UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

ANTHONY KOZUR	:	
	:	
-V-	:	
	:	1:18-cv-08750-JHR-JS
F/V ATLANTIC BOUNTY, LLC., et al	:	
	:	**MOTION DATE: AUGUST 20, 2018**

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the Affidavit of Sam Martin, dated July 17, 2018, Defendants F/V Atlantic Bounty, LLC and Sea Harvest, Inc.'s Brief in Support of Motion to Dismiss or Stay Plaintiff's Action and Compel Arbitration will move this Court before Judge Joseph H. Rodriguez at the US Courthouse in Camden, New Jersey located at Mitchell H. Cohen Building, 4th and Cooper Streets, Camden, New Jersey 08101 on August 20, 2018

PLEASE TAKE FURTHER NOTICE that any opposing papers and answering brief shall be served as directed by the Court.

REEVES McEWING, LLP

/s/ Brian McEwing, Esquire
681 Town Bank Road
Cape May, New Jersey 08204
Tele: #609-846-4717
Attorney for Defendants
mcewing@lawofsea.com

Date: July 19, 2018

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CITATIONS

STATUTES

BRIEF OF DEFENDANTS F/V ATLANTIC BOUNTY LLC AND SEA HARVEST, INC. IN SUPPORT OF MOTION TO DISMISS OR STAY PLAINTIFF'S ACTION AND COMPEL ARBITRATION

Defendants, F/V Atlantic Bounty LLC, and Sea Harvest, Inc., by and through their attorneys, Reeves McEwing LLP, hereby submit their brief in support of their Motion to Dismiss or Stay Plaintiff's Action and Compel Arbitration pursuant to the written employment contract governing his employment on the vessel.

I. BACKGROUND

Plaintiff was allegedly injured while working as a deckhand on the F/V ATLANTIC BOUNTY ("the Vessel"), a commercial fishing vessel owned by F/V Atlantic Bounty LLC, and operated by Sea Harvest, Inc. Plaintiff's Complaint alleges causes of action under the Jones Act, as well as the general maritime law of unseaworthiness and maintenance and cure.

Plaintiff's employment on the Vessel was governed by his employment contract. *See* Exhibit A, Crew Terms of Employment". The Agreement provides:

> 11. Arbitration: I understand and agree that any dispute, claim or controversy arising out of my work as a crewmember, including but not limited to statutory Jones Act claims, negligence, unseaworthiness, maintenance and cure, and wage claims, and whether such claim or controversary be brought against the vessel, vessel owner(s) or vessel operator/employer, or any combination of them; or disputes relating to this Agreement, or the breach, termination, enforcement, interpretation or validity, thereof, including the determination of the scope or applicability of this arbitration clause, shall be determined by one arbitrator sitting in Philadelphia, Pennsylvania.
>
> The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. If this agreement to arbitrate is determined to be exempt from enforcement under the Federal Arbitration Act, the laws of the State of New York shall be applied in determining the validity and enforceability of this agreement.
>
> ARBITRATION SHALL BE MY EXCLUSIVE REMEDY AND I UNDERSTAND THAT I GIVE UP MY RIGHT TO SUE. I FURTHER UNDERSTAND AND AGREE THAT I GIVE UP MY RIGHT TO SELECT THE VENUE FOR ANY CLAIM OR CONTROVERSY AND THAT I GIVE UP MY RIGHT TO TRIAL BY JUDGE OR JURY FOR ANY AND ALL CLAIMS, INCLUDING BUT NOT LIMITED TO STATUTORY JONES ACT, NEGLIGENCE, MAINTENANCE AND CURE, UNSEAWORTHINESS, AND WAGES.

> The fee for arbitration, except the cost of any dispute concerning the enforceability of this Agreement or appeal of the arbitrator's decision, shall be borne by the Vessel's owner or Operator/employer as they may amongst themselves decide. Each party shall be responsible for their own attorney fees and costs and lay and expert witness fees and costs, unless contrary to law. Judgment on the Arbitration Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction; however, each party shall bear its own costs in pursuing such remedies.
>
> I have read, understand and agree to the terms of the above Agreement. By signing below, I acknowledge that I have been given time to review this Agreement, that I have read (or otherwise understand) and agree to its terms, and that I make this Agreement freely and voluntarily.

Plaintiff's Complaint arises from an injury that allegedly occurred on August 28, 2017. Plaintiff's employment on the Vessel was governed by the foregoing agreement. This agreement contains a "binding arbitration instead of litigation" clause covering the alleged injury, therefore this action should be dismissed or stayed pending arbitration.

II. LEGAL ARGUMENT

A. Arbitration Agreements in Seaman's Employment Contracts are Generally Enforceable

Prior to the allegedly injury, plaintiff signed the Crew Terms of Employment ("the Agreement"), in which he agreed to arbitrate all claims, including any Jones Act, negligence, unseaworthiness claims, as well as claims for maintenance and cure. *Id.* It is undisputed that Plaintiff is a seaman. (Complaint at ¶ 1). An employee is regarded as a seaman if he "performs service which is rendered primarily as an aid in the operation of a vessel as a means of transportation, provided he performs no substantial amount of work of a different character. *Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 395 (5th Cir. 2003). *See also, Garza Nunez v. Weeks Marine, Inc.*, 2007 WL 496855 at *2 (E.D. La. Feb. 13, 2007) (holding that the term *seaman* has been found to have the same meaning for purposes of both the FAA and the Jones Act).

Employment contracts concerning seamen and other transportation workers are exempt from the Federal Arbitration Act and are governed by state law. *In re Oil Spill by the Oil Rig DEEPWATER HORIZON in the Gulf of Mexico, on Apr. 20, 2010,* 2010 WL 4365478 at *1, *4 (E.D. La. 2010); *see also Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 596 (3d Cir. 2004) cert. denied 543 U.S. 1049 (2005) (*citing Mason-Dixon Lines, Inc. v. Local Union No. 560*, 443 F.2d 807 (3d Cir. 1971)).

In general, federal maritime law recognizes the enforceability of arbitration clauses in seamen's employment contracts. *O'Dean v. Tropicana International, Inc.*, 1999 WL 335381 (S.D.N.Y. 1999). ["Under federal maritime law, there is nothing inherently invalid or unenforceable about an agreement to arbitrate disputes relating to the employment of seamen."] *Id.* at *2, *citing Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109,122-124 (1924); *Grooms v. Marquette Transportation Co.*, LLC, 2015 WL 681688 (S.D. Ill. Feb. 17, 2015); *Nunez v. Weeks Marine, Inc.* 2007 WL 496855 at *6 (E.D. La. 2007). *See also Valdes v. Swift Transp. Co., Inc.*, 292 F. Supp. 2d 524 (S.D.N.Y. 2003) *appeal dismissed* 2015 WL681688 (7th Cir. 2015).

B. Choice of Law

As discussed, the enforceability of arbitration agreements in employment contracts are governed by state law. In evaluating whether a contractual choice-of-law clause is enforceable, federal courts apply the choice-of-law rules of the forum state. *Homa v. American Express Co.*, 558 F.3d 225, 227 (3d Cir.2009). Here the parties have expressly agreed that the enforceability of the arbitration clause shall be determined by the laws of New York. *See* Exhibit "A" at ¶ 11.

Generally, "when parties to a contract have agreed to be governed by the laws of a particular state, New Jersey courts will uphold the contractual choice if it does not violate New

Jersey's public policy." *Id. quoting Instructional Systems, Inc. v. Computer Curriculum Corp.*, 614 A.2d 124 (N.J. 1992).

New Jersey favors arbitration over litigation. *Hojnowski v. Vans Skate Park,* 901 A.2d 381, 392 (N.J. 2006). New Jersey's Uniform Arbitration Act of 2003 authorizes courts to recognize and enforce arbitration agreements. N.J.S.A. 2A:23B-5 and 6; *see also Wein v. Morris*, 944 A.2d 642, 648 (N.J. 2008); *Van Duren v. Rzasa-Ormes*, 926 A.2d 372, 378 (N.J. App. Div. 2007), *aff'd* 195 A.2d 1285 (N.J. 2008). Moreover, an agreement to arbitrate will be enforced unless it violates public policy. *Hojnowski* at 342. New Jersey courts have long noted the State's public policy favoring the "use of arbitration proceedings as an alternative forum." *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 610 A.2d 364, 369 (N.J. 1992); *see also Delta Funding Corp. v. Harris*, 912 A.2d 104, 110 (N.J. 2006).

Accordingly, the Court should apply New York law to the issue at hand, as the arbitration agreement does not violate New Jersey public policy.

C. The Arbitration Agreement is Enforceable under New York Law

"It is firmly established that the public policy of New York State favors and encourages arbitration and alternative dispute resolutions." *Westinghouse Elec. Corp. v. New York City Transit Auth.,* 623 N.E.2d 531, 534 (N.Y. Ct. App. 1993); *Valdes v. Swift Transp. Co., Inc.*, 292 F. Supp. 2d 524, 530 (S.D.N.Y. 2003).

The Agreement to arbitrate specifically covers the injury raised in Plaintiff's Complaint. Exhibit A. The Agreement states, in part, "I understand and agree that any dispute, claim or controversy arising out of my work as a crewmember, including but not limited to statutory Jones Act claims, negligence, unseaworthiness, maintenance and cure, and wage claims...shall be determined by one arbitrator..." *Id. at* ¶ 11. (*emphasis in original*).

Plaintiff's Complaint contains three counts, which allege causes of action under Jones Act Negligence, Unseaworthiness and Maintenance and Cure. (Docket No. 1). The claims at issue are therefore the very type of claims covered by the arbitration clause of the Agreement.

Under New York law, by accepting the terms of the Crew Terms of Employment, Plaintiff agreed to submit his claims to binding arbitration. *See Moorning–Brown v. Bear, Stearns & Co., Inc.,* 1999 WL 1063233, at *4 (S.D.N.Y. Nov. 23, 1999) ("plaintiff's promise to arbitrate is supported by [defendant's] offer of employment to plaintiff and its continued employment of plaintiff"); *Valdes*, 292 F. Supp. 2d at 531. Moreover, under New York law, in the absence of fraud or other wrongful conduct, a party who signs a written contract is conclusively presumed to know its contents and to assent to them, and he is therefore bound by its terms and conditions. *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela,* 991 F.2d 42, 46 (2d Cir.1993) (*citing Level Export Corp. v. Wolz, Aiken & Co.,* 111 N.E.2d 218 (N.Y. Ct. App.1953)); *Valdes*, 292 F. Supp. 2d at 531–32. Finally, where his signature appears on the document containing the arbitration clause, the plaintiff is presumed to have understood its contents. *Gillman v. Chase Manhattan Bank,* 534 N.E.2d 824 (N.Y. Ct. App.1988) (*citing Metzger v. Aetna Ins. Co.,* 125 N.E. 814 (N.Y. Ct. App. 1920)); *Valdes*, *supra,* 292 F. Supp. 2d at 531.

By entering into the arbitration agreement, plaintiff is deemed to have waived the right to the jury trial. *See In re Currency Conversion Fee Antitrust Litigation,* 265 F. Supp. 2d 385, 414 (S.D.N.Y. 2003); *Valdes v. Swift Transportation Co.,* 292 F. Supp. 2d at 531 *(citing cases).* An express jury trial waiver is unnecessary for the arbitration agreement to be enforceable. *Id.* In this case, Plaintiff specifically waived his right to a jury trial:

> ARBITRATION SHALL BE MY EXECUTIVE REMEDY AND I UNDERSTAND THAT I GIVE UP MY RIGHT TO SUE. I FURTHER UNDERSTAND AND AGREE THAT I GIVE UP MY RIGHT TO SELECT THE VENUE FOR ANY CLAIM OR CONTROVERSY AND THAT I GIVE UP MY RIGHT TO TRIAL BY JUDGE OR JURY FOR ANY AND ALL CLAIMS, INCLUDING BUT NOT LIMITED TO STATUTORY JONES ACT, NEGLIGENCE, MAINTENANCE AND CURE, UNSEAWORTHINESS, AND WAGES.

Exhibit "A" at ¶ 11.

