SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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JESSICA DENSON,

Plaintiff, Index No.: 101616/17

-against-

DONALD J. TRUMP FOR PRESIDENT, INC.

Defendant.
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MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S ORDER TO SHOW CAUSE TO STAY ARBITRATION AND TO VACATE THE ARBITRAL AWARDS

On the brief:

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Defendant Donald J. Trump for President, Inc. (the "Campaign"), by its attorneys LaRocca Hornik Rosen Greenberg & Blaha LLP, respectfully submits this memorandum of law in opposition to plaintiff's order to show cause seeking to (i) stay the arbitration that the Campaign commenced against plaintiff (the "Arbitration") before the American Arbitration Association ("AAA"), and (ii) vacate the arbitral awards that were issued by Judge L. Paul Kehoe in the Campaign's favor on October 19, 2018 (the "October 19, 2018 Award") and December 11, 2018 (the "December 11, 2018 Award") (collectively, the "Arbitral Awards").

PRELIMINARY STATEMENT

As an initial matter, plaintiff's motion to vacate the Arbitral Awards on the grounds that the Campaign's claims were not arbitrable in the first instance is time-barred. Under the CPLR, plaintiff was required to assert any challenges to arbitrability within 20 days of service of the Campaign's demand for arbitration (the "Demand for Arbitration"). She was admittedly served with the Demand for Arbitration more than a year ago, yet she failed to make any such motion to challenge the arbitrability of the Campaign's claims against her.

Even if her challenges to the arbitrability of the Campaign's claims were not time-barred, plaintiff is in any event collaterally estopped by Judge Furman's decision in the related federal action from now challenging the arbitrability of the Campaign's claims against her. In her federal court declaratory-judgment action, plaintiff asserted that the agreement (the "Agreement") she had signed at the outset of her employment with the Campaign was "void and unenforceable," and was being improperly used by the Campaign in the Arbitration to "thwart or prohibit the assertion of legal rights in a lawsuit" and "as a club to thwart and chill" her employment claims in this Court, i.e., ***the exact same claims she now asserts in this motion to vacate***.

In response to the Campaign's motion to compel arbitration of her federal court claim, Judge Furman expressly held—based upon United States Supreme Court precedent in *Buckeye*

Check Cashing, Inc. v. Cardegna—that all issues relating to the validity or enforceability of the Agreement, including issues of arbitrability, were solely reserved for Judge Kehoe, the AAA Arbitrator. Plaintiff, however, thereafter knowingly and intentionally refused to participate in the Arbitration, and is thus estopped from now re-litigating before this Court these very same issues of arbitrability.

Beyond the foregoing, plaintiff's remaining arguments for vacatur, *to wit*, that Judge Kehoe "exceeded his authority" and that the Arbitral Awards "violate public policy," are solely a rehash of her barred arbitrability arguments. These arguments also fail for other reasons under the strict standards governing motions to vacate arbitral awards.

For these reasons (and the reasons set forth below), it is respectfully requested that plaintiff's motion be denied in its entirety.

ARGUMENT

I.

PLAINTIFF'S MOTION FAILS AS A MATTER OF LAW

A. Plaintiff's Motion is Time-Barred

By plaintiff's own admission, she was properly served with the Campaign's predicate Demand for Arbitration via FedEx delivery more than a year ago in December 2017. *Plaintiff's moving brief, p. 13.* This method of service was proper as a matter of law because the parties contractually agreed to arbitrate in accordance with the AAA's rules, which expressly permit service by FedEx delivery. *See e.g. Town of Amherst v. Granite State Ins. Co., Inc.*, 129 A.D.3d 1657, 1659, 12 N.Y.S.3d 465, 467 (4th Dept. 2015) (rejecting contention that arbitration demand served via FedEx delivery was jurisdictionally defective for failing to comply with CPLR 7503(c) because the parties previously agreed to be bound by the AAA's Rules permitting such service); *Smith v. Positive Productions*, 419 F.Supp.2d 437, 446 (S.D.N.Y. 2005) (New York law governing

notice did not apply to arbitration where the parties agreed that the AAA's Rules would govern the arbitration); *Matter of New York Merchants Protective Co. v. Mima's Kitchen, Inc.*, 114 A.D.3d 796, 797, 979 N.Y.S.2d 847 (2d Dept. 2014) ("parties to an arbitration agreement may prescribe a method of service different from that set forth in the CPLR"); *attached as Exhibit C to the Affirmation of Lawrence S. Rosen, dated January 10, 2019 (the "Rosen Affirm.") is a true and correct copy of Rule 43 of the AAA's Commercial Arbitration Rules*.[1]

