IP 01-1243-C B/S Abbott v. Lexford Apartment
Judge Sarah Evans Barker Signed on 8/2/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ABBOTT, BILL E,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
LEXFORD APARTMENT SERVICES INC,	)	CAUSE NO. IP01-1243-C-B/S
	)	
Defendant.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BILL E. ABBOTT, Plaintiff,	)	
vs.	)	IP 01-1243-C-B/S
LEXFORD APARTMENT SERVICES, INC., Defendant.	)	

ORDER GRANTING MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

Plaintiff Bill E. Abbott sues his former employer, Lexford Apartment Services, Inc. ("Lexford"), alleging employment discrimination. Abbott's claims are brought under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., and Indiana common law. Pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., Defendant filed a Motion to Compel Binding Arbitration and to Stay Litigation. For the reasons set forth below, Lexford's motion is GRANTED. The proceedings in this court are STAYED, and Plaintiff is ORDERED to submit to arbitration of his claims.

Factual Background

Bill Abbott worked as a general maintenance employee at Marabou Mills Apartments in Indianapolis from September 28, 1999 to September 26, 2000. When he began working at the apartment complex, Marabou Mills was owned and operated by Lexford. Also at that time, Lexford

was undergoing a merger with Equity Residential Properties Trust ("Equity"). Defendant maintains that Abbot was an employee of Equity from the start of his work at Marabou Mills. Def.'s Reply at 7 n.1.

On September 28, 1999, when he began work, Defendant contends that Abbott met with Janice Reed, Senior Property Manager at Marabou Mills. Reed Aff. ¶ 3. According to Lexford, Ms. Reed provided Abbott with a two-page document consisting of Equity's Arbitration Policy and Agreement ("the Policy" or "the Arbitration Policy" and "the Agreement"), which Abbott then signed. Plaintiff's account of his first day of work differs from that of Defendant. Abbot states that he met with Bob Reed (not Janice Reed) who gave him a number of documents and directed Abbott to sign them quickly because there was work to be done. Abbot Aff. ¶¶ 10-11. Abbott states that he does not remember signing or even seeing the Agreement. Id. at ¶¶ 13-14. We discuss this dispute in further detail below, but suffice to say, for now, that both sides attach to their submissions a copy of the Agreement and of the Arbitration Policy, carrying a signature purporting to be that of Plaintiff. Def.'s Ex. A; Pl.'s Ex. A.

The Agreement consists of two paragraphs, stating that the signer consents to be bound by the Arbitration Policy attached to the Agreement. Id. at 1. It also contains a signature line and lines on which the location and date of signing are entered. Id. The Arbitration Policy is comprised of two short paragraphs and three longer paragraphs on one page. Id. at 2. It lists various types of claims which Equity and the employee agree will be subject to binding arbitration. Id. The Policy provides that the American Arbitration Association will conduct any arbitration brought under the Agreement and states that both parties to the contract are giving up the right to bring their disputes before a jury.

Other documents were also exchanged between Equity and Abbott during their employment relationship. On October 12, 1999, Abbott received the Lexford Employee Guidebook ("the Guidebook") and signed a form acknowledging receipt. Pl.'s Exs. D and C. The Guidebook makes no reference to arbitration. In January of 2000, Abbott received the Equity Employee Handbook/Lexford Division ("the Handbook"). Pl.'s Ex. E. The Handbook includes a one-page discussion of arbitration. Id. at 25. It also mentions arbitration in the introduction to the Handbook. Id. at 2. No form acknowledging receipt has been submitted to the Court.

Abbott's employment ended following a work-related injury he suffered on January 20, 2000 for which he underwent surgery in March 21, 2000. Pl.'s Opp. at 1. His physician released him to work with restrictions that Abbott states prevented him from performing his duties without reasonable accommodation. For reasons not essential to the motion before us, the parties did not reach an agreement regarding reasonable accommodation, and Abbott's employment was terminated on in late September of 2000.

Analysis

The FAA provides for a stay of proceedings and for an order compelling arbitration in certain situations. See 9 U.S.C. §§ 3 and 4. For a claim to be arbitrable, (1) there must be a valid and enforceable arbitration agreement, (2) the claim must fall within the scope of the agreement, and (3) there must not have been a waiver of the agreement. DeGroff v. MascoTech Forming Technologies-Fort Wayne, Inc., 179 F. Supp.2d 896, 902 (N.D. Ind. 2001); Medina v. Hispanic Broadcasting

Corp. , 2002 WL 389628, at *1 (N.D. Ill. 2002); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24-34 (1991). Here, the parties disagree concerning only the first of these requirements. We examine below whether there was a valid and enforceable contract to arbitrate.