Both New York and New Jersey law favor arbitration as a matter of public policy. Plaintiff executed the Agreement, and expressly agreed to waive his right to a trial by jury and to arbitrate any claim for injury onboard the vessel. Accordingly, this Court should dismiss the complaint or, in the alternative, stay the action and compel arbitration pursuant to the Agreement.

III. CONCLUSION

Plaintiff agreed to arbitrate all injury claims. Plaintiff's Complaint alleges causes of action specifically covered by the arbitration clause, which is clear and understandable. The law of the State of New York applies, and the Agreement is enforceable under New Jersey law. Accordingly, this action should be dismissed or stayed pending arbitration.

REEVES McEWING, LLP

BY: */s/Brian McEwing*
Brian McEwing, Esquire
Mary Elisa Reeves, Esquire
681 Town Bank Road
Cape May, NJ 08204
(609) 846-4717

Date: July 19, 2018

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

ANTHONY KOZUR	:	
-V-	:	1:18-cv-08750-JHR-JS
F/V ATLANTIC BOUNTY, LLC, ATLANTIC CAPE FISHERIES, INC., and SEA HARVEST, INC.	:	

AFFIDAVIT OF SAM MARTIN

I, Sam Martin, do hereby depose and state that:

1. I am the vice president of operations for Sea Harvest Inc. and other affiliated companies, and oversee a fleet of vessels, including the F/V ATLANTIC BOUNTY.

2. Sea Harvest Inc. is the operator of the F/V ATLANTIC BOUNTY.

3. Sea Harvest Inc. was the employer of Anthony Kozur at all material times, including August 2017.

4. Sea Harvest Inc. paid Anthony Kozur a share of the vessel's catch and issued him a 1099 at the end of the year.

5. The foregoing statements are true and correct to the best of my knowledge, information and belief, and are made under penalty of perjury.

SAM MARTIN

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 17 DAY
OF July, 2018

Joann Atkinson Endicott
Notary Public

JOANN ATKINSON ENDICOTT
NOTARY PUBLIC OF NEW JERSEY
COMM. # 2366518
MY COMMISSION EXPIRES 11/05/2022

Manifest

SEA HARVEST, INC – VESSEL OPERATOR
VESSEL: F/V ATLANTIC BOUNTY
985 Ocean Drive
CAPE MAY, NEW JERSEY 08204
609-884-3000

Date & Time out: 8/17/17
Closed area: YES
NMFS Observer: YES
Date & Time in:

CREW TERMS OF EMPLOYMENT

THIS AGREEMENT IS MADE BETWEEN THE UNDERSIGNED AND THE VESSEL OWNER[S] AND OPERATOR/EMPLOYER. THIS MANIFEST MUST BE NEATLY AND COMPLETELY FILLED OUT AND GIVEN TO THE OFFICE PRIOR TO EACH TRIP. THE UNDERSIGNED CREW MEMBERS AGREE TO THE FOLLOWING TERMS AND CONDITIONS.

1. I understand and agree that I am a self-employed fishermen and I am solely responsible for paying my own state and federal taxes.

2. I understand that I have been hired by the Captain and can be dismissed by the Captain at any time, in his sole discretion. **Also at the conclusion of any trip, the Captain shall have the right to dismiss me with or without cause.**

3. I understand and agree that I have been hired by the Captain and that the Captain and crew are working for a percentage (%) of the catch, less certain expenses, including but not limited to fuel, oil, food, packaging, and consumables. My full, or part, share shall be determined solely by the Captain at the time of settlement. My full or part share shall be paid at the end of the trip based on my position, duties, and my performance of the duties assigned to me by the Captain, and my cooperation and coordination with the rest of the crew.

4. I authorize the vessel to withhold from my gross share, advances for travel, gear, cigarettes, and other personal consumables. I understand that only the Captain can authorize advances to the crew.

5. I understand the vessel homeports in Cape May, NJ, but that the vessel may from time to time offload in other ports. I understand and agree that it is my sole responsibility and cost to arrange transportation to and from the vessel and to be at the vessel at the time directed by the Captain.

6. I understand and agree it is the responsibility of the crew to offload and pack out the vessel, clean the vessel's exterior, fish-hold, and interior, and to completely maintain the vessel to the satisfaction of the Captain. I agree that I will not put any pins, nails, tape or other material into the walls of the vessel for personal belongings.

7. I understand and agree that following the vessel's mooring and offload, the captain may release me from duty and permit me to leave the vessel. Once I leave the vessel, I understand and agree that I, and not the vessel's captain, am solely responsible for my activities and actions. I agree to return to the vessel sober, drug free and fit for duty and that my employment will resume only after I have returned to the vessel fit to perform my duties. If I decide to leave the vessel at the end of the trip, I agree to give notice to the Captain so that a replacement can be found.

8. I certify that I am more than eighteen (18) years of age, and have full knowledge and understanding of the dangers involved with ocean fishing and the handling of fishing equipment. I certify that I am physically able to perform the duties of a crewmember aboard a scallop/fish trawler and have no current injury, illness or other condition which would prevent me, or limit me, in performing my assigned duties.

11. Arbitration: I understand and agree that any dispute, claim or controversy arising out of my work as a crewmember, including but not limited to statutory Jones Act claims, negligence, unseaworthiness, maintenance and cure, and wage claims, and whether such claim or controversy be brought against the vessel, vessel owner[s] or vessel operator/employer, or any combination of them; or disputes relating to this Agreement, or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this arbitration clause, shall be determined by one arbitrator sitting in Philadelphia, Pennsylvania.

The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. If this agreement to arbitrate is determined to be exempt from enforcement under the Federal Arbitration Act, the laws of the State of New York shall be applied in determining the validity and enforceability of this agreement.

ARBITRATION SHALL BE MY EXCLUSIVE REMEDY AND I UNDERSTAND THAT I GIVE UP MY RIGHT TO SUE. I FURTHER UNDERSTAND AND AGREE THAT I GIVE UP MY RIGHT TO SELECT THE VENUE FOR ANY CLAIM OR CONTROVERSY AND THAT I GIVE UP MY RIGHT TO TRIAL BY JUDGE OR JURY FOR ANY AND ALL CLAIMS, INCLUDING BUT NOT LIMITED TO STATUTORY JONES ACT, NEGLIGENCE, MAINTENANCE AND CURE, UNSEAWORTHINESS, AND WAGES.

The fee for arbitration, except the cost of any dispute concerning the enforceability of this Agreement or appeal of the arbitrator's decision, shall be borne by the Vessel's owner or Operator/employer as they may amongst themselves decide. Each party shall be responsible for their own attorney fees and costs and lay and expert witness fees and costs, unless contrary to law. Judgment on the Arbitration Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction; however, each party shall bear its own costs in pursuing such remedies.

I have read, understand and agree to the terms of the above Agreement. By signing below, I acknowledge that I have been given time to review this Agreement, that I have read (or otherwise understand) and agree to its terms, and that I make this Agreement freely and voluntarily.

PLEASE COMPLETELY AND LEGIBLY FILL IN ALL BLANKS ON THE FOLLOWING PAGES. IF YOU HAVE NO PRIOR EMPLOYMENT CLAIMS OR MEDICAL HISTORY, PLACE "N/A" ON THAT LINE

Manifest

1 NAME CAPTAIN TONY LEAL PHONE _____

2 NAME Sergey Martsveladze SS# _____ PHONE 609 350 0630

ADDRESS 5011 Tremont ave Egg Harbor Twp

NEXT OF KIN Elena RELATION Wife PHONE 609 350 0378

CLAIMS/MEDICAL HISTORY _____

SIGNATURE [signature]

3 NAME Juan A. Bolado SS# 451-63-1304 PHONE 757-768-8068

ADDRESS 66 Decatur St Newbedfor Ma

NEXT OF KIN _____ RELATION _____ PHONE _____

CLAIMS/MEDICAL HISTORY _____

SIGNATURE Juan A. Bolado

4 NAME Saulo Trejo SS# _____ PHONE _____

ADDRESS SAME

NEXT OF KIN _____ RELATION _____ PHONE _____

CLAIMS/MEDICAL HISTORY _____

SIGNATURE Saulo Trejo

5 NAME Aaron Trejo SS# Sine PHONE _____

ADDRESS _____

NEXT OF KIN Sine RELATION _____ PHONE _____

CLAIMS/MEDICAL HISTORY _____

SIGNATURE [signature]

Manifest

6 NAME Nicholas Genovese SS# _____ PHONE _____

ADDRESS _____

NEXT OF KIN _____ RELATION SAME PHONE _____

CLAIMS/MEDICAL HISTORY _____

_____

_____ SIGNATURE Nicholas Genovese

7 NAME Anthony M. Getz (Koeun) SS# 139-82-0030 PHONE 609-972-6496

ADDRESS SAME

NEXT OF KIN _____ RELATION _____ PHONE _____

CLAIMS/MEDICAL HISTORY _____

_____

_____ SIGNATURE Anthony M. Koeun

8 NAME _____ SS# _____ PHONE _____

ADDRESS _____

NEXT OF KIN _____ RELATION _____ PHONE _____

CLAIMS/MEDICAL HISTORY _____

_____

_____ SIGNATURE _____

9 NAME _____ SS# _____ PHONE _____

ADDRESS _____

NEXT OF KIN _____ RELATION _____ PHONE _____

_____

CLAIMS/MEDICAL HISTORY _____

_____ SIGNATURE _____

2007 WL 496855
Only the Westlaw citation is currently available.
United States District Court,
E.D. Louisiana.

Martin GARZA NUNEZ
v.
WEEKS MARINE, INC.

Civil Action No. 06-3777.
|
Feb. 13, 2007.

Attorneys and Law Firms

Darleen Marie Jacobs, Jacobs & Sarrat, New Orleans, LA, for Martin Garza Nunez.

James A. Cobb, Jr., Matthew F. Popp, Emmett, Cobb, Waits & Kessenich, John F. Emmett, Emmett, Cobb, Waits & Henning, New Orleans, LA, for Weeks Marine, Inc.

ORDER AND REASONS

ELDON E. FALLON, United States District Judge.

*1 Pending before the Court is Defendant Weeks Marine, Inc.'s Motion to Stay and Compel Arbitration (Rec.Doc.8). For the following reasons, the Court determines that the Defendant's Motion is DENIED without prejudice, pending a bench trial to determine the validity of the arbitration agreement at issue.

I. FACTUAL BACKGROUND

This dispute concerns whether the present action before this Court should be stayed and the Plaintiff Martin Nunez ('Plaintiff") should be compelled to arbitrate his claims against Defendant Weeks Marine Inc. (Defendant") pursuant to a post-injury arbitration agreement that was allegedly executed by the two parties. On July 17, 2006, the Plaintiff seaman filed suit against the Defendant employer in this Court for injuries he allegedly sustained on June 24, 2006 while working aboard the Defendant's vessel located in the Atchalfalaya Bay Channel. The Plaintiff claims damages under the Jones Act, 46 U.S.C. § 688, and general maritime law predicated on negligence and unseaworthiness of the vessel, along with a claim for maintenance and cure.

The Defendant filed the instant motion to compel arbitration, alleging that on June 28, 2006, the Plaintiff signed a Claims Arbitration Agreement (the "Arbitration Agreement" or "Agreement") which provided that any claims arising from his injuries on June 24, 2006 would be subject to arbitration pursuant to the American Arbitration Association Rules for Arbitration of Employment Disputes. The Defendant states that as consideration, it agreed to advance 50% of the Plaintiff's gross wages to him during the period of his convalescence or until October 28, 2006, an agreement with which it fully and timely complied. However, after it sent a written demand for arbitration to the Plaintiff's counsel on October 4, 2006, Plaintiff's counsel informed the Defendant on October 10, 2006 that the Plaintiff claims he never executed the Arbitration Agreement.

