined that there was sufficient evidence to require a trial on the issue of whether there was a meeting of the minds and formation of a contract. Id. at 674-75

Here the situation is significantly different. There is a signed contract between identifiable parties. At the time of the signing of the ICA, plaintiff was aware that an agreement was being signed between himself and Lasership, Inc. There was no question concerning each party's identity and, at that time, no issues regarding the description of their business relationship. In addition, after the ICA was signed, the parties performed under the agreement for a period of time. While plaintiff is now challenging his classification and treatment as an independent contractor, there simply is no question that the parties to the contract (Mr. Senderovic and Lasership) were, and are, clear and that the parties agreed to submit to arbitration all disputes relating to any relationship between them.

B. The Delegation Provision is not Voidable as Unconscionable

Determining that the contract was indeed formed and contained a broad arbitration agreement does not end the inquiry. Plaintiff next argues that the arbitration provision itself is voidable as unconscionable. Plaintiff's argument is flawed in light of the Supreme Court's decision in Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63 (2010) and the Honorable Charles S. Haight's decision in Pingel v. Gen. Elec. Co., No. 3:14-CV-00632 CSH, 2014 WL 7334588 (D. Conn. Dec. 12, 2014).

In arguing that the arbitration agreement is unconscionable, plaintiff first claims that the "ICA and its arbitration clause is procedurally unconscionable because the Plaintiff lacked a meaningful opportunity to agree with the clause's terms." Dkt. #20-1 at 20. To support his claim of substantive unconscionability, plaintiff argues that the arbitrator's potential fees as well as the cost of arbitrating the case in Virginia would be a barrier to the vindication of plaintiff's rights. Id. at 21-22.

However, as the defendant points out in its reply brief, the plaintiff has failed with any specificity to challenge the delegation provision within the ICA's arbitration agreement. The delegation provision states that:

> [t]he arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Dispute Resolution provision including, but not limited

> to any claim that all or any part of this Agreement is void or voidable

Dkt. #21-1 at 19 (emphasis added). In *Rent-A-Center*, the Supreme Court was presented with a nearly identical provision. Rent-A-Center, 561 U.S. at 65. The question presented to the Court was whether "a district court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator." Id. The Court noted that the agreement contained multiple provisions regarding arbitration. Id. at 68. The first provision required arbitration of all disputes arising out of the employment relationship between the parties. Id. The second provision, which the Court described as the "delegation provision," was an "agreement to arbitrate threshold issues concerning the arbitration agreement." Id. Given this arrangement, the Court held that "a party's challenge to another provision [in a] contract, or to [a] contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." Id. at 70.

The Court's decision in *Rent-A-Center* established that not only are arbitration agreements severable from larger agreements, but specific delegation provisions that are contained within an arbitration agreement are severable as well. Id. at 70-72. Given the facts of this case, the Undersigned is

constrained to find that the delegation provision at issue renders any gateway questions subject to arbitration.

> The Supreme Court has indeed recognized that, through a "delegation provision," "parties can agree to arbitrate 'gateway' questions of arbitrability," including whether the arbitration agreement is unconscionable. The agreement must, however, demonstrate "clearly and unmistakably" that "the parties agreed to arbitrate arbitrability."

Doctor's Associates, Inc. v. Tripathi, No. 3:16CV00562 (JCH), 2016 WL 7634464, at *16, report and recommendation adopted, No. 3:16-CV-562 (JCH), 2016 WL 7406725 (quoting Crewe v. Rich Dad Educ., LLC, 884 F. Supp. 2d 60, 84 (S.D.N.Y. 2012)).

In Pingel v. Gen. Elec. Co., No. 3:14-CV-00632 CSH, 2014 WL 7334588 (D. Conn. Dec. 12, 2014), the Honorable Charles Haight interpreted and applied *Rent-A-Center* and reached a similar conclusion. In *Pingel*, the plaintiff argued that the agreement to arbitrate was void as unconscionable. Judge Haight concluded that "the *Rent-A-Center* Court confirmed that the requirement that a challenge be posed directly at the delegation provision exists, even though the underlying contract is itself an arbitration agreement." Id. at *5. Judge Haight further noted that while a challenge to an entire arbitration agreement may also apply equally to a delegation provision contained therein, in *Rent-A-Center* it was explained that the challenge will fail if it is not specifically directed to the delegation provision. *See* Id. at *7 ("The *Rent-A-Center* court explained that the

respondent's challenges failed because he had not made any arguments specific to the delegation provision.").

That is precisely the situation the Court finds itself in here. Plaintiff has challenged the entirety of the arbitration agreement as unconscionable, not specifically the delegation provision. However, under the delegation provision the parties have clearly and unmistakably delegated gateway questions such as unconscionability to the arbitrator. Therefore, without reaching the merits of the parties' other arguments, the Undersigned recommends that defendant's motion to stay the proceedings and compel arbitration be granted.

III. Conclusion

For these foregoing reasons the undersigned recommends that defendant's motion be granted and that this case be stayed pending the arbitration. In recommending that this complaint be dismissed the Court renders no opinion on the merits of plaintiff's claims.

Any party may seek the district court's review of this recommendation. *See* 28 U.S.C. § 636(b) (written objections to proposed findings and recommendations must be filed within fourteen days after service of same); Fed. R. Civ. P. 6(a), 6(d) & 72; Rule 72.2 of the Local Rules for Magistrate Judges; Thomas v. Arn, 474 U.S. 140, 155 (1985). Failure to file timely objections to Magistrate Judge's recommended ruling waives

further review of the ruling. Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992).

Dated this 21st day of November, 2018 at Hartford, Connecticut.

_____/s/_____
Robert A. Richardson
United States Magistrate Judge