UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Case No.: 1:19-cv-00016-SM

KETLER BOSSÉ,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, NEW YORK LIFE INSURANCE AND ANNUITY CORP., and NEW YORK LIFE INSURANCE COMPANY OF ARIZONA,

Defendants.

PLAINTIFF'S OBJECTION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY PROCEEDINGS AND COMPEL ARBITRATION AND INCORPORATED MEMORANDUM OF LAW

Plaintiff Ketler Bossé objects to Defendants' Motion to Dismiss or, in the Alternative, Stay Proceedings and Compel Arbitration ("Motion to Dismiss") and provides, below, his incorporated Memorandum of Law in support of same.

INTRODUCTION

Rather than allowing Mr. Bossé his day in court with a jury, the Defendants have reached far back into the annals of their history with Mr. Bossé, located and dusted off a 15-year-old employment agreement (that was only in effect for one year), and have claimed that an arbitration clause in that agreement requires that this case be stayed and Mr. Bossé's claims be referred to arbitration. Defendants also contend one of Mr. Bossé's claims (Count III, Conspiracy to Interfere with Civil Rights, 42 USC § 1985) fails to state a claim for relief. Their arguments lack merit.

First, the arbitration clause does not apply to this dispute because the facts and events alleged in the Complaint occurred – in their entirety – ***over 12 years after*** Mr. Bossé's employment agreement expired. When the facts alleged in the Complaint occurred, Mr. Bossé was operating as an independent contractor, with a distinct and more onerous set of duties and obligations and a far different and more lucrative compensation structure, and under two different agreements with Defendants, neither of which contains an arbitration clause. Thus, the arbitration clause in his employment agreement from over a decade ago does not cover this dispute.

Second, the issue of whether the arbitration clause applies to this dispute is not an arbitrability issue that should be decided in arbitration. Rather, there is no clear and unmistakable evidence in the employment agreement that the parties intended for that issue to be decided in arbitration. The language of that agreement limited issues of arbitrability to only those claims and disputes that could arise from Mr. Bossé's prior employment relationship with the Defendants. Thus, *the Court* must decide whether the arbitration clause applies here.

Third, the doctrines of judicial estoppel and waiver bar the Defendants from invoking the arbitration clause at all. In a prior administrative agency proceeding over two years ago, Mr. Bossé filed some of the discrimination claims he is asserting in this proceeding. Instead of introducing the employment agreement and arguing those claims should be referred to arbitration, the Defendants introduced *another* agreement (Mr. Bossé's Agent's Contract), under which Mr. Bossé was operating as a soliciting agent, and claimed the agency lacked jurisdiction over Mr. Bossé's claims because he was an independent contractor under that Contract. The Defendants are obviously adopting the opposite position here. They should be judicially

estopped from doing so, and they have otherwise waived the right to invoke arbitration because they delayed doing so until now.

Fourth, Count III states a valid claim for relief. Mr. Bossé has alleged that the Defendants, through various agents (individual corporate officers), conspired to interfere with his civil rights, and the Complaint provides extensive detail regarding how these individuals accomplished that feat.

The Court should deny Defendants' Motion.

MEMORANDUM OF LAW

A. The Court Should Deny Defendants' Request to Compel Arbitration of Mr. Bosse's Claims Because the Arbitration Clause Does Not Cover This Dispute

Defendants argue all of Mr. Bossé's claims should be dismissed and/or referred to arbitration because a "Partner's Employment Agreement" he purportedly signed in March 2004 contains an arbitration clause. *See* Defendants' Memorandum of Law in support of Motion to Dismiss (Doc #9-1) at 2-4. All of Mr. Bossé's claims, however, concern facts and events that occurred ***after*** that Employment Agreement was terminated in 2005. Those claims, therefore, are not covered by the arbitration clause in the Employment Agreement and cannot be referred to arbitration.

"A party who attempts to compel arbitration must show that a valid agreement to arbitrate exists, that the movant is entitled to invoke the arbitration clause, that the other party is bound by that clause, and that the claim asserted comes within the clause's scope." *InterGen N.V. v. Grina*, 344 F.3d 134, 142 (1st Cir. 2003). It is axiomatic that "'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Id.* at 142-43 (quoting *AT&T Techs., Inc. v. Commcn's Workers of Am.*, 475 U.S. 643 (1986)).