The Defendant contends that the Plaintiff, a Spanish speaker, executed a copy of the Arbitration Agreement in Spanish after an employee of the Defendant, fluent in both English and Spanish, explained the Arbitration Agreement's terms and conditions to the Plaintiff in his native language. The Defendant states that this employee and another employee were both witnesses to the Plaintiff's signing the Arbitration Agreement and they declare under penalty of perjury that the Plaintiff signed this document of his own free will in their presence. The Defendant also offers as evidence other documents signed by the Plaintiff to verify that the Arbitration Agreement includes the Plaintiff's true signature. As it contends the Arbitration Agreement is a post-accident agreement that is not part of the Plaintiff's employment contract and was knowingly and voluntarily executed by the Plaintiff absent fraud or duress, the Defendant states that the Agreement is legally valid and thus must be enforced.

In response, the Plaintiff claims that the Arbitration Agreement submitted by the Defendant is fraudulent and that he never signed such an agreement, nor did he waive his legal rights, including his right to a trial by jury, as a Jones Act seaman. The Plaintiff states that duress is also factually evident as the Defendant alleges that the Plaintiff signed the document only four days after his accident without the presence of an attorney, indicating that the

Defendant attempted to rush and coerce the Plaintiff into signing the document. Moreover, the Plaintiff claims that the Arbitration Agreement is unenforceable under the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1-14, and void pursuant to public policy and Section 5 of Federal Employer Liability Act (the "FELA"), 45 U.S.C. § 55.

II. LAW AND ANALYSIS

A. Enforceability of the Arbitration Agreement Under the FAA

*2 "[T]here is a strong federal policy favoring the arbitration process," *Buckley v. Nabors Drilling USA, Inc.*, 190 F.Supp.2d 958, 960 (S.D.Tex.2002), *aff'd*, 51 Fed. Appx. 928, --- F.3d ----, 2002 WL 31415106 (5th Cir.2002) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)); *Freudensprung v. Offshore Tech. Services, Inc.*, 379 F.3d 327, 341-42 (5th Cir.2004) (citing *E.A.S. T., Inc. of Stamford, Conn. v. M/V Alaia*, 876 F.2d 1168, 1173 (5th Cir.1989)), which is reflected in the provisions of the FAA. Under the FAA, a federal court is required to compel arbitration if "a maritime transaction or a contract evidencing a transaction involving commerce" contains a written provision requiring arbitration of a dispute arising out of the contract or transaction, except in cases where the contract is a product of fraud, coercion, or is otherwise revocable in law or equity. 9 U.S.C. § 2. The district court must stay trial of the action until arbitration has been made in accordance with the written arbitration agreement, 9 U.S.C. § 3, or it must affirmatively order the parties to engage in arbitration. 9 U.S.C. § 4. However, Section 1 of the FAA, 9 U.S.C. § 1, specifically excludes employment contracts of seaman, without limitation, from FAA application. *Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 394 (5th Cir.2003). The term "seamen" has been found to have the same meaning for purposes of both the FAA and the Jones Act. *See Buckley*, 190 F.Supp.2d at 963-65. In the present case, the parties do not dispute that the Plaintiff qualifies as a seaman under either Act. The primary contention between the parties here is whether the Arbitration Agreement qualifies as a "contract of employment" under the Section 1 exclusion.

The Supreme Court addressed the Section 1 exemption in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed .2d 234 (2001), in which the Court rejected an interpretation of that Section that would extend its application to *all* contracts of employment. The Court found that, in accordance with the maxim *ejusdem generis*, Section 1 was intended to apply only to the employment contracts of transportation workers. *Id.* at 115-19. Though the Supreme Court found the legislative record regarding the Section 1 exemption limited, [1] the Court made the "permissible inference" that "Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Id.* at 120-21; *see also Buckley*, 190 F.2d at 962 ("Congress probably singled out seamen and railroad employees from the FAA because it had already enacted federal legislation otherwise providing for arbitration of disputes between seamen and their employers...."). The Court also postulated that seamen may have been exempted from FAA coverage because the Shipping Commissioners Act of 1872, 17 Stat. 262, already provided for arbitration of seamens' disputes with employers. *Circuit City*, 532 U.S. at 121.

*3 Though the Supreme Court decision in *Circuit City* dealt with the narrow question of whether Section 1 barred all employment contracts from governance under the FAA, the Fifth Circuit and district courts within its purview have subsequently held that a reading of *Circuit City* and Section 1's text and legislative history reveal that *all* seamen are exempted under Section 1, as all seamen are directly involved in the transport of goods in interstate commerce. *Buckley*, 190 F.Supp.2d at 961-62; *Brown*, 339 F.3d at 394-94. The most pertinent Fifth Circuit opinion on the present issue before this Court is *Brown v. Nabors Ofshore Corp.*, though that case is factually distinguishable since the arbitration provision was not an ad-hoc post-injury agreement. In that case, several months pre-injury, the defendant employer sent employees, including the plaintiff, a letter noticing its adoption of a program requiring that all disputes between the defendant employer and employees be resolved through an arbitration process. *Id.* at 392. Attached to the letter was an acknowledgment form which the defendant required its employees to sign confirming notice and understanding of the letter. *Id.* The letter also stated that failure to return the signed form and continued employment constituted acceptance of the program. *Id.* The Fifth Circuit denied the defendant employer's request to stay the suit brought by the plaintiff in federal court and to compel arbitration because it found that the seamen

plaintiff's employment contract was expressly excluded from FAA coverage pursuant to Section 1. *Id.* at 394. Thus, it can be inferred from the Fifth Circuit's holding that the form and notice were considered part of the plaintiff's employment contract, though the court did not expressly make this statement. [2]

Though the Defendant in the present case contends that the Arbitration Agreement is not an employment contract, the Plaintiff claims that the Arbitration Agreement arose out of the Plaintiff seaman's employment contract and the injury allegedly suffered by the Plaintiff occurred while the Plaintiff was performing tasks within the course and scope of his employment. In other words, "but for" the Plaintiff's employment, the Arbitration Agreement would not exist or would have no purpose. The Plaintiff argues that the Defendant's contention that the Agreement is not related to the employment contract, but rather involves a separate and distinct issue of choosing a forum for a personal injury claim, is therefore unfounded.

After a review of the terms and conditions of the English-translation of the Arbitration Agreement allegedly signed by the Plaintiff, it does not appear that this document qualifies as an employment contract. Though it is true that the accident occurred while the Plaintiff was performing his employment duties and the Defendant was required to advance a portion of the Plaintiff's salary to him in excess of maintenance and cure, [3] this alone is not sufficient to constitute an employment contract. No language exists in the contract itself that indicates the Plaintiff's acceptance of the agreement as a condition of his continued employment, nor does it otherwise modify the Plaintiff's employment status or alter the terms of his employment. [4]

***4** This is in contrast to *Brown* and *Buckley* where the defendant employer "effectively *required* all ... employees to resolve disputes against [defendant] through binding arbitration proceedings." *Buckley*, 190 F.Supp.2d at 958 (emphasis added), no matter what type of dispute was involved and no matter when the event giving rise to the dispute took place. In those cases, failure to send back a signed acknowledgment form and continued employment was deemed consent. *Brown*, 229 F.3d at 392. [5] In the present case, the Plaintiff was allegedly offered a choice whether to accept arbitration or not for a tort claim, and he was offered this choice after his injury occurred.

Though the Plaintiff argues that the Agreement qualifies as an employment contract because it would not exist, "but for" the fact he was employed by Defendant, using this reasoning would designate any and all contracts signed by the parties as employment contracts, no matter their purpose or subject matter. The Court declines to adopt this broad construction of Section 1. *See Barbieri v. K-Sea Transp. Corp.*, 2006 U.S. Dist. LEXIS 91565, at *22 (E.D.N.Y. Dec. 18, 2006) ("[G]iven the Congressional intent manifested in the FAA, courts have been extremely reluctant to afford a much more expansive meaning to what is, in effect, an exclusionary clause.").

Though the Fifth Circuit has not specifically addressed Section 1's applicability to ad-hoc, post-injury arbitration agreements, [6] a New York state court decision, *In re Nicholas Schreiber v. K-Sea Transp. Corp.*, 30 A.D.3d 101, 814 N.Y.S.2d 124 (N.Y.App.Div. Apr. 25, 2006), directly concerns the issue at hand and is thoughtful in its analysis. In that case, the post-injury agreement provided that the defendant employer's payment to the plaintiff seaman of two-thirds of his net weekly wages was conditioned upon the plaintiff's agreement to submit all legal claims, including those related to the Jones Act and unseaworthiness, to arbitration. *Id.* at 103. Though the court found that it did not have enough factual information before it to make a determination regarding the validity of the arbitration agreement, the court held that the plaintiff failed to demonstrate that a post-injury agreement to arbitrate a personal injury claim constituted an alteration of his employment contract. *Id.* at 109-11. The court reasoned that the plaintiff's claims were based in tort, rather than contract, and the dispute did not arise under the collective bargaining agreement applicable to the plaintiff. *Id.* at 106.

The court noted the tension between the strong federal policy favoring arbitration, reflected in the FAA, and the federal policy affording seamen heightened protection, reflected in the Jones Act. *Id.* at 107. Though it considered it "tempting to reason that an arbitration provision incorporated into an employment contract is ineffective against a Jones Act claim then an ad hoc, post-injury agreement should be reasonably ineffective," the plaintiff failed to sustain his burden to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue, including the right to a trial by jury. *Id.* at 105-08. [7] The court found it settled from the *Circuit City* decision as well as the *Buckley* case that

"courts are required to accord a literal application to the FAA's exclusion for employment contracts of workers engaged in interstate commerce, without regard to policy considerations." *Id.* at 108 (citing *Circuit City*, 532 U.S. at 119-20 and *Buckley*, 190 F.Supp.2d at 965 n. 2)). A plain reading of the Section 1 exclusion for arbitration provisions inserted into contracts of employment revealed that it did not extend to the arbitration agreement at issue in that case. *Schreiber*, 30 A.D.3d at 109. No policy implications could be drawn from the Section 1 statutory exception, and the plaintiff failed to identify any Jones Act provision supporting his argument that the right to a jury trial under the Jones Act stems from Congress wish to single out seamen for special protection. *Id.* at 107-09 ("Predating the FAA by five years, the Jones Act contains no expression of intent to limit the pursuit of its remedies to the judicial forum.")[8]

***5** In the present case, the Plaintiff states that his claim is not subject to arbitration because "Congress enacted the Jones Act and the Longshoremen's and Harbor Worker's Compensation Act to ensure that seamen are compensated for injuries arising from the perils of their occupation" (Pl's Supp. Mem. Opp. Def's Mot. 6) and "the Agreement is contrary to public policy because it takes away a Jones Act seamen's fundamental right to trial by jury." (Pl's Sur-Reply Mem. Opp. Def's Reply Mot. 3). These statements are similar to those arguments stated in "summary fashion" by the plaintiff in *Schreiber*, and likewise, this Court is not persuaded. *See Schreiber*, 30 A.D.3d at 106.[9] The Plaintiff also cites *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L .Ed. 239 (1942) and *Duncan v. Thompson*, 315 U.S. 1, 62 S.Ct. 422 (1942), in support of his argument. However, these cases dealt with release of claims or permitted the defendant's exemption from liability. Here, the Arbitration Agreement does not release the Defendant from liability, nor does it make any determination of fault. Moreover, *Garrett* held that a seaman may waive his right to a jury trial via a release executed without fraud or coercion. *Id.* at 248. The Plaintiff states in an Opposition Memorandum that the "Defendant erroneously argues that the purported 'agreement' does not limit Weeks' liability to Nunez under the Jones Act and general maritime law. However, it clearly limits Nunez's rights by denying him his fundamental constitutional right to a trial by jury." " (Pl's Sur-Reply Mem. Opp. Def's Reply Mot. 2-3). However, an agreement to arbitrate rather than proceed through federal court is not a limitation on liability. The Plaintiff misconstrues the two concepts. There is nothing within the Jones Act that states that a Plaintiff may not waive the right to a jury trial. In fact, a seaman does in effect waive his right to a jury trial when he files his claim under Rule 9(h) of the Federal Riles of Civil Procedure.

