NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 19, 2017

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Re: *George Primov v. Serco, Inc.*, Case No. CL-2016-17124

Dear Counsel:

This matter came before the Court on July 7, 2017 for argument on Defendant Serco, Inc.'s Plea in Bar and Demurrer. At the conclusion of the hearing, the Court took the matter under advisement.

BACKGROUND

This case arises out of an employment agreement. George Primov ("Plaintiff") is a former employee of Serco Incorporated, a U.S. military contractor ("Defendant"). Plaintiff worked for Defendant from November 7, 2012, to September 1, 2014. Defendant sent Plaintiff

OPINION LETTER

an Offer Letter on June 24, 2012 ("Offer Letter"), that outlined the terms and conditions of Plaintiff's employment. Pursuant to those terms, Plaintiff agreed to work in Afghanistan to assist his employer in its role supporting U.S. operations there. This Offer Letter provided Plaintiff's base pay would be $22 per hour, and that he would receive an additional percentage of his base pay in "Danger Pay" or "Hardship Pay," as prescribed by Department of State regulations, which allegedly was 35%. Rather than paying this 35% uplift, Defendant only paid Plaintiff a 15% uplift. The 15% uplift was provided for in a Letter of Assignment, which Defendant sent Plaintiff the day before Plaintiff started his position, on November 6, 2012. Plaintiff acknowledged and confirmed acceptance of the terms and conditions in the Letter of Assignment on November 8, 2012. While Plaintiff worked in Afghanistan, Defendant did not pay