The FAA compels judicial enforcement of a broad expanse of written arbitration agreements. The FAA provides that:

> [a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.[1] As indicated by the language of the statute, an agreement to arbitrate is to be treated like any other contract. Id.; see also Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130 (7th Cir. 1997). As for any other contract, we look to the state law that ordinarily governs the formation of contracts to determine whether a valid arbitration agreement arose between the parties. Gibson, 121 F.3d at 1130. The parties agree that the contract law of Indiana applies to the situation before us.

Indiana courts apply ordinary contract principles to arbitration agreements. Id. Under Indiana contract law, the party seeking to compel arbitration has the burden of demonstrating the existence of an enforceable agreement to arbitrate. Id.; Wilson Fertilizer & Grain, Inc. v. ADM Milling Co., 654

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[1]The Supreme Court recently confirmed that the wide range of contracts for which arbitration agreements must be enforced includes contracts of employment (for all employees except transportation workers). Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001).

N.E.2d 848, 849 (Ind. Ct. App. 1996). Where the contract issue can be determined without resort to extrinsic evidence, the question is for the court and not a jury. Kokomo Veterans, Inc. v. Schick, 439 N.E.2d 639, 643 (Ind. Ct. App. 1982).

Defendant contends that the Agreement of September 28, 1999 is a valid, enforceable agreement to arbitrate Abbott's employment claims. As noted earlier, the Agreement states that both the employee and Equity would be bound to arbitrate certain types of disputes. The Arbitration Policy that is part of the Agreement lists as controversies to be arbitrated any claims arising out of the ADA and any disputes related to his employment.

Offer and Acceptance

Plaintiff's first objection to Lexford's argument that his claims are subject to binding arbitration is Abbott's argument that he did not accept the offer encompassed in the contract. Pl.'s Opp. at 7. To form a valid contract pursuant to Indiana law, an offer must be made and accepted, with a meeting of the minds of the contracting parties. Flynn v. Aerchem, Inc., 102 F. Supp.2d 1055, 1058 (S.D. Ind. 2000). The existence of a signed contract, like the Agreement here, suggests that there was offer and acceptance. However, Plaintiff argues that it is not his signature on the contract and further contends that even if he did sign the contract, he is not bound by it because he did not understand it. Pl.'s Opp. at 9-10. We reject this argument.

First, the Agreement appended to both parties' submissions does indeed include a signature purporting to be that of "Bill E. Abbott." Pl.'s Ex. A; Def.'s Ex. A. An affidavit from Janice Reed,

Senior Property Manager at Lexford, attests that Abbott signed the document in her presence. Reed Aff. ¶ 5, Def.'s Ex. A. As noted above, Abbott contends that Janice Reed was not present when he completed his paperwork, but that Bob Reed was at that meeting on September 28, 1999. Abbott Aff. ¶ 19. He also states that "*to the best of [his] recollection*," he never signed the arbitration agreement. Id. at ¶¶ 4, 19 (emphasis added). In light of the signature on the Agreement, this indirection is telling. Furthermore, Abbott does not affirm that the signature on the document is *not* his signature. In the face of warring affidavits, we turn to the most direct statement of the facts and find that Abbott did indeed sign the Agreement.

Second, the fact of the signature itself is important to the issue of offer and acceptance. Pursuant to Indiana law, "a person is presumed to understand the documents which he signs and cannot be released from the terms of a contract due to his failure to read it." Clanton v. United Skates of America, 686 N.E.2d 896, 899-900 (Ind. Ct. App. 1997). In Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp.2d 985, 998 (S.D. Ind. 2001), we found that the defendants had "created a contractual setting that overcomes this presumption." In that case, the packet of documents containing the arbitration agreement conspicuously invited the applicant to ask the manager any questions he or she had about the agreement and informed the applicant of his or her right to consult an attorney. Id. We reasoned that "in affording such an opportunity to receive answers to any questions that applicants might have about the agreement, . . . the Defendants can[not] thereafter fairly rely on a presumption that the applicant has understood the agreement's provisions." Id. Plaintiff tries to analogize his case to Geiger, arguing that his situation is even less worthy of the presumption of understanding cited in

Clanton because he was not afforded the opportunity to ask questions about the agreement. Pl.'s Opp. at 9-10. We do not find the situations analogous. The reason that the documents in this case do not invite questions is probably that they do not need to do so. In Geiger, the contract signed by the employee was with EDSI, an arbitration company. Geiger, at 989. Ryan's, the employer, was the third-party beneficiary of the employee agreement with EDSI. Id. at 990. The agreement between EDSI and the employee also was strongly dependent on a related contract between EDSI and Ryan's. Id. at 998. Here, in contrast, we have a relatively straightforward, 2-page contract in which two parties, the employee and the employer, agree to send their disputes to the AAA. Lexford did not create a situation so complex that it overcomes the well-settled presumption that a party who signs a contract has read and understood the document he signs.

