

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SAMUEL M. KOREN, et al.,)	
)	
Plaintiffs)	
)	
v.)	Docket No. 00-238-P-C
)	
NORTH EAST INSURANCE)	
COMPANY, et al.,)	
)	
Defendants)	

**RECOMMENDED DECISION ON DEFENDANTS’
MOTION TO DISMISS AND TO COMPEL ARBITRATION**

In this action arising in part from the termination of the employment of Samuel M. Koren, defendants North East Insurance Company (“North East”) and Ronald Libby move to dismiss Counts V through XII of the plaintiffs’ amended complaint on the ground that those claims are arbitrable.¹ Defendant North East’s and Defendant Libby’s Motion To Dismiss and To Compel Arbitration of Counts V Through XII, etc. (“Motion”) (Docket No. 9) at 1. Relatedly, they ask the court to compel arbitration with respect to those claims. *Id.* The plaintiffs concede that North East is entitled to arbitrate with respect to claims in this subgroup asserted against it; however, they contest that Libby is so entitled. Plaintiffs’ Partial Objection to Defendant North East’s and Defendant Libby’s Motion To Dismiss and To Compel Arbitration of Counts V Through XII (“Opposition”) (Docket No. 12) at 1. Inasmuch as I

¹ Although Susan Koren is also a named plaintiff, none of the counts at issue concerns her claims. For ease of reference, I shall refer to both plaintiffs as “the plaintiffs” and to plaintiff Samuel M. Koren as “Koren.”
(continued on next page)

agree that Libby, a nonsignatory to the contract in issue, is not entitled to compel arbitration of the subset of claims asserted against him, I recommend that the Motion be granted in part and denied in part.

I. Applicable Legal Standards

North East and Libby do not identify the basis upon which they seek dismissal of the claims in issue, *see generally* Motion; however, the only apparent foundation for that portion of the Motion is Fed. R. Civ. P. 12(b)(6), pertaining to “failure to state a claim upon which relief can be granted[.]”²

“When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending [the] plaintiff every reasonable inference in his favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).³

² The only other potentially applicable ground for dismissal — lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) — is inapposite inasmuch as the enforceability of a private arbitration clause does not implicate such concerns. *See, e.g., DiMercurio v. Sphere Drake Ins., PLC*, 202 F.3d 71, 77 (1st Cir. 2000) (noting “modern view that arbitration agreements do not divest courts of jurisdiction, though they prevent courts from resolving the merits of arbitrable disputes.”).

³ I note that North East and Libby rely for purposes of this Motion on two employment contracts (one entered into in 1996 and the other in 1998) that are neither appended to, nor explicitly incorporated by reference in, the complaint or the answer. *See generally* Amended Complaint (“Complaint”) (Docket No. 4); First Amended Answer of Defendants North East Insurance Company, Ronald Libby and Motor Club of America and Affirmative Defenses (“Answer”) (Docket No. 15). However, it is clear that these documents are integral to the current action. *See e.g.*, Complaint ¶¶ 40-41, 47 (referencing 1996 agreement), 44, 48 (apparently alluding to 1998 agreement); Answer, Affirmative Defenses ¶¶ 5-6 (raising 1998 agreement as affirmative defense). A court may consider such “integral” materials in the context of a motion to dismiss pursuant to Rule 12(b)(6). *See, e.g., Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, No. 99-1608, slip op. at 12 (1st Cir. Oct. 3, 2000) (“[I]t is well-established that in reviewing the complaint, we may properly consider the relevant entirety of a document integral to or explicitly relied upon in the complaint, even though not attached to the complaint, without converting the motion into one for summary judgment.”) (citation and internal quotation marks omitted).

Motions to compel arbitration are governed by 9 U.S.C. § 4, which provides in relevant part:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default . . . the court shall hear and determine such issue. . . .

An evidentiary hearing or jury trial is unnecessary in the context of a motion to compel arbitration when, as in this case, the parties neither request such a hearing or trial nor dispute the relevant underlying facts. *See, e.g., Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 795 F.2d 1111, 1115 n.7 (1st Cir. 1986).

