SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JESSICA DENSON Plaintiff, v. DONALD J. TRUMP FOR PRESIDENT, INC. Defendant.	Index No. 101616-17 **REPLY MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE** **Motion Seq. 2**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. SUMMARY

Plaintiff Jessica Denson ("Plaintiff") has moved this Court, via order to show cause entered on December 4, 2018, to vacate a final arbitration award (the "Award") entered by Arbitrator Paul Kehoe (the "Arbitrator"). As Plaintiff demonstrated in her moving papers, the Award should be vacated because the Arbitrator exceeded his authority by continuing the arbitration even after this Court had ruled the subject matter of the arbitration to be non-arbitrable, by ruling on issues not before him, and also because the Award violates public policy.

Plaintiff's motion also requested *vacatur* of the prior partial arbitration award issued by the Arbitrator and for a stay of arbitration. Dkt. 5. As noted in Plaintiff's letter to the Court of December 12, 2018, attached to the Reply Affirmation of David K. Bowles ("Bowles Reply Aff") as Exhibit H and filed with the Court at Docket No. 7, the Arbitrator issued his final award on December 11, 2018 – during this briefing sequence – and therefore Plaintiff's motion to stay the arbitration and vacate the partial award are now moot. The only issue remaining before the Court is the *vacatur* of the final award. A copy of the final award is attached to the Bowles Reply Affirmation as Exhibit I.

Defendant Donald J. Trump for President, Inc. (the "Campaign" or "Defendant") has not meaningfully opposed Plaintiff's points, but instead argues that (1) Plaintiff's motion is time-barred by New York Civil Practice Law and Rules ("CPLR") 7503, and (2) that Plaintiff is collaterally estopped due to a parallel proceeding in the federal courts. Defendant is mistaken on both points.

First, Plaintiff's motion is not time-barred because the time limit under CPLR 7503 applies only to an action to *stay* an arbitration, and has nothing to do with a motion to *vacate* an award. The Campaign obscures the distinction, but the CPLR is clear on this point: the argument regarding CPLR 7503(c) would only have application to a stay, not to *vacatur*. Further, it is

equally clear that the Campaign never complied with statutory requirements to demand the arbitration, and therefore CPLR 7511's broader standard of review applies here – including a review of the arbitrability of the matter.

Second, there is no collateral estoppel from the federal action for three reasons: (a) any decisions by the Arbitrator, even if initially reserved to him, are now properly before this Court for review; (b) the federal court never had subject matter jurisdiction (and this issue is now being litigated in the federal court); and (c) the Campaign does not meet the standards for collateral estoppel.

Finally, since the Campaign has not refuted Plaintiff's points regarding the Arbitrator's exceedance of his authority and the Award's violation of public policy, Plaintiff respectfully moves this Court to vacate the Award by CPLR 7503(c).

II. ARGUMENT

a. Plaintiff is Not Time-Barred

The Campaign's first argument is that Plaintiff's motion is time-barred under CPLR 7503(c). Defendant's Memorandum of Law in Opposition to Plaintiff's Order to Show Cause ("D.Mem.") at 2-4. The Campaign pretends that this provision of the CPLR applies to Plaintiff's entire motion, but it clearly does not. CPLR 7503(c) reads, in pertinent part:

> Such notice or demand [for arbitration] shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An *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.

N.Y. C.P.L.R. 7503 (McKinney) (emphasis added). Thus, by its own text, the 20-day clock only applies to an application to stay an arbitration, not an action to vacate an arbitration.

An action to vacate an arbitration relies on an entirely different provision of the CPLR: Section 7511(b)(2) – as Plaintiff made clear in her moving papers. *See* Plaintiff's Memorandum of Law in Support of Order to Show Cause ("P.Mem.") at 7. CPLR 7511(b)(2) reads "[a]n

application to *vacate* or modify an award may be made by a party *within ninety days after its delivery to him*." N.Y. C.P.L.R. 7511 (McKinney) (emphasis added). Since Plaintiff actually made her application to the Court on November 27, 2018, several days prior to the Arbitrator's December 11, 2018 Award, Plaintiff has obviously met this deadline. It is frankly misleading to the Campaign to not cite the Court to the correct law on this point.[1]

b. Plaintiff Can Challenge Arbitrability Here

The Campaign also argues that "service was proper" and that therefore Plaintiff cannot challenge arbitrability here. D.Mem. at 3-4. In the first place, the Campaign conflates CPLR 7503(c), which relates to a stay of an arbitration, with CPLR 7511, which relates to *vacatur* of an arbitration. CPLR 7503(c) is now moot, as discussed above, but CPLR 7511 is not, and in fact the law here shows that Plaintiff can challenge arbitrability.

