

PREPARED BY THE COURT

NAFISA ELSEED,

Plaintiff,

v.

Y INTERNATIONAL USA, INC. and
SCOTT WEBER,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO.: **BER-L-6040-18**

Civil Action

OPINION

Argued: November 9, 2018
Decided: November 15, 2018

Honorable Robert C. Wilson, J.S.C.

Paul Castronovo, Esq. appearing on behalf of Plaintiff Nafisa Elsed (from Castronovo & McKinney LLC).

Anna Maria Tejada, Esq. appearing on behalf of Defendants Y International USA, Inc. and Scott Webber (from Kaufman Dolowich & Voluck LLP).

INTRODUCTION

THIS MATTER has been brought before the Court motion by Defendant Y International USA, Inc. (“Defendant”) seeking to dismiss Plaintiff Nafisa Elsed’s (“Plaintiff”) complaint for failure to state a claim upon which relief can be granted, and in the alternative, to stay the proceeding and compel arbitration of the matter. The Court, having considered the written submissions and oral arguments of the parties, declares that Defendant’s motion is **DENIED**.

FACTUAL BACKGROUND

Plaintiff was employed by Defendant as a translator/document reviewer on or about October 17, 2016. Prior to beginning her employment with Defendant, Plaintiff executed hiring documents, which included an employment agreement (“Employment Agreement”). The Employment Agreement included an arbitration clause, set forth in section 9(a), as well as a clause

regarding consent to personal jurisdiction and choice of law in New Jersey for matters concerning termination of employment. The Employment Agreement is attached to this Opinion as Exhibit A.

In addition to these clauses, the Employment Agreement contained an acknowledgment section to confirm that Plaintiff read the Employment Agreement in its entirety, that she understood it, and that Plaintiff took the necessary steps to review the Employment Agreement with an attorney before signing it.

On August 17, 2018, Plaintiff allegedly violated the Employment Agreement by filing a civil complaint against Defendants. Plaintiff commenced this action against Defendants claiming a violation of the New Jersey Law Against Discrimination (“NJLAD”) based on sex, retaliation, and hostile work environment.

RULE OF LAW

I. Legal Standard for a Motion to Dismiss for Failure to State a Claim

Under the New Jersey Court Rules, a complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the complaint, particularly if additional discovery is permitted. R. 4:6-2(e); Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746). Thus, a court must give the non-moving party every inference in evaluating whether to dismiss a complaint. NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The “test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts.” Printing Mart, 116 N.J. at 746. However, “a court must dismiss the plaintiff’s complaint if it has

failed to articulate a legal basis entitling plaintiff to relief.” Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

II. Enforceability of Arbitration Agreements Pursuant to New Jersey Law

An arbitration agreement, like any other agreement, “must be the product of mutual assent, as determined under the customary principles of contract law.” Atalese v. U.S. Legal Services Group, 219 N.J. 430, 442 (2012). Specifically, “an effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights.” Id. Because arbitration involves a waiver of the right to pursue a case in a judicial forum, “courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent.” Id. New Jersey courts have repeatedly stated that “[t]he point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue.” Garfinkel v. Morristown Obstetrics, 168 N.J. 124, 132 (2001) (citing Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)).

In Atalese, the Court stated that “the waiver-of-rights language . . . must be clear and unambiguous – that is, the parties must know that there is a distinction between resolving a dispute in arbitration and in a judicial forum.” Atalese, 219 N.J. at 445. An arbitration clause must also convey to the parties that they are giving up their right to bring claims in court or have a jury resolve their dispute in “at least some general and sufficiently broad way.” Id. at 444. An arbitration clause that fails to “clearly and unambiguously signal” to the parties that they are surrendering their rights to pursue a judicial remedy renders such an agreement unenforceable. Id. at 447-48.

Although Atalese arose in the consumer context, its principles have been routinely applied in the employment context. Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 606-07 (App.

Div. 2015) (applying the principles of Atalese to an employment contract between a stockbroker and a brokerage firm); Morgan v. Raymours Furniture Co., Inc., 443 N.J. Super. 338 (2016) (citing to Atalese in determining that the New Jersey Supreme Court has made clear that an employee must “clearly and unambiguously” agree to a waiver of the right to sue).

