AMERICAN ARBITRATION ASSOCIATION

RUDOLF ZIMMERMAN, Claimant, v. SUNTRUST BANK, Respondent.	)	CASE NO.: 30-160-00790-08

ORDER

This matter came before the Arbitrator upon Motion for Respondent SunTrust Bank ("SunTrust'), to dismiss Claimant Rudolph Zimmerman's ("Zimmerman") demand for class arbitration. Claimant Zimmerman raises legal claims for overtime pay pursuant to the FLSA and brought this arbitration as a class action. After reviewing the entire record, and for reasons stated herein, Respondent's Motion to Dismiss is GRANTED.

BACKGROUND

Zimmerman was employed as a Client Technology Specialist, CTS, for Suntrust from March 1999 to June 30, 2008. Zimmerman contends that he and other CTS employees were treated by SunTrust as exempt from the Fair Labor Standards Act (FLSA) and were not paid overtime as required by 29 U.S.C.§207.

In October 2006 Suntrust converted Zimmerman and other CTS positions to non-exempt. Under the FLSA, SunTrust continued to pay Zimmerman the same base salary and began paying him overtime for hours worked in excess of 40 hours per week. Zimmerman contends that SunTrust failed to pay him and other similarly situated employees overtime compensation he contends was

due. SunTrust denies Zimmerman's claims and contends that he and other CTS employees have been fully compensated pursuant to the FLSA.

Shortly after SunTrust, in October 2006, changed the CTS classification from exempt to non-exempt status, several pieces of litigation were filed against SunTrust for its alleged failure to properly pay CTS employees overtime. These suits were filed by Zimmerman's current attorneys.

The first action, *Palmer, et al. v. SunTrust Banks, Inc.*, was filed November 2, 2006 in U.S. District Court for the Middle Districtof Florida. Six weeks later a second collective action, *Allen et al. V. SunTrust Banks, Inc*, was filed in the U.S. District Court for the Northern District of Georgia. The *Palmer* case and the *Allen* case were later consolidated in the U.S. District Court for the Northern District of Georgia with Judge Richard Story presiding.

In March 2007, Judge Story conditionally certified the *Allen* matter as a collective action pursuant to the FLSA and permitted the Plaintiffs to send opt-in notices to potential class members. Zimmerman received notice of the *Allen* suit but did not attempt to opt-in. On April 14, 2008, Zimmerman filed a separate collective action in U.S. District Court for the Northern District of Georgia. The case, *Zimmerman, et al. v. SunTrust Bank*, was assigned to Judge Richard Story on that same date. Zimmerman's case involved the same issues of fact or arose out of the same transaction as the Allen lawsuit.

After Zimmerman filed his lawsuit, he and other CTS employees were informed that SunTrust was eliminating the CTS department and outsourcing its function. Zimmerman and approximately one hundred seventy-seven (177) other CTS employees were told their termination was effective as of June 30, 2008 as SunTrust had decided to out source the functions of their department. SunTrust offered these employees a severance package. To receive severance

payments, CTS employees were required to sign a Severance Agreement that called for them to dismiss all pending litigation, waive all claims, and agree to arbitrate all claims.

The Severance Agreement contained the following arbitration clause:

> "I agree that any claim arising from or relating to this Agreement shall be settled by arbitration in accordance with the employment arbitration rules of the American Arbitration Association..." (Severance Agreement, ¶6).

Zimmerman's attorneys objected to the application of the Severance Agreement to any pending or potential FLSA claims and moved the *Allen* court for a temporary restraining order and preliminary injunction to prevent such application. In their brief in support of the temporary restraining (TRO Brief), Zimmerman's counsel objected to any requirement that employees with pending FLSA claims be required to dismiss such claims in order to receive severance benefits. Zimmerman's counsel in that brief urged that SunTrust be ordered to "carve-out" the pending claims from [the Severance Agreement] (TRO Brief @ p. 14). Claimant's counsel further specifically referred to the impact of the Severance Agreement on other, pending and potential overtime claims, including Zimmerman's District Court action. (TRO Brief @ pp. 12 & 23).

Judge Story held a hearing on the request for injunctive relief in the *Allen* case on April 29, 2008. During the hearing, Claimant's counsel argued that SunTrust should be enjoined from applying the release and dismissal provisions of the Severance Agreement to any pending FLSA claims which would include that of Zimmerman. (Hearing Transcript @ pp. 43-45).

