

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number:
08-22934-CIV-MORENO

IOANNIS SKORDILIS,

Plaintiff,

vs.

CELEBRITY CRUISES, INC.,

Defendant.

ORDER GRANTING MOTION FOR RECONSIDERATION

THIS CAUSE came before the Court upon Plaintiff's Motion for Reconsideration and/or Rehearing (**D.E. No. 10**), filed on **January 13, 2009**.

THE COURT has considered the motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is GRANTED. After reconsideration, the Court finds that Defendant's motion to compel arbitration is DENIED. The Court will issue a separate ruling on Plaintiff's motion for remand.

BACKGROUND

Plaintiff Ioannis Skordilis was allegedly injured while acting within the scope of his employment aboard one of Defendant Celebrity Cruises, Inc.'s vessels. It appears from the pleadings that Plaintiff's employment contract with Defendant included a collective bargaining agreement ("CBA") that provided for the arbitration of all disputes arising out of Plaintiff's employment. See Def. Mot. To Compel Arbitration, Ex. 1-2. Arbitration was to take place in

Greece, the country of Plaintiff's citizenship at the time both parties entered into the employment contract.

After allegedly suffering two different injuries aboard Defendant's cruise ship, Plaintiff filed suit in Dade County Circuit Court under the Jones Act, 46 U.S.C. § 30104,¹ and general maritime law. In Count I, Plaintiff alleges that Defendant was negligent after Plaintiff's eye was splashed with cleaning fluid on February 19, 2006. Plaintiff further alleges that Defendant's negligence caused him to slip on a puddle of liquid soap in a stairwell on the vessel. In Count II, Plaintiff alleges that the vessel was unseaworthy due to conditions created by Defendant's conduct. Trial was set for November 10, 2008.

In late October 2008, Defendant removed the case to federal court pursuant to 28 U.S.C. § 1441 and 9 U.S.C. § 205. The latter statute, part of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The New York Convention"), states that "[w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement...under the Convention, the defendant...may, at any time before the trial thereof, remove such action..." Thereafter, pursuant to 9 U.S.C. § 206, Defendant filed a motion seeking to compel arbitration and to stay the suit pending the arbitration's outcome. Although Plaintiff did not respond to Defendant's motion, Plaintiff filed a motion to remand the case back to the state court, tacitly opposing Defendant's motion to compel arbitration.

DISCUSSION

Section 205 of the New York Convention states that "[w]here the subject matter of an action or proceeding in State court relates to an arbitration agreement or award falling under the

¹formerly cited as 46 U.S.C. § 688.

Convention, the defendant...may, at any time before trial thereof, remove such action..." 9 U.S.C. § 205. In its order (**D.E. No. 8**) compelling arbitration and denying remand, the Court misread this language to mean that the defendant may invoke the right to arbitrate the dispute at any time before trial. Accordingly, the Court must reconsider Defendant's motion to compel arbitration. For the reasons stated below, the Court vacates and strikes its previous order and denies Defendant's motion to compel arbitration.

I. Legal Standard Under the New York Convention

It is undisputed that the New York Convention governs the employment contract between the parties. 9 U.S.C. § 202. Furthermore, the Court follows well-settled precedent in this Circuit that a collective bargaining agreement ("CBA") between Plaintiff and Defendant containing an arbitration clause "is incorporated by reference into the main contract." *Allen v. Royal Caribbean Cruise, Ltd.*, No. 08-22014-CIV-UNGARO, 2008 WL 5095412, at *5 (S.D. Fla. Sept. 30, 2008) (citing *Acosta v. Norwegian Cruise Line, Ltd.*, 303 F. Supp.2d 1327, 1330 (S.D. Fla. 2003)); *See also Lobo v. Celebrity Cruises, Inc.*, 488 F.3d 891 (11th Cir. 2007) (affirming district court's order compelling arbitration based on the arbitration clause in the CBA). Defendant asks the Court to compel the parties to attend arbitration, while Plaintiff argues that Defendant waived its right to arbitration.

In ruling on Defendant's motion to compel arbitration pursuant to the New York Convention, the Court conducts a "very limited inquiry." *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 (11th Cir. 2005). The Court "must order arbitration unless four jurisdictional prerequisites are not met...or one of the Convention's affirmative defenses applies." *Id.* at 1294-95. The Court must initially find that: (1) there is an agreement in writing within the meaning of the Convention;

(2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a commercial legal relationship; and (4) a party to the agreement is not an American citizen, or that the commercial relationship relates to a foreign state. *Id.* at 1295, n.7.