DECISION

I. The Arbitration Clause is Invalid Because it Fails to Specify Plaintiff is Waiving Her Right to a Jury Trial

The arbitration clause in the Employment Agreement fails to clearly and unambiguously set forth that Plaintiff is waiving her right to seek relief in court or by jury trial. The arbitration clause contained in paragraph 9(a) of the Employment Agreement does not contain *any* explanation that Plaintiff is waiving these rights. Furthermore, the clause does not explain what arbitration is, or how arbitration differs from a judicial proceeding.

On its face, the arbitration clause at issue also fails to include any language that “in some general and sufficiently broad way, [explains] that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute.” Atalese, 219 N.J. at 447. Accordingly, the arbitration clause is deemed invalid.

II. The Arbitration Clause Fails to Unmistakably State it Applies to NJLAD or Other Statutory Discrimination or Retaliation Claims

The NJLAD confers rights upon employees that are essential to eradicating discrimination in the workplace. Garfinkel, 168 N.J. at 130. Considering the importance of these rights, New Jersey courts will not assume that an employee intends to waive those rights unless an agreement so provides in clear and unambiguous terms. Id. at 132. Therefore, any waiver-of-rights clause must specify that the employee agrees to arbitrate all statutory claims arising out of the

employment relationship or its termination. Id. Any ambiguity in the agreement must be construed against the employer as the drafter. Id. at 133.

The court in Garfinkel recognized that the right to a trial by jury is “an integral feature” of the NJLAD. Id. at 131. Therefore, “a party’s waiver of statutory rights must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively. In the same vein, a court may not rewrite a contract to broaden the scope of arbitration.” Id. at 132. Furthermore, the arbitration agreement “should also reflect the employee’s general understanding of the type of claims included in the waiver, e.g. employment discrimination claims.” Id. at 136.

In this matter, the Employment Agreement states only that Plaintiff “agrees that any dispute, claim, or controversy concerning [Plaintiff’s] employment or the termination of [Plaintiff’s] employment or any dispute, claim or controversy arising out of or relating to any interpretation, construction, performance or breach of this Agreement shall be settled by arbitration . . .” Nowhere in the language of this clause is it specified that Plaintiff is waiving her right to a jury trial for NJLAD or other statutory, discrimination, or retaliation claims. The ambiguous nature of this clause invalidates it as to Plaintiff’s three NJLAD claims, as a waiver of the right to bring NJLAD and other statutory claims is not specified. Therefore, the arbitration clause must be deemed unenforceable.

III. The Arbitration Agreement is Invalid Because Plaintiff did not Knowingly and Voluntarily Waive her Rights to Court or a Trial by Jury

The Federal Arbitration Act (“FAA”) specifically permits states to regulate arbitration agreements under standard contract law. Martindale v. Sandvik, Inc., 173 N.J. 76, 85 (2002). New Jersey contract law states that a person must knowingly and voluntarily waive one’s rights in order for such a waiver to be valid. Id. at 96. The Martindale court enumerated five factors that must

be weighed in deciding whether an employee knowingly and voluntarily waived their rights to a court and jury trial. These factors include: (1) whether the employee read and understood the arbitration agreement; (2) whether the employee was permitted time to consider the agreement; (3) whether the employee was provided with the chance to ask the employer meaningful questions about the agreement; (4) whether the employee was allowed to take the agreement home to consult with another person or attorney before signing; and (5) the employee's degree of sophistication.

Id.

In this case, the record supports a finding that Plaintiff's waiver was unknowing and involuntary when applying the facts to the Martindale factors. First, Defendant never notified Plaintiff that she was signing an arbitration agreement. Plaintiff also did not know that she had signed an arbitration agreement at the time she commenced employment with Defendant. Furthermore, Plaintiff did not understand what arbitration was until after she filed this action. Finally, Defendant never advised Plaintiff that she could or should consult with an attorney before signing the Employment Agreement.

The aforementioned facts on the record support a finding that Plaintiff did not knowingly and voluntarily waive her statutory rights to a jury trial proscribed by the NJLAD. Therefore, the arbitration agreement must fail.

For the reasons stated above, Defendants' motion to dismiss Plaintiffs' claims is hereby **DENIED.**

EXHIBIT A



Y INTERNATIONAL USA INC.

