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Docket: CIVIL ACTION No. 18-00227 BLS 2

Date: July 23, 2018

Parties: THOMAS MCCARTHY, Plaintiff vs. GENESEE & WYOMING RAILROAD SERVICES, INC., Defendant

Judge: Janet L. Sanders, Justice of the Superior Court

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

Plaintiff Thomas McCarthy brings this lawsuit against his former employer, defendant Genesee & Wyoming Railroad Services, Inc. (Genesee) alleging that Genesee breached its contract with him by failing to pay severance benefits. Genesee now moves to dismiss the Complaint because the contract upon which plaintiff relies requires that any disputes regarding its enforcement or interpretation be resolved by binding arbitration. In opposing the motion, plaintiff argues that the contract is ambiguous and could be interpreted to permit litigation. He also contends that Genesee has waived any right to arbitration. This Court concludes that Genesee's Motion must be Allowed.

BACKGROUND

The contract that plaintiff alleges to have been breached is the Change in Control Agreement (CIC Agreement). Section 10 of the CIC Agreement is entitled "Dispute Resolution." It states in relevant part:

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Unless otherwise prohibited by law or specified below, all disputes, claims and clauses of action (including but not limited to any claims of statutory discrimination of any type) in law or equity arising from or relating to this Agreement or its enforcement, performance, breach or interpretation shall be resolved solely and exclusively by final and binding arbitration...."

On August 18, 2017, McCarthy resigned from his employment at Genesee. One month later, on September 29, 2017, he sent a letter to Genesee demanding severance benefits that he says he was owed pursuant to the CIC Agreement. Among other things, the letter stated that "in the event that you elect not to pay McCarthy's owed severance, please consider this letter a formal demand for arbitration." Defendant did not respond and on January 23, 2018, McCarthy instituted this action rather than follow through on his request for arbitration. On March 8, 2018, the parties filed a joint motion extending the time for defendant to respond, which was allowed. The instant motion was filed on May 24, 2018.

DISCUSSION

In opposing the motion, plaintiff first argues that the arbitration provision in the CIC Agreement is in conflict with the section of the Agreement immediately preceding it. Specifically, Section 9, entitled "Governing Law/Jurisdiction," states that the CIC Agreement is to be interpreted under Massachusetts law and that "each party hereby consents to the jurisdiction of a competent court in Massachusetts to hear any dispute arising out of this Agreement." Plaintiff argues that Section 9 and Section 10 conflict with each other, creating at the very least an ambiguity in the contract which must be construed against Genesee. This Court disagrees.

"It is a well settled rule of contract interpretation that to determine 'whether an agreement is clear and unambiguous, the document must be viewed in its entirety and its language be given its plain and ordinary meaning.'" Siebe, Inc. v. Louis M. Gerson

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Co., Inc., 74 Mass.App.Ct. 544, 549 (2009), quoting *W.P. Assoc. v. Forcier, Inc.*, 637 A.2d 353, 356 (R.I. 1994). "Only when an agreement is reasonably and clearly susceptible to more than one interpretation is it deemed to be ambiguous." *Id.* If the contract is unambiguous, then it must be enforced according to its terms. In the instant case, the CIC Agreement is unambiguous in requiring arbitration of any dispute concerning its interpretation or enforcement. That the Agreement also states that it is governed by Massachusetts law and that Massachusetts courts have jurisdiction over the parties does not abrogate this arbitration requirement. Rather, it says only that, in the event the matter does end up in court, the parties consent to having a Massachusetts court hear the dispute. That could occur, for example, where a party seeks a court order compelling arbitration or where, after an arbitration takes place, one party seeks judicial review of the arbitration decision or enforcement of it. In short, there is no conflict. Reading the CIC Agreement as a whole, this Court concludes that it unambiguously requires arbitration of plaintiff's dispute.

Plaintiff argues in the alternative that Genesee has waived arbitration because it failed to properly and timely assert its right to arbitration. In determining whether a waiver has occurred, this Court applies the factors set forth in *Home Gas Corp. of Massachusetts, Inc. v. Walter's of Hadley, Inc.*, [403 Mass. 772](#), 776 (1989). Those factors include: 1) whether the parties substantially engaged in litigation before the intent to arbitrate was communicated; 2) the length of delay in asserting a right to arbitrate; 3) whether the moving party filed a counterclaim or otherwise invoked the court's jurisdiction; and 4) whether the nonmoving party has been prejudiced by any delay. In the instant case, Genesee raised the issue of arbitration in its first responsive

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pleading, which was timely filed pursuant to the parties' joint motion to extend the time for that filing. Applying the factors set forth the SJC in *Home Gas*, this Court concludes that there has been no waiver.

The Motion to Dismiss is therefore ALLOWED and the Complaint is hereby DISMISSED.

Janet L. Sanders, Justice of the Superior Court

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