While Plaintiff did not directly respond to Defendant's motion to compel arbitration, Plaintiff's motion for remand takes issue with the fourth prerequisite because Plaintiff allegedly became a U.S. citizen after signing the employment contract, and after the commencement of this suit.

Plaintiff also asserts the affirmative defense that Defendant waived its right to arbitration.

II. Plaintiff's U.S. Citizenship Does Not Void the Arbitration Clause

The fourth jurisdictional prerequisite requires that, either, a party to the agreement is not a U.S. Citizen, or that the commercial relationship relates to a foreign state. Plaintiff was a Greek citizen in 2006 when he entered into the employment contract with Defendant. It was only after the filing of this lawsuit that Plaintiff received U.S. citizenship, on April 11, 2008. Plaintiff cites to no case, nor could the Court find any precedent, for the proposition that the non-citizenship prerequisite is not met where a party to the agreement later becomes a U.S. citizen. At the time of the contract's formation, the time of plaintiff's injury, and even at the commencement of this lawsuit in the 11th Circuit Court of Miami-Dade County, Plaintiff was not a U.S. citizen. Despite Plaintiff's urging, the Court declines to take this step with Plaintiff, for fear of slipping itself.

Even assuming *arguendo* that the Court must classify Plaintiff as an American citizen for the purpose of weighing the fourth jurisdictional prerequisite, the arbitration clause is still enforceable if the commercial relationship between the parties relates to a foreign state. Here, the employment contract was written in Greek and called for the application of Greek law, arbitration was to take place in Greece, and Plaintiff himself was a Greek citizen. Based on these facts, the

Court finds that the commercial relationship relates sufficiently to Greece, satisfying the fourth jurisdictional prerequisite. Accordingly, the Court must compel arbitration absent any affirmative defenses raised by Plaintiff. *See Bautista*, at 1294-95.

III. Defendant's Waiver of Arbitration

Indeed, Plaintiff raises the “domestic” affirmative defense that Defendant waived its right to arbitration. *See Id.* at 1302 (noting that the Convention provides for the standard breach of contract defenses of fraud, mistake, duress, and waiver, any of which would render an arbitration clause “null and void”). Plaintiff alleges that Defendant’s persistence in litigating this suit in state court up to a few weeks before trial constitutes a waiver of its right to enforce the arbitration agreement. After reconsideration, the Court agrees that Defendant's conduct in state court constitutes a waiver of its right to arbitration.

A waiver of the right to arbitration is appropriate where the Court finds, after reviewing the "totality of the circumstances" that a party "has acted inconsistently with the arbitration right." *S & H Contractors, Inc. v. A.J. Taft Coal Co., Inc.*, 906 F.2d 1507, 1514 (11th Cir. 1990) (internal quotations omitted); *See also Morewitz v. West of England Ship Owners Mut. Prot. & Indemn. Assoc.*, 62 F.3d 1356, 1366 (11th Cir. 1995) (finding that a party waives the right to arbitration when it participates in a litigation "to a point inconsistent with an intent to arbitrate" such that the other side is prejudiced); *Inverrary Gardens Condo. I Assoc., Inc. v. Spender*, 939 So. 2d 1159, 1161 (Fla. 4th DCA 2006) (accord). In *S & H Contractors*, the Eleventh Circuit found that party may waive its right to arbitration after it "substantially invokes the litigation machinery prior to demanding arbitration..." *Id.* After litigating for eight months after the filing of the complaint, the court found that the plaintiff in *S & H Contractors* had waived its right to arbitration. *Id.*

Here, the parties litigated this case in state court for fifteen months. Only on the eve of trial did Defendant abruptly enact its right to remove the case under § 205 of the New York Convention, and subsequently move to compel arbitration. Allowing Defendant to continue this course would result in severe prejudice to Plaintiff. The Court therefore agrees with Plaintiff that Defendant has waived its right to arbitration. *See S & H Contractors*, at 1514; *See also Tripledeck, Inc. v. Creole Yacht Charters Ltd.*, No. 05-21182-CIV-TORRES, 2006 WL 3507971, at *1 (S.D. Fla. Dec. 5, 2006) (finding that Plaintiff waived right to arbitration after litigating case for over a year).

CONCLUSION

Upon reconsideration, the Court's previous order (**D.E. No. 8**) is hereby vacated and stricken. The Court finds that Defendant's motion to compel arbitration is DENIED. The Court will separately rule on Plaintiff's motion for remand.

DONE AND ORDERED in Chambers at Miami, Florida, this 16th day of January, 2009.



FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

Counsel of Record