Judge Story protected the Court's jurisdiction over the pending FLSA claims from application of the release and arbitration requirements and enjoined SunTrust from requiring any Class Plaintiff to dismiss the pending FLSA action as a condition of receiving any severance benefits. (Order @ p. 9).

A subsequent settlement of the issues between the *Allen* Plaintiffs and SunTrust in which SunTrust agreed to "carve-out" the pending FLSA claims from the Severance Agreement resulted in vacating the injunction with entry of an Agreed Permanent Injunction.

On May 12, 2008, Zimmerman's counsel, Dan Getman, e-mailed SunTrust's counsel, Glenn Patton, proposing that SunTrust provide Zimmerman with the same assurance provided to the *Allen* Plaintiffs to avoid the need to file an identical temporary restraining order application on Zimmerman's behalf. (Getman e-mail 5/12/08).

Counsel Patton responded by e-mail of May 12th to Getman stating:

> "I certainly agree that filing the same type motion for Zimmerman makes no sense. How about we agree to handle Zimmerman the same way we are handling the Plaintiffs in *Allen*? Let's just reach an agreement on the basis for the injunctive relief and get this whole issue to bed." (Patton e-mail 5/12/08).

In a subsequent e-mail on May 14, 2008, Counsel Getman opined that the issues in the *Allen* case and Zimmerman's case were identical and stated:

> "Zimmerman should be treated the same as the others, whether its by order or agreement. I'd like to avoid further unnecessary and duplicative proceedings." (Getman e-mail 5/14/08).

On May 20, 2008, SunTrust provided Zimmerman with a written assurance that his FLSA claims would not be affected by the terms of the Severance Agreement. On May 29, 2008, Zimmerman and SunTrust executed the Severance Agreement. Zimmerman thereafter collected his severance pay of Twenty Four Thousand Thirty-Eight Dollars and 46/100th ($24,038.46).

On September 22, 2008, Zimmerman initiated the instant arbitration concerning his FLSA claims citing the Severance Agreement as the basis for jurisdiction. (Demand @ ¶ 17).

On November 6, 2008, Zimmerman voluntarily dismissed, without prejudice, the District Court action before Judge Story pursuant to Fed. Rules Civ. Proced. 41(a)(1)(A).

DISCUSSION

The Federal Arbitration Act, (FAA), provides that pre-dispute arbitration agreements "shall be valid, irrevocable and unenforceable, save upon grounds as exit at law or in equity for the revocation of any contract." (9 U.S.C §2).

The Supreme Court has noted that the purpose of the FAA is to reverse the longstanding judicial hostility to arbitration agreements... and to place [them] upon the same footing as other contracts. *Green Tree Fin. Corp - Ala. v. Randolph*, 531 U.S. 79, 89, 121 S. Ct. 518, 148 L. Ed.2d 373 (2000) quoting *Gilmer v. Interstate/Johnson Lake Corp.*, 500 U.S. 20, 24; 111 S. Ct. 1647, 114 L. Fd, 26 (1991). Accordingly, there is a strong presumption in favor of arbitration and a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity. *Gilmer* 500 U.S. @ 26, 111 S. Ct. 164, cited in *Carter v. Country Wide Credit Industries Inc.*, 362 F. 3d 294, 297 (5th Circuit 2004). The FAA makes an arbitration agreement as enforceable as other contract but not more so. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n-12 (1967).

FLSA claims are arbitrable. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002). Further, courts have held that individually executed pre-dispute arbitration agreements like the one in the instant case are subject to arbitration. However, arbitration under the FAA is a matter of "consent, not coercion" and a party cannot be required to submit any dispute to arbitration, that it has not agreed to submit to arbitration. *Albert M. Higley Co. v. NS Corp.*, 445 F.3d, 861, 863 (6th Cir. 2006).

In determining the contractual validity of an arbitration agreement, courts apply ordinary state law principles that govern the formation of contracts to determine whether a dispute is arbitrable. *First Options of Chicago, Inc. V. Koplan,* 514 U.S. 938, 944; 115 S. Ct. 1920; 131 L.Ed. 2d 985 (1995). In determining whether a dispute is arbitrable, the arbitrator must initially engage in a limited review. *Javitch v. First Union, Sec. Inc.,* 315 F.3d 619, 624 (6th Cir. 2003). The first determination to be made is whether a valid agreement to arbitrate exists between the parties. In this case, there is no dispute that an agreement to arbitrate exists between Zimmerman and SunTrust. The Severance Agreement executed by Zimmerman and SunTrust contains an arbitration clause. Neither party contends that there is any defect or issue in the arbitration clause or that the arbitration clause is void or unenforceable.

