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Brown v Twenty-First Century Fox, Inc., 2017 N.Y. Misc. LEXIS 5351

Supreme Court of New York, Bronx County

November 13, 2017, Decided

22446/2017E

Reporter

2017 N.Y. Misc. LEXIS 5351 * | 2017 NY Slip Op 51988(U) ** | 59 Misc. 3d 1201(A) | 93 N.Y.S.3d 624

[**1] Tichaona Brown, TABRESE WRIGHT, and MONICA DOUGLAS, Plaintiffs, against Twenty-First Century Fox, Inc., FOX NEWS NETWORK, LLC., JUDITH SLATER, in her individual and professional capacities, and DIANNE BRANDI, in her individual and professional capacities, Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT

Core Terms

arbitration, arbitration provision, class action, cross-motion, arbitration clause, unenforceable, benefits, duress, oppose, waived, party plaintiff, costs, arbitration agreement, proposed claim, doctrine doctrine doctrine, law law law, vindication, rights, void, propose an amendment, cause of action, overreaching, cross-moves, unambiguous, effective, severance, sur-reply, mediator, reasons, signing

Headnotes/Summary

Headnotes

Arbitration-Agreement to Arbitrate-Effective Indication Doctrine-Plaintiff failed to demonstrate he would likely incur prohibitive costs and fees that would deter him from arbitrating claims. Release-Avoidance-Plaintiffs failed to establish grounds for avoidance of employee's severance agreement and release.

Counsel: **[*1]** Counsel for the plaintiffs:Jeanne M. Christensen, Esq., Douglas H. Wigdor, Esq., Michael J. Willemin, Esq., Wigdor LLP.

For Twenty-First Century Fox, Inc. and Fox News Network, LLC, defendants: Eric. J. Wallach, Esq., Joseph A. Piesco, Esq., Garrett D. Kennedy, Esq., DLA Piper, LLP. (US).

For Dianne Brandi, defendant: Barry Asen, Esq., Epstein, Becker & Green, P.C.

For Judith Slater defendant: Catherine M. Foti, Esq., Brian A. Jacobs, Esq., Curtis B. Leitner, Esq., Brent M. Tunis, Esq., Morvillo, Abramowitz, Grand, Iason & Anello, P.C.

Judges: Hon. Mary Ann Brigantti, J.S.C.

Opinion by: Mary Ann Brigantti

Opinion

Mary Ann Brigantti, J.

Upon the foregoing papers, the plaintiffs Tichaona Brown, Tabrese Wright, and Monica Douglas (collectively, "Plaintiffs") move for an order pursuant to CPLR 1003 and 3025, granting Plaintiffs' request to file a Second Amended Complaint, adding Kelly Wright, Musfiq Rahman, Mark LeGrier, Mariela Lindsay, Vielka Rojas, Mauretta Thomas, Griselda Benson, Senami Tolode, Claudine McLeod, and Elizabeth Blanchard as plaintiffs to this action, and also asserting additional causes of action seeking to convert this action into a class action lawsuit.

Defendants Twenty-First Century Fox, Inc., and Fox News Network, **[*2]** LLC. ("Fox News") oppose the motion and cross-move for an order (1) pursuant to CPLR7503, to compel the arbitration of proposed plaintiff Kelly Wright's claims, and (2) pursuant to CPLR 3001, for a declaratory judgment that proposed plaintiff Musfiq Rahman's claims are barred pursuant to a release and waiver of claims, and (3) for such other an further relief as this Court deems just and proper. Defendants Judith Slater ("Slater") and Dianne Brandi ("Brandi") also oppose Plaintiffs' motion. Plaintiffs' oppose Fox News' cross-motion.

Plaintiffs filed an original notice of motion and supplemental notice of motion. The supplemental notice of motion is identical to the original aside from seeking joinder of two more individuals as plaintiffs - McLeod and Blanchard. The two motions are consolidated and disposed of in the following decision and order[1].

I. Background

The plaintiffs and the proposed plaintiffs are current and former employees of Fox News who claim that the defendants harassed and racially discriminated against them during the course of their employment. Plaintiffs now move to include additional plaintiffs to this action, to add causes of action seeking **[*3]** to convert this case into a putative class action.