Knowing and Voluntary Consent

Abbott next asserts that he is not bound by the arbitration agreement because he did not give knowing and voluntary consent to its provisions. Pl.'s Opp. at 10. Plaintiff fails to convince us that heightened standard must be met in order for an arbitration contract to be valid. We recognize that certain circuits have adopted this requirement for employment arbitration agreements. See, e.g., Prudential Ins. Co. of America v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994). However, the Seventh Circuit has not adopted the standard of knowing and voluntary consent, Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753, 761 (7th Cir. 2001), and the case cited by Plaintiff fail to convince us that the appellate court is likely to do so. Abbott points to Pierce v. Atchison, Topeka, and Santa Fe Railroads Co., 65 F.3d 562, 571 (7th Cir. 1995), for the proposition that the Seventh Circuit uses a

"totality of the circumstances" approach to determine whether a plaintiff knowingly and voluntarily entered an arbitration agreement. In fact, Pierce does not stand for this rule of law. In that case, the plaintiff had signed a *general release of liability.* Id. at 567. Here, Abbott did not agree to forego any employment discrimination rights, but rather he consented to seek their vindication in arbitration rather than before a court. A release of liability is not to be freely equated with an agreement to arbitrate. See Gilmer, 500 U.S. at 26 ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statue; it only submits to their resolution in an arbitral, rather than a judicial, forum."). Furthermore, the Seventh Circuit recently "question[ed] the continued validity of [requiring knowing and voluntary consent to employment arbitration agreements] in light of the Circuit City decision." Penn, 269 F.3d at 761. Plaintiff cannot avoid arbitration on this basis.

Adequate Consideration

Abbott also attacks the validity of the Agreement on the ground of failure of consideration. "It is a basic tenet of contract law that in order for a promise to be enforceable against the promisor, the promisee must have given some consideration for the promise." Gibson, 121 F.3d at 1130. The party claiming that a contract is invalid on this basis has the burden of proving the absence of consideration. Ind. Rule of Trial Proc. 8(C). Plaintiff fails to meet this burden.

Abbott claims that the only possible consideration is Equity's promise to consider Abbott's application for employment if he agrees to be bound by the arbitration policy. Pl.'s Opp. at 15 citing the Agreement ("I acknowledge and understand that Equity will not consider my application unless I

consent to be bound by the [arbitration policy].”). If this statement were the only consideration evidenced in the Agreement, Plaintiff would likely prevail. See Penn, 269 F.3d at 760 (“[T]he defendants provide no evidence that any Indiana court has ever held that a mere promise to consider an application for employment would provide consideration for a separate contract.”). However, the Agreement makes clear that Equity also promises to be bound by arbitration. The Policy consented to in the Agreement states that “[y]ou *and Equity* agree to submit certain types of employment related disputes to *binding* arbitration.” Def.’s Ex. A. at 2 (emphasis added). Such a promise comprises adequate consideration. Gibson, 121 F.3d at 1131 (“Often, consideration for one party’s promise to arbitrate is the other party’s promise to do the same.”).

Plaintiff’s only means of undercutting this conclusion is to point to the Equity Handbook given to Abbott in January of 2000. Pl.’s Ex. E. The Handbook states that “[t]he company may, at its discretion, change or modify the guidelines, policies and standards set forth herein, without notice and without a revision to this handbook .... If the company changes the terms of the arbitration procedures set forth in this handbook, you will be given notice of such changes and, by continuing to work for the company, you will be expressing your acknowledgment of and consent to those changes.” Ex. E at 2. Abbott argues that the ability to revoke the terms of the Handbook makes Equity’s agreement to submit to binding arbitration an illusory promise, insufficient to constitute consideration. Pl.’s Opp. at 13-14. A contract is not enforceable if the promise on which it is based “by its terms makes performance entirely optional with the promisor.” Penn, 269 F.3d at 759 (citing Pardieck v. Pardieck, 676 N.E.2d 359, 364 n.3 (Ind. Ct. App. 1982)). The problem with Plaintiff’s argument is that Abbott makes no

connection between the Equity Handbook and the Agreement signed on September 28, 1999 which would indicate that the former overrides the latter. He does not persuade us that the Handbook was even a contract. He claims that he was not told to sign the receipt acknowledging receipt of the Handbook. Abbott Aff. ¶ 23. Indeed, no signed acknowledgment of receipt of the Equity Handbook was submitted with the exhibits. As such, we find that the September 28, 1999 Agreement remains in effect and satisfies the consideration requirement.