II. Background

Resolution of the arbitrability of claims against Libby turns on whether a First Circuit case adverse to his position, but not precisely on point, controls. I conclude that it does. Before analyzing the applicability of that case, *McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994), I briefly summarize relevant facts drawn from the amended complaint or documents integral thereto, which for purposes of the motion to dismiss are accepted as true and for purposes of the motion to compel are not controverted.

Koren worked for North East from November 1977 until mid-March 1999, at which time he was a senior vice-president. Complaint ¶ 4. On December 1, 1998 Koren and North East executed an employment agreement providing in relevant part:

AGREEMENT, effective as of October 1, 1998 between NORTH EAST INSURANCE COMPANY, a Maine corporation (the "Company"), and SAMUEL M. KOREN (the "Executive").

[T]he parties hereto (the "Parties") agree as follows:

2. Positions and Duties.

During the Employment Term the Executive shall serve as Senior Vice President Claims of the Company. The Executive shall report to the Chief Operating Officer of the Company (the "COO") and perform such employment duties, consistent with his position, as are specified by the COO, with duties and responsibilities including, but not limited to, claims administration and such additional duties as may be assigned from time to time by the COO. . . .

11. Arbitration.

The Parties agree that any controversy or claim arising out of or relating to this Agreement, or the breach of any provision hereof, or the terms or conditions of employment, including whether such controversy or claim is arbitrable, . . . shall be settled by arbitration

13. Assignability; Binding Nature.

This Agreement is binding upon, and shall inure to the benefit of, the Parties hereto and their respective successors, heirs, administrators, executors and assigns. . . . No rights or obligations of the Company under this Agreement may be assigned or transferred except that such rights or obligations may be assigned or transferred by operation of law in the event of a merger or consolidation in which the Company is not the continuing entity, or the sale or liquidation of all or substantially all of the assets of the Company

14. Entire Agreement.

This Agreement contains the entire agreement between the Parties concerning the subject matter hereof and supersedes all prior agreements, understandings, discussions, negotiations, and undertakings, whether written or oral, between the Parties with respect thereto.

16. Miscellaneous.

No provision of this Agreement may be modified, waived, or discharged unless such waiver, modification or discharge is agreed to in writing and signed by the Executive and such officer of the Company as may be specifically designated by the Board. . . . No agreements or representations, oral or otherwise, express or implied, with respect to the subject matter hereof have been made by either Party which are not expressly set forth in this Agreement. . . .

North East Insurance Company Employment Agreement (“1998 Agreement”), attached to Affidavit of Linda Hatt (“Hatt Aff.”), attached as Exh. A to Motion.

North East and Koren had previously entered into a so-called employment continuity agreement that contained no arbitration provision. Employment Continuity Agreement (“1996 Agreement”), attached to Hatt Aff.

Libby was the chief operating officer of North East. Complaint ¶ 6. The plaintiffs complain that Libby created a hostile work environment and made an anti-Semitic comment concerning Koren’s wife, Susan Koren, about which Koren complained to various North East personnel. *Id.* ¶¶ 7-8. In March 1999 Koren was ordered to leave the North East premises and, shortly thereafter, his employment was terminated. *Id.* ¶ 9.

III. Analysis

In the counts at issue in this Motion, Koren alleges that (i) North East breached the 1996 Agreement and “other written and/or oral agreements” by failing to provide severance pay and certain other benefits upon his termination (Count V); (ii) that North East is equitably estopped from arguing that the terms of the 1996 Agreement were superseded by subsequent agreement (Count VI); (iii) that North East made negligent representations with respect to the continuing effectiveness of the 1996 Agreement (Count VII); (iv) that Libby tortiously

interfered with a valid contractual relationship between North East and Koren (Count VIII); (v) that Libby repeatedly harassed and tormented Koren and insulted Susan Koren, intentionally inflicting emotional distress on Koren (Count IX); (vi) that in harassing the plaintiffs and inducing North East to breach its contract with Koren, Libby negligently inflicted emotional distress on Koren (Count X); (vii) that North East, acting under Libby's direction and influence, violated Koren's rights under federal and state family and medical-leave laws (Count XI); (viii) and that North East and Libby breached fiduciary duties owed to Koren (Count XII).

