SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN **PART** 49M

Justice

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MARC BERLEY,

Plaintiff,

- v -

WALTER & SAMUELS, INCORPORATED, DAVID I. BERLEY, PETER WEISS

Defendants.

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INDEX NO. 653205/2023

MOTION DATE 10/27/2023, 11/14/2023

MOTION SEQ. NO. (MS) 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (MS 001) 11, 12, 13, 14, 30, 36 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (MS 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 37, 38 were read on this motion to/for COMPEL ARBITRATION.

Plaintiff Marc Berley was terminated from his position as president of defendant Walter & Samuels, Inc. (W&S), a full service real estate firm. Plaintiff brings this action[1] alleging retaliation under § 740 of the New York Labor Law against defendants seeking compensation as provided in the parties' agreement. Defendant David I. Berley (DIB), who is plaintiff's father, as well as the chairman and majority shareholder of W&S, moves, together with W&S, to compel arbitration pursuant to CPLR 7503(a) and stay the instant action. Co-defendant Peter Weiss is the successor to plaintiff as president of W&S and a minority shareholder of W&S, who moves for a motion to dismiss pursuant to CPLR 3211(a)(7).

Background

Defendant David I. Berley is the chairman of W&S (together, the W&S defendants) as well as its majority shareholder. DIB is also plaintiff's father. According to the Amended Complaint,[2] DIB began to experience noticeable cognitive decline and that, coupled with mounting financial pressure, caused DIB to make

[1] Plaintiff alleged 4 causes of action but has since withdrawn the second, third, and fourth causes of action leaving only the retaliation claim (NYSCEF ## 24, 29 39, 40, 41).

[2] Unless otherwise indicated, the facts in the Background section is obtained from the Amended Complaint (NYSCEF # 6).

poor financial decisions (Amended Complaint ¶ 45). Notably, DIB allegedly spent approximately $ 1.2 million of company money on his personal expenses (*id.* ¶ 11).

Plaintiff alleges that he was first apprised of his father's spending by a longtime CPA associated with W&S and W&S's CFO, prompting plaintiff to look at the company's general ledgers for the first time (*id.*). After reviewing the ledgers, the plaintiff allegedly sent an email on June 16, 2023 to DIB, Peter Weiss, and all of the company's shareholders to express his belief that W&S has engaged, and is continuing to engage in, illegal activities (*id.* ¶ 12).

Plaintiff alleges that he received no response from his email, but on June 27, 2023, he received a termination "for cause" letter without any details as to what the cause was (*id.* ¶¶ 13-14). Plaintiff alleges that the term "cause" is defined in a written Consulting Agreement (Agreement) and First Amendment to the Consultation Agreement (Amendment) (*id.* ¶14). Plaintiff alleges that his wrongful termination on June 27 arose from his June 16 disclosure email, which is a protected activity, and his termination was retaliation for that disclosure (*id.* ¶¶ 15-16). Plaintiff adds that subsequent to his termination, DIB and Weiss continued to retaliate against him (*id.* ¶ 19). Plaintiff therefore alleges that he is entitled to the Additional Payment under the Agreement and that the defendants are liable for violating § 740 of the New York Labor Law (NYSCEF # 31 - Pltf's MOL in Opp ¶ 2).

The Consulting Agreement was entered into by DIB and plaintiff, as a consultant, on November 24, 2014 (NYSCEF # 17 – the Agreement). On April 28, 2016, plaintiff and the W&S defendants amended the Agreement by signing and executing Amendment No. 1 to the Consulting Agreement (NYSCEF # 17 – the Amendment).

Under the terms of the Agreement and the Amendment, plaintiff's role as president of W&S would only terminate under a certain set of conditions; the two relevant conditions here are as follows: if " (ii) [W&S] elects to terminate [the] Agreement without 'Cause' (as such term is defined in Section 5[c]) and notifies [plaintiff] in writing of such election ..." or " (iv) [W&S] elects to terminate [the] Agreement with Cause and notifies [plaintiff] in writing of such election" (the Amendment at sections 5[ii],[iv]).

Pursuant to Section 5(b) of the Amendment, if W&S terminated plaintiff with Cause (a term expressly defined in Section 5[c] of the Agreement), he would be entitled to a cash payment equal to his 15 % ownership in W&S so that the shares can be returned to W&S, amounting to $825,000. Under the same provision, if W&S were terminated without Cause, he would be entitled to the $825,000 plus an additional severance payment of $1,000,000 (Additional Payment) (*id.*). Plaintiff contends that he has not only been terminated *without Cause* and is therefore entitled to the Additional Payment but that he also has been retaliated against by

the defendants. (NYSCEF # 5 – Amended Complaint ¶¶ 14, 19). Defendants, on the other hand, contend that plaintiff is not entitled to the Additional Payment because he has been terminated *with Cause* (NYSCEF # 8 ¶ 19).

The Agreement also contains an arbitration clause as follows: "[a]ny controversy or claim arising out of or relating to this Agreement . . . shall be settled by arbitration in New York . . . in accordance with the Commercial Arbitration Rules of the American Arbitration Association . . . ." (Agreement at 5, Section 11 [c]). Thus, the W&S defendants move to compel arbitration.

DISCUSSION

The W&S defendants' motion to compel arbitration will be addressed first followed by defendant Weiss' motion to dismiss.