The Fifth Circuit clearly favors the enforcement of arbitration clauses. "It is by now beyond cavil" that an agreement to arbitrate personal injury claims are "presumptively enforceable." *Freudensprung*, 379 F.3d at 342. "It is only by rigorously enforcing arbitration agreements according to their terms, do we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA." *Id.* (quoting *Ford. v. NYL Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 248-49 (5th Cir.1998) and *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). As Section 1 is a narrowly-tailored exception to the well-settled liberal policy favoring enforcement of arbitration provisions, *see Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 505 (4th Cir.2002) (citing *Circuit City*, 532 U.S. at 118). the Arbitration Agreement does not qualify as an employment contract under Section 1, and it is not exempt from the FAA's application.[10]

B. Enforceability of the Arbitration Agreement under FELA

***6** The Plaintiff additionally asserts that *Boyd v. Grant T.W.R. Co.*, 338 U.S. 263, 70 S.Ct. 26 (1949) supports his argument. In that case, a railroad employee signed a contract with his employer post-injury restricting his choice of venue for an action based upon the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.* The employee subsequently argued that the contract was void under Section 6 of FELA, which permits injured railroad workers to bring suit in state or federal court and prohibits removal of his or her action. 45 U.S.C. § 56. The Supreme Court held that the contract limiting choice of venue was void as it conflicted with FELA, stating that the "petitioner's right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of Section 5 of the Liability Act." *Id.* at 265. Section 5 states that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that

extent be void...." 45 U.S.C. § 55. The Court determined that the right to select a forum in Section 6 of FELA is a "substantial right." *Id.* at 265.

The Jones Act extends the same rights to seamen as those extended to railroad employees under FELA. *Cox. v. Roth*, 348 U.S. 207, 208, 75 S.Ct. 242, 243, 99 L.Ed. 260 (1955); 46 U.S.C. § 688, and it incorporates FELA's "entire judicially developed doctrine of liability." *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 439, 78 S.Ct. 394, 401 2 L.Ed.2d 382 (1958). Thus, the Plaintiff argues that the Court should find the arbitration agreement void under the *Boyd* decision.

However, besides the fact that the Fifth Circuit has held that a forum selection clause contained in a seaman's employment contract is enforceable as long as it is fundamentally fair. *Marine Chance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221 (5th Cir.1998) (though, as stated above, this dispute does not concern an employment contract), this case concerns an agreement to arbitrate and not a forum selection or venue clause. [11] Accordingly, *Boyd* is not applicable to the issue before the Court.

C. Enforceability of the Arbitration Agreement Under State Law

Additionally, even if this Court had determined that the Arbitration Agreement is excluded from FAA application, the Arbitration Agreement is otherwise enforceable under state law. In *Schreiber*, the court reasoned that even if federal arbitration law did not apply, state arbitration law did, and state law, like the FAA, reflected the strong public policy of promoting arbitration. *Schreiber*, 30 A.D.3d at 106. Thus, state law required enforcement of the arbitration agreement, unless federal policy precluded it. Other courts have similarly held that "the effect of Section 1 is merely to leave the arbitrability of disputes in the excluded categories as if the Arbitration Act had never been enacted ... [T]he question remains whether, without regard to the Arbitration Act, [a] stay order [is] within judicial power." *Mason-Dixon Lines, Inc. v. Local Union No. 560*, 443 F.2d 807, 809 (3rd Cir.1971). Thus, courts have enforced arbitration provisions against claims arising from FAA-excluded contracts if such provisions are enforceable under state law. *See O'Dean v. Tropicana Cruises Int'l Inc.*, 1999 U.S. Dist. LEXIS 7751, at *4 (S .D.N.Y. May 25, 1999) ("The inapplicability of the FAA does not mean, however, that arbitration in seaman's employment contracts are unenforceable, but only that the particular enforcement mechanisms of the FAA are not available."); *Valdes v. Swift Transp. Co.*, 292 F.Supp.2d 524, 528-30 (S.D.N.Y.2003).

*7 In making this determination, courts have looked to the plain language of Section 1 itself. *See id.* at 529. Section 1, interpreted to apply to the FAA in its entirety, states that "nothing herein contained shall apply" to the employment contracts of certain categories of workers. 9 U.S.C. § 1. However, no language in Section 1 addresses whether or not FAA-exempt employment contracts are enforceable otherwise. *See id.* In *Valdes*, a truckdriver's claims against his employer relating to alleged Title VII and New York human rights law violations were excludable from FAA coverage under Section 1. The court held, however, that the claims remained arbitrable and stated that an opposite conclusion "flouts the principle that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. And most importantly, it essentially re-writes what is merely an exemption providing that the FAA does not apply into a substantive pronouncement that such clauses in transportation workers' contracts are unenforceable." *Valdes*, 292 F.Supp.2d at 529.

Under Louisiana law, a presumption of arbitrability exists with regard to the enforceability of arbitration agreements. *Aguillard v. Auction Mgmt. Corp.*, 2004-2804 & 2004-2857, p. 7 (La.6/29/05), 908 So.2d 1, 6 (declaring "[a]t the outset, we note the positive law of Louisiana favors arbitration" and citing La.Rev.Stat. §§ 9:4201 and 9:4202). [12] Thus, the Arbitration Agreement would be enforceable under state law, even if it was exempted from FAA governance.

D. Validity of Arbitration Agreement Absent Fraud and Duress

However, the Court's review at this point is not complete as the determination remains as to whether the Arbitration Agreement is invalid due to fraud or duress. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (citing 9 U.S.C. § 4 and stating federal court may determine challenges to arbitration provisions's validity, but not to validity of entire contract containing

arbitration provision, as "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate"). "Under the FAA, a written arbitration agreement is prima facie valid and must be enforced unless the opposing party ... alleges and proves that the arbitration clause itself was a product of fraud, coercion, or such grounds exist at law or in equity for the revocation of the contract." *Freudensprung,* 379 F.3d at 341 (citing *National Iranian Oil v. Ashland Oil, Inc.,* 817 F.2d 326, 332 (5th Cir.1987) and 9 U.S.C. § 2).[13] Courts must "remain attuned to well supported claims that the agreement to arbitrate resulted from some sort of fraud or overwhelming economic power that would provide for grounds for the revocation of any contract." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 627, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). It is particularly important in this case, as the shipowner owes a fiduciary responsibility to a seaman and the seaman is considered a ward of admiralty.[14]

***8** Since the Plaintiff is the party seeking to invalidate the Arbitration Agreement's enforceability and therefore opposes arbitration, he holds the burden of proving that there was no deception or coercion on the part of the Defendant. *See Green Tree Fin. Corp-Alabama v. Randolph,* 531 U.S. 79, 91, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000).[15] The Plaintiff claims that he did not sign the Arbitration Agreement and that the Defendant committed fraud. The Plaintiff also contends that even assuming he did indeed sign the Agreement, it was executed only four days after his injury in a hotel room and therefore "smells of coercion." (Pl's Mem. Opp. 2).

In response, the Defendant offers voluntary, though unsworn, statements of two alleged witnesses, including one employee who states that he explained the terms and conditions of the Arbitration Agreement to the Plaintiff in Spanish. It also offers the Arbitration Agreement in Spanish with the Plaintiff's signature, as well as an English translation and other documents allegedly signed by the Plaintiff, as verification that the Arbitration Agreement contains a copy of his true signature.

The Court at this time is not adequately apprised of the facts and circumstances surrounding the execution of the Agreement and thus is not "satisfied that the making of the Agreement is not in issue." 9 U.S.C. § 4. The Court has no information before it concerning the Plaintiff' education level, including his reading ability, nor his English comprehension level. The Court also does not have any information before it concerning the circumstances leading up to and surrounding the execution of the document, other than that two witnesses were allegedly present and it is claimed to have taken place in a hotel room four days after the injury. One witness states that he explained the document in Spanish to the Plaintiff. However, the extent of disclosure is not revealed. Nor does the Court have knowledge regarding the extent of the Plaintiff's injuries, whether he was on any medication or whether he was experiencing effects of any pain. It also cannot ascertain the credibility of witnesses from the pleadings. Accordingly, a bench trial on the issue of whether fraud or duress invalidates the Arbitration Agreement is necessary. 9 U.S.C. § 4; *see also Schreiber,* 30 A.D.3d at 110-11; *Endriss,* 1998 WL 1085911, at *5-6; *Barbieri,* 2006 U.S. Dist. LEXIS 91565, at *31.

III. CONCLUSION

For the foregoing reasons, the Defendant's Motion to Stay and Compel Arbitration under 9 U.S.C. §§ 3 and 4 is DENIED without prejudice. Any arbitration proceedings are stayed pending the outcome of a bench trial on the issues of fraud and duress and the Court's determination that the Arbitration Agreement was knowingly and voluntarily executed. IT IS ORDERED that a status conference shall be held on March 1, 2007 at 1:30 p.m. to schedule a bench trial on the issues of fraud and duress.

All Citations

Not Reported in F.Supp.2d, 2007 WL 496855

Footnotes

1 The Supreme Court noted that the legislative record regarding Section 1 was "quite sparse" and commented that the parties had not provided any language from Committee Reports nor from House and Senate debate transcripts addressing the meaning of the Section 1 exemption. *Circuit City,* 532 U.S. at 119.

2 Additionally, the district court in *Buckley,* a case factually and legally indistinguishable from *Brown,* concluded that the exact same arbitration agreement and program at issue in *Brown* constituted an invalid and unenforceable arbitration

provision under the FAA, as it arose pursuant to the plaintiff's exempt employment contract. *Buckley,* 190 F.3d at 966. The Fifth Circuit later affirmed the *Buckley* district court decision, but did not comment on the proper scope of Section 1 or whether the arbitration provisions at issue were exempted, as the defendant did not raise these points in his opening brief. *Buckley v. Nabors Drilling USA, Inc.,* 51 Fed. Appx. 928, 2002 WL 31415106, at *1 (5th Cir. Oct. 8, 2002). Rather, the Fifth Circuit based its decision on failure to establish the existence of a binding agreement between the parties. *Id.*

3 According to the pleadings, the Plaintiff was entitled to maintenance and cure of $20.00 per day. (Williams Decl., Ex. to Def. Mot. to Stay)

4 In *Gilmer. v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 25 n. 2, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), the United States Supreme Court found that a registered securities representative's agreement to submit discrimination claims to arbitration in his securities registration application was not a "contract of employment" within Section 1's meaning, as it was a contract with the securities exchanges, and not with his employer. Thus, the Supreme Court does not broadly define "employment contract" as any contract that has some connection or relation to a party's employment.

5 The form stated "[y]our continued employment after the date you receive the enclosed documents will constitute your acceptance of the Program." *Id.*

6 Before the filing of this opinion, the Defendant notified the Court that the Fifth Circuit recently issued a decision that directly speaks to the issue at hand. (Def.Supp.Mem., Rec.Doc.32). That decision, *Terrebonne v. K-Sea Transp. Corp.,* --- F.3d ----, 2007 WL 196532 (5th Cir. Jan. 26, 2007), confirms this Court's holding today. The Fifth Circuit held that a post-injury agreement between a seaman and his employer providing for arbitration of claims related to an injury incurred during the course of employment did not qualify as an employment contract. The arbitration agreement did not appear to fall within the Section 1 exemption because it did not purport to employ the Plaintiff seaman or modify his employment contract in any way. *Id.* at *4. The arbitration agreement's maintenance and cure provision, though "an intrinsic part of the employment *relationship,*" was not a part of the actual employment contract. *Id.* at *4-5.

> Likewise, in this case, the Arbitration Agreement does not attempt to modify or otherwise alter the maintenance and cure obligation or the Plaintiff's employment with the Defendant. The Arbitration Agreement therefore cannot be considered part of the employment contract. *See id.* at *5.
>
> The Fifth Circuit also dismissed the plaintiff's argument that the arbitration agreement was void due to public policy and applicability of FELA Sections 5 and 6. These points are discussed in further detail in this opinion. *See infra,* n. 9 & 11.
>
> The Plaintiff attempts to limit the applicability of *Terrebonne* by arguing that that case may be distinguished from this one in three different ways: in *Terrebonne,* (i) the plaintiff accepted money in consideration of restricting himself to binding arbitration; (ii) an evidentiary hearing was held regarding the merits of the plaintiff's claim; and (iii) the plaintiff signed a consent order. The Court is not persuaded that any of these arguments limit the applicability of *Terrebonne* to the present dispute.