Fox News as well as Slater and Brandi (collectively "Defendants") oppose those branches of the motion seeking to add Kelly Wright ("Wright") and Musfiq Rahman ("Rahman") as party plaintiffs. Defendants assert that Wright is barred from joining in this lawsuit because his claims are subject to mandatory arbitration, pursuant to the arbitration clause contained in his employment contract. Fox News accordingly cross-moves for an order compelling arbitration with respect to Wright's proposed claims. Defendants further note that a different court interpreted the same arbitration clause and found that it was binding and enforceable. Slater further argues that Wright's claims are palpably insufficient because he fails to allege that Slater actually caused him injury, and therefore he lacks standing to maintain claims against Slater. Slater also contends that even assuming that he has standing, Wright fails to adequately state a claim under State or City Human Rights Law.

Defendants allege that Rahman's proposed claims are precluded because he signed a severance agreement and release, waiving his right to pursue these claims against Defendants. ***[*4]*** *Fox News cross-moves for a declaratory judgment that Rahman's claims are barred pursuant to release and waiver*.

In opposition to the cross-motion, Plaintiffs assert inter alia that Wright must be permitted to participate in this proposed class action because his arbitration agreement is unenforceable. First, the arbitration clause is invalid because the arbitration costs and fees that would be incurred are prohibitively expensive and thus violate the "effective vindication" doctrine. Second, because Wright cannot waive his right to "self-organize" and engaged in a "concerted activity" by participating in a class action, he must be permitted to join in this action. With respect to Rahman, Plaintiffs assert that the severance agreement and release is void because it fails to inform Rahman of his right to file a claim with the EEOC, and his time to do so has expired. Since the agreement misleadingly waived Rahman's rights under the EEOC, he must be allowed to participate in this action. In addition, Plaintiffs argue that the agreement is void because it did not give Rahman adequate time for attorney review, and moreover, the language of the release's confidentiality clause is overly vague ***[*5]*** *and ambiguous. Plaintiffs also note that policy reasons support Plaintiffs proceedings together in one action, and Defendants' papers inappropriately make arguments concerning the substantive merit of the proposed claims*.

In further support of the cross-motion, Defendants' argue inter alia, that the arbitration provision is valid and Wright has failed to establish that he will experience economic hardship as a result of arbitrating his claims. Furthermore, the arbitration clause does not violate the National Labor Relations Act because it does not limit Wright's ability to participate in a class action. Rahman's claims are unavailing because he entered into a valid release and there was no requirement that he be notified of EEOC rights. In any event, his ability to file an EEOC charge is irrelevant since Rahman is proposing state law claims and not federal law claims under which EEOC has jurisdiction. Moreover, Rahman had ample time to review the release.

II. Applicable Law and Analysis

While it is "fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (Kocourek v. Booz Allen Hamilton Inc., 85 AD3d 502, 925 N.Y.S.2d 51 [1st Dept 2011] citing CPLR 3025[b]), "a proposed pleading that fails to state ***[*6]*** *[**2] a cause of action or is plainly lacking in merit will not be permitted (Eighth Ave. Garage Corp. v. H.K.L. Realty Corp. et al., 60 AD3d 404, 875 N.Y.S.2d 8 [1st Dept 2009]). Indeed, where leave to amend is sought in the face of a pending motion to dismiss, such leave is properly denied where the proposed amendment suffers from the same deficiencies as the original claim ("J. Doe No. 1" v. CBS Broadcasting Inc., 24 AD3d 215, 806 N.Y.S.2d 38 [1st Dept. 2005]), or seeks to assert a claim that is itself subject to dismissal (Eighth Ave. Garage Corp., supra., see also Viacom Int'l. v. Midtown Realty Co., 235 AD2d 332, 652 N.Y.S.2d 740 [1st Dept. 1997]; Matter of South Bronx Unite! v. New York City Indus. Dev. Agency, 138 A.D.3d 462, 462-63, 31 N.Y.S.3d 1 [1st Dept. 2016])*.