North East and Libby press for dismissal and arbitration of those of Counts V-XII that are asserted against Libby on the basis of a theory of equitable estoppel. Motion at 7-13. Under this theory, a nonsignatory to a contract containing an arbitration agreement may compel a signatory to arbitrate in either of two circumstances:

First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting [its] claims against the nonsignatory. When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise[] out of and relate[] directly to the [written] agreement, and arbitration is appropriate. Second, application of equitable estoppel is warranted . . . when the signatory [to the contract containing the arbitration clause] raises allegations of . . . substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.

MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999) (citations and internal quotation marks omitted) (brackets in original). The theory is grounded at least in part on federal arbitration policy: "Otherwise, the arbitration proceedings [between the two signatories] would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." *Id.* (citation and internal quotation marks omitted) (brackets in original).

The plaintiffs rejoin, *inter alia*, that the question whether a person is bound to arbitrate unlike a question concerning the scope of an arbitration clause is a matter of straightforward contract interpretation that need not be filtered through the lens of federal policy favoring arbitration. Opposition at 2-3. *McCarthy* makes clear that this basic premise is indeed correct:

[A] party seeking to substitute an arbitral forum for a judicial forum must show, at a bare minimum, that the protagonists have agreed to arbitrate *some* claims.

This imperative is in no way inconsistent with the acknowledged federal policy favoring arbitration. The federal policy presumes proof of a preexisting agreement to arbitrate disputes arising between the protagonists. Once that agreement has been proven and the protagonists identified, cases such as *Cone* and *McMahon* instruct courts to use a particular hermeneutical principle for interpreting the breadth of the agreement The federal policy, however, does not extend to situations in which the identity of the parties who have agreed to arbitrate is unclear.

McCarthy, 22 F.3d at 354-55 (citations and internal quotation marks omitted) (emphasis in original).

In *McCarthy*, as in the instant case, a nonsignatory to a contract attempted to compel a signatory to submit to arbitration. *McCarthy* had contracted to sell his business to a corporation, Theta II. *Id.* at 353. An individual, Leo L. Azure, Jr., signed certain contracts on behalf of Theta II, including a purchase agreement. *Id.* All of Theta II's employees, including *McCarthy*, were abruptly laid off following the closing. *Id.* at 354. *McCarthy* sued Azure (in his personal capacity) and Theta II, among others. *Id.* at 354, 355 n.4. Azure sought to compel *McCarthy* to arbitrate, relying on theories of agency, third-party beneficiary status and alter-ego status. *Id.* at 356-63. The First Circuit found none of the theories persuasive, primarily on the basis that none squared with the intent of the parties as manifested in the controlling contract language:

Although the Purchase Agreement does contain an arbitration clause, it is narrow in scope and does not extend the right to compel arbitration to agents or employees of the corporate signatory. By like token, the Purchase Agreement does not make manifest an intention to confer third-party beneficiary status on any such agents or employees.

Id. at 363. Specifically, the First Circuit observed that:

1. The arbitration clause itself was comparatively narrow, pertaining to disputes “arising under” the agreement rather than disputes “arising out of or relating to” the same. *Id.* at 358.

2. The purchase agreement included an integration clause. *Id.* The court “routinely ha[d] declined to read unwritten terms into agreements containing similar declarations.” *Id.*

3. Although the purchase agreement provided that it would be binding on the parties’ successors and assigns, there was “no comparable provision anent the parties’ agents, servants, or employees” a “telling” omission. *Id.* at 359 n.11.

McCarthy does not address the theory of equitable estoppel, presumably because Azure did not present it. Nor, inasmuch as appears, has the First Circuit ever been called upon to address the question whether a nonsignatory can be compelled to arbitrate on the basis of this particular theory. Nonetheless, application of the principles enunciated in *McCarthy* leads to the conclusion that, at least in this case, Libby’s attempt fails.