CPLR 7511 provides two standards for *vacatur* of an arbitration award. The first requires a showing that an arbitrator has exceeded his authority, corruption, or partiality. CPLR 7511(b)(1). The second, however, applies to "a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate . . ." CPLR 7511(b)(2).

In order to limit Plaintiff to the narrower grounds of review of CPLR 7511(b)(1), the Campaign was required to serve the arbitration demand notice with a "statement that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made . . . ." N.Y. C.P.L.R. 7503 (McKinney). The Court of Appeals has held that failure to provide such notice in accordance with the statue opens an award to broader review. Matter of Blamowski (Munson

[1] It is worth noting that the Campaign would be incorrect even if Plaintiff's application for a stay was not now moot. As discussed in the next section, the Campaign's failure to properly serve the arbitration demand also deprives the petitioner of the protection of the 20-day clock. Matter of Blamowski (Munson Transp., Inc.), 91 N.Y.2d 190, 195, 690 N.E.2d 1254, 1256 (1997).

Transp., Inc.), 91 N.Y.2d 190, 195, 690 N.E.2d 1254, 1256 (1997) (concluding failure to provide proper statutory notice opened a broader range of reasons to vacate arbitration award and denies the protections of the 20-day limit). The Campaign's arbitration demand is barren of any such language, and it was not properly served according to the statute. *See* Affirmation of Lawrence S. Rosen ("Rosen Aff.") at Ex. B (arbitration demand). Blamowski is similar to the matter here, as the plaintiff there attempted to enforce an arbitration award against a defendant where they had failed to properly serve the arbitration demand with proper notice, and where the defendant had refused to participate in the arbitration. Blamowski, 91 N.Y.2d at 195, 690 N.E.2d at 1256. The court held that the notice was insufficient, and that plaintiff was therefore entitled to the broader standard of review of CPLR 7511(b)(2). Id. The court also rejected plaintiff's arguments that the defendant had participated in the proceeding by "transmittal of approximately six letters to the AAA." Id. at 196. The court vacated the award.

Accordingly, the broader standard of CPLR 7511(b)(2) applies here. One of the grounds for *vacatur*, therefore, is whether "a valid agreement to arbitrate was not made." CPLR 7511(b)(2)(ii). Thus the issue of arbitrability is squarely before this Court. As the court did in Blamowski, this Court should grant Plaintiff's motion and vacate the Award.

c. Plaintiff's Motion is Not Collaterally Estopped

The Campaign also argues that Plaintiff is collaterally estopped from "again challenging the issue of arbitrability." D.Mem. at 4-5. This argument fails on several levels. First, the Court is statutorily entitled to review the Award. Second, the federal court lacks subject matter jurisdiction here. Third and finally, the elements of collateral estoppel are not met here.

1. This Court is Entitled to Review the Arbitrator's Decision

First and most obviously, the Court can review the award here. The federal court's decision was on a motion to compel arbitration. *See* Rosen Aff., Ex. E. The court held that the

"threshold question of arbitrability" is for the arbitrator to decide. Id. at 2. The court also noted that this "conclusion is not inconsistent with the state court's decision denying the Campaign's motion to compel arbitration of Denson's state-law claims . . . ." Id. at 3. However, the federal court said nothing at all regarding later judicial review of an award after it was made. *See generally* id.

Both federal and state law expressly allow for *vacatur* of an award in arbitration. *See generally* Federal Arbitration Act ("FAA"), Section 10 (9 U.S.C. §10) and CPLR 7511(b)(2). Accordingly, the fact that the federal court initially determined that the arbitrator must first rule on the issue of arbitrability says nothing at all about the ability of this court (or the federal court) to review the arbitrator's decision on a motion to vacate.

