UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Gambardella	:	
	:	
v.	:	**No. 3:01cv1827(JBA)**
	:	
Pentec, Inc., et al.	:	

Ruling on Motion for Leave to File Rule 60(b) Motion [Doc. #44]

Plaintiff commenced this employment discrimination suit against her former employer despite having signed an agreement to arbitrate such disputes. When defendants filed their motion to compel arbitration, plaintiff opposed by asserting that she was fraudulently induced to sign the arbitration agreement and that the provision of the agreement providing that she would pay one-half of the cost of arbitration deprives her of rights guaranteed to Title VII plaintiffs. The Court's ruling on the motion rejected both contentions, see Gambardella v. Pentec, Inc., 218 F. Supp. 2d 237, 244-246 (D. Conn. 2002), but raised a related ground sua sponte: the unavailability of legal fees for a prevailing Title VII complainant.[1]

Following the Court's ruling declining to compel

[1]"But for the arbitration agreement, [Gambardella] would presumptively be entitled to recover both her attorney's fees and costs under Title VII if she prevailed. By denying Gambardella access to a remedy Congress made available to ensure that violations of Title VII are effectively remedied and deterred, the arbitration agreement drafted by Pentec impermissibly erodes the ability of arbitration to serve those purposes as effectively as litigation." Id. at 247.

arbitration, defendants filed their pending interlocutory appeal, and this case was stayed. After the appeal was filed, defendants indicated to the Second Circuit that "it is Pentec's position that the arbitration agreement does not foreclose the award to a prevailing plaintiff of reasonable attorney's fees or taxable costs from Pentec," and that defendants would assert this position on appeal. [Doc. #44] ¶ 4. Rather than raise this argument for the first time at the appellate level, defendants filed the instant motion for permission for leave to file a Rule 60(b) motion [Doc. #44], asking that the Court express its inclination to grant such a motion.[2]

In support of the motion for leave, defendants argue that the Court's sua sponte consideration of the attorney's fees issue deprived them of the chance to express their position here that fees and costs are not precluded by the arbitration agreement. They argue that the agreement should be construed to allow for an award of attorney's fees to a prevailing party, thus guaranteeing Gambardella's right to fees and costs if she prevails while preserving the arbitration agreement to which the parties were

[2]Because Pentec's notice of appeal divests the Court of jurisdiction to revisit and reconsider its denial of defendants' motion to compel arbitration, defendants followed the proper procedure under Toliver v. County of Sullivan, 957 F.2d 47 (2d Cir. 1992), in that they have asked this Court to first express its inclination to grant such a motion, at which time the Court of Appeals could be asked to return jurisdiction to this Court so that the motion may be granted.

bound. Gambardella asserts that construing the agreement to allow for attorney's fees would constitute ex post "blue penciling" of the agreement, which she contends is poor public policy.

The agreement in this case provides: "You and Pentec, Inc. shall each bear respective costs for legal representation at any such arbitration." Gambardella, 218 F. Supp. 2d at 244 n.5. While the agreement's complete silence on the subject of shifting these fees and costs to the non-prevailing party is in contrast with Title VII's explicit provisions on this issue,[3] the agreement does not affirmatively foreclose the possibility of attorney's fees. Compare, e.g., Spinetti v. Service Corp. Int'l, 324 F.3d 212, 215 (3rd Cir. 2003) (agreement provided that "[e]ach party may retain legal counsel and shall pay its own costs and attorney's fees, regardless of the outcome of the arbitration") (emphasis added); Armendariz v. Foundation Health Psychcare Servs., Inc., 6 P.3d 669, 675 (Cal. 2000) (agreement limited available remedies to back pay and explicitly excluded

[3]See 42 U.S.C. § 2000e-5(k) (providing for award of attorney's fees and costs to "the prevailing party"); Bridges v. Eastman Kodak Co., 102 F.3d 56, 58 (2d Cir. 1996) ("To be eligible for attorney's fees and costs under § 2000e-5(k), a plaintiff (or a defendant) must be a prevailing party. A plaintiff prevails when she succeeds on any significant issue in litigation which achieves some of the benefit the party sought in bringing suit.") (citations, quotations and alterations omitted); see also Hanrahan v. Hampton, 446 U.S. 754 (1980) (party may "prevail" on some issues and thus be entitled to an interlocutory award of attorney's fees even before final judgment).