Defendants only oppose those branches of the motion that seek to add Kelly Wright and Musfiq Rahman as party plaintiffs. Plaintiffs have demonstrated that their other proposed amendments sufficiently state

a cause of action and are not plainly devoid of merit, and therefore those branches of the motion seeking to add Mark LeGrier, Mariela Lindsay, Vielka Rojas, Mauretta Thomas, Griselda Benson, Senami Tolode, Claudine McLeod, and Elizabeth Blanchard as plaintiffs to this action, and adding causes of action seeking to convert this action into a class action lawsuit, are granted without opposition.

A. Kelly Wright

Defendants oppose Plaintiffs' motion for leave to add Kelly Wright as a party plaintiff, and defendant Fox News cross-moves to compel arbitration of Wright's proposed claims. Fox News argues that Wright cannot ***[*7]*** *be joined in this lawsuit because his employment contract contains an unambiguous arbitration provision. The provision states*:

> *10. ARBITRATION*
>
> *Any controversy, claim or dispute arising out of or relating to this Agreement or Performer's employment shall be brought before an arbitrator/mediator and held in New York City* ***in accordance with the rules of the Judicial Arbitration and Mediation Services (JAMS) then in effect****. The mediator/arbitrator shall issue a full written opinion setting forth the reasons for his/her decisions. Such arbitration, all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration, shall be held in strict confidence. Judgment may be entered on the mediator/arbitrator's award in any court having jurisdiction; however, all papers filed with the court either in support of or in opposition to the mediator/arbitrator's decision shall be filed under seal. Breach of confidentiality by any party shall be considered to be a material breach of this Agreement*.

Under CPLR 7501, "[a] written agreement to subject any controversy thereafter arising or any existing controversy to arbitration is enforceable without ***[*8]*** *regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and enter judgment on the award." Further, when determining matters that arise under this statute, courts "shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute" (id., see GAF Corp. v. Werner, 66 NY2d 97, 485 N.E.2d 977, 495 N.Y.S.2d 312 [1985]). [**3] "Where there is no substantial question whether a valid agreement was made or complied with," and the claim is not time-barred, "the court shall direct the parties to arbitrate" (see CPLR 7503[a])*.

The Court of Appeals has "repeatedly recognized New York's 'long and strong public policy favoring arbitration'" because it conserves the time and resources of the courts as well as the contracting parties (Stark v. Molod Spitz DeSantis & Stark, P.C., 9 NY3d 59, 66, 876 N.E.2d 903, 845 N.Y.S.2d 217 [2007], quoting Matter of Smith Barney Shearson v. Sacharow, 91 NY2d 39, 49, 689 N.E.2d 884, 666 N.Y.S.2d 990 [1997]). Courts therefore "interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration" (id).

In this case, Wright's proposed employment discrimination and retaliation claims are subject to arbitration because the provision at issue broadly and unambiguously covers "[a]ny controversy, claim or dispute arising out of or relating to this Agreement or [Wright's] employment" (see ***[*9]*** *Tong v. S.A.C. Capital Management, LLC., 52 AD3d 386, 387, 860 N.Y.S.2d 84 [1st Dept. 2008]). Furthermore, defendants Slater and Brandi may invoke the arbitration provision because the proposed claims relate to their behavior as officers, directors, or agents of Fox News (see Hirschfeld Prods. v. Mirvish, 88 N.Y.2d 1054, 1056, 673 N.E.2d 1232, 651 N.Y.S.2d 5 [1996]; DiBello v. Salkowitz, 4 AD3d 230, 231, 772 N.Y.S.2d 663 [1st Dept. 2004]; Degraw Constr. Group, Inc. v. McGowan Builders, Inc., 152 AD3d 567, 58 N.Y.S.3d 152 [2nd Dept. 2017])*.

In opposition to the cross-motion, Plaintiffs allege that the subject arbitration agreement is unenforceable for two reasons. First, Plaintiffs argue that compelling arbitration of Wright's claims would be prohibitively expensive and thus violate the "effective vindication" doctrine. Second, the arbitration provision is void because it constitutes a class action waiver, which runs afoul of the National Labor Relations Act ("NLRA"), as it impedes the litigant's right to self-organize or engaged in concerted activity.