October 8, 2016

**Nafisa Elced
59 Colston Ave.
Brooklyn, NY. 77200**

Dear Ms. Nafisa Elced,

This letter shall confirm our offer of employment to you as a Salaried Exempt Employee in Documentations and Translations Dept. working for Y International USA Inc. subject to the following terms and conditions:

- 1. You shall begin employment on October 17, 2016.**
- 2. You are to report to Regional Manager.**
- 3. Your work schedule shall be as indicated Company requirements.**
- 4. The scope of your responsibilities shall be as a Translator/Documentation.**
- 5. Your gross compensation shall be \$1,154.00(base rate) weekly. Gross compensation shall begin at \$60,000.00 annually. Salaried payroll with run 2 times monthly**
- 6. You shall be eligible to participate in the following benefit programs in accordance with the following schedule: health benefits available after one full calendar month plus 90 days continuous employment. Two weeks' vacation after one full year, potential participation in MIB after one full year (TBD) and other incentive programs yet to be developed**
- 7. Your employment status is at-will and therefore is for no predetermined period of time.**

If you are agreeable to these terms, please sign, date, and return one original of this letter to my attention by no later than October 13, 2016. You may retain the duplicate original for your records.



Y INTERNATIONAL (USA) INC.

EMPLOYMENT, CONFIDENTIAL INFORMATION, AND NON-COMPETE AGREEMENT

As a condition of my employment with Y International USA Inc., its subsidiaries, affiliates, successors or assigns (together the "Company"), and in consideration of my further employment with the Company and my receipt of the compensation now and hereafter paid to me by Company and the Company's agreement in Section 2(a)(i), I agree to the following terms and conditions of this Employment, Confidential Information and Invention Assignment Agreement (the "Agreement"):

1. **At-Will Employment.** I UNDERSTAND AND ACKNOWLEDGE THAT MY EMPLOYMENT WITH THE COMPANY IS FOR AN UNSPECIFIED DURATION AND CONSTITUTES "AT-WILL" EMPLOYMENT. I ALSO UNDERSTAND THAT ANY REPRESENTATION TO THE CONTRARY IS UNAUTHORIZED AND NOT VALID UNLESS OBTAINED IN WRITING AND SIGNED BY AN AUTHORIZED REPRESENTATIVE OF THE COMPANY. I ACKNOWLEDGE THAT THIS EMPLOYMENT RELATIONSHIP MAY BE TERMINATED AT ANY TIME, WITH OR WITHOUT GOOD CAUSE OR FOR ANY OR NO CAUSE, AT THE OPTION EITHER OF THE COMPANY OR MYSELF, WITH OR WITHOUT NOTICE.

A handwritten signature in black ink, appearing to be 'K. K. K.', written vertically on the right side of the page.

2. **Confidential Information.**

(a) **Company Information.**

(i) The Company agrees that upon the commencement of my employment, it will make available to me that Confidential Information of the Company that will enable me to optimize the performance of my duties to the Company. In exchange, I agree to use such Confidential Information solely for the Company's benefit. Notwithstanding the preceding sentence, I agree that upon the termination of my employment in accordance with Section 1, the Company shall have no obligation to provide or otherwise make available to me any of its Confidential Information. I understand that "Confidential Information" means any Company proprietary information, technical data, trade secrets or know-how, including, but not limited to, research, product plans, products, services, customer lists and customers (including, but not limited to, customers of the Company on whom I called or with whom I became acquainted during the term of my employment), markets, software, developments, inventions, processes, formulas, technology, designs, drawings, engineering, hardware configuration information, marketing, finances or other business information disclosed to me by the Company either directly or indirectly in writing, orally or by drawings or observation of parts or equipment. I further understand that Confidential Information does not include any of the foregoing items which has become publicly known and made generally available through no wrongful act or omission of mine or of others who were under confidentiality obligations as to the item or items involved or improvements or new versions thereof.

(ii) I agree at all times during the term of my employment and thereafter, to hold in strictest confidence, and not to use, except for the exclusive benefit of the Company, or to disclose to any person, firm or corporation without written authorization of the Board of Directors of the Company, any Confidential Information of the Company.



Y INTERNATIONAL (USA) INC

(b) **Former Employer Information.** I agree that I will not, during my employment with the Company, improperly use or disclose any proprietary information or trade secrets of any former or concurrent employer or other person or entity and that I will not bring onto the premises of the Company any unpublished document or proprietary information belonging to any such employer, person or entity unless consented to in writing by such employer, person or entity.

(c) **Third Party Information.** I recognize that the Company has received and in the future will receive from third parties their confidential or proprietary information subject to a duty on the Company's part to maintain the confidentiality of such information and to use it only for certain limited purposes. I agree to hold all such confidential or proprietary information in the strictest confidence and not to disclose it to any person, firm or corporation or to use it except as necessary in carrying out my work for the Company consistent with the Company's agreement with such third party.