For example, in *Bogen Communications, Inc. v. Tri-Signal Integration, Inc.*, 227 F. App'x 159 (3d Cir. 2007), the Third Circuit found that a dispute that occurred after the expiration of the parties' agreement was not subject to an arbitration clause contained in that agreement. Bogen was a manufacturer and seller of sound systems and telephone peripherals, and it hired Tri-Signal to distribute its products in California. Bogen and Tri-Signal's contract included an arbitration clause and expressly stated that it would terminate on December 31, 2000. After the contract expired, the companies continued to do business together, but on different terms. On May 7, 2003, more than two years after the expiration of the initial contract, Bogen terminated its business relationship with Tri-Signal. Tri-Signal sued, and Bogen moved to compel arbitration pursuant to the arbitration clause in their agreement. The Third Circuit denied the motion. It held: "Despite well-established policy considerations favoring the enforcement of arbitration agreements . . . , a party can only be required to arbitrate if 'that party has entered into a written agreement to arbitrate that covers the dispute.'" The Third Circuit identified the fact that the parties did not enter into a new written agreement after the termination of the original contract, and that their dispute did not arise ***until over two years after the termination of their agreement***. The court found that the lawsuit did not arise under the original contract, and there was no evidence of a clear intention to arbitrate disputes that arose under the parties' new arrangement.

Similarly, in *Vantage Tech. v. College Entrance Examination Bd.*, 591 F. Supp. 2d 768 (E.D. Pa. 2008), the district court denied a motion to compel arbitration of a contract dispute because it arose after the expiration of the parties' written contract containing an arbitration clause and before the commencement of their subsequent written contract that did not include an arbitration provision. *Id.* at 770-72.

Here, ***all*** of the claims Defendants seek to refer to arbitration concern facts and events that arose ***over 12 years after*** the Employment Agreement was terminated. Defendants concede the Employment Agreement terminated, and Mr. Bossé "ceased to be an employee of New York Life," ***in 2005***, "when he transferred to a different role as an insurance agent." Doc #9-1 at 5. At that point, Mr. Bossé and Defendants resumed proceeding under the Agent's Contract he signed in November 2001, and Defendants concede he "transitioned back to an Agent's position." *See* Complaint (Doc #1) ¶ 10; Doc. #9-2 ¶ 3. Mr. Bossé then became a District Agent and signed a District Agent Agreement in 2013. Doc. #1 ¶¶ 23, 27. Neither of those contracts contains an arbitration clause. *See id.* & Exhibits C, E.

Mr. Bossé's claims are based on facts and events that did not arise under the Employment Agreement and, instead, arose under either of two separate, subsequent arrangements under which he worked with the Defendants: the above-referenced Agent's Contract or the District Agent Agreement. The earliest events concerning this dispute occurred in ***2013***, seven years after the Employment Agreement was terminated, and Mr. Bossé's term as an employee ended. *See id.* ¶ 61. The majority of Defendants' conduct occurred in 2015. *See id.* ¶¶ 41-66. Mr. Bossé's termination and the events that preceded it occurred in 2015 and 2016. *See id.* ¶¶ 67-81. Indeed, when Defendants terminated Mr. Bossé, they provided him with a letter that purported to terminate him under the 30-day at-will provision in the ***Agent's Contract***, not the Employment Agreement. *See id.* ¶ 80. Defendants then defamed Mr. Bossé to his clients and FINRA in 2016, *after* his termination. *See id.* ¶¶ 89-92.

Indeed, the nature of the dispute Mr. Bossé describes in the Complaint relates to his role as a soliciting agent and then, from 2013 onward, a District Agent, ***not*** as an employee under the Employment Agreement. Under the Agent's Contract, Mr. Bossé was authorized "to solicit

applications for individual life insurance policies, individual annuity policies, individual health insurance policies, group insurance policies, and group annuity policies." *Id.* ¶ 11. That Contract also entitled him to earn either First Year Commissions ("FYC"), a percentage of the entire first-year premium a new client that he directly generated paid on an individual policy or annuity, and renewal commissions, income generated from a client's renewal of a contract or policy (known as "residual income"). *Id.* ¶ 14; *see also* Doc. #9-2 ¶ 2 ("Agents are compensated with commissions based on the percentage of first-year and renewal premiums they generate."). In addition to his duties as a soliciting agent under the Agent's Contract, when he entered into the District Agent Agreement, Mr. Bossé was required "to select, recruit and recommend the appointment of Agents to New York Life." Doc #9-1 ¶ 29. He was also required to have one proactive agent (an agent earning at least $24,000 per year in commissions) at the end of his first full District Agent calendar, two proactive agents by the end of his fourth year, and three proactive agents by the end of his fifth year. *Id.* Under the compensation schedule included with the District Agent Agreement, Mr. Bossé could earn various "override" commissions in addition to his usual compensation. *Id.* ¶ 30; *see also* Doc. #9-2 ¶ 2 ("District Agents are eligible for additional compensation in the form of overrides based on commissions paid to agents they recruit."). An "override" was a "fee paid to the District Agent when a contracted Agent within the District Agent Unit sells [certain] products for New York Life." *Id.* A "District Unit" was comprised of the agents Mr. Bossé recommended and who were contracted by New York Life and assigned to Mr. Bossé. *Id.* As a District Agent, Mr. Bossé could lease his own office space, purchase furniture, hire his own administrative staff, and pay office expenses. *Id.* ¶ 31.