The effective vindication doctrine bars the enforcement of an arbitration clause when doing so would preclude a litigant from vindicating his or her statutory rights in the arbitral forum (see Brady v. Williams Capital Group, L.P., 14 NY3d 459, 467, 928 N.E.2d 383, 902 N.Y.S.2d 1 [2010]). The existence of excessive arbitration costs could invoke the effective vindication doctrine thus rendering the arbitration provision unenforceable (id. at 466, citing Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 90, 121 S. Ct. 513, 148 L. Ed. 2d 373 [2000]). The Supreme Court in Green Tree Financial Corp,-Ala instructed that the party seeking to invalidate an arbitration agreement on this ground ***[*10]*** *"'bears*

the burden of showing the likelihood of incurring [the] costs that would deter the party from arbitrating the claim'" (Brady, 14 NY3d at 466, quoting Green Tree Financial Corp-Ala at 92). In determining whether a party has carried this burden, a court must consider factors such as "(1) whether the litigant can pay the arbitration fees and costs; (2) what is the expected cost differential between arbitration and litigation in court; and (3) whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum" (id. at 467 [internal citations omitted]). While a full hearing is not required in all situations, courts should make a written record of its findings with respect to the litigant's financial ability (id).

*In this case, Wright failed to demonstrate that he will likely incur prohibitive costs and fees that would deter him from arbitrating his claims. Plaintiffs' counsel states that it will cost approximately $11,000 to bring this case before a JAMS arbitrator as provided in the arbitration agreement, when considering the JAMS initial filing fee ($2,000) and the 12% Case Management [**4] Fee assessed against the arbitrator's professional fees. In contrast, the cost to have this case heard by a jury is $275.* ***[*11]*** *However, JAMS Rule 31(c) specifically provides, in relevant part: "If an Arbitration is based on a clause or agreement that is required as a condition of employment, the only fee that an employee may be required to pay is the initial JAMS Case Management Fee." JAMS's internal instructions for submission of arbitration form states: "For matters based on a clause or agreement that is required as a condition of employment, the employee is only required to pay $400. See JAMS Policy on Employment Arbitrations, Minimum Standards of Fairness." The arbitration clause at issue arises out of an employment agreement, and therefore according to JAMS rules, he could only be required to pay a $400 fee to arbitrate his claims, which is not substantially different from the $275 court fee. Accordingly, Wright has failed to show the likelihood that he would incur prohibitive costs and fees that would deter him from arbitrating his claims (Brady v. Williams Capital Group, L.P., 14 NY3d at 466, quoting Green Tree Financial Corp.-Ala. at 92). Furthermore, even if the court were to ignore the plain language of the JAMS fee rules and assume that the fee would be in fact $11,000, Wright did not submit any information concerning his finances or alleged inability to pay that fee, in order to substantiate* ***[*12]*** *the claims in his affidavit wherein he alleges that payment of the fee would be a financial hardship. This court therefore cannot make an assessment as to whether the arbitration costs and fees would deter Wright from arbitrating his claims. Accordingly, Plaintiff has failed to demonstrate that the effective vindication doctrine bars enforcement of the arbitration provision at issue.*

Plaintiffs next assert that the arbitration provision is unenforceable because arbitration agreements containing class action waivers are illegal under the NLRA. Plaintiffs contend that Wright is entitled to file a class action with his co-workers as a form of "concerted activity" and refusing to permit him to act as a class representative would violate the rights of all minorities at Fox to participate in this concerted activity of a class action.

After the motion and cross-motion were fully briefed, Plaintiff submitted a sur-reply bringing to the court's attention the recent decision Gold v. New York Life Ins. Co., 153 AD3d 216, 59 N.Y.S.3d 316 (1st Dept. 2017). While sur-replies served without leave of court are generally disregarded, however this court will consider the papers because Defendants' also submitted a sur-reply responding to Plaintiffs' new contentions (see Gluck v. New York City Transit Auth., 118 AD3d 667, 668, 987 N.Y.S.2d 89 [2nd Dept. 2014]). Plaintiff ***[*13]*** *argues that Gold quashes Defendants' efforts to remove Wright from this case because the arbitration clause at issue effectively precludes him from participating in a class action. On an issue of first impression, the First Department in Gold held that arbitration provisions that prohibit class, collective, or representative claims violate the NLRA and are therefore unenforceable.*