7 In *Gilmer,* the Court stated that the burden is on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies for statutory rights at issue. *Gilmer,* 500 U.S. at 26.

8 The Jones Act provides, in pertinent part:

> Any seamen who shall suffer personal injury in the course or his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States, modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.

46 U.S.C. § 688(a).

9 *See also Terrebonne,* 2007 WL 196532, at *9-10 (dismissing the plaintiff's "vague reference to the unfairness of pre-injury arbitration agreements (of seamen and of others) *generally* and *generically*").

10 *See also Endriss v. Ekloff Marine Corp.,* 1998 WL 1085911 (S.D.N.Y. July 28, 1998). In that case, interestingly, the plaintiff seaman argued that the ad-hoc post-injury arbitration agreement executed by the plaintiff and the defendant employer did not qualify as an employment contract exempt under Section 1. *Id.* at *4. The Court found that the agreement was not part of his employment contract, as it was executed after the injury and for the specific purpose of resolving claims for those injuries. The Court also looked to prior case law which called for Section 1 to be narrowly construed. *Id.*

11 The Fifth Circuit recently dismissed this argument in *Terrebonne,* 2007 WL 196532, at *6, decided before this opinion was filed on the record. *See* n. 6 *supra.* The Fifth Circuit reiterated its holding that FELA's Section 6 venue provision was not applicable to the Jones Act, which contains its owns venue provision, Section 688(a). *Id.* at *6 (referring to prior decision in *Pure Oil Co. v. Suarez,* 346 F.2d 890, 892 (5th Cir.1965); *see also* 46 U.S.C. § 688(a) (stating that venue is proper in a district where "the defendant employer resides" or "his principal office is located."). As Section 6 of the FELA is inapplicable, the Court found that "it necessarily follows that nothing in section 5 of the FELA is applicable to Jones Act venue. Hence, neither *Boyd* not section 5 dictate the result here." *Id.* at *7. Moreover, at the time of the *Boyd*

decision, the FAA had not been enacted, nor did any other federal statute calling for the presumptive enforceability of arbitration agreements exist. *Id.*

12 La.Rev.Stat. § 9:4201 contains similar language to Section 2 of the FAA. *See Aguillard*, 908 So.2d at 7 ("Such favorable treatment echos the Federal Arbitration Act."). Section 4201 specifically states:

> A provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Furthermore, Section 4202 provides:

> If any suit or proceedings be brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which suit is pending, upon being satisfied that the issue involved in the suit or proceedings is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until an arbitration has been had in accordance with the terms of the agreement, providing the application for the stay is not in default in proceeding with the arbitration.

La.Rev.Stat. § 9:4202.

13 Though the Court finds that federal law applies to the validity and enforceability issue, it notes that state law provides for similar analysis. In addressing the enforceability of arbitration, the Louisiana Supreme Court recently stated that "[d]ue to the strong and substantial similarities between our state arbitration provisions and the federal arbitration law ..., the federal jurisprudence provides guidance in the interpretation of our provisions." *Aguillard*, 908 So.2d at 18.

Louisiana law promotes a liberal policy favoring arbitration and "[i]t is well settled that a party who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending that [he or] she did not read it, that [he or] she did not understand it, or that the other party failed to explain it to [him or] her." *Stadtlander v. Ryan's Family Steakhouses, Inc.*, 794 So.2d 881, 889 (La.App. 2 Cir. 04/04/01); *see also Aguillard*, 908 So.2d at 17. However, fraud or duress negates application of this traditional rule. La.Rev.Stat. § 9:4201.

14 This issue is also significant because the Plaintiff focuses on his right to a trial by jury. If he indeed entered into an arbitration agreement, the Plaintiff would be deemed to have waived his right to a jury trial. *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir.2002), *cert. denied, Orr v. Am. Heritage Life Ins. Co.*, 537 U.S. 1106, 123 S.Ct. 871, 154 L.Ed.2d 775 (2003).

15 The Plaintiff argues that the Defendant, as fiduciary, bears the burden of proving the validity of the Arbitration Agreement and cites language from *Garrett,* decided before the FAA's enactment:

> If there is any undue inequality of the terms, any disproportion of the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary high benefits on the other, the judicial interpretation of the transaction, is that the bargain is unjust and unreasonable....

Garrett, 317 U.S. at 247.The Plaintiff states that the Arbitration Agreement represented "a grossly unbalanced exchange." (Pl's Supp. Mem. Opp.). However, the Agreement does not release the Defendant from any claims or in any way determine the extent of its liability. It does not preclude him from pursuing all of his claims or deny him the right to seek full compensation. The Plaintiff argues that the short-period of time between the injury and the date the Defendant approached the Plaintiff for Agreement execution indicates that the Defendant must have believed it was being released from something. The Court disagrees. As stated clearly in the opening paragraph of the Arbitration Agreement, both parties had some benefit to gain from arbitration: "The purpose of this Claim Arbitration Agreement is to help avoid the time, expense and emotions associated with dragging our problems through the litigation system." (Ex. 2 to Def. Mot. Compel). *See also Green Tree,* 531 U.S. at 521 ("We have ... rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.' ") Moreover, the burden in *Garrett* concerned a burden of sustaining release of claims. As stated previously, release of claims is not an issue here.

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2015 WL 681688
Only the Westlaw citation is currently available.
United States District Court,
S.D. Illinois.

Mark K. Grooms, Plaintiff,
v.
Marquette Transportation Company, LLC, Bluegrass Marine, Inc. and M/V Ray A. Eckstein, in rem, Defendants.

Case No. 14–cv–603–SMY–DGW
|
Signed February 17, 2015

Attorneys and Law Firms

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Ronald E. Fox, Laura M. Robb, Fox Galvin LLC, St. Louis, MO, for Defendants.

MEMORANDUM AND ORDER

STACI M. YANDLE, DISTRICT JUDGE

***1** This matter comes before the Court on defendants Marquette Transportation Company, LLC ("Marquette Transportation"), Bluegrass Marine Inc. ("Bluegrass Marine"), and M/V *Ray A. Eckstein* 's Motion to Compel Arbitration (Doc. 13). Plaintiff filed his response (Doc. 19) to Defendants' motion. For the following reasons the Court grants Defendants' motion.

Bluegrass Marine, which merged with Marquette Transportation on October 1, 2011, hired Plaintiff as a deckhand and crew member of the M/V *Ray A. Eckstein* on September 14, 2010. As part of his employment, Bluegrass required Plaintiff to sign an arbitration agreement that states in pertinent part:

> The first thing you should know about the Dispute Resolution Program is that it requires that all disputes between you and Bluegrass that are covered by the Program be resolved through arbitration and not in a court of law. In return for your agreement to be bound by the Dispute Resolution Program, Bluegrass will consider your application for employment. If you do not agree to be bound by the Dispute Resolution Program, then Bluegrass cannot further consider you for employment.
>
> ...
>
> In consideration for Bluegrass considering your application and conditionally offering you employment, you and Bluegrass agree that all claims between you and Bluegrass will be arbitrated as provided by the Federal Arbitration Act ("FAA") or the law of the state where you reside and/or are employed. This Program includes claims for maintenance and cure and those brought under the Jones Act.

Doc. 2–1, p. 1, 3. The agreement's footer stated it was a "Conditional Offer of Employment."

On or about July 29, 2011, while the vessel was afloat on the Mississippi River, Plaintiff was severely injured when his leg was crushed between a barge and the M/V *Ray A. Eckstein* 's line deck. Plaintiff filed suit under the Jones Act, 46 U.S.C. §§ 30101–06 and general maritime law. Defendants filed their Counterclaim seeking a declaration from this Court that Plaintiff is bound by the arbitration agreement and his claims are only properly brought in arbitration. In response, Plaintiff argues he cannot be compelled to bring his claims in an arbitral forum.

Because the foregoing contract is an employment contract of a seaman, the Federal Arbitration Act does not apply. *See Sherwood v. Marquette Transp. Co.*, 587 F.3d 841, 842 (7th Cir.2009). The arbitration clause, however, may be enforceable under the Illinois Uniform Arbitration Act, 710 ILCS 5/1 to 5/23. *Id.* Plaintiff argues that the Jones Act incorporates Section 5 of the Federal Employers Liability Act ("FELA") which prohibits enforcement of the arbitration agreement under the Illinois Uniform Arbitration Act.

The Jones Act provides in relevant part:

> A seaman injured in the course of employment ... may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or

> death of, a railway employee apply to an action under this section.

2** 46 U.S.C. § 30104. The Supreme Court has held that "the Jones Act adopts 'the entire judicially developed doctrine of liability' under the [FELA]." *Am. Dredging Co. v. Miller*, 510 U.S. 443, 345 (1994) (quoting *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 439 (1958)); ***see also *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 455 (2001). As the Seventh Circuit similarly acknowledged, the Jones Act "by its terms extends the protections of the [FELA] to seamen, and thus FELA caselaw is broadly applicable in the Jones Act context." *Sobieski v. Ispat Island, Inc.* 413 F.3d 628, 631 (7th Cir.2005). Section 5 of the FELA provides that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any civil liability by this chapter shall to that extent be void." 45 U.S.C. § 55.

Plaintiff argues that Section 5 of FELA is thus incorporated into the Jones Act making void the arbitration agreement because it will cause Plaintiff to forego the aforementioned substantive statutory rights. This argument, however, is contrary to the Supreme Court explanation that:

> [b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. *See Wilko v. Swan*, [346 U.S. 427, 434–35 (1953)]. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Mitsubishi Motor Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 628 (1985).

Here, Plaintiff did not forego any substantive rights by agreeing to arbitrate his claims. Rather, he is simply submitting to their resolution through arbitration. Further, Congress did not express its intention that the rights afforded under the Jones Act be protected against waiver of the right to a judicial forum. The Court also notes that other courts have similarly concluded that Section 5 does not prohibit seaman arbitration agreements under state law. *See Harrington v. Atlantic Sounding Co.*, 602 F.3d 113, 123–24 (2d Cir.2010); *O'Dean v. Tropicana Cruises Int'l, Inc.*, No. 98 Civ. 4543(JSR), 1999 WL 335381, at *1 (S.D.N.Y.1999). Moreover, in *Sherwood v. Marquette Transp. Co., LLC*, 587 F.3d 841, 845 (7th Cir.2009), the Seventh Circuit indicated that this particular arbitration agreement would be enforceable under state law. Accordingly, the Court finds that the arbitration agreement contained in Plaintiff's employment contract is not unenforceable as a matter of law. As such, the Court dismisses this case. *See Nat'l Loan Exchange, Inc. v. LR Receivables Corp.*, 08–cv–527–GPM, 2009 WL 466459, at *4 (S.D.Ill. Feb. 25, 2009) ("In general, where, as here, all of the claims in a case are subject to arbitration, the better practice is to dismiss the case.").

For the foregoing reasons, the Court **GRANTS** Defendants' Motion to Compel Arbitration (Doc. 13), **DENIES** Plaintiff's Motion to Dismiss Defendants' Counterclaim (Doc. 20) as moot, and **DISMISSES** this case without prejudice.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 681688, 2015 A.M.C. 955

End of Document

1999 WL 1063233
United States District Court, S.D. New York.

Kim MOORNING–BROWN, Plaintiff,
v.
BEAR, STEARNS & CO., INC., Defendant.

No. 99 CIV 4130 JSR HBP.
|
Nov. 23, 1999.

OPINION AND ORDER

PITMAN, Magistrate J.

I. *Introduction*

*1 Defendant Bear, Stearns & Co., Inc. ("BSCI") moves (1) to stay this action and to compel arbitration and (2) for its costs, disbursements and attorney's fees in bringing this motion. For the reasons set forth below, BSCI's motion to stay the action and to compel arbitration is granted; its motion for costs and attorney's fees is denied.

II. *Facts*

Plaintiff, proceeding *pro se,* commenced this civil rights action alleging that BSCI had discriminated against her on the basis of race, gender and national origin.