2. The Federal Court Lacks Subject Matter Jurisdiction

Second, while this Court's jurisdiction to review the arbitration award is unassailable, the federal court lacks subject matter jurisdiction to do so. This issue has been briefed to the federal court, and the parties are awaiting that court's decision. Bowles Reply Aff., Ex. J at 10-12 (Plaintiff's opposition brief to motion to confirm in the federal court).

In brief summary of the issue, the Second Circuit has determined that the FAA does not independently confer jurisdiction on the federal courts:

> [W]e have consistently held that Congress did not intend the [FAA] as a grant of jurisdiction. There must be *an independent basis of jurisdiction* before a district court may entertain petitions under the Act.

Harry Hoffman Printing, Inc. v. Graphic Commc'ns Int'l Union, Local 261, 912 F.2d 608, 611 (2d Cir. 1990) (denying jurisdiction under FAA but sustaining jurisdiction under another statute not relevant here) (emphasis added). As Plaintiff pointed out, there is no independent basis for jurisdiction here because the amount in controversy is indisputably less than $75,000. Bowles

Reply Aff., Ex. J at 10-12 (amount of the Award is $49,507.64). Accordingly, the federal court lacks jurisdiction to decide this controversy, and this Court should do so.

3. There Can Be No Collateral Estoppel Under These Circumstances

Finally, there can be no collateral estoppel in this matter because the elements are not met here. The Court of Appeals has held that for the doctrine to apply:

> First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination.

Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455, 482 N.E.2d 63, 67 (1985). Here, as thoroughly described in Plaintiff's moving papers, Plaintiff never had a full and fair opportunity to contest the prior determination. P.Mem. at 5-7. Because of the events described therein, Plaintiff relied fully upon this Court's decision that her sex discrimination case was non-arbitrable. Id. As also pointed out in the moving papers, the arbitration was clearly brought in retaliation to the sex discrimination claim, because it says so in the arbitration demand: "Respondent . . . breached her obligations by publishing certain confidential information and disparaging statements in connection with a lawsuit she filed against claimant in New York Supreme Court." Affirmation of David K. Bowles in Support of Order to Show Cause ("Bowles Aff.") at Ex. 2, second page. Accordingly, Plaintiff never participated in the arbitration, and collateral estoppel cannot apply.

d. Plaintiff Has Demonstrated Cause for Vacatur

Once the Campaign's procedural arguments are disposed of, the Campaign makes no serious argument that the Court should not vacate the Award on the grounds of the arbitrator's exceeding his authority and issuing a decision that is violative of public policy.

1. The Arbitrator Exceeded His Authority

Plaintiff made the point in her moving brief that the Arbitrator exceeded his authority by, *inter alia*, ruling on the validity of the NDA when it was not properly before him, and by

awarding fees from another action, also not before him. P.Mem. at 8-10. The Campaign responds by fabricating a ruling from the federal court that does not exist. The Campaign's memorandum of law says that "Judge Furman previously ruled that all challenges to the validity and enforceability of the Agreement were reserved for Judge Kehoe." D.Mem. at 8, citing to Rosen Aff., Ex. E. This is made up from whole cloth: Judge Furman made no such decision. The actual quote from the federal court's decision is "the parties' dispute – including the threshold question of arbitrability itself – is for *an arbitrator*, not this Court, to decide." Rosen Aff., Ex. E at 2 (emphasis added). The decision certainly does not mention Judge Kehoe. The Campaign continues to conflate the issue of their arbitration, which is in retaliation to Plaintiff's sex discrimination claim, with Plaintiff's arbitration to invalidate the NDA and its arbitration clause, which has not yet been brought. *See* P.Mem. at 9 n. 4, describing the continuing attempts by the Campaign to confuse the issue.

In short, the Arbitrator clearly went out of his way to rule on issues not before him, and particularly upon the validity of the NDA. P.Mem. at 8-10. The issue was never briefed or fairly litigated.