"any other remedy, at law or in equity, including but not limited to reinstatement and/or injunctive relief").

In contrast to the silence of the Gambardella/Pentec agreement, the agreements at issue in each case[4] cited by the Court's original ruling (save one) were either unambiguous in their contravention of Title VII or had actually been interpreted by the arbitrator in a manner inconsistent with Title VII.[5] The agreement in McCaskill, identical to the Spinetti agreement quoted above, affirmatively foreclosed the possibility of an award of attorney's fees to a prevailing party by providing that each party would be responsible for its own attorney's fees "regardless of the outcome of the arbitration."[6] The arbitration

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[4]Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244 (9th Cir. 1994); McCaskill v. SCI Management Corp., 285 F.3d 623 (7th Cir. 2002); Hooters of America, Inc. v. Phillips; 39 F. Supp. 2d 582 (D.S.C. 1998); DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459 (S.D.N.Y. 1997); and Gourley v. Yellow Transp. LLC, 178 F. Supp. 2d 1196 (D. Colo. 2001).

[5]Graham Oil is the sole exception, as the clause at issue there provided only that "[e]ach party shall pay its own costs and expenses, including attorneys' fees related to such arbitration." 43 F.3d at 1247. There is no indication, however, that the defendant in that case proffered an alternative construction of the clause (as defendant does here), and other provisions of the agreement at issue were found to invalidate the agreement, as well, id. at 1247-1248 (delineating three separate ways in which the agreement contravened the statute, only one of which was the attorney's fee issue).

[6]This opinion in McCaskill was vacated for rehearing. 294 F.3d 879. On rehearing, the court again held that the arbitration provision was unenforceable because of the prohibition on attorney's fees for a prevailing party, 298 F.3d at 680, but noted that the arbitration issue "was not well

rules in Hooters provided that "attorney's fees can only be awarded upon a showing of frivolity or bad faith of the unsuccessful litigant," 39 F. Supp. 2d at 599, which is a higher standard than Title VII's guarantee of presumptive attorney's fees.[7] While the arbitration provision in DeGaetano itself did not foreclose an attorney's fee award to a prevailing party, the arbitrator had refused to award such fees, which the district court thereafter added as part of its confirmation of the arbitration award. The arbitration provision in Gourley expressly required that "[a]ll documents to be considered by the arbitrator shall be filed at the hearing" and reiterated that "[t]here shall be no post-hearing briefs," 178 F. Supp. 2d at 1204, which the Gourley court concluded would preclude prevailing plaintiffs from ever seeking a post-hearing award of attorney's fees.

This silence on the availability of an award of attorney's fees to a prevailing claimant also distinguishes the

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presented, as SCI has waived the intertwined issues of severability and construction of arbitration agreements by the arbitrator and may not now raise them on rehearing," id. at 680 n.1. These intertwined issues were again presented by the same defendant company and decided in Spinetti, discussed infra.

[7] See Lyte v. Sara Lee Corp., 950 F.2d 101, 103 (2d Cir. 1991) ("While the language of the Title VII fee provision refers to the award as discretionary, a prevailing plaintiff is in fact entitled to fees unless special circumstances would render such an award unjust in light of the congressional goals underlying enforcement of fee awards in civil rights litigation.") (citation and internal quotation omitted).

Gambardella/Pentec arbitration agreement from those in the cases relied on by Gambardella in opposing the instant motion, each of which contained an express provision which the court found to be unlawful.[8] The arbitration agreements in Cooper and Popovich adopted the rules of the American Arbitration Association, which each court found to expressly and unlawfully require a claimant to bear certain prohibitive costs, Cooper, 199 F. Supp. 2d at 781; Popovich, 2002 WL 449003 at *1, and the Shankle and Perez agreements themselves specified (unlawfully, according to the both courts) that an employee would be liable for one-half of the costs of arbitration, Shankle, 163 F.3d at 1232; Perez, 253 F.3d at 1285.[9] The agreement in Armendariz could not have been