(d) **Maintenance of Records.** I agree to keep and maintain adequate and current written records of all inventions made by me (solely or jointly with others) during the term of my employment with the Company. The records will be in the form of notes, sketches, drawings, and any other format that may be specified by the Company. The records will be available to and remain the sole property of the Company at all times.

3. **Conflicting Employment.** I agree that, during the term of my employment with the Company, I will devote my full time and efforts to the Company and I will not engage in any other employment, occupation or consulting activity, nor will I engage in any other activities that conflict with my obligations to the Company.

4. **Returning Company Documents, etc.** I agree that, at the time of leaving the employ of the Company, I will deliver to the Company (and will not keep in my possession, recreate or deliver to anyone else) any and all devices, records, data, notes, reports, proposals, lists, correspondence, specifications, drawings blueprints, sketches, materials, equipment, other documents or property, or reproductions of any aforementioned items developed by me pursuant to my employment with the Company or otherwise belonging to the Company. In the event of the termination of my employment, I agree to sign and deliver the "Termination Certification" attached hereto as Exhibit B.

5. **Solicitation of Employees.** I agree that for a period of twelve (12) months immediately following the termination of my relationship with the Company for any reason, whether with or without good cause or for any or no cause, at the option either of the Company or myself, with or without notice, I will not hire any employees of the Company and I will not, either directly or indirectly, solicit, induce, recruit or encourage any of the Company's employees to leave their employment, or take away such employees, or attempt to solicit, induce, recruit, encourage or take away employees of the Company, either for myself or for any other person or entity.

6. **Interference.** I agree that during the course of my employment and for a period of twelve (12) months immediately following the termination of my relationship with the Company for any reason,



INTERNATIONAL (USA) INC.

whether with or without good cause or for any or no cause, at the option either of the Company or myself, with or without notice, I will not, either directly or indirectly, interfere with the Company's contracts and relationships, or prospective contracts and relationships, including, but not limited to, the Company's customer or client contracts and relationships.

7. Covenant Not to Compete

(a) I agree that during the course of my employment and for a period of twelve (12) months immediately following the termination of my relationship with the Company for any reason, whether with or without good cause or for any or no cause, at the option either of the Company or myself, with or without notice, I will not, without the prior written consent of the Company, (i) serve as a partner, employee, consultant, officer, director, manager, agent, associate, investor, or otherwise for, (ii) directly or indirectly, own, purchase, organize or take preparatory steps for the organization of, or (iii) build, design, finance, acquire, lease, operate, manage, invest in, work or consult for or otherwise affiliate myself with, any business in competition with or otherwise similar to the Company's business. The foregoing covenant shall cover my activities in every part of the Territory in which I may conduct business during the term of such covenant as set forth above. "Territory" shall mean (i) all counties in the State of New Jersey, (ii) all other states of the United States of America and (iii) all other countries of the world; provided that, with respect to clauses (ii) and (iii), the Company derives at least five percent (5%) of its gross revenues from such geographic area prior to the date of the termination of my relationship with the Company.



(b) I acknowledge that I will derive significant value from the Company's agreement in Section 2(a)(i) to provide me with that Confidential Information of the Company to enable me to optimize the performance of my duties to the Company. I further acknowledge that my fulfillment of the obligations contained in this Agreement, including, but not limited to, my obligation neither to disclose nor to use the Company's Confidential Information other than for the Company's exclusive benefit and my obligation not to compete contained in subsection (a) above, is necessary to protect the Company's Confidential Information and, consequently, to preserve the value and goodwill of the Company. I further acknowledge the time, geographic and scope limitations of my obligations under subsection (a) above are reasonable, especially in light of the Company's desire to protect its Confidential Information, and that I will not be precluded from gainful employment if I am obligated not to compete with the Company during the period and within the Territory as described above.

(c) The covenants contained in subsection (a) above shall be construed as a series of separate covenants, one for each city, county and state of any geographic area in the Territory. Except for geographic coverage, each such separate covenant shall be deemed identical in terms to the covenant contained in subsection (a) above. If, in any judicial proceeding, a court refuses to enforce any of such separate covenants (or any part thereof), then such unenforceable covenant (or such part) shall be eliminated from this Agreement to the extent necessary to permit the remaining separate covenants (or portions thereof) to be enforced. In the event the provisions of subsection (a) above are deemed to exceed the time, geographic or scope limitations permitted by applicable law, then such provisions shall be reformed to the maximum time, geographic or scope limitations, as the case may be, then permitted by such law.