The issue in this case revolves around whether the specific dispute raised by Zimmerman falls within the substantive scope of the arbitration agreement and whether SunTrust agreed to arbitrate the FLSA claim of Zimmerman. SunTrust contends that Zimmerman and SunTrust have not agreed to arbitrate the FLSA dispute.

To determine whether the parties intended for the arbitration clause in the Severance Agreement to include arbitration of FLSA claims, one must examine the intent of the parties. *NCR Corp. v. Korola Assoc., Ltd.* 512 F.3d 807, 814 (6th Cir. 2008). In the instant case, the parties' actions prior to the execution of the Severance Agreement are significant in determining the intention of these parties concerning arbitration of Zimmerman's FLSA claims.

Zimmerman initiated his federal court lawsuit on April 14, 2008. Subsequently, Zimmerman learned that his department and all CTS positions were being eliminated. The Severance Agreement that Zimmerman and others were offered would clearly on its terms have required Zimmerman to

dismiss the Zimmerman district court action and release his FLSA claim in order to receive severance pay. Further, it would have required Zimmerman to submit his FLSA dispute with SunTrust to arbitration. (Severance Agreement @ ¶ ¶ 4, 6 (a). However, several events occurred in this case which negated that requirement.

Claimant has stated in his Response Brief (f.n. 4, p. 4) that: "SunTrust does not deny that it expects CTS staff who signed severance/arbitration agreements to bring any FLSA claims to arbitration rather than in the federal court, provided such individuals were not already in litigation in federal court at the time the Severance Agreement was signed." [Emphasis added].

Zimmerman was already in litigation in federal court having filed his suit on 5/14/08 prior to the date he executed the Severance Agreement on 5/29/09. Thus, by Claimant's own statement, it is clear that Zimmerman or Zimmerman's attorneys knew that SunTrust did not intend individuals who had a case pending in federal court to dismiss and then arbitrate their FLSA claims.

As previously noted, Zimmerman's attorneys, acting in the *Allen* case, a case pending before the same Judge as in Zimmerman's case and closely related to it, sought a temporary restraining order from Judge Story concerning the FLSA claims. Zimmerman's attorneys argued that... "SunTrust should be ordered to "carve-out" the pending claims from [the Severance Agreement]. (TRO Brief @ p. 14). Having "carved-out" the FLSA claims, the Severance Agreement would not apply.

On September 29, 2008, in a hearing held by Judge Story in the *Allen* case concerning the request for injunctive relief, Zimmerman's counsel strongly argued that SunTrust should be enjoined from applying the release and dismissal provisions of the Severance Agreement to any pending FLSA claims. (Hearing Transcript @ pp. 43-45). U.S. District Court Judge Story agreed with the

Plaintiffs' counsel and enjoined SunTrust from enforcing certain aspects of the Severance Agreement that related to FLSA claims.

Following the court's order, SunTrust and the *Allen* Plaintiffs agreed to carve-out all pending FLSA claims from the Severance Agreement and to enter a Substituted Agreed Permanent Injunction with the same terms. The Agreed Permanent Injunction was entered on June 3, 2008. (Respondent Ex. 7).

After Judge Story's initial order, Zimmerman's counsel initiated discussions with SunTrust's counsel regarding the Order in the *Allen* case and its application to Zimmerman's case. Zimmerman's counsel Getman indicated that the issues in the *Allen* and Zimmerman case "are identical. Zimmerman should be treated the same as others whether it is by order or agreement." (Gutman 5/14/08 e-mail).

SunTrust's counsel Patton stated in is e-mail communication with attorney Getman:

> "I certainly agree that filing the same type of motion for Zimmerman makes no sense. How about we agree to handle Zimmerman the same way that we are handling the Plaintiffs in *Allen*." (Patton 5/12/08 e-mail).