Because plaintiff was properly served with the Campaign's Demand for Arbitration, her sole remedy under the CPLR for challenging the arbitrability of the Campaign's claims was to file a motion within 20 days that sought to stay the Arbitration, which she did not do. *See* CPLR 7503(c) ("application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded"); *Fiveco, Inc. v. Haber*, 11 N.Y.3d 140, 144–45, 863 N.Y.S.2d 391, 394 (2008) (petition to stay arbitration made more than 3 months after service of demand for arbitration was time-barred). Having not availed herself of this procedural vehicle for challenging arbitrability, plaintiff is now barred and otherwise estopped from asserting in her instant motion that the Campaign's claims were never arbitrable in the first place.

Plaintiff's instant contention that she is permitted to challenge arbitrability under CPLR 7511(b)(2)(ii) is erroneous for related reasons. A party properly served with a demand for arbitration is not permitted to challenge the issue of arbitrability on a motion made under CPLR 7511(b)(2) (as this would completely obviate the 20-day deadline to challenge arbitrability under

[1] Notwithstanding that service was proper, plaintiff was also well aware of the Arbitration. She was provided with written notice by the AAA of each and every step taken in the Arbitration; sent letters on her own behalf to the AAA; commenced the federal court action in response to the Arbitration; and made multiple motions in state and federal court directly related to the Arbitration. *Rosen Affirm., Exh. F; Marsillo v. Geniton*, 2004 WL 1207925, * 6 (S.D.N.Y. June 1, 2004) (rejecting assertions of improper notice of arbitration proceeding where petitioner had "actual knowledge" of the arbitration).

CPLR 7503(c)). *See e.g. Lurie v. Sobus*, 289 A.D.2d 578, 579, 735 N.Y.S.2d 187, 188 (2d Dept. 2001) (denying motion to vacate under CPLR 7511(b)(2)(ii) because "appellant was served with a proper notice of intention to arbitrate"); *State Farm v. Motor Vehicle Accident*, 25 A.D.3d 740, 807 N.Y.S.2d 570 (2d Dept. 2006) ("because the petitioner was properly served with a notice of intention to arbitrate, but nonetheless failed to participate in the arbitration, there was no basis upon which to vacate the arbitration award rendered against it [under CPLR 7511(b)(2)]").

For these reasons alone, plaintiff's instant motion must be denied.

B. Plaintiff is Also Collaterally Estopped from Again Challenging the Issue of Arbitrability

In the related federal action, Judge Furman expressly held that any purported challenge by plaintiff regarding the validity and enforceability of the Agreement, including issues of arbitrability, ***are solely reserved for the AAA arbitrator***.[2] *Rosen Affirm., Exh. E.* In doing so, Judge Furman unequivocally ruled that any claims by plaintiff that the Agreement was "void and unenforceable" or that the Campaign's claims in Arbitration were being improperly used to retaliate against her (or were otherwise not arbitrable) ***must*** be brought before Judge Kehoe, the AAA Arbitrator. Nevertheless, plaintiff disregarded Judge Furman's decision and intentionally and knowingly refused to appear in the Arbitration.[3]

Plaintiff is, therefore, collaterally estopped by Judge Furman's decision from re-litigating issues of arbitrability in this state court action, as Judge Furman already directed that any such

[2] Specifically, Judge Furman ruled that "the parties' dispute—including the threshold question of arbitrability itself—is for an arbitrator, not this Court, to decide." *Rosen Affirm., Exh. E, p. 2.* This decision was directly based on United States Supreme Court precedent in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204 (2006). We note that this Court similarly acknowledged, in its August 7, 2018 Decision and Order, that affirmative claims by the Campaign against plaintiff for breaches of the Agreement would fall under the parties' arbitration agreement.

