SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EUGENE J. LAKA, Plaintiff, -against- AFLAC NEW YORK and KENNETH MEIER, Defendants.	:	Index No. 651809/2018 Motion Sequence No. 004 Hon. Justice Ostrager

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION PURSUANT TO CPLR 2221(d) FOR LEAVE TO REARGUE THE COURT'S ORDER OF JULY 27, 2018 COMPELLING ARBITRATION

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PRELIMINARY STATEMENT

Plaintiff respectfully move this Court to reconsider its order made on July 27, 2018 (the "Order") compelling arbitration.

In the Order, the Court held that Aflac could compel arbitration pursuant to its Arbitration Agreement with Plaintiff "on the express condition that Aflac pay all arbitration costs for both parties." ECF No.47.

The Arbitration Agreement itself provides that disputes "shall be resolved by a panel of three arbitrators," and that each party "shall pay all expenses and fees of its selected Party Arbitrator." Accordingly, the Court judicially reformed the Arbitration Agreement by severing its unenforceable fee allocation provision, replacing it with a different, judicially created provision, and upholding the Agreement as reformed.

Plaintiff respectfully submits that, in enforcing the reformed Arbitration Agreement, the Court might have "overlooked or misapprehended," within the meaning of CPLR 2221(d), that (i) the Agreement has remained procedurally and substantively unconscionable following the reformation because of its other unconscionable features pervading the Agreement; and (ii) the

waiver of the fee allocation provision rests on a very uncertain foundation. In light of clear New York authority on both counts, Plaintiff urges the Court to reconsider its ruling of July 27, 2018 by taking it to its logical conclusion and invalidating the Agreement in its entirety as an integrated scheme to contravene public policy.

ARGUMENT

"[T]he presumption of arbitrability 'does not apply to disputes concerning whether an agreement to arbitrate has been made.'" Wework Cos. v. Zoumer, No. 16-cv-457, 2016 WL 1337280 (S.D.N.Y. Apr. 5, 2016)(internal citations omitted). Here, the Arbitration Agreement, even after judicial reformation of its fee allocation provision, remained "unconscionable, and . . . therefore unenforceable. As a result, there was no agreement to arbitrate." Brennan v. Bally Total Fitness, 198 F. Supp. 2d 377, 384 (S.D.N.Y. 2002).

1. The reformed Agreement has remained unconscionable.

Following the July 27, 2018 judicial reformation, the Arbitration Agreement has remained severely one-sided in many substantive dimensions favoring Aflac. These pervasive one-sided features of the Arbitration Agreement include:

- a carve-out of all material claims by Aflac against the associate from the scope of the arbitration agreement (ECF No. 42, ¶ 10.1);

- contractual language making clear that Appellee is not a "Complaining Party" initiating arbitration under the Agreement (id. ¶ 10.2);

- a one-sided obligation of Appellants to arbitrate all disputes not only with Aflac but also with Aflac's numerous affiliates regardless of whether Aflac itself is a party (id.);

- a one-sided limitation on Appellee's and its affiliates' liability, leaving Appellants' liability unlimited (id. at ¶ 10.7); and

- a strict confidentiality provision favoring Appellee as a repeat arbitration player (id. at ¶ 10.2).

In Brennan v. Bally Total Fitness, 198 F. Supp. 2d 377, 384 (S.D.N.Y. 2002), the Court held that "[t]he EDRP is ***substantively unconscionable because its terms unreasonably favor*** Bally." So too is the case here, where Plaintiff alleges that the Agreement unreasonably favors Aflac in many substantive dimensions.

For procedural unconscionability, Plaintiff alleged in the Complaint and in his affidavit that high pressure tactics and/or deceptive conduct used by Aflac, the stronger bargaining party, left Plaintiff, the weaker party, with no meaningful choice but to accept Aflac's Arbitration Agreement without any reasonable opportunity to review, understand, or negotiate its onerous terms. See Sablosky v. Gordon Co., 73 N.Y.2d 133, 137 (N.Y. 1989)("Such claims [of procedural unconscionability] are judged by whether the party seeking to enforce the contract has used

high pressure tactics or deceptive language in the contract and whether there is inequality of bargaining power between the parties.").

This Court stated in the Order that the Agreement could only be enforced "on the express condition that Aflac pay all arbitration costs for both parties" –- necessarily (albeit implicitly) finding that the Agreement's own fee-allocation provision requiring Plaintiff to pay for an arbitrator was unenforceable as written.

The Court, however, overlooked that this unenforceable fee allocation provision coexists with other unconscionable features of the Arbitration Agreement and ought to be considered in light of "all the facts and circumstances of a particular case," In re Estate of Friedman, 64 A.D.2d 70, 407 N.Y.S.2d 999, 1008 (2d Dep't 1978), judged on a "sliding scale," Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 391 (E.D.N.Y. 2015), with "no set weight . . . to be given any one factor." State v. Wolowitz, 96 A.D.2d 47, 68 (2d Dep't 1983). *See Brennan v. Bally Total Fitness ("Brennan II")*, 198 F. Supp. 2d 377, 384 (S.D.N.Y. 2002) ("Judging the contract in light of 'all the facts and circumstances of [this] particular case' as I must, Friedman, 407 N.Y.S.2d at 1008, I conclude that the agreement to arbitrate was unconscionable, and is therefore unenforceable. As a result, there was no agreement to arbitrate.").