In contrast, the Employment Agreement made Mr. Bossé a mere employee with far more limited duties. It afforded Mr. Bossé a salary of $60,000. *See* Doc. #9-3 at 1. It did not identify

any right to earn commissions or any other incentivized form of compensation derived from the solicitation of insurance products. *See id.* His only responsibility under the Employment Agreement was to "personally recruit, train, and supervise Agents under the direction of the Managing Partner of the General Office." *See* Doc. #9-3 at 1.

In the Complaint, Mr. Bossé has alleged claims that relate to the nature of his role as a soliciting agent and District Agent, not as an employee. For example, Mr. Bossé alleges the Defendants (a) failed to process and underwrite applications for him and his agents that they properly submitted; (b) engaged in back billing that undermined Mr. Bossé and his agents; and (c) stole or drove away Mr. Bossé's agents. *See id.* ¶ 41. The Complaint provides excruciating detail about instances in which Defendants delayed the processing of applications that Mr. Bossé's agents such as Willie Miles, Xavier Veras, and Paul Etienne had submitted. *Id.* ¶¶ 42-43. It also details how the Defendants treated Mr. Bossé's agents, such as Malcom Ngundam, Mr. Miles, and Mr. Etienne, with respect to denying them compensation they were due, and how that treatment led to three of his agents – Mr. Ngundam, Mr. Veras, and Amanda Brown – quitting. *Id.* ¶ 49. The Complaint also explains how Defendants seduced two of Mr. Bossé's top-producing agents, David Duquette and Ron Noyes, to re-locate to the General Office and diverted the hiring of another agent, Marie Elsie Buteau, to the General Office. *Id.* ¶¶ 50-51. Mr. Bossé has also alleged that, as a result of Defendants' conduct above, he lost new commissions, residual commissions, and override commissions. *Id.* ¶ 100. These are all components related to Mr. Bossé's role as a soliciting agent under the Agent's Contract and a District Agent under the District Agent Agreement, not his status as an employee under the long-ago terminated Employment Agreement.

The fact that Defendants contend the arbitration clause survived the termination of the Employment Agreement is irrelevant: the dispute must still be covered by the arbitration clause in order to be arbitrable. *See Bogen*, *supra*; *Vantage Tech*, *supra*. This dispute arose, however, long after the termination of the Employment Agreement. Accordingly, Mr. Bossé's claims are not covered by the arbitration clause in the Employment Agreement, and the Court should deny Defendants' request to stay this case and refer them to arbitration.

B. The Issue of Whether the Arbitration Clause Applies to this Dispute is for the Court to Decide.

Defendants argue the issue of arbitrability must be decided in arbitration because the Employment Agreement states "any dispute as to whether such Claim is arbitrable, shall be resolved by an arbitration proceeding." *See* Doc. #9-1 at 7; Doc #9-3 at 3. They rely on a recent U.S. Supreme Court case, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), which held that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, ... a court possesses no power to decide the arbitrability issue . . . . even if the court things that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Id.* at 528. This is inaccurate.

"A dispute over whether an arbitration provision applies to a particular controversy raises an issue of substantive arbitrability that is presumptively for the courts, not the arbitrator, to decide. *Shank/Balfour Beatty v. IBEW Local 99*, 497 F.3d 83, 89 (1st Cir. 2007). While it is true "parties may delegate threshold arbitrability questions to the arbitrator," the parties' agreement must do so by "clear and unmistakable evidence." *Henry Schein*, 139 S. Ct. at 530. In the First Circuit, the "clear and unmistakable evidence" standard is a "high one." *Shank/Balfour*, 497 F.3d at 89-90 (quoting *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 14 (1st Cir. 2005)).

Here, the Employment Agreement states it "shall be governed by and interpreted in accordance with the laws of the State of New York." Doc. #9-3 at 5. Accordingly, under New York law, "'[t]he court must ascertain the intent of the parties from the plain meaning of the language employed,' and a 'contract should be construed so as to give full meaning and effect to all its provisions.'" *Painewebber, Inc. v. Elahi*, 87 F.3d 589, 600 (1st Cir. 1996) (quoting *Am. Express Bank Ltd. v. Uniroyal, Inc.*, 562 N.Y.S.2d 613, 614 (N.Y. Add. Div. 1990)). "A contract term is ambiguous if it is 'capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business.'" *Painewebber*, 87 F.3d at 600 (quoting *Walk-In Med. Ctrs., Inc. v. Breuer Capital Corp.*, 818 F.2d 260, 263 (2d Cir. 1987)).