*Plaintiffs' contentions are unavailable because, as noted by Defendants, the arbitration provision at issue does not include a class action waiver, and therefore Gold and the cases it relies upon are inapposite. The arbitration provision in Gold stated that the plaintiff "waived any right to a jury trial and agreed that no claim could be brought or maintained 'on a class action, collective action or representative action basis either in court or arbitration'" and also "provided that if the waiver of class, collective, or representative actions were found to be unenforceable, the class, collective, or representative claim would proceed in court" (153 AD3d at 220). The First Department held that "arbitration provisions such as the one in [the plaintiff's] contract, [**5] which prohibit class, collective, or representative claims,* ***[*14]*** *violate the National Labor Relations Act (NLRA) and thus, that those provisions are unenforceable" (Id at 221).*

In this case, however, Wright's arbitration clause contains no language waiving or restricting the his right to pursue collective legal action. While Wright must arbitrate his claims, he may do so on a class or collective basis. In fact, the JAMS rule submitted by Plaintiffs in sur-reply clearly permit the arbitrator to make a threshold determination of whether the arbitration should proceed on a class basis. Furthermore, as noted by Defendants in their sur-reply letter, the Gold court relied on Lewis v. Epic Systems Corporation in arriving at its conclusions (823 F.3d 1147 [7th Cir. 2016], cert. granted,137 S. Ct. 809, 196 L. Ed. 2d 595, 2017 WL 125664 [U.S. 2017]). Lewis specifically noted that: "[i]f [the arbitration] provision had permitted collective arbitration, it would not have run afoul of Section 7 []. But it did not, and so it ran up against the substantive right to act collectively that the NLRA gives to employees" (id at 1158). In this case, the arbitration provision contains no restriction on collective arbitration and therefore it does not violate the NLRA.

In light of the foregoing, that branch of Plaintiffs' motion seeking to add Wright as a party plaintiff is denied, because ***[*15]*** *the proposed amendment is devoid of merit and, itself, subject to dismissal (Matter of South Bronx Unite! v. New York City Indus. Dev. Agency, 138 A.D.3d 462, 462-63, 31 N.Y.S.3d 1). Plaintiff's additional arguments that policy reasons support Plaintiffs' proceeding together in one action are unavailing where, as here, proposed Plaintiff Wright entered into a valid arbitration agreement (CPLR 7503[a]; O'Neill v. Krebs Communs. Corp., 16 A.D.3d 144, 790 N.Y.S.2d 451 [1st Dept. 2005]). Defendants' cross-motion to compel arbitration of Wright's proposed claims is granted for the above-noted reasons. The Court does not reach Slater's additional arguments that Wright lacks standing to bring his claims, or that Wright failed to state a claim against her under State and/or City Human Rights Law (NY Exec. Law §296; N.Y.C. Admin. Code §8-107). Furthermore, this branch of the cross-motion is resolved without considering the additional argument that another court has enforced an identical arbitration clause in a separate New York County proceeding*.

B. Musfiq Rahman

Defendants also oppose that branch of Plaintiffs' motion that seeks to add Rahman as a party plaintiff, because Rahman signed a severance agreement and release ("Release") and has therefore waived his right to pursue claims against Defendants in this action. Fox News cross-moves for an order declaring that Rahman's claims are barred pursuant to that release and waiver **[*16]** .

*"Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (Centro Empresarial Cempresa S.A. v. America Movil, S.A.B.de C.V.. 17 NY3d 269, 276, 952 N.E.2d 995, 929 N.Y.S.2d 3 [2011]). "A release will not be treated lightly because it is a 'a jural act of high significance without which the settlement of disputes would be rendered all but impossible'" (Allen v. Riese Organization, Inc., 106 AD3d 514, 516, 965 N.Y.S.2d 437 [1st Dept. 2013], quoting Mangini v. McClurg, 24 NY2d 556, 563, 249 N.E.2d 386, 301 N.Y.S.2d 508 [1969]). The enforceability of releases are generally analyzed under the same principles that govern contract law (see Johnson v. Lebanese American University, 84 AD3d 427, 428, 922 N.Y.S.2d 57 [1st Dept. 2011][quotation omitted]). Accordingly, where a release is clear, unambiguous, and knowingly and voluntarily entered into, it is binding on all [**6] parties unless it was procured by fraud, duress, overreaching, illegality, or mutual mistake (Allen, supra at 516; see also Skluth v. United Merchants & Mfrs., Inc., 163 A.D.2d 104, 106, 559 N.Y.S.2d 280 [1st Dept. 1990]). A release extends to claims both known and unknown if the agreement was "fairly and knowingly made" (Johnson v. Lebanese American University, supra. at 430, quoting Mangini v. McClurg, 24 NY2d at 566). This analysis applies to a plaintiff's alleged waiver of employment discrimination claims under State and City Human Rights Law (see Johnson v. Lebanese American University, supra)*.