Agreement not Unconscionable

Plaintiff next argues that the Agreement is unconscionable based on the potential for bias in the arbitral forum, the disparate bargaining power of the parties, and Abbott's lack of understanding of the terms of the contract. Pl.'s Opp. at 17. We reject this contention. A contract is unconscionable if it is such that "no sensible man not under delusion, duress or in distress would make, and such [that] no honest and fair man would accept." Weaver v. American Oil Co., 276 N.E.2d 144, 462 (Ind. 1971). The Agreement does not sink to that level.

Most of Plaintiff's argument on this point centers on likening his case to that of the plaintiff in Geiger (where we found the contract unconscionable) and distinguishing his situation from that of the plaintiff in Flynn (where we did not find the contract unconscionable). Pl.'s Opp. at 17-18. While neither case presents a perfect parallel, we find Flynn to be more on point. For instance, in Geiger, the employer had its own contract with a EDSI, a firm that provides arbitration services only to employers. See Penn, 269 F.3d at 756. In contrast, there is less potential for bias in the case now before us

because both parties contract *with each other* to send their disputes to a neutral third party, the American Arbitration Association. With regard to the issue of disparate bargaining power, we note that Abbott was employed as a maintenance worker in an apartment complex, a position presumably requiring enough skill that he is not regarded as a "fungible commodity" like the plaintiff in Geiger, 134 F. Supp.2d at 998, who worked as a restaurant server.[2] In contrast to the aforementioned complex contractual situation in Geiger, Abbott needed to make sense only of a two-page document, memorializing an agreement between him and his employer. The plaintiff in Geiger received only some of the documents related to the arbitration agreement before signing the contract. Geiger, 134 F. Supp.2d at 998. Here, as in Flynn, Abbott received all the papers pertinent to understanding his rights and obligations when he signed the Agreement. Abbot's alleged lack of understanding of the contract does not render it unconscionable.

Constitutional Right to Jury Trial Waived

Abbott argues that he cannot be forced to arbitrate his disputes because he has a constitutional right to a jury trial of employment discrimination claims. Pl.'s Opp. at 19. This argument is not

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[2]We also note that Weaver, 276 N.E.2d at 462, establishes that there must be a "gross" inequality between the bargaining parties. If we were to find that no low-level employee can be held to an arbitration agreement due to a supposed disparity in bargaining power between the employer and employee, then most arbitration agreements to resolve employment disputes would be rendered ineffective. This result is contrary to the Supreme Court's determination that the advantages of the arbitration process hold true in the employment context. See Circuit City, 532 U.S. at 123 (ruling on scope of FAA as applied to arbitration agreement between sales counselor and national retailer of consumer electronics). See also Kreimer v. Delta Faucet Co., 2000 WL 962817, at * 5 (S.D. Ind. 2000) ("[A] party does not need to be a sophisticated business-person or have an advanced education to be bound by an arbitration agreement.") (citation omitted).

supported by the record or by case law. The right to a jury trial is waivable by signing an agreement to submit claims to arbitration. Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361, 368 (7th Cir. 1999). The Arbitration Policy and Agreement signed by Plaintiff on September 28, 1999 explicitly states that "[b]oth you and Equity are giving up the right to have disputes covered by this agreement resolved in court and/or by a jury." Pl.'s Ex. A. at 2; Def.'s Ex. A.

Costs of Arbitration Do Not Invalidate the Agreement

Finally, Plaintiff contends that "[t]o the extent that arbitration would subject [him] to a financial burden not imposed if the case remains in court, the arbitration agreement is invalid." Pl.'s Opp. at 24. This argument is unavailing. As Abbott admits, the Agreement is silent as to which party is responsible for payment of the costs of arbitration. Id. In this situation, Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79 (2000), is squarely on point. In response to a similar argument from the plaintiff in that case, the Supreme Court stated:

> The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that [the plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.

Id. at 91. This argument does not allow Abbott to avoid arbitration in favor of a judicial forum for his claims.

Summary

For the reasons explained above, Defendant's Motion to Compel Binding Arbitration and to Stay Litigation is GRANTED. Plaintiff Abbott is hereby ORDERED to submit to and proceed with arbitration. His claims in this court are STAYED pending arbitration.

It is so ORDERED this _____ day of August 2002.

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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