Here, the Employment Agreement does not demonstrate "clear and unmistakable" evidence that the parties intended that the issue of whether the arbitration clause applies to this dispute is an arbitrability issue that must be decided in arbitration. The arbitration clause states, "The ***Partner*** and New York Life agree that ***any dispute, claim or controversy arising between them, including those alleging employment discrimination (including sexual harassment and age and race discrimination) in violation of a statute (hereinafter "the Claim"), as well as any dispute as to whether such Claim is arbitrable***, shall be resolved by an arbitration proceeding." Doc. #9-3 at 3 (emphases added). Mr. Bossé was an ***employee*** under this Agreement, and his relationship with Defendants was an ***employment*** relationship: as described above, he had a far more limited set of duties and obligations than he had under the Agent's Contract or District Agent Agreement, and he earned a salary and had no right to the extensive commission structure provided by the latter two agreements. Thus, reading the Employment Agreement as a whole, a

"dispute, claim, or controversy" between Mr. Bossé and the Defendants would have necessarily been limited to employment-related claims, such as a traditional employment discrimination claim (which is expressly included in the arbitration clause) or a breach of the non-compete provision in the Employment Agreement. They would not have included claims or disputes arising out of Mr. Bossé's subsequent relationship with the Defendants as a soliciting agent and District Agent (and, as the Defendants contend, an "independent contractor," *see infra* pp. 10-12). The latter relationship yields a separate set of duties and obligations and different array of disputes, claims, or controversies, such as the many claims Mr. Bossé has asserted in the Complaint. Thus, while there may be "clear and unmistakable" evidence that the parties intended that the issue of whether the arbitration clause applies to disputes, claims, or controversies arising out of Mr. Bossé's prior employment relationship with the Defendants is an arbitrability issue that must be decided in arbitration, there is no such evidence that the issue of whether the clause applies to disputes, claims, or controversies arising out of Mr. Bossé's subsequent independent contractor relationship with the Defendants is an arbitrability issue that must be decided in arbitration. Thus, *the Court* must decide whether the arbitration clause applies to this dispute. As demonstrated above, the clause does not apply.

C. Defendants are Judicially Estopped from Invoking the Arbitration Clause

"[T]he doctrine of judicial estoppel prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant either in a prior legal proceeding or in an earlier phase of the same legal proceeding." *InterGen*, 344 F.3d at 144. "The doctrine is designed to ensure that parties proceed in a fair and aboveboard manner, without making improper use of the court system." *Id.* "Courts are prone to invoke it 'when a litigant is playing fast and loose with the courts.'" *Id.* (quoting *Patriot Cinema, Inc. v. Gen. Cinemas Corp.*, 834 F.2d 208, 212 (1st

Cir. 1987)). It applies in "a situation in which a party has adopted one position, secured a favorable decision, and then taken a contradictory position in search of legal advantage." *InterGen*, 344 F.3d at 144.

Mr. Bossé filed a Charge of Discrimination with the New Hampshire Commission for Human Rights on February 12, 2016 alleging some of the same claims he is alleging here, including, among others, race discrimination and retaliation. *See* Doc. #1 ¶ 87. As noted in Defendants' Motion, the arbitration clause in the Employment Agreement applies to "any dispute, claim or controversy arising between them, ***including those alleging employment discrimination*** (including sexual harassment and age and ***race discrimination***) in violation of a statute . . . ." *See* Doc. #9-1 at 2 (emphases added). Defendants did ***not***, however, invoke the arbitration clause in the Employment Agreement and request the Commission to refer Mr. Bossé's claims to arbitration; rather, they alleged Mr. Bossé was an *independent contractor*, not an employee, and they provided the Commission with Mr. Bossé's Agent's Contract and argued that Contract controlled that dispute and supported the notion that he was an independent contractor. *See* Doc. #1 ¶ 87 & Exhibit L. Defendants argued that, because Mr. Bossé was not an employee, the Commission lacked jurisdiction over the dispute. *See id.* The Commission agreed with Defendants and dismissed the Charge.