In this case, the Release states, in pertinent part: "In consideration for the promises entered into in this Agreement, Fox shall continue to make weekly payments to Rahman through and including May 27, 2015, at the weekly rate of $1,308.15, less deductions as required by law." It also provided ***[*17]*** *that Rahman's benefits were to continue through May 31, 2015, and as of June 1, 2015, Rahman will be eligible for COBRA benefits at his sole cost and expense. Fox also agreed that it would not contest any application for unemployment benefits. Under "PROMISES OF RAHMAN," "Released Actions/General Release," the Release provides that Rahman releases Fox, as well as all current/former employees, officers, and directors, from all liabilities or causes of action of whatever nature, he has had or may have, arising from the beginning of time and including but not limited to those arising from the termination of his employment. The next section, subparagraph "b" entitled "Knowing and Voluntary Discrimination Release" states that "Rahman specifically intends to include, as a Released Action, any claims related to race, color, ancestry, national origin, sex, pregnancy, disability, medical condition, religion, age, sexual orientation, or marital status, discrimination in employment under Title VII of the 1964 Civil Rights Act...the New York State Human Rights Law, the New York City Human Rights Law...or any other law, regulation, ordinance, or common law breach of contract or tort claim that may have arisen before* ***[*18]*** *the effective date of this Agreement, including but not limited to those arising from or related to Rahman's services to Fox or the termination of Rahman's employment. Rahman makes this inclusion knowingly and voluntarily." In bold print at the beginning of subparagraph "b", the agreement states "Rahman is hereby advised to consult with his attorney carefully prior to signing this Agreement because he is permanently giving up significant legal rights." The Release also states that both Rahman and Fox had full opportunity to thoroughly discuss all aspects of the Release with their respective attorneys, that they have carefully read and understand all provisions, have been given a reasonable time to consider the agreement, and are voluntarily entering into it. This Release, containing clear and unambiguous language, sufficiently carries Fox News' initial burden of demonstrating that the proposed amendment adding Rahman as a plaintiff is without merit, as Rahman knowingly and voluntarily waived any employment discrimination claims against Defendants (see Johnson v. Lebanese American Univ., 84 AD3d at 430; Allen v. Riese Organization, Inc., 106 AD3d 514, 515, 965 N.Y.S.2d 437)*.

In opposition to the cross-motion, Plaintiffs assert that the Release is invalid because it fails to inform Rahman of his non-waivable ***[*19]*** *right to file a charge with the EEOC and his time to do so has expired. However, Plaintiffs provides no legal authority supporting their contention that the failure to include such language voids a release. As noted supra, a release can only be avoided with a showing of the traditional bases for setting aside written agreements such as fraud, duress, overreaching, illegality, or mutual mistake (Centro Empresarial Cempresa S.A., 17 NY3d at 276).*

Plaintiffs argue that the Release misleadingly waived Rahman's right to file a charge with the EEOC. In an affidavit, Rahman states that the Release did not explain that he had a right to file a complaint with the EEOC, and had no idea that he could have done so after signing the agreement. Rahman also cannot recall when the Release was given to him, or how long Slater said before he had to sign it. Rahman asserts that he did not have money for a lawyer to review the Release, and that he was "led to believe that [he] had no choice in whether to sign it or not." Rahman further contends that the Release is void because it failed to adequately provide him time for review.