[3] Plaintiff's supposition that Judge Furman must not have been "aware of" the pendency of the Arbitration when he decided the Campaign's motion and compelled plaintiff to arbitrate her claim is demonstrably incorrect. *Plaintiff's moving brief, fn. 4.* The Campaign's Demand for Arbitration was expressly referenced and annexed as an Exhibit by plaintiff herself to plaintiff's federal court complaint. *Rosen Affirm., Exh. D.*

issues must be (and should have been) presented to Judge Kehoe. *See e.g. Hudson v. Merrill Lynch & Co., Inc.*, 138 A.D.3d 511, 515, 31 N.Y.S.3d 3, 7 (1st Dept. 2016) ("[t]he doctrine of collateral estoppel precludes a party from relitigating in a subsequent action an issue clearly raised and decided against that party in a prior action") (*citation omitted*); *Milione v. City University of New York*, 153 A.D.3d 807, 809, 59 N.Y.S.2d 796, 798 (2d Dept. 2017) (plaintiff was collaterally estopped from re-litigating discrimination claims under the NYSHRL and NYCHRL after the Southern District dismissed his discrimination claims under Title VII and declined to exercise supplemental jurisdiction over his state law claims).

There is currently a motion pending before Judge Furman to confirm the Arbitral Awards. In response to the filing of that motion, plaintiff requested that Judge Furman "abstain" immediately from exercising jurisdiction over the Campaign's motion, given the pendency of her instant motion in this Court. Judge Furman denied plaintiff's request, and the motion is returnable on January 25, 2019. *Rosen Affirm., Exh. J–L.* Notably, in plaintiff's request that Judge Furman abstain, plaintiff unwittingly stated that she intends to file ***an arbitration*** that will challenge the validity and enforceability of the Agreement. *Rosen Affirm., Exh. J.* In doing so, plaintiff tacitly concedes that her instant challenges to arbitrability on this motion are, in fact, arbitrable and should have been asserted as defenses before Judge Kehoe in the context of the Arbitration.

C. Plaintiff Fails to Establish the Existence of Any Other Grounds for Vacating the Arbitral Awards

"It is beyond cavil that the scope of judicial review of an arbitration proceeding is ***extremely limited***." *Brown & Williamson Tobacco Corp. v. Chesley*, 7 A.D.3d 368, 371, 777 N.Y.S.2d 82, 86 (1st Dept. 2004) (*emphasis added*). In fact, an arbitral award "will not be vacated unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on [the arbitrator's] power." *Id.*, 7 A.D.3d at 372, 777 N.Y.S.2d at 86

(*citation omitted*); *Greenky v. Aytes*, 138 A.D.3d 460, 30 N.Y.S.3d 35, 36 (1st Dept. 2016) (the party seeking to vacate the arbitration award bears a "heavy burden" of establishing the existence of any ground for vacatur by "clear and convincing evidence").

Moreover, "a court is bound by an arbitrator's factual findings, interpretation of the contract…concerning remedies, and cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one." *Azrielant v. Azrielant*, 301 A.D.3d 269, 275, 752 N.Y.S.2d 19, 24 (1st Dept. 2002), *citing New York State Correctional Officers v. State*, 94 N.Y.2d 321, 326, 704 N.Y.S.2d 910, 913–14 (1999) ("even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice"). Indeed, "[a]n arbitration award will be confirmed if any plausible basis exists for the award." *Graniteville Co. v. First Nat. Trading Co., Inc.*, 179 A.D.2d 467, 469, 578 N.Y.S.2d 183, 185 (1st Dept. 1992).