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[8]Cooper v. MRM Inv. Co., 199 F. Supp. 2d 771, 782 (M.D. Tenn. 2002) ("Defendants will not be allowed, at this point, to abandon a provision that KFC's attorneys carefully drafted, in order to 'save' the Arbitration Agreement."); Shankle v. B-G Maint. Mgmt. of Colorado, Inc., 163 F.3d 1230, 1235 n.6 (10th Cir. 1999) ("The Agreement clearly makes the employee responsible for one-half of the arbitrator's fees and we are not at liberty to interpret it otherwise.") (citation omitted); Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280, 1287 (11th Cir. 2001), vacated pursuant to parties' stipulation of dismissal, 294 F.3d 1275 (11th Cir. 2002); Armendariz, supra; and Popovich v. McDonald's Corp., No. 01C662, 2002 WL 449003 (N.D. Ill. March 20, 2002).

[9]Gambardella raised the cost argument present in Cooper, Shankle, Perez and Popovich in this case as well, but the Court's earlier opinion rejected it, relying on Gambardella's failure to carry her burden of proof under Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000). In Green Tree, the Supreme Court held that "where . . . a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." Id. at 92. Because Gambardella

clearer, providing that a successful claimant's "exclusive" remedies were "limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award [and] I shall not be entitled to any other remedy, at law or in equity, including but not limited to reinstatement and/or injunctive relief." 6 P.3d at 675. Thus, in every case cited by Gambardella in opposition to defendants' motion, the offending provisions of the arbitration agreements at issue were explicit and were not open to differing interpretations.

Defendants point to the Third Circuit's decision in Spinetti, supra, which severed the provision of the arbitration agreement which expressly precluded award of attorney's fees and costs to prevailing party[10] and enforced the remainder of agreement, reflecting the opinion that "[y]ou don't cut down the trunk of a tree because some of its branches are sickly," 324 F.3d at 214. While courts have differed on whether to sever an express provision contravening Title VII and enforce the

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provided "nothing from which the Court could conclude that the costs are likely to personally burden her financial ability to pursue her statutory claims," Gambardella, 218 F. Supp. 2d at 246, she failed to meet her Green Tree burden, and thus cannot rely on prohibitive expense as grounds to avoid arbitration.

[10]The language of the Spinetti agreement was identical to that of the agreement in McCaskill: "Each party may obtain legal counsel and shall pay its own costs and attorney's fees, regardless of the outcome of arbitration." (emphasis added).

remainder of the arbitration agreement (e.g., Spinetti) or not (Cooper, Shankle, Perez, Armendariz and Popovich), the Court need not reach that question here. Viewing the canons of contract construction as requiring the arbitration agreement sub judice to be read as to (if possible) make the agreement lawful, construe ambiguity in the agreement against the drafter, and serve the public interest, the silence on prevailing claimant attorney's fees must be construed to allow for a presumptive entitlement to such fees as part of a successful claimant's award, thus paralleling Title VII's provisions. So viewed, the arborist-like decision is not implicated in this case.

First, an agreement should be construed, when possible, to render it lawful rather than unlawful. See Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485-1486 (D.C. Cir. 1997) (silence in an arbitration agreement as to certain costs construed to render the agreement valid and enforceable: "It is well understood that, where a contract is unclear on a point, an interpretation that makes the contract lawful is preferred to one that renders it unlawful.") (citations omitted); accord Restatement (Second) of Contracts § 203(a) ("an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect").

Second, ambiguity in agreements should be construed against

the drafter. See Hartford Elec. Applicators of Thermalux, Inc. v. Alden, 169 Conn. 177, 182 (1975) (citing Ravitch v. Stollman Poultry Farms, Inc., 165 Conn. 135 (1973)). "If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." United Illuminating Co. v. Wisvest-Connecticut LLC, 259 Conn. 665, 671 (2002) (citing Lopinto v. Haines, 185 Conn. 527, 538 (1981)). As set out above, the language of this contract is subject to two reasonable interpretations: (1) that each party will bear attorney's fees and costs regardless of the outcome; or (2) that while attorney's fees are initially the burden of the party incurring them, a successful claimant may, in keeping with the substantive law of Title VII, recover such fees as part of an award. Construing the ambiguity against Pentec (undisputedly the drafter of this agreement) means adopting the second interpretation, as it is that interpretation which exposes Pentec to greater legal liability.[11]

Finally, "[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred." Restatement (Second) of

[11]It is of no moment that the second interpretation is the one Pentec is advancing here. See Cole, 105 F.3d at 1466 (construing ambiguous provision regarding costs of arbitration "against the drafter" such that the drafter would have to pay the costs of arbitration, even though construing the provision the opposite way would have voided the arbitration agreement and thus achieved the result sought in the litigation by the draftee).