Thus, an agreement to treat Zimmerman in the same manner as the *Allen* Plaintiffs was reached. Additionally, in the *Allen* case, the attorneys for the Plaintiffs and Zimmerman, in addition to requesting the temporary restraining order from District Court, Judge Story specifically requested that the district court retain jurisdiction over the pending FLSA claims. Zimmerman's counsel, Alan Garber, expressed grave concerns about the potential impact of the arbitration clause in the absence of court interventions and emphasized the Plaintiffs desire to have the court continue its jurisdiction.

Plaintiff's counsel, Mr. Garber, argued to the court:

> "We absolutely want the court to - - the remedy that the court is going to provide, that

> they will not disappear into the black hole of arbitration." (Hearing Transcript @ p. 48).

In response, Judge Story expressed his intention to maintain jurisdiction over all pending FLSA claims stating:

> "It would be my intention if I step out into this arena, as I've suggested. I'm inclined to do, it would be to protect the court's jurisdiction over the claims that are before the Court." (Hearing Transcript @ p. 48).

As predicted, Judge Story protected the court's jurisdiction over the pending FLSA claims from application of the release and arbitration requirements.

At that time, May 7, 2008, Zimmerman's case had been filed and assigned to Judge Story. In the subsequent discussions between *Allen* and Zimmerman's attorneys and attorneys for SunTrust about treating Zimmerman exactly the same as *Allen* Plaintiffs, there was no mention of arbitration or excepting any of the items enjoined in *Allen* from Zimmerman's case. The parties' actions prior to the execution of the Severance Agreement do not indicate an intention by either Zimmerman or SunTrust to arbitrate Zimmerman's FLSA claim.

By the time SunTrust and Zimmerman signed the Severance Agreement on May 29, 2008, they had a mutual and express agreement that the Severance Agreement would not apply to or affect Zimmerman's pending FLSA claim.

Zimmerman's claim that "any reading of the terms of the Agreed Permanent Injunction (which SunTrust made applicable to Zimmerman) shows the parties only agreed that SunTrust could not compel arbitration of the claims already in court for the 40 *Allen* Plaintiffs and for Plaintiff Zimmerman's claims." does not support the contention that there was an agreement to arbitrate Zimmerman's FLSA claims.

Nor does the Agreed Permanent Injunction say anything about the arbitrability of the FLSA claims belonging to those individuals who signed the Severance Agreements containing the arbitration clause, but whose claims were not in court at the time they signed the arbitration agreement. Claimant Zimmerman in his response brief states that those individuals FLSA claims are governed by the arbitration clause they signed. SunTrust has never denied arbitration for these individuals. (Response Brief f.n3 @ p.3). However, those individuals are not similarly situated to Zimmerman who had filed a lawsuit and was in court when he executed the Severance Agreement. Individuals who had no lawsuit were not before the Court, made no agreements with Zimmerman's counsel and are in a totally different situation than either the *Allen* Plaintiffs or Zimmerman. How their cases or claims may be treated, when and if they arise, have no bearing on Zimmerman's case.

The record establishes that Zimmerman's counsel on behalf of the *Allen* Plaintiffs and, by express extension to Zimmerman, consistently and vigorously opposed arbitration of the FLSA claims. Counsel for Zimmerman obtained relief from a federal district court and assurance from SunTrust confirming that pending FLSA claims would not be affected by the release and arbitration clauses in the Severance Agreement executed by Zimmerman.

Zimmerman contends that the Severance Agreement as originally conceived by SunTrust and proposed to Zimmerman prior to the TRO - related agreements would have covered his FLSA claims and required arbitration of such claims. While this may have been SunTrust's original intention, it subsequently was clearly not SunTrust's intention as to Zimmerman whose counsel fought the potential arbitration of Zimmerman's FLSA claims.

The facts support SunTrust's contention that the parties reached an agreement to "carve-out" Zimmerman's pending FLSA claims so that the terms of the Severance Agreement would not apply

to the FLSA claims. Thus, Zimmerman's claims do not require interpretation or application of the Severance Agreement and are not arbitrable.

Both parties raise other issues concerning reasons for and against arbitration. Since it has been determined that the facts support Respondent's contention that SunTrust did not agree to arbitrate FLSA claims, it is not necessary to address those issues or reasons.

CONCLUSION

For the reasons stated herein, Respondent SunTrust's Motion to Dismiss is GRANTED.

PATTY K. WHEELER, ARBITRATOR

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing Order to the following individuals via the American Arbitration Association to Aaron Fisher on this the 28th day of May, 2009:

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