Here, plaintiff makes the following arguments for vacatur under CPLR 7511(b)(1): (i) the Arbitral Awards violate public policy because the Arbitration's claims against her were "retaliatory," and (ii) Judge Kehoe exceeded his authority by determining that the Agreement was "valid and enforceable." Both of these arguments—which are ***identical*** to the arguments raised by plaintiff in the federal court action—fail as a matter of law.

i. The Awards Do Not Violate Public Policy

Plaintiff's purported public policy argument is solely a rehash of her arbitrability claim, which she is barred from raising because (i) she was properly served with the Demand for Arbitration, and (ii) she is collaterally estopped by Judge Furman's decision (*See* Point I(A) and (B), *supra*). Specifically, plaintiff asserts that the Campaign's affirmative claims that she breached her confidentiality and non-disparagement provisions are not arbitrable (and cannot be enforced) because the claims are being asserted by the Campaign in retaliation for her filing employment

discrimination claims in state court.[4] *Plaintiff's moving brief, p. 10.* However, Judge Furman expressly held—in response to the exact same argument by plaintiff—that any such challenge must be raised before Judge Kehoe. *Rosen Affirm., Exh. E.* She cannot now collaterally attack Judge Furman's decision by raising it again in this forum.

In any event, plaintiff's retaliation argument is academic because Judge Kehoe did not base either of the Arbitral Awards on any statements made by plaintiff in her state court action. *See e.g. Transparent Value, L.L.C. v. Johnson*, 93 A.D.3d 599, 600, 941 N.Y.S.2d 96, 97 (1st Dept. 2012) ("when a court is asked to vacate an arbitral award on public policy grounds, the focus of inquiry is on the result, the award itself") (*emphasis in original*) (*internal quotations and alterations omitted*). To the contrary, he held in the October 19, 2018 Award that plaintiff breached the Agreement by "disclosing, disseminating and publishing confidential information ***in the federal action***, and by making disparaging statements about [the Campaign] and the Agreement ***on the internet on her GoFundMe page and on her Twitter account***." *Rosen Affirm., Exh. G.* Likewise, the December 11, 2018 Award was premised on the damages incurred by the Campaign arising out of plaintiff's confidentiality breaches under the Agreement in the federal action and her non-disparagement breaches on the internet, and again has no bearing on and awards no damages in connection with plaintiff's statements in this Court. *Rosen Affirm., Exh. I.*

For all of these reasons, plaintiff's public policy argument fails as a matter of law.

[4] Plaintiff provides no authority to suggest that her assertion of employment-related claims obviates her confidentiality and non-disparagement obligations under her Agreement, much less that a breach of contract claim is retaliatory *per se* when made against a plaintiff who has asserted employment claims. For one thing, New York courts have held that retaliation statutes "are designed principally to deal with retaliatory conduct that occurs outside the judicial system." *Klein v. Town & Country Fine Jewelry Group, Inc.*, 283 A.D.2d 368, 369, 725 N.Y.S.2d 42, 43 (1st Dept. 2001). Employment discrimination claims are also routinely litigated with confidentiality stipulations. Moreover, parties often have certain claims that are arbitrable (e.g. the Campaign's claims against plaintiff) and certain claims that are not arbitrable proceed in different forums at the same time. *See e.g. Weiss v. Nath*, 97 A.D.3d 661, 949 N.Y.S.2d 81 (2d Dept. 2012) (severing non-arbitrable claims from arbitrable claims and allowing plenary action and arbitration to proceed simultaneously). Regardless, to the extent that plaintiff wanted to raise any issues that the Campaign's claim is not enforceable, she needed to do so before Judge Kehoe in the Arbitration.

ii. Judge Kehoe Did Not Exceed his Authority

As an initial matter, "any limitation on an arbitrator's power must be contained, explicitly or by reference, in the arbitration clause itself." *Brown & Williamson Tobacco Corp. v. Chesley*, 7 A.D.3d 368, 372, 777 N.Y.S.2d 82, 87 (1st Dept. 2004) (*internal quotations omitted*); *SLG 625 Lessee, LLC v. Neiman Marcus Group, Inc.*, 112 A.D.3d 541, 978 N.Y.S.2d 130, 131 (1st Dept. 2013) ("[a]bsent action taken by the arbitrator contrary to a provision in a parties' arbitration agreement…the arbitrator is accorded unfettered discretion in matters submitted to him") (*internal quotations omitted*). Here, the subject arbitration clause contains no such limitation on Judge Kehoe's power nor did he take any action that was contrary to the powers vested in him under the arbitration clause. *See e.g. State v. Phillip Morris Inc.*, 42 A.D.3d 353, 355, 840 N.Y.S.2d 55, 58 (1st Dept. 2007) (arbitrator did not exceed authority where there was no limitation of arbitrator's power in the parties' agreement).