8. Representations. I agree to execute any proper oath or verify any proper document required to carry out the terms of this Agreement. I represent that my performance of all the terms of this



INTERNATIONAL LLC INC

Agreement will not breach any agreement to keep in confidence proprietary information acquired by me in confidence or in trust prior to my employment by the Company. I have not entered into, and I agree I will not enter into, any oral or written agreement in conflict herewith.

9. Arbitration and Equitable Relief.

(a) Arbitration. Except as provided in subsection (b) below, I agree that any dispute, claim or controversy concerning my employment or the termination of my employment or any dispute, claim or controversy arising out of or relating to any interpretation, construction, performance or breach of this Agreement, shall be settled by arbitration to be held in Lyndhurst, New Jersey in accordance with the rules then in effect of the American Arbitration Association. The arbitrator may grant injunctions or other relief in such dispute or controversy. The decision of the arbitrator shall be final, conclusive and binding on the parties to the arbitration. Judgment may be entered on the arbitrator's decision in any court having jurisdiction. The Company and I shall each pay one-half of the costs and expenses of such arbitration, and each of us shall separately pay our counsel fees and expenses.

(b) Equitable Remedies. I agree that it would be impossible or inadequate to measure and calculate the Company's damages from any breach of the covenants set forth in Sections 2, 3, 5, 7 and, 8 herein. Accordingly, I agree that if I breach any of such Sections, the Company will have available, in addition to any other right or remedy available, the right to obtain an injunction from a court of competent jurisdiction restraining such breach or threatened breach and to specific performance of any such provision of this Agreement. I further agree that no bond or other security shall be required in obtaining such equitable relief and I hereby consent to the issuance of such injunction and to the ordering of specific performance.

10. General Provisions.

(a) Governing Law/ Consent to Personal Jurisdiction. THIS AGREEMENT WILL BE GOVERNED BY THE LAWS OF THE STATE OF NEW JERSEY WITHOUT REGARD FOR CONFLICTS OF LAWS PRINCIPLES. I HEREBY EXPRESSLY CONSENT TO THE PERSONAL JURISDICTION OF THE STATE AND FEDERAL COURTS LOCATED IN THE STATE OF NEW JERSEY FOR ANY LAWSUIT FILED THERE AGAINST ME BY THE COMPANY CONCERNING MY EMPLOYMENT OR THE TERMINATION OF MY EMPLOYMENT OR ARISING FROM OR RELATING TO THIS AGREEMENT.

(b) Entire Agreement. This Agreement sets forth the entire agreement and understanding between the Company and me relating to the subject matter herein and supersedes all prior discussions between us. No modification of or amendment to this Agreement, nor any waiver of any rights under this Agreement, will be effective unless in writing signed by the party to be charged. Any subsequent change or changes in my duties, salary or compensation will not affect the validity or scope of this Agreement.

(c) Severability. If one or more of the provisions in this Agreement are deemed void by law, including, but not limited to, the covenant not to compete in Section 9, then the remaining provisions will continue in full force and effect.



Y INTERNATIONAL (USA) INC.

(d) Successors and Assigns. This Agreement will be binding upon my heirs, executors, administrators and other legal representatives and will be for the benefit of the Company, its successors, and its assigns.

(e) Construction. The language used in this Agreement will be deemed the language chosen by the parties to express their mutual intent, and no rules of strict construction will be applied against either party.

(f) Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be enforceable, and all of which together shall constitute one agreement.

11. I acknowledge and agree to each of the following items:

(a) I am executing this Agreement voluntarily and without any duress or undue influence by the Company or anyone else; and

(b) I have carefully read this Agreement. I have asked any questions needed for me to understand the terms, consequences and binding effect of this Agreement and fully understand them; and

(c) I sought the advice of an attorney of my choice if I wanted to before signing this Agreement.





Y INTERNATIONAL (USA) INC.

IN WITNESS WHEREOF, the parties have executed this Agreement on the day, month and year first set forth below; provided, however, that the Company executed this Agreement solely for the purpose of entering into the covenants contained in Section 2(a)(1).

COMPANY: Y INTERNATIONAL USA INC.

[Signature] Date 10-12-16

Company Representative's Signature

Scott M. Welch Date 10-12-16

Company Representative's Printed Name

EMPLOYEE:

Nafisa ELSEED

Employee's Signature

[Signature] Date October 10, 2016

Employee's Printed Name

WITNESS:

Witness Signature

_____ Date _____

Witness Printed Name

