United States District Court
Southern District of Texas
ENTERED
September 21, 2021
Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PHILIP E. THENNES,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. H-21-1435
	§	
EMIT TECHNOLOGIES, INC.,	§	
	§	
Defendant.	§	

ORDER

Pending before the Court is Defendant's Motion to Compel Arbitration and Motion to Stay and Memorandum in Support (Document No. 6). Having considered the motion, submissions, and applicable law, the Court determines the motion should be denied.

I. BACKGROUND

This is an employment dispute. Plaintiff Philip E. Thennes ("Thennes") is a former Vice President of Sales for Defendant EMIT Technologies, Inc. ("EMIT"). On June 24, 2020, EMIT hired Thennes, and in its offer letter included: (1) a six-month severance package if he were to be fired for any reason other than cause; and (2) a guaranteed bonus for the year 2020. On July 20, 2020, Thennes signed the Employee Handbook (the "Handbook") acknowledgment form, and the accompanying agreements. The Handbook contains an arbitration agreement section

(the "Arbitration Agreement") with a separate acknowledgement, which Thennes signed contemporaneously with the Handbook acknowledgment. On December 11, 2020, EMIT fired Thennes allegedly for cause pursuant to EMIT's alcohol policy. Based on the foregoing, on April 30, 2021, Thennes filed this suit alleging: (1) breach of contract; (2) promissory estoppel; and (3) unjust enrichment based on EMIT's refusal to pay a portion of the guaranteed bonus and severance detailed in the offer letter. On May 18, 2021, EMIT moved to compel arbitration pursuant the Arbitration Agreement. On July 21, 2021, EMIT filed an amended answer including counterclaims against Thennes for: (1) unjust enrichment; (2) restitution; and (3) money had and received.

II. LAW & ANALYSIS

EMIT moves to compel arbitration based on the Arbitration Agreement, contained within the Handbook and signed by both Thennes and EMIT. Thennes contends the Arbitration Agreement is illusory and unenforceable.

A. Compelling Arbitration of Thennes's Claims

"There is a two-step inquiry to determine whether a party should be compelled to arbitrate." *JP Morgan Chase & Co. v. Conegie ex rel. Lee*, 492 F.3d 596, 598 (5th Cir. 2007) (citing *Washington Mut. Fin. v. Bailey*, 364 F.3d 260, 263 (5th Cir. 2004)). First, the Court must determine whether the parties agreed to arbitrate the dispute. *Id.* Second, the Court must determine "whether the dispute in question falls

within the scope of that arbitration agreement." *Id.* If the Court determines the parties agreed to arbitrate, the Court must then determine "whether any federal statute or policy renders the claims unarbitrable." *Id.* The Court addresses each step of the inquiry in turn.

1. Whether the Parties Agreed to Arbitrate

a. Whether the Arbitration Agreement is Enforceable

The Parties disagree as to the enforceability of the Arbitration Agreement. Thennes contends the Arbitration Agreement is illusory and unenforceable because it is a part of the Handbook, which contains a provision stating "the policies and benefits, . . . in the handbook . . . , are subject to interpretation, review, removal, and change by management at any time without notice."[1] EMIT contends the Arbitration Agreement, while technically contained within the Handbook, is a separate, mutually binding agreement, and therefore not illusory.

The Federal Arbitration Act ("FAA") establishes "a liberal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). However, that federal policy "does not apply to the determination of whether there is a valid agreement to arbitrate between the parties." *Morrison v. Amway Corp.*, 517 F.3d 248, 253 (5th Cir. 2008). Courts apply "ordinary state-law principles

[1] *Defendant's Motion to Compel Arbitration*, Document No. 6, Exhibit B at 54 (*Handbook*) [hereinafter *Handbook*].

that govern the formation of contracts" when determining an agreement to arbitrate is valid. *Id.* at 254. The parties agree that Texas law applies.