2. The Award Violates Public Policy

Finally, as Plaintiff demonstrated in her moving papers, the Award violates public policy. P.Mem. at 10-12. This is so because it clearly is retaliatory to Plaintiff's sex discrimination claims in the current lawsuit, and thus it is in violation of numerous laws for public protection. Id. As briefed therein, both of these laws clearly forbid retaliatory action against plaintiffs bringing sex discrimination lawsuits. Id. at 11 n. 5. This is what, *in their own words*, the Campaign has done. Bowles Aff. at Ex. 2, second page. As briefed in the Campaign's moving papers, so egregious a violation of public policy cannot support an arbitration award.

In this instance the public policy at issue is set forth in the legion of federal, state and local statutes that prohibit retaliation against employees for bringing or participating in proceedings to oppose unlawful workplace conduct. In the case of sex discrimination and harassment as Plaintiff alleges in the this action, laws on the federal, state and local level prohibit the Campaign from retaliating against Plaintiff for asserting such claims in court or before an administrative agency, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a); the New York State Human Rights Law, Executive Law §296(7); and NYCHRL, NYC Admin. Code §8-107(7).

In opposition, the Campaign argues, in effect, that the Arbitrator cured the problem by ignoring the Campaign's demands for damages relating to this case. D.Mem. at 6-7. They ignore the fact that the Arbitration was clearly commenced for this purpose. Rosen Aff., Ex. B, second page. They also ignore the fact that the Campaign demanded more than $44,000 from Plaintiff in retaliation for bringing the suit – the Award makes that clear – even though the Arbitrator ultimately denied that request. Rosen Aff., Ex. G at 4. They ignore the fact that the GoFundMe and Twitter accounts were attempts by the Plaintiff to protect herself from that retaliation. For example, Plaintiff's GoFundMe page clearly states that "[t]he Trump campaign is now retaliating again, wielding an irrelevant NDA to intimidate me . . . . They want to force my case into <u>secret arbitration</u> . . ." Bowles Reply Aff., Ex. K (emphasis in original).

They ignore the fact that the federal action – for which they did obtain damages in the award – was commenced in an attempt to invalidate the NDA and stop the retaliation. Rosen Aff., Ex. D at second page. The retaliatory effects of using the NDA as a tool to punish Plaintiff for bringing this lawsuit are intertwined throughout this lawsuit, the Arbitration, and the federal proceeding. When an initial action – filing the arbitration demand – is against public policy, so should be the ensuing effects of doing so.

Further, since the Arbitration was uncontested, there was no one to point out that filing a lawsuit was not, in this case, a violation of the arbitration clause in the NDA. The clause is both unilateral and discretionary, but it does not forbid Plaintiff from bringing any lawsuit at all. The clause states "any dispute arising or relating to this agreement *may*, *at the sole discretion of each Trump Person*, be submitted to binding arbitration . . . ." Rosen Aff., Ex. A at Section 8(b) (emphasis added). The wording of the clause is such that Plaintiff is within her rights to bring a lawsuit, which the Campaign may, at their discretion, remove to arbitration. Apparently the Arbitrator never considered this crucial point.

In any case, the public policy implications of this issue are immense. There is no doubt that there would have been no Arbitration and no Award if Plaintiff had not brought this lawsuit – it is therefore retaliatory. Retaliation for bringing a sex discrimination claim is flatly illegal, and therefore against public policy. Because arbitration is confidential, it is impossible to know how many Campaign workers might have been similarly discriminated against, and who might be afraid to bring a lawsuit due to the *in terrorum* effect of the Campaign's NDAs. Indeed, it is impossible to know how many Campaign workers have already been retaliated against by the Campaign. Ultimately the Campaign fails to persuasively respond to Plaintiff's public policy arguments, and this Award should be vacated for this reason as well.

III. CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court vacate the Award.

Dated: New York, New York
January 24, 2019

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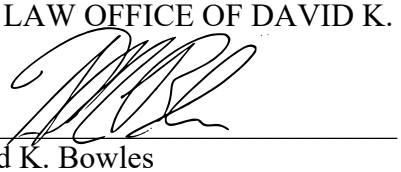

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