Defendants are now taking the opposite position. Mr. Bossé has raised the same claims, this time in a proper forum (in court, not an administrative agency that lacked jurisdiction). Defendants now contend, however, that Mr. Bossé was an ***employee***, and that a ***different contract*** (the Employment Agreement) controls this dispute and supports referring his claims to arbitration. The Court should hold Defendants are estopped from assuming this position now,

after having secured a favorable ruling by assuming a contradictory position in a prior legal proceeding.

D. Defendants Waived Their Right to Arbitrate

If the Court is inclined to disagree that the doctrine of judicial estoppel applies, it should, nevertheless, hold that Defendants waived their right to arbitrate. "[A]n arbitration provision has to be invoked in a timely manner or the option is lost." *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12 (1st Cir. 2003). "Such a forfeiture is an issue for the judge." *Id.*; *see also Marie*, 402 F.3d at 14-15 (holding whether a party waived the right to arbitrate was not an issue to be decided by an arbitrator). "[T]he components of waiver of an arbitration clause are undue delay and a modicum of prejudice to the other side." *Rankin*, 336 F.3d at 12.

Before the Commission, Defendants could have invoked the arbitration clause in the Employment Agreement and requested Mr. Bossé's claims be referred to arbitration. They failed to do so. Rather, they waited to invoke it until *after* Mr. Bossé undertook the extensive effort and cost to have his Complaint prepared and filed in this Court (rather than the Charge of Discrimination he filed with the Commission). Further, Mr. Bossé has incurred significant costs in filing this case. Defendants have exhibited undue delay in invoking the arbitration clause, and Mr. Bossé has suffered prejudice. Thus, Defendants have waived their right to invoke the arbitration clause.

E. The Court Should Decline to Dismiss Count III

Defendants argue the Court should dismiss Count III because it (1) fails to allege two or more persons engaged in a conspiracy to interfere with his civil rights, and (2) makes conclusory allegations regarding the remaining elements. These arguments lack merit.

1. The Complaint Sufficiently Alleges a Conspiracy

Defendants argue the Complaint "fail[s] to implicate two or more of the defendants in such a conspiracy and instead only mention[s] three individual employees of New York Life." *See* Doc. #9-1 at 8. This is a distinction without a difference. Mr. Bossé is obviously alleging the three corporate Defendants interfered with Mr. Bossé's civil rights through the actions of its agents: James Robbins, Stephen Irish, and Nicholas Inglese, among others. *See* Doc. #1 ¶ 132. In a case cited in Defendants' Motion, *Stathos v. Bowden*, 728 F.2d 15 (1st Cir. 1984), the First Circuit held a Section 1985(3) conspiracy claim could proceed against a corporate defendant because the conduct alleged involved a series of acts over time engaged in by several individuals commissioners and ratified by the company. *Id.* at 21. Thus, the Complaint sufficiently alleges a conspiracy in Count III.

2. The Complaint Does Not Make Conclusory Allegations

Defendants argue the Complaint "makes only passing and conclusory allegations, stating that 'Mr. Robbins used his position to influence other New York Life employees, including but not limited to, Mr. Inglese, Mr. Irish, and others, in a civil conspiracy to intentionally deprive Mr. Bossé of his right to equal protection under the law . . . ." Doc. #9-1 at 9. This is inaccurate. Count III incorporates, by reference, other allegations in the Complaint. *See* Doc. #1 ¶ 130. The Complaint, in turn, alleges elsewhere that the Defendants – through Mr. Robbins, Mr. Irish, and others in the General Office – conspired to deprive Mr. Bossé of his rights in several ways: (a) failed to process and underwrite applications Mr. Bossé and his agents properly submitted; (b) engaged in back billing that undermined Mr. Bossé and his agents; and (c) stole or drove away Mr. Bossé's agents. *See id.* ¶ 41. Mr. Robbins' conduct and influence concerning the delays in processing and underwriting is specifically described in various instances. *See id.*

¶¶ 42-43, 47. His conduct, including with others in the General Office, with respect to the poaching of Mr. Bossé's agents is also described at length in the Complaint. *See id.* ¶¶ 49-51. Thus, Count III states a valid claim for relief.

CONCLUSION

For the foregoing reasons, Mr. Bossé respectfully requests that the Court (1) deny the Defendants' Motion to Dismiss; and (2) grant any other relief deemed just and necessary.

Respectfully submitted,

KETLER BOSSÉ,

By His Attorneys,

FOJO LAW, P.L.L.C.

Dated: April 26, 2019

/s/ Robert M. Fojo

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was electronically filed with the Clerk of Court using CM/ECF on April 26, 2019. I also certify that this document is being served this day on all counsel of record via transmission of Electronic Filing generated by CM/ECF.

/s/ Robert M. Fojo

Robert M. Fojo