In Texas, "an arbitration clause is illusory if one party can 'avoid its promise to arbitrate by amending the provision or terminating it altogether.' " *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205 (5th Cir. 2012) (quoting *In re 24R, Inc.*, 324 S.W.3d 564, 567 (Tex. 2010)). Essentially, an arbitration agreement that can be retroactively modified by one party who retains the power to terminate is not enforceable. *Id.*; *see also Nelson v. Watch House Int'l, L.L.C.*, 815 F.3d 190, 193–95 (5th Cir. 2016) (holding an arbitration agreement to be illusory because it allowed the employer to terminate or modify the agreement but did not contain a savings clause or notice period). However, an arbitration provision is enforceable when it is "in a separate document that does not include language allowing unilateral changes or termination of the arbitration requirement." *Long v. BDP Int'l., Inc.*, 919 F. Supp. 2d 832, 845 (S.D. Tex. 2013) (Atlas, J.) (holding an arbitration agreement to be separate from the employee handbook and therefore not rendered illusory by the employer's retention of the power to terminate or modify handbook policies).

The threshold issue here is whether the Arbitration Agreement is a separate document from the Handbook's policies. Here, the Arbitration Agreement is included at the end the Handbook, following the Handbook policies but preceding the Handbook acknowledgment form. The separate Arbitration Agreement signature

page requires both the employee's and EMIT's signature. Additionally, the Arbitration Agreement states it is mutually binding both in its terms and the acknowledgment preceding the signature lines,[2] while the Handbook acknowledgment only requires the employee's signature. The Handbook acknowledgment, placed immediately after the Arbitration Agreement, states:

> "I understand that the handbook and all other written and oral materials provided to me are intended for information purposes only. Neither it, company practices, nor other communications create an employment contract or term. *I understand that the polices and benefits, both in the handbook and those communicated to me in any other fashion, are subjected to interpretation, review, removal, and change by management at any time without notice.*"[3]

This provision allows EMIT to modify or terminate any its policies or benefits at any time and is similar to clauses which courts in the Fifth Circuit have held render arbitration provisions illusory. *See Nelson*, 815 F.3d at 193–95 (5th Cir. 2016). However, in those cases, the provision is typically either found in the arbitration agreement itself, or the arbitration agreement is considered a policy within the handbook and not a standalone agreement. *See, e.g.*, *Scudiero v. Radio One of Tex. II, L.L.C.*, 547 F. App'x 429, 431–32 (5th Cir. 2013) (per curiam) (denying motion to compel arbitration because the arbitration provision was not separate from the

---

[2] *Handbook*, *supra* note 1, at 52–53.

[3] *Handbook*, *supra* note 1, at 54 (emphasis added).

handbook and was therefore subject to the employer's right to unilaterally modify the handbook); *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 207–09 (5th Cir. 2012) (holding an arbitration agreement was illusory due to a "Change-in-Terms" clause in the employee handbook); *Nelson*, 815 F.3d at 193–95 (5th Cir. 2016) (holding language which allowed the employer to unilaterally modify the arbitration agreement rendered the agreement illusory).

Here, there is no provision within the Arbitration Agreement itself, which is contained within the Handbook, that allows either party to alter or revoke the Arbitration Agreement. However, there is a provision in the same Handbook's acknowledgment page immediately following the Arbitration Agreement which allows EMIT to unilaterally alter the terms of the Handbook. That provision does not exclude the Arbitration Agreement from the employer's ability to alter or terminate policies within the Handbook. Based on the placement of the Arbitration Agreement in the Handbook prior to the Handbook acknowledgment, the Court finds the Arbitration Agreement is not a separate document from the Handbook. The Court further finds the provision in the Handbook acknowledgment which allows EMIT to alter the terms of the Handbook renders the Arbitration Agreement illusory and unenforceable. Accordingly, the motion is denied.

III. CONCLUSION

Based on the foregoing, the Court hereby

ORDERS that Defendant EMIT Technologies, Inc.'s Motion to Compel Arbitration and Motion to Stay and Memorandum in Support (Document No. 6) is **DENIED**.

SIGNED at Houston, Texas, on this 21 day of September, 2021.

DAVID HITTNER
United States District Judge