Moreover, Judge Furman previously ruled that ***all challenges to the validity and enforceability of the Agreement were reserved for Judge Kehoe***.[5] *Rosen Affirm., Exh. E.* As such, plaintiff's assertion that Judge Kehoe exceeded his authority by ruling on the validity and enforceability of the Agreement is again barred by collateral estoppel.

As for plaintiff's assertion that Judge Kehoe exceeded his authority by ruling on the validity and enforceability of the Agreement because this was "an issue that no party had raised,"

[5] Plaintiff's assertion that the Arbitral Awards are "a product of corruption, fraud or misconduct" because the Arbitration continued after this Court denied the Campaign's motion to compel arbitration of plaintiff's common law tort claims against the Campaign is meritless. *See e.g. Hausknecht v. Comprehensive Medical Care of New York, P.C.*, 24 A.D.3d 778, 809 N.Y.S.2d 85 (2d Dept. 2005) (rejecting allegations of corruption, fraud, and misconduct where movant failed to demonstrate by clear and convincing evidence that the arbitral award was "the result of improper influence or bias" or "that any impropriety on the part of the arbitrator prejudiced…the integrity of the arbitration process"). There has been no showing by clear and convincing evidence that there was any improper influence or bias much less that Judge Kehoe prejudiced the integrity of the arbitration process. Again, in any event, Judge Furman expressly ruled that Judge Kehoe had the power to determine the arbitrability or enforceability of the Campaign's claims against plaintiff. To the extent plaintiff wanted to assert as a defense to those claims that they were not arbitrable under Your Honor's August 7, 2018 Decision and Order, she was required to raise that defense before Judge Kehoe in the Arbitration.

plaintiff not only ignores that Judge Furman expressly ruled that this determination was reserved for Judge Kehoe, but also that the primary purpose of the Arbitration was for Judge Kehoe to adjudicate the Campaign's ***contract*** claims against plaintiff for breaching the Agreement. It is axiomatic that the very first element to be considered in a breach of contract claim is the determination of whether there was in fact a valid and enforceable agreement between the parties. *See e.g. VisionChina Media Inc. v. Shareholder Representative Services*, 109 A.D.3d 49, 58, 967 N.Y.S.2d 338, 345 (1st Dept. 2013) (the elements of a breach contract claim are (1) the existence of a valid agreement, (2) a breach of the agreement, and (3) damages). As such, plaintiff's assertions only serve to underscore the fact that Judge Kehoe properly considered the elements of the Campaign's contract claim, in accordance with his authority to do so under the Agreement.[6]

CONCLUSION

Based on the foregoing, defendant Donald J. Trump for President, Inc. respectfully requests that the Court deny plaintiff's order to show cause in its entirety and grant defendant all such other relief as the Court may deem just and proper.

Dated: New York, New York
January 10, 2019

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[6] Finally, plaintiff's assertion that Judge Kehoe exceeded his authority by awarding the Campaign damages for plaintiff's breaches of the Agreement in connection with her prosecution of the federal court action is also meritless. As an initial matter, any limitation on an arbitrator's power must be specifically enumerated in the subject arbitration clause, and there is no such limitation in the Agreement. Moreover, plaintiff's breaches in connection with her prosecution of the federal court action arose subsequent to the Campaign serving its Demand for Arbitration, and the Campaign's pleading simply conformed to the evidence it presented in the Arbitration. In any event, to the extent plaintiff wanted to raise this as a defense she needed to do so in the context of the Arbitration, but she did not.