Like in Brennan, Plaintiff here was similarly rushed into signing the Agreement by a stronger party and had no meaningful opportunity to review, understand or negotiate its many substantively unconscionable provisions, which saddle him with prohibitive arbitration costs, limit the types of claims he can bring, and leave him at a severe informational disadvantage (which is not merely an inconvenience but a major concern and a significant handicap in any adversarial process).

All these "facts and circumstances" considered, the Arbitration Agreement represents an "integrated scheme to contravene public policy" by denying Plaintiff and other sales associates an opportunity to "effectively vindicate" their federal statutory rights and by shielding Aflac's fraudulent practices from judicial and public scrutiny. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (mandatory arbitration is enforceable "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum").

In sum, the Court should reconsider its Order because the unconscionable features pervade the Arbitration Agreement, rendering it unenforceable in its entirety and not subject to judicial reformation. See E. Allan Farnsworth, Farnsworth on Contracts § 5.8 at 70 (1990) (severance is inappropriate when

the entire provision represents an "integrated scheme to contravene public policy").

2. The waiver is highly problematic.

Aside from and in addition to the above, the Court's acceptance of Aflac's belated waiver of the fee allocation provision rests on a highly uncertain foundation, for the following reasons.

First, the post-factum waiver option is difficult to reconcile with the general rule that a contract provision is unconscionable where it is "both procedurally and substantively unconscionable ***when made***." Gillman v. Chase Manhattan Bank, 73 N.Y.2d 1, 10 (1988) (emphasis added throughout). Indeed, Defendants themselves cite Gillman in arguing that ***"[t]he relevant time for assessing procedural unconscionability of a contract is when the agreement is entered into by the party challenging its enforceability, not thereafter***." Reply Brief, ECF No. 24 at p. 10. The Arbitration Agreement as written contained the unenforceable fee allocation provision along with the other unconscionable provisions, making the Agreement as a whole unenforceable "when made."

Second, in Ragone v. Atlantic Video, 595 F.3d 115, 125 (2d Cir. 2010), defendants waived arbitration agreements' statute of limitations and fee-shifting provisions, and the Second Circuit stated that "we can enforce an agreement that modifies a

provision that otherwise might be unconscionable." The Court, however, sounded a "***Note of Caution***," stating that "we do so with something ***less than robust enthusiasm***" and laying out its concerns at some length, which concerns apply *a fortiori* to this case.

The Ragone Court first cited Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 637 (1985), for the proposition that "***if certain terms of an arbitration agreement served to act 'as a perspective waiver of a party's right to pursue statutory remedies . . ., we would have little hesitation in condemning the agreement as against public policy.***" Ragone, 595 F.3d at 125. So is the case here, where such terms include the prohibitive fee allocation scheme as well as the "limitation of liability" provision (¶ 10.7) severely limiting the scope of claims that the sales associates may bring against Aflac and its affiliates.

The Second Circuit in Ragone further noted that "[h]ad the defendants attempted to enforce the arbitration agreement as originally written it is not clear that we would hold in their favor" because in that case "it is at least possible that Ragone would be able to demonstrate that these provisions were incompatible with her ability to pursue her Title VII claims in arbitration, and therefore void under the FAA." Id.

This is also exactly the case here, where Plaintiff was deterred from pursuing his federal statutory claims for discrimination and retaliation by the Arbitration Agreement which Aflac sought to enforce "as is" with its prohibitive fee allocation scheme and without any waivers since this dispute commenced in 2014 and until after the applicable statutes of limitations had expired.

Third, the Ragone Court also took note of plaintiff's argument that the waiver option "'create[s] highly undesirable incentives to employers' because it 'teaches employers to create as oppressive and one-sided arbitration agreements as possible (with the hopes of chilling employment discrimination actions) while maintaining the expectation that [they] can still enforce arbitration by simply stating 'Never Mind' to all the unenforceable provisions that never should have been included in the first place.'" Ragone, 595 F.3d at 126.

Here, Aflac appears to have learned that "highly undesirable" lesson all too well, and its Arbitration Agreement, brimming as it is with unconscionable features, has chilled, continues to chill, and will chill countless former, current and future sales associates of Aflac and deter them from pursuing their federal statutory claims –- and to the very few persistent ones, like Plaintiff here, Aflac would simply say "Never Mind" at the end, as a last resort to save its Arbitration Agreement,

and having already extinguished their federal statutory claims. Plaintiff believe that the Ragone Court would have invalidated Aflac's Arbitration Agreement in these circumstances –- and the Second Circuit will have a chance to do so in the pending appeal in American Family Life Assur. Co. of New York v. Baker, No. 18-1960.

But Plaintiff should not be required to wait for the Second Circuit to decide this issue in a parallel case, and respectfully asks this Court to reconsider its July 27, 2018 Order and to invalidate Aflac's Arbitration Agreement in this Action, based on Plaintiff's Complaint, and for the reasons set out above.

Respectfully Submitted,

Dated: August 21, 2018

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