First, to the extent that Rahman is alleging that the Release is void on the grounds of fraudulent inducement, Rahman failed ***[*20]*** *to allege "every material element of fraud with specific and detailed evidence in the record sufficient to establish a prima facie case" (see Allen v. Riese Organization, Inc., 106 AD3d at 517, footnote 2, citing Touloumis v. Chalem, 156 AD2d 230, 232-33, 548 N.Y.S.2d 493 [1st Dept. 1989]). Moreover, Rahman does not allege that he could not read or understand the Release, or that he only signed it based upon another's misrepresentations (see Touloumis v. Chalem, 156 AD2d 230, 232-33, 548 N.Y.S.2d 493). Second, to the extent that Rahman is alleging duress or overreaching, his affidavit fails to claim that he had insufficient time to review the Release, or that Fox News impeded his free will or his opportunity to consult with counsel before signing it (see Nelson v. Lattner Enterprises of NY, 108 AD3d 970, 972, 969 N.Y.S.2d 614 [3rd Dept. 2013]). Furthermore, Rahman does not recall when he first received the Release, and there are fifteen calendar days between the date of the Release and the date he signed it, thus indicating that Rahman had ample time for review.*

Even assuming arguendo that there are factual issues as to duress or overreaching, Rahman is barred from challenging the Release because he ratified it (see Allen v. Riese Organization, Inc., 106 AD3d at 517). "Ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it" (id., [internal citations omitted]). The doctrine of ratification is consistently applied in cases involving a release (id. [citing cases]; ***[*21]*** *see also Nelson v. Lattner Enterprises of NY, supra at 972-973). Rahman does not dispute that he was paid a severance and he received benefits in exchange for signing the Release in March 2015. Rahman also does not dispute that over two years have passed between the time he signed the Release, allegedly under duress, and the time that he now seeks to repudiate it. This duration of time cannot be considered "prompt" (Allen v. Riese Organization, Inc, at 440). Rahman's acceptance of benefits under the Release and his inordinate delay in challenging it therefore precludes any claim of duress or overreaching (id., see also Nelson, 108 AD3d at 973, quoting Foundry Capital Sarl v. International Value Advisers, LLC., 96 AD3d 620, 620-21, 947 N.Y.S.2d 98 [1st Dept. 2012] ["'[p]laintiff's argument that the release [agreement] was executed under duress is belied by the fact that [she was] paid [severance and received benefits] for [signing the release agreement] and a party cannot claim that it was compelled to execute an agreement under duress while simultaneously accepting the benefits of the agreement'"]).*

Finally, Plaintiffs allege that the confidentiality provision of the Release is vague and ambiguous. However, even assuming that this is true, the Release specifically provides that a provision determined to be legally unenforceable does not affect the remaining provisions (Release at Par. 6[b]). Accordingly, Rahman's ***[*22]*** *clear and unambiguous release of potential [**7] discrimination claims remain valid even if the confidentiality provision is considered unenforceable (id).*

In light of the foregoing, the proposed amendment on behalf of Rahman is palpably insufficient, devoid of merit, or itself subject to dismissal. Therefore, that branch of Plaintiffs' motion seeking to add Rahman as a party plaintiff is denied. Fox News' cross-motion for a declaration that the Release is valid and enforceable, and bars Rahman's participation in this action, is granted.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiffs' motion for leave to file a Second Amended Complaint is granted to the extent that Mark LeGrier, Mariela Lindsay, Vielka Rojas, Mauretta Thomas, Griselda Benson, Semani Tolode, Claudine McLeod, and Elizabeth Blanchard may be added as party plaintiffs, and Plaintiffs may include class action allegations, and it is further,

ORDERED, that the remaining branches of Plaintiffs' motion are denied, and it is further,

ORDERED, that Plaintiffs are directed to file and serve a Second Amended Complaint in accordance with the CPLR within thirty (30) days after service of a copy of this Order with Notice of ***[*23]*** *Entry, and it is further*,

ORDERED, that Fox News' cross-motion to compel arbitration as to proposed plaintiff Kelly Wright is granted, and it is further,

ORDERED, that Fox News' cross-motion for a declaratory judgment pursuant to CPLR 3001 is granted and it is hereby ordered and declared that proposed plaintiff Musfiq Rahman's claims are barred pursuant to release and waiver.

This constitutes the Decision and Order of this Court.

Dated: November 13, 2017

Hon. Mary Ann Brigantti, J.S.C.

Footnotes

[1] *Fox News' request for oral argument is denied (22 NYCRR §202.8[d])*.

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Narrow By: -None-

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