Contracts § 207. While this rule "applies only to agreements which affect a public interest," id. § 207 cmt. a, "awarding attorney's fees to prevailing plaintiffs, and thereby encouraging ameliorative lawsuits, serve[s] broader policy goals" than simply "mak[ing] it easier for a plaintiff of limited means to bring a meritorious suit." DeGaetano, 983 F. Supp. at 465 (citations and internal quotations omitted). Rather, Title VII's attorney's fee provision effectuates Congressional policy against invidious discrimination in employment. See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 716 (5th Cir. 1974). Of two competing interpretations, the one which would read the agreement to protect this important policy choice is the better of the two. While it is true that reading the agreement to preclude a fee and thus be unenforceable would permit Gambardella to proceed with a jury trial in federal court, voiding the agreement to protect public policy addresses only one of the principles of construction, while construing the agreement to allow attorney's fees both conforms it with public policy and preserves its validity. Cf. also Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 45 (2d Cir. 1993) ("Federal policy, as embodied in the Federal Arbitration Act, strongly favors arbitration as an alternative dispute resolution process.") (footnote omitted) (citing, inter alia, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1,

24 (1983).

For all of these reasons, construing the silence in the arbitration agreement in the manner now urged by Pentec is the proper course of action. The parties' agreement will be rendered valid rather than void, and Gambardella will enjoy her full panoply of Title VII rights and remedies (except a jury trial), including her right to presumptive attorney's fees in the event she is a "prevailing party." Because the issue of attorney's fees was raised sua sponte and without notice,[12] Pentec never had occasion to advance this argument. Thus, the Court concludes that relief from its prior opinion denying defendants' motion to compel arbitration is in order, should the Court of Appeals return jurisdiction over this matter.

Therefore, for the reasons set out above, the motion [Doc. #44] for leave to file a Rule 60(b) motion is GRANTED. If the Court of Appeals returns jurisdiction over this matter, see Toliver, 957 F.2d at 49, the Court will vacate its prior ruling,

[12]While there is a half-sentence reference to attorney's fees in Gambardella's memorandum in opposition to defendants' motion to compel arbitration, see [Doc. #24] at 7-8 ("There exist no limitations as to the arbitrator's fees and no formula for the calculation of attorney's fees."), this reference was presented in the context of Gambardella's assertion that the uncertainty and expense of the arbitration envisioned in the agreement were sufficient grounds to void the agreement. This sparse reference was insufficient to put defendants on notice that the agreement's provisions regarding attorney's fees were the grounds for Gambardella's challenge to the agreement.

appoint an arbitrator pursuant to 9 U.S.C. § 5,[13] and dismiss the case.[14]

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 25th day of August, 2003.

[13] Gambardella, 218 F. Supp. 2d at 239 ("Defendants have also requested that the Court appoint an arbitrator pursuant to 9 U.S.C. § 5 because no method of appointment of an arbitrator is specified in the arbitration agreement.").

[14] All of Gambardella's claims against all parties are subject to the arbitration agreement, see Gambaradella, 218 F. Supp. 2d at 242 (noting that all claims against Pentec are "indisputably within the scope of the arbitration agreement" and concluding that the claims against the individual defendants are "directly related to [those defendants'] employment with Pentec and to Gambardella's claims against Pentec" such that they are within the scope of the agreement), and thus dismissal of the complaint (rather than a stay pending arbitration) is warranted, Lewis Tree Serv., Inc. v. Lucent Techs., Inc., 239 F. Supp. 2d 332, 340 (S.D.N.Y. 2002) (citations omitted), although the dismissal will be without prejudice, see Jureczki v. Banc One Texas, N.A., 252 F. Supp. 2d 268, 380 (S.D. Tex. 2003) (citing, inter alia, Fedmet Corp. v. M/V Buyalyk, 194 F.3d 674 (5th Cir. 1999)).