As set forth in the complaint, plaintiff, an African–American female and a citizen of the United States by birth, was initially hired by BSCI as a secretary on March 2, 1992. At the time she was initially hired, plaintiff signed the following document:

MEMO

To All Employees

From Stephen A. Lacoff

Subject ARBITRATION AGREEMENT

In consideration of employment with Bear Stearns, all employees hereby agree to submit to final and binding arbitration any and all claims, controversies of any nature whatsoever and disputes arising out of or related in any way to their employment at Bear Stearns, including only by way of example and not by limitation, any and all claims related to hiring, employment and cessation of employment. Employees specifically agree, without limiting the interpretation of this section, to forego litigation and to submit to arbitration all claims under Title VII (equal Employment Opportunity Act), under the Federal Age Discrimination Employment Act (ADEA), under any other applicable employment or human rights laws, rules and regulations, including, but not limited to, any city and state laws [and claims under the Employment Retirement Income Security Act (ERISA).] Said arbitration shall be conducted only by a panel of the New York Stock Exchange, Inc., American Stock Exchange or National Association of Securities Dealers, Inc., as Bear Stearns, in its sole discretion, shall elect. If any portion of this agreement is found unenforceable that portion shall fail while the remainder of this agreement continues in full force and effect.

ACKNOWLEDGED AND ACCEPTED:

Kim Moorning–Brown

/s/ Kim Moorning–Brown March 2, 1992

(Exhibit A to the Affidavit of Anne F.P. Corwin, sworn to July 12, 1999 (emphasis in original)).

After receiving her Bachelor's degree in computer programming in 1994, plaintiff applied for a position in BSCI's Information Services Department. According to plaintiff, she was interviewed and then informed that she did not qualify.

Plaintiff next alleges that she applied again for a position in the Information Services Department after she received her Masters degree in Information Management in January 1997. After interviewing again, plaintiff was given a position in BSCI's Information Services Department's training program, commencing in April, 1997.

*2 From May 1997 through September 1998, plaintiff alleges she was subjected to a series of discriminatory and retaliatory acts. Among other things, plaintiff alleges that she was subjected to a number of unwanted amorous advances from her supervisor, which she rejected with the consequence that she unjustly received unfavorable reviews and undesirable assignments. Plaintiff also alleges that her work was altered by her supervisor to make it appear that she was incompetent and that her supervisor made derogatory race-based remarks during the same period in which plaintiff was treated less favorably than other employees in the department.

In July 1997, plaintiff executed the following agreement:

> In consideration of my employment or continued employment with Bear, Stearns & Co. Inc., ... I hereby agree to forego litigation and action in court and to submit to final and binding arbitration any and all claims, controversies of any nature and disputes of any nature whatsoever arising out of or in any way related to my employment at Bear Stearns or its termination ("Claims") including, but not limited to, Claims relating to hiring, terms and conditions of employment, and cessation of employment, Claims for breach of express or implied contract or covenant, tort Claims, Claims for discrimination including, but not limited to, Claims brought under Title VII, the federal Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), the Older Workers Benefit Protection Act ("OWBPA"), the Pregnancy Discrimination Act, Claims under any other applicable federal, state or local laws, rules and regulations, including, by way of example but not limitation, those covering sexual harassment, and all city and state laws and ordinances and decisional law and any Claims under the Employee Retirement Income Security Act ("ERISA").
>
> I, Kim Moorning–Brown (Employee name), have read the foregoing statements and agree to the terms as a condition of my employment or continued employment.
>
> /s/ Kim Moorning–Brown
>
> Kim Moorning–Brown
>
> July 22, 1997

(Exhibit A to the Affidavit of Robert N. Holtzman, sworn to August 6, 1999).

Plaintiff left BSCI's employ in September 1998.

III. *Analysis*

A. *Motion to Stay Pending Arbitration*

Four factors are relevant to a motion to stay an action pending arbitration:

> A court asked to stay proceedings pending arbitration must resolve four issues: first, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration.

Oldroyd v. Elmira Sav. Bank, 134 F.3d 72, 75–76 (2d Cir.1998), ***citing*** *Genesco Inc. v. T. Kakiuchi & Co.*, 815

F.2d 840, 844 (2d Cir.1987). *See also Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 121 (2d Cir.1991); *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116, 118 (2d Cir.1991).

*3 Applying these four factors to this case compels the conclusion that a stay pending arbitration is appropriate.

1. *Existence of Arbitration Agreement*

Both the agreement plaintiff signed at the commencement of her employment and the agreement she signed on July 22, 1997, constitute, on their face, agreements by plaintiff to arbitrate all claims arising out of plaintiff's employment with BSCI.

Plaintiff argues that she should be relieved of her obligations under the arbitration agreement because (1) BSCI has waived its right to seek arbitration through its delay in seeking arbitration, (2) the putative agreement to arbitrate is not bilateral, (3) she did not read the arbitration agreement before she signed it and (4) it constitutes an unconscionable contract of adhesion.

Plaintiff's waiver argument is not persuasive. In view of the strong federal policy in favor of arbitration, waiver of an arbitration agreement "is not to be lightly inferred." *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir.1968); *accord Leadertex v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir.1995). Rather, a waiver will be found only when the party against whom waiver is asserted has engaged in substantial litigation activity resulting in prejudice to the party asserting waiver.

> [A] party waives its right to arbitration when it engages in protracted litigation that prejudices the opposing party. *See Doctor's Assocs., [Inc. v. Distajo*, 107 F.3d 126, 131 (2d Cir.1997)]; *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir.1993); *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir.1991). "[P]rejudice as defined by our cases refers to the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Doctor's Assocs.*, 107 F.3d at 134.... Thus, we have found that a party waived its right to arbitration when it engaged in extensive pre-trial discovery and forced its adversary to respond to substantive motions, *see Con-Tech Assocs. v. Computer Assocs. Int'l, Inc.*, 938 F.2d 1574, 1576–77 (2d Cir.1991), delayed invoking arbitration rights by filing multiple appeals and substantive motions while an adversary incurred unnecessary delay and expense, *see Kramer*, 943 F.2d at 179, and engaged in discovery procedures not available in arbitration, *see Zwitserse Maatschappij Van Levensverzekering En Lijfrente v. ABN Int'l Capital Mkts. Corp.*, 996 F.2d 1478, 1480 (2d Cir.1993) (per curiam).

PPG Indus., Inc. v. Webster Auto Parts, Inc., 128 F.3d 103, 107 (2d Cir.1997). Plaintiff claims that BSCI is guilty of delay here because it did not seek arbitration as soon as plaintiff first advised it of her grievance. Neither my research, nor the parties', has found any case in which such delay has been found to constitute a waiver of an arbitration agreement. Moreover, plaintiff has not explained how this alleged delay prejudiced her in any way. Thus, plaintiff's waiver argument is rejected.

*4 Plaintiff next claims that the arbitration agreement is invalid because it is not bilateral and imposes no obligation on BSCI to arbitrate its claims against plaintiff. Even if I assume this construction of the agreement is correct, it does not invalidate the agreement. The existence of an arbitration agreement is governed by the " 'substantive law of arbitrability" ' *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626 (1985), ***quoting*** *Moses H. Cone Memorial Hosp v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), "which comprises generally accepted principles of contract law." *Genesco Inc. v. T. Kakiuchi & Co., supra*, 815 F.2d at 845. As a matter of contract law, there is no requirement that both parties to a contract offer the same consideration. In this case, plaintiff's promise to arbitrate is supported by BSCI's offer of employment to plaintiff and its continued employment of plaintiff. No additional consideration is necessary.

Plaintiff's third argument—that she did not read the arbitration agreement before she signed it—is insufficient as a matter of law. Plaintiff is conclusively presumed to be familiar with the terms of an agreement that she signed. *Smith V. Lehman Bros., Inc.*, 95 Civ. 10326(JSM), 1996 WL 383232 at *1 (S.D.N.Y. July 8, 1996); *Degaetano v. Smith Barney, Inc.*, 95 Civ. 1613(DLC), 1996 WL 44226 at *7–*8 (S.D.N.Y. Feb. 5, 1996); *Maye v. Smith Barney, Inc.*, 897 F.Supp. 100, 106–08 (S.D.N.Y.1995).

Plaintiff's final argument concerning the validity of the agreement—that the arbitration agreement constitutes

an unconscionable contract of adhesion—is also legally defective. Although there can be no doubt that plaintiff did not have bargaining power equal to BSCI with respect to the terms of her employment contract, that fact does not render the agreement unenforceable. *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) ("mere inequality in bargaining power ... is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."). *See also Hart v. Canadian Imperial Bank of Commerce*, 43 F.Supp.2d 395, 400 (S.D.N .Y.1999); *Desiderio v. NASD*, 2 F.Supp.2d 516, 520 (S.D.N.Y.1998), *aff'd*, 191 F.3d 198 (2d Cir.1999).

2. *Scope of the Arbitration Agreement*

Both arbitration agreements signed by plaintiff expressly refer to Title VII claims of the type asserted here. Thus, there can be no issue that the claims asserted are within the scope of the arbitration agreement.

3. *Arbitrability of Plaintiff's Claim*

Any doubt in this Circuit concerning the arbitrability of Title VII claims has been eliminated by the Court of Appeals' recent decision in *Desiderio v. NASD*, 191 F.3d 198 (2d Cir.1999), in which the Court held that an employment agreement requiring the arbitration of claims asserted under Title VII was enforceable and did not violate the employee's rights under Title VII. After noting that the party asserting non-arbitrability bears the burden of persuasion, the Court found no inconsistency between the mandatory arbitration and the provisions of Title VII:

> *5 Compulsory arbitration does not defeat the right to compensatory and punitive damages, or fee shifting because an arbitrator is also empowered to grant this kind of relief. Moreover, it is untenable to contend that compulsory arbitration conflicts with the [Civil Rights Act of 1991's] provision for the right to a jury trial, because *Gilmer [v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)] ruled that compulsory arbitration clauses could be enforced in claims under the ADEA, a statute that explicitly provides for jury trials. *See Rosenberg [v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 11 (1st Cir.1999)]. Nor are we convinced that the underlying purposes of Title VII and the 1991 Civil Rights Act inherently conflict with the imposition of compulsory arbitration.

191 F.3d at 205. After noting that inconsistent legislative history could not outweigh clear statutory language, the Court concluded that Desiderio had "not met her burden of showing that with respect to claims under Title VII, Congress intended to preclude the waiver of judicial remedies." 191 F.3d at 206. [2]

Thus, plaintiff's claim is arbitrable.

4. *Number of Claims Subject to Arbitration*

Since plaintiff asserts only one claim, thisfactor is inapplicable here.

5. *Summary*

Since all relevant factors weigh in favor of arbitration, BSCI's motion to stay this matter and to compel arbitration is granted.

B. *Attorney's Fees*

Although BSCI seeks attorney's fees in its notice of motion, it entirely ignores the issue in the affidavits and memoranda submitted in support of its motion.

Neither the Federal Arbitration Act nor those portions of plaintiff's employment agreement submitted to me contain any provision for the award of attorney's fees. The only attorney's fee provision even remotely applicable here is that contained in Title VII itself, 42 U.S.C. § 2000e–5(k), which provides that a prevailing party in a Title VII action may recover its attorney's fees. This section cannot provide a basis for the award of attorney's fees to BSCI for at least two reasons. First, the granting of BSCI's motion to compel arbitration does not implicate cate the merits of plaintiff's claim in any way. Thus, BSCI is not a prevailing party within the meaning of Title VII.

Second, the standards for an award of attorney's fees to a prevailing employer in a Title VII action are substantially different from the standard by which attorney's fees are

awarded to a prevailing plaintiff. Although a prevailing Title VII plaintiff is entitled to attorney's fees as a matter of course, attorney's fees are very rarely awarded to a prevailing Title VII defendant. A prevailing defendant may recover its attorney's fees only upon a showing that the plaintiff's "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). BSCI has not come anywhere close to making this showing. To the contrary, BSCI's motion for attorney's fees, unsupported by fact or law, is, itself, frivolous.