The scope of the arbitration provision at issue here is broader than that at issue in *McCarthy*, pertaining not only to claims “arising out of or relating to” the 1998 Agreement but also to “the terms and conditions of employment[.]” 1998 Agreement at 7. Nonetheless, the language of the 1998 Agreement as a whole makes clear that there was no intent that nonsignatory North East employees such as Libby be able to compel Koren to arbitrate

workplace-related disputes. First, and most obviously, only North East and Libby are parties to the 1998 Agreement. The agreement, which contains an integration clause expressly stating that it embodies the whole of the parties' understandings on its subject matter, expressly binds the parties' successors, heirs, administrators, executors and assigns but no other persons or entities. Finally, the agreement specifies that no modification is effective unless reflected in a writing signed by both parties. There is nothing ambiguous about it. In short, in this case, as in *McCarthy*, "the [contract] itself is the best indicator of the parties' intent. We must honor that intent — an intent which, for our purposes, translates into a direction to read the arbitration clause set forth in the Purchase Agreement straightforwardly rather than expansively." *McCarthy*, 22 F.3d at 359.⁴

IV. Conclusion

For the foregoing reasons I recommend that the Motion be **GRANTED** with respect to Counts V-VII in their entirety and those portions of Counts XI and XII that are asserted against North East only, and that the Motion otherwise be **DENIED**. Inasmuch as the defendants do

⁴ North East and Libby suggest that Libby is entitled to prevail based in part on the plaintiffs' failure to meet the equitable-estoppel argument head-on. Defendant North East's and Defendant Libby's Reply to Plaintiffs' Objection to Defendants' Motion To Dismiss and To Compel Arbitration (Docket No. 13) at 1, 4. The plaintiffs sufficiently raise the point that the principles of contract construction set forth in *McCarthy* control the outcome here. See Opposition at 2-3. In any event, it is doubtful that, if squarely presented with the issue, the First Circuit would adopt the *MS Dealer* equitable-estoppel test — which depends entirely on examination of the similarity of claims. The court in *McCarthy* noted that it would not "suggest that similarity of claims alone suffices to clear the decks for arbitration. As we have made pellucid, . . . the basic prerequisite is the parties' agreement to arbitrate, or, put another way, the existence of an actual waiver of the right to litigate. But similarity of claims sometimes may help to clarify what the parties intended when they included an arbitration provision in an instrument." *McCarthy*, 22 F.3d at 357 n.7. It is also noteworthy that Judge Dennis, dissenting in a case in which a majority of the Court of Appeals for the Fifth Circuit adopted the *MS Dealer* equitable-estoppel test, raised concerns similar to those voiced by the First Circuit in *McCarthy*. See *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 538 (5th Cir. 2000) (Dennis, J., dissenting) ("I believe that the majority has fallen into a number of serious, harmful legal errors in the present case. The amorphous, misnamed estoppel theories of *MS Dealer* . . . conflict with and endanger the basic principles that the Supreme Court has held must be adhered to in compelling a person to submit to commercial arbitration, viz., (1) a person cannot be required to submit to arbitration any dispute which he has not agreed so to submit, (2) a person who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute, and (3) ordinary state-law principles governing the formation of contracts should be applied when deciding whether the parties agreed to arbitrate a certain matter.").

not seek arbitration with respect to Counts I-IV and XIII-XVI of the Complaint, and I am here recommending denial of the motion to compel arbitration with respect to the subset of Counts V-XII asserted against Libby, I also recommend that the instant action be **STAYED** during the pendency of arbitration proceedings. *See Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 156 n.21 (1st Cir. 1998).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 3rd day of November, 2000.

David M. Cohen
United States Magistrate Judge

STNDRD
U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-238

KOREN, et al v. NORTH EAST INSURANCE, et al
08/28/00

Filed:

Assigned to: JUDGE GENE CARTER
Demand: \$0,000
Lead Docket: None
Question
Dkt # in CCSC : is CV-00-495

Jury demand: Plaintiff
Nature of Suit: 442
Jurisdiction: Federal

Cause: 29:1001 E.R.I.S.A.: Employee Retirement

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