MS002 – Motion to Compel Arbitration

The W&S defendants argue that, in the Agreement and Amendment, the plaintiff had agreed to arbitrate "[a]ny controversy or claim arising out of or relating to [the Agreement] or the breach thereof"; therefore, the alleged violation of § 740 of the New York Labor Law must be sent to arbitration. The W&S defendants add that because the language in Section 11(c) of the Agreement is broad, mandatory arbitration is appropriate for that cause of action (NYSCEF # 29 · W&S defts' MOL at 3). The W&S defendants also argue that because Rule 7 of the AAA Commercial Rules mandates that gateway issues such as an arbitrator's jurisdiction and the arbitrability of claims under arbitration agreements are first given to arbitrators to determine, the court must therefore compel arbitration of the gateway issue of whether plaintiff's New York Labor Law § 740 claim must be arbitrated on the merits.

Plaintiff, on the other hand, contends that the arbitration provision in Section 11(c)—*i.e.*, that "[a]ny controversy or claim arising out of or relating to [the Agreement] or breach thereof shall be settled by arbitration"—is a narrowly-worded or "unique" provision since its intention is to only to arbitrate the issues in the Agreement, not all issues whatever related to plaintiff's employment (NYSCEF # 31 – pltf's MOL ¶ 1). Plaintiff notably contends that statutory claims are not to be encompassed in the arbitration provision; instead, only claims related to, or arising out of, the payments that are due to plaintiff by reason of his termination are to be arbitrated. Plaintiff contends that only questions of whether there was "Cause," as defined in the Agreement, must be arbitrated since the presence of Cause ultimately dictates the amount of money that is owed to plaintiff.

Here, there is no dispute as to the validity of the Agreement or of Section 11(c) therein. The controversy here goes primarily to the interpretation of Section 11(c): the W&S defendants argue that the language is broad and captures any and all claims, whereas the plaintiff argues that it is narrow and incapable of capturing statutory claims, such as plaintiff's claim under § 740 of the New York Labor Law.

New York courts have defined language that is similar to or the same as that found in the arbitration provision of the Agreement as "broad" (*Faberge Int'l Inc. v Di Pino*, 109 AD2d 235, 238 [1st Dept 1985] ("[t]he employment agreement contains a broad arbitration clause stating in relevant part: 'Controversies of any kind relating to this agreement shall be settled by arbitration...'" [*id.*]). Additionally, New York courts have addressed the contention by the plaintiff that statutory claims are not to be included in such broad arbitration provisions as the one found in Section 11(c) of the Agreement. "If a statutory claim is . . . covered by an arbitration agreement, it is suitable for arbitration 'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue'" (*Fletcher v Kidder, Peabody & Co.*, 184 AD2d 359, 361 [1st Dept 1992] aff'd 81 NY2d 623, 619 [1993]). Moreover, "the burden is on the party seeking to avoid arbitration of a statutory claim to show that Congress specifically intended to preclude waivers of the right to judicial remedy for such claims."

Therefore, unless it has been agreed upon legislatively that violations of § 740 of the New York Labor Law are to be excluded from arbitration agreements and plaintiff can demonstrate that the legislature has intended to do so, violations of § 740 can be encompassed by the broad language of the arbitration provision under the Agreement. Lastly, even if such violations were *arguendo* excluded from broad arbitration provisions, plaintiff still has not satisfied his burden of demonstrating that there is any such legislative intent "to preclude a waiver of judicial remedies for the statutory rights at issue" (*id.*).

The W&S defendants' motion to compel arbitration is granted.

MS001 – Motion to Dismiss

The second motion before the court is that of defendant Peter Weiss, moving to dismiss plaintiff's claims pursuant to CPLR 3211(a)(7).

In view of W&S defendants' motion to compel arbitration (MS002) having been granted, the court must first look to whether defendant Weiss' motion to dismiss has been affected by the court's decision to compel arbitration. Thus, under the facts of this case which closely tie defendant Weiss, as successor president of W&S to the W&S defendants, the better course is to stay the proceedings (*see Huntsman Intl., LLC v Albemarle Corp.*, 163 AD3d 420, 421 [1st Dept 2018]).

Here, Weiss is a non-signatory to the Agreement; however, as the successor of plaintiff for the president position W&S and a shareholder of W&S, Weiss is closely related to the signatories. Moreover, Weiss is "alleged to have engaged in substantially the same improper conduct" in the Amended Complaint. Plaintiff makes it clear that Weiss's alleged improper conduct was performed in tandem with DIB, a signatory to the Agreement. Repeatedly throughout the Amended Complaint, plaintiff uses DIB and Weiss as compound subjects in his allegations, making a great deal of their conduct inseparable and the same. For instance, "DIB and Weiss continued to retaliate against Berley after DIB and W&S illegally terminated his employment"; "Weiss and DIB refused to return Berley's personal computer..."; and "Weiss and DIB refused to restore Berley's Outlook contacts" (NYSCEF # 6 – Amended Complaint ¶¶ 40-41). Given this connection, the motion to dismiss is stayed pending arbitration.

Conclusion

For the aforementioned reasons, it is hereby

ORDERED that the motion to compel arbitration and stay this action (MS002) is granted; and it is further

ORDERED that plaintiff Marc Berley shall arbitrate its claims against defendants in accordance with Section 11(c) of the Agreement; and it is further

ORDERED that all proceedings in this action are hereby stayed; and it is further

ORDERED that either party may make an application by order to show cause or vacate or modify this stay upon the final determination of the arbitration; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this decision, along with notice of entry, on the remaining defendants within ten days of this filing.

07/03/2024
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

This constitutes the Decision and Order of the court.