IV. *Conclusion*

***6** For all the foregoing reasons, BSCI's motion to stay this action and to compel arbitration is granted. BSCI's motion for attorney's fees is denied.

All Citations

Not Reported in F.Supp.2d, 1999 WL 1063233, 81 Fair Empl.Prac.Cas. (BNA) 1488, 79 Empl. Prac. Dec. P 40,328

Footnotes

1 This motion has been referred to me for general pretrial supervision and to report and recommend with respect to dispositive motions. Since the relief sought in the present motion is not dispositive of plaintiff's claim, I may properly decide the motion and not merely recommend a resolution. *All Saint's Brands, Inc. v. Brewery Group Denmark, A/S*, 57 F.Supp.2d 825, 833 (D.Minn.1999); *Herko v. Metropolitan Life Ins. Co.*, 978 F.Supp. 149, 150 (W.D.N.Y.1997).

2 Even before the decision in *Desiderio*, the "overwhelming weight of authority in this circuit [found] arbitration of Title VII claims to be appropriate." *Raiola v. Union Bank of Switzerland, LLC*, 47 F.Supp.2d 499, 505 (S.D.N.Y.1999) (collecting cases).

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1999 WL 335381
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Mark O'DEAN, Plaintiff,
TROPICANA CRUISES INTERNATIONAL, INC., Ship Management and Catering Co., M/V Tropicana, her engines, boilers, tackles, appurtenances and cargo, in rem, Defendants.

No. 98 CIV. 4543(JSR).
|
May 25, 1999.

MEMORANDUM ORDER

RAKOFF, D.J.

*1 On June 26, 1998, plaintiff Mark O'Dean filed this maritime action arising from his employment on the M/V Tropicana, [1] a vessel owned by defendant Tropicana Cruises International, Inc. ("Cruises"), and operated by defendant Ship Management and Catering Co. ("Ship Management"). *See* Complaint ¶ ¶ 4, 8. Plaintiff alleged that in July, 1997, he was hired by Ship Management to serve as an assistant bar manager aboard the M/V Tropicana for a nine month period, but that in September 1997 the defendants had unilaterally reduced his wages by half in breach of his employment agreement, and that when he complained he was discharged by the defendants, and, at their behest, arrested, forcibly removed from the vessel, and repatriated to his home in Antigua. *See id.* ¶¶ 20, 24–26. Based on these and related allegations, plaintiff sought lost wages (Count I), repatriation expenses (Count II), penalty wages (Count III), damages for wrongful arrest (Count IV), and damages for wrongful discharge and breach of contract (Count V). [2]

On November 9, 1998, the defendants duly moved to dismiss Counts II, IV and V on the ground that the claims were subject to compulsory arbitration under the terms of the employment agreement. The defendants also initially sought dismissal of Counts I and III on the same basis, *see* Def. Mot., but conceded at oral argument that plaintiff had a statutory right to pursue those claims in federal court and modified their application to seek only a stay of those claims pending arbitration. *See* transcript, November 9, 1998, at 3; *see also U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 356–57 (1971). On November 20, 1998, the parties were telephonically advised that the defendants' motion, as modified, would be granted. This Memorandum Order will formally confirm that ruling and briefly state the reasons therefor.

The written employment contract between plaintiff and Ship Management provides that: "In the event of a dispute between the parties which cannot be resolved, the parties shall settle such dispute under the rules and supervision of the American Arbitration Association, the proceedings of which shall be held in Miami, Florida." Affidavit of Richard A. Menchini, Ex. B, Employment Contract Dated July 10, 1997 ("Contract") ¶ 15F. While defendants argue that the Federal Arbitration Act ("FAA") requires the Court to enforce this provision by dismissing or staying plaintiff's arbitrable claims, *see* Def. Br. at 7–8, section 1 of the FAA provides in pertinent part that "nothing herein shall apply to contracts of employment of seamen." 9 U.S.C. § 1. The inapplicability of the FAA does not mean, however, that arbitration provisions in seaman's employment contracts are unenforceable, but only that the particular enforcement mechanisms of the FAA are not available. *See generally Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 202–05 (1958); *Cole v. Burns*, 105 F.3d 1465, 1472 (D.C.Cir.1997); *Mason–Dixon Lines, Inc. v. Local Union No. 560*, 443 F.3d 807, 809 (3d Cir.1971); *Mikes v. Straus*, 897 F.Supp. 805, 807 (S.D.N.Y.1995).

*2 Under federal maritime law, there is nothing inherently invalid or unenforceable about an agreement to arbitrate disputes relating to the employment of seamen. *See Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 122–24 (1924). While specific enforcement of such agreements was once beyond the powers of a federal court sitting in admiralty, *see id.* at 123, the modern rule is that a court enjoys the same power to grant equitable relief in an admiralty case as in an ordinary civil action, *see Farrell Lines Inc. v. Ceres Terminals Inc.*, 161 F.3d 115, 116–17 (2d Cir.1998); *Pino v. Protection Maritime Ins. Co.*, 599 F.2d 10, 15–16 (1st Cir.1979); *see also* Charles Alan Wright et. al., *Federal Practice and Procedure* (3d ed.1998) § 3671. Accordingly, even assuming *arguendo* that dismissing plaintiff's claims on the basis of the arbitration clause would be tantamount to specific enforcement of that provision, [3] the Court is not without power to grant such relief.

To be sure, as the parties concede, plaintiff's claims for wages and penalty wages (Counts I and III) are non-arbitrable in this case, since a seaman has a statutory right to vindicate such wage claims in federal court if he so chooses, *see Arguelles*, 400 U.S. at 351, 356–57 (1971). There is no comparable bar, however, to enforcing the arbitration agreement with respect to plaintiff's claims for repatriation expenses, wrongful arrest, and wrongful discharge (Counts II, IV and V), since these non-wage claims fall outside the federal wage statutes, *see Korinis v. Sealand Services, Inc.*, 490 F.Supp. 419, 420 (S.D.N.Y.1980).

Plaintiff's final objection to this result is to argue that the arbitration provision is an unenforceable contract of adhesion because it was presented to plaintiff after he commenced his employment and in a situation in which there was a gross inequality of bargaining power. *See generally* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L.Rev. 1173 (1983). However, under New York law, [4] an agreement cannot be treated as an unenforceable contract of adhesion unless it is not only procedurally unfair but also substantively so. *See Aviall, Inc. v. Ryder System, Inc.*, 913 F.Supp. 826, 831 (S.D.N.Y.1996). Moreover, a contract will be considered substantively unfair only if its terms are oppressive, unconscionable, contrary to public policy, or "not within the reasonable contemplation of the [weaker] party." *See id.*

In the case at bar, it cannot seriously be contended that the innocuous arbitration provision at issue is inherently oppressive or unconscionable, since it in no way precludes plaintiff from pursuing the full panoply of his claims in the arbitral forum and obtaining full compensation for his injuries. *See Ball v. SFX Broadcasting, Inc.*, 665 N.Y.S.2d 444, 447 (3d Dep't 1997) (arbitration provision not substantively unfair where petitioner not precluded from obtaining full compensation in arbitral forum). Nor can it be maintained that the provision is contrary to New York's public policy, which strongly favors arbitration, *see Carnegie v. H & R Block, Inc.*, No. 60612/696, 1999 WL 184545, *3 (N.Y.1999); *PromoFone, Inc. v. PCC Management, Inc.*, 224 A.D.2d 259, 637 N.Y.S.2d 405, 406 (1st Dep't 1996). [5]

***3** Finally, as for plaintiff's conclusory argument that "it is unlikely that an arbitration clause [would be] within the reasonable expectations of a foreign seaman signing an employment contract," Pl. Supplemental Br. at 8, there is little reason to credit this naked assertion, given the widespread and longstanding use of arbitration to resolve employment disputes. Even in the maritime context, where seaman enjoy the right to a federal forum with respect to wage-related claims, it has long been recognized that certain non-wage disputes may be subject to compulsory arbitration or other grievance procedures in the first instance, *see Korinis*, 490 F.Supp. at 418–19 (seaman may be required to arbitrate claims for which there is no statutory right to proceed in federal court); *see also Lamont v. United States*, 613 F.Supp 588, 592 n. 1 (noting that "a seaman's claim of an employer's discriminatory conduct arising out of a disciplinary action or a claim of unfair discharge would be proper subjects for arbitration").

For the foregoing reasons, Counts II, IV and V must be dismissed in favor of mandatory arbitration. As to Counts I and III, although plaintiff is free to seek simultaneous arbitration of these wage claims, he cannot be compelled to do so. However, the Court has the inherent power to stay those claims pending arbitration of the balance of the dispute. *See Worldcrisa Corp. v. Armstrong*, 129 F.3d 71, 76 (2d Cir.1997); *Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co.*, 339 F.2d 440, 441 (2d Cir.1964). Here, a stay pending arbitration is warranted, since the claims to be arbitrated arise out of the same set of facts as plaintiff's wage claims and arbitration can thus be expected to resolve many common issues. *See Nederlandse*, 339 F.2d at 441. Moreover, arbitration is unlikely to cause undue delay or hardship, *see id.* at 442, given the defendants' representation that they will begin arbitration at plaintiff's earliest convenience and will stipulate to arbitration in New York if the plaintiff would prefer to proceed there rather than in Miami, the arbitral forum provided by contract, *see* Def. Br. at 9 n. 3. Plaintiff, moreover, is hereby given leave to move to vacate the stay if the defendants in any way impede the progress of the arbitration proceedings or if the arbitration has not concluded within one year from the date of this order. *See Worldcrisa*, 129 F.3d at 76.

In sum, Counts II, IV and V are hereby dismissed in favor of arbitration, and Counts I and III are hereby stayed pending conclusion of the arbitration. The Clerk is directed to place this case on the Court's suspense calender pending conclusion of the arbitration.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 1999 WL 335381

Footnotes

1 The M/V Tropicana, a defendant sued *in rem,* has not appeared in this action.

2 Plaintiff's claim for wrongful discharge and breach of contract was incorrectly labeled Count IV in plaintiff's complaint (even though there was already a preceding Count IV). It is herein referred to as Count V.

3 *See Zimmerman v. Continental Airlines, Inc.,* 712 F.2d 55, 56 n. 1 (3d Cir.1983) (motion to dismiss on ground of forum selection clause is in practical effect an application for specific enforcement); *but cf. Kulukundis Shipping Co., S/A, v. Amtorg Trading Corporation,* 126 F.2d 978, 987 (2d Cir.1942) (distinguishing between affirmative specific enforcement and grant of stay pending arbitration)

4 The Court here applies New York law to the question of whether the arbitration agreement is an unenforceable contract of adhesion. Although federal admiralty law generally governs maritime contracts, state law may be applied to the extent that it is not inconsistent with admiralty law. *See Ham Marine, Inc. v. Dresser Industries, Inc.,* 72 F.3d 454, 459 (5th Cir.1995); *Koninklyke Nederlandsche Stoomboot Maalschappy, N.V. v. Strachan Shipping Co.,* 301 F.2d 741, 743 (5th Cir.1962). Accordingly, since there is little federal admiralty law directly on point and much of it arises in a distinguishable context, the Court applies New York law, as the parties have done in their briefs. Parenthetically, the Court notes that it is at least arguable that Bahamian law should govern since the employment contract contains a choice of law provision to that effect, *see* Contract ¶ 15D; *see also Farrel Lines, Inc. v. Columbus Cello–Poly Corp.,* 32 F.Supp.2d 118, 127 (S.D.N.Y.1997). However, since the parties have neither argued Bahamian law nor given the notice of intent to rely on foreign law required by the Federal Rules of Civil Procedure, *see* Fed.R.Civ.P. 44.1, the Court sees no reason to countenance this possibility. Where litigants give no indication that they wish to rely on foreign law, a district court may apply the law of the forum state. *See Clarkson Co. Ltd. v. Shaheen,* 660 F.2d 506, 512 n. 4 (2d Cir.1981); *Carey v. Bahama Cruise Lines,* 864 F.2d 201, 205–06 (1st Cir.1988); *Commercial Insurance Co. v. Pacific–Peru Construction Corp.,* 558 F.2d 948, 952 (9th Cir.1977); *Walter v. Netherlands Mead, N.V.,* 514 F.2d 1130, 1137 n. 14 (3d Cir.1975).

5 Plaintiff's attempt to infer a federal policy against arbitration of seamen's employment disputes from section 1 of the FAA is unavailing. As discussed above, section 1 does not bar arbitration clauses in seamen's employment contracts—it merely prevents use of the FAA to enforce such provisions without in any way precluding their enforcement by other means.

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2010 WL 4365478
Only the Westlaw citation is currently available.
United States District Court,
E.D. Louisiana.

In re OIL SPILL BY THE OIL RIG "DEEPWATER HORIZON" IN the GULF OF MEXICO, ON APRIL 20, 2010.
This Document Relates to 10–1984.

MDL No. 2179.
|
Oct. 25, 2010.

ORDER

CARL J. BARBIER, District Judge.

*1 Before the Court is Defendant Abdon Callais Offshore's **Motion to Compel Arbitration and Stay Litigation Pending Arbitration (Rec.Doc.114)** and Plaintiff Clay Whittinghill's **Memorandum in Opposition (Rec.Doc.177).**

PROCEDURAL HISTORY AND BACKGROUND FACTS

Beginning in June of 2007, Plaintiff, Clay Whittinghill, was employed by Defendant, Abdon Callais Offshore, as captain aboard the M/V ST. IGNATIOUS LOYOLA ("vessel"). As a condition of his employment with Defendant, Plaintiff was required to sign an Arbitration Agreement, which he executed on May 11, 2007. Plaintiff's employment continued with Defendant until he was terminated on July 8, 2010. During the latter part of Plaintiff's employment (from approximately April 23, 2010 to July 8, 2010), the vessel led clean-up efforts in the aftermath of the Deepwater Horizon explosion. During the clean-up efforts, Plaintiff alleges that he suffered various ailments because of his exposure to contaminants. Plaintiff also alleges that he was constructively terminated after taking time off to tend to the alleged ailments.

On July 14, 2010, Plaintiff filed a Seaman's Complaint against Defendant, alleging that because of Defendant's negligence, he suffered severe, painful, and disabling injuries. He also alleges that his constructive termination was an unlawful violation of the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2615. On August 27, 2010, Defendant filed a motion asking this Court to compel arbitration and stay litigation in this matter pursuant to the Federal Arbitration Act because of the May 11, 2007 arbitration agreement. Plaintiff objects to arbitration, alleging that the agreement is not enforceable under the FAA. After reviewing the motion and the applicable law, this court finds as follows:

THE PARTIES' ARGUMENTS

Defendant asserts that pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et. seq.*, the arbitration agreement signed by Plaintiff is a valid and enforceable agreement and that regardless of Plaintiff's arguments, this court should enforce the agreement because federal courts strongly support resolution of disputes by arbitration, rather than by litigation. Defendant recognizes that § 1 of the FAA provides an exception for contracts of employment of seamen, however, Defendant believes that the arbitration agreement in this matter does not fall under that exception because the agreement was not included in an actual employment contract.

Plaintiff argues that although the agreement was not entitled "Employment Contract," the agreement falls under the FAA's § 1 exception because the agreement was a mandatory condition of Plaintiff's employment with Defendant.

DISCUSSION

The FAA requires enforcement of arbitration agreements in contracts involving commerce and maritime contracts. Section 1 of the FAA discusses exceptions to operation of the FAA and exempts certain individuals from being subject to the act. Of particular relevance to this matter is § 1, which states, in part, that contracts of employment of seamen are not covered by the FAA. According to Plaintiff, the May 11, 2007 arbitration agreement is not enforceable because while he was employed with

Defendant, he was a seaman and the agreement was a contract of employment.

*2 Neither Plaintiff nor Defendant disputes Plaintiff's seaman status. Therefore, whether this Court decides to stay this litigation and compel arbitration pursuant to the FAA hinges on whether the agreement in question is classified as a contract of employment under § 1. For the reasons stated below, the Court answers this question in the affirmative.

The agreement at issue in this case was signed by Plaintiff on May 11, 2007, approximately one month prior to the beginning of his employment. The agreement, which is entitled "Arbitration Agreement," begins with a notice that states: "Reviewing and signing this Arbitration Agreement is an essential part of the application process. You *must sign this agreement to be considered for employment.*" Rec. Doc. 114–2, pg. 1 (*emphasis included in original*). According to the agreement, "[a]ny controversy or claim arising out of, in connection with, incidental to or directly resulting from employment with Abdon Callais Offshore, LLC. shall be settled by arbitration, which shall be the sole and exclusive procedure for resolution of any such dispute." *Id.* Additionally, the agreement contains a section in which Plaintiff declares: "In consideration of the mutual promises contained above, and in exchange for the valuable consideration of acceptance of my application of possible employment with Abdon Callais Offshore, LLC., and/or continued employment with this company, I hereby agree to be bound by this Arbitration Agreement." *Id.* at pg. 2.

Defendant alleges that this agreement is enforceable under the FAA because it is not a "contract of employment" under § 1. Although this specific issue has not been addressed by the Fifth Circuit or the U.S. Supreme Court in relation to this fact pattern, both parties have cited cases which they urge this Court to use as persuasive authority in deciding this case. Defendant cites cases which courts have found that arbitration agreements were not classified as "contracts of employment." *See* Rec. Doc. 114–1, pgs. 5–7 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Endriss v. Eklof Marine*, 1998 WL 1085911, No. 96 Civ. 3137 (S.D.N.Y. July 28, 1998); *Nunez v. Weeks Marine, Inc.*, 2007 WL 496855, Civ. A. No. 06–3777 (E.D. La.2007 Feb. 13, 2007); and *Lejano v. K.S. Bandak*, 2000 WL 33416866, No. Civ. A. 00–2990 (E.D.La. Nov. 3, 2000)). However, a close examination of these cases reveals that they are easily distinguishable from this matter.

In *Gilmer*, the Court held that an arbitration agreement was not a contract of employment for purposes of § 1.[1] *Gilmer*, 500 U.S. at 25, n. 2. The plaintiff in *Gilmer* was employed as a Manager of Financial Services at Interstate. *Id.* at 23. As a condition of his employment, the plaintiff was required to register with the New York Stock Exchange ("NYSE") and several other stock exchanges. *Id.* The plaintiff's registration application with the NYSE included an agreement to arbitrate. *Id.* According to the plaintiff, the arbitration agreement was exempt from the FAA pursuant to § 1. The Court disagreed, holding that although registering with the NYSE was a condition of employment, the agreement was not a contract of employment under § 1 because it was an agreement between the employee and a third party. *Gilmer*, 500 U.S. at 25, n. 2.

*3 In *Endriss* and *Nunez*, the courts also held that the arbitration agreements did not fall under § 1's definition of contract of employment. *See, e.g., Endriss*, 1998 WL 1085911; *Nunez*, 2007 WL 496855. However, in those cases, the plaintiffs were injured prior to signing agreements to arbitrate with the defendants. Further, the agreements were not a condition of employment in either case; rather the agreements were focused on the settling the injury claims and the parties simply agreed to arbitrate any claims or disputes arising from those injuries. *See Endriss*, at *4 (holding that the agreement at issue was not subject to the exceptions clause of § 1 of the FAA because the agreement "was not a part of the employment contract between [the plaintiff] and [the defendant], but was executed subsequent to the accident in which [the plaintiff] sustained injuries and for the specific purpose of resolving claims arising from these injuries"); *Nunez* at *3 (stating that no language in the contract indicates that the plaintiff's acceptance of the agreement was a condition of his continued employment).

Similarly, in *Lejano*, the court held that a seaman's arbitration agreement was not a contract of employment. *Lejano*, 2000 WL 33416866 at *2. However, the court's ruling was partially based on the fact that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("CREFAA") applied and because the plaintiff filed his suit after the parties sought arbitration by filing a complaint with the National Labor Relations

Commission ("NLRC"). *Id.* at *3–4. The court held that § 1 does not apply to arbitration awards covered by the CREFAA. *Id.* Further, the court interpreted the filing of the complaint to the NLRC as a submission to the jurisdiction of an arbitration panel. *Id.* at *4. Lastly, as in *Endriss,* the *Lejano* court's decision to enforce arbitration was partially based on the fact that the plaintiff signed the agreement after he was injured. *Id.* at n. 5.

In this matter, the agreement was signed well before Plaintiff's injury and was not an agreement between Plaintiff and a third party. Further, unlike the facts in *Lejano,* there is no indication that the CREFAA applies and there has been no allegation that Plaintiff sought to arbitrate his claims prior to filing this suit. Accordingly, *Gilmer, Endriss, Nunez,* and *Lejano* are distinguishable from the current matter and are not persuasive.

Contrarily, this Court finds as persuasive the holding in *Shanks v. Swift Transp. Co. Inc.*, 2008 WL 2513056 (S.D. Tex. June 19, 2008). In *Shanks,* the court was faced with a fact pattern similar to this matter in which an employee signed a mandatory arbitration agreement prior to beginning his employment. The *Shanks* court "easily conclude[d]" that an agreement between an employee and his employer, which provides benefits tied to continued employment and is a mandatory condition of employment, should be classified as a component of the Plaintiff's contract of employment. *See Shanks,* 2008 WL 2513056 at *3 (citing *Brown v.. Nabors Offshore Corp.*, 339 F.3d 394 (5th Cir.2003); *Buckley v. Nabors Drilling USA, Inc.*, 190 F.Supp.2d 958, 960 (S.D.Tex.2002); *Carr v. Transam Trucking, Inc.*, No. 3:07–cv–1944–BD, 2008 WL 1776435, at *2 (N.D.Tex. Apr. 14, 2008)).

***4** The holding in *Shanks* is consistent with the Fifth Circuit's opinion in *Brown.* In *Brown,* as in this case, the plaintiff was subject to a mandatory arbitration agreement with his employer prior to being injured. *Brown,* 339 F.3d at 392. However, the *Brown* court did not specifically address the issue of whether the arbitration agreement in question should be classified as a contract of employment. Instead, the court focused on whether the plaintiff was the type of employee covered by § 1's exception. *Id.* After addressing this issue, and answering in the affirmative, the court found that the arbitration agreement was covered by § 1's exception. *Id.* at 394. The *Brown* holding indicates that a pre-injury arbitration agreement, the execution of which is mandatory for continued employment, should be considered a contract of employment under § 1. This Court finds the *Shanks* and *Brown* logic persuasive. When a potential employee is compelled to sign an arbitration agreement as a condition of employment and the agreement states that it is "in exchange for the valuable consideration of acceptance of [the employee's] application of possible ... and/or continued employment[,]" it is difficult to see how this mandatory agreement, which provides benefits tied to continued employment, does not constitute a contract of employment for purposes of § 1. Rec. Doc. 114–2, pg. 1; *see Shanks* 2008 WL 2513056 at *3. For these reasons, the Court finds that plaintiff's arbitration agreement is a contract of employment of a seaman and therefore, pursuant to § 1, the agreement is not enforceable under the FAA.

Accordingly, **IT IS ORDERED** that Defendant's **Motion to Compel Arbitration and Stay Litigation Pending Arbitration (Rec.Doc.114)** is hereby **DENIED.**

All Citations

Not Reported in F.Supp.2d, 2010 WL 4365478, 2011 A.M.C. 48, 31 IER Cases 834, 16 Wage & Hour Cas.2d (BNA) 1583

Footnotes

1 Although the plaintiff in *Gilmer* was not a seaman, he was an employee engaged in interstate commerce, and therefore, the § 1 exception was applicable if the agreement was indeed a contract of employment. *See* § 1 (stating "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce").

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

ANTHONY KOZUR,	:	
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-V-	:	1:18-cv-08750-JHR-JS
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F/V ATLANTIC BOUNTY, LLC, ATLANTIC CAPE FISHERIES, INC., and SEA HARVEST, INC.	:	

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2018, I electronically filed the foregoing document with the United States District Court for the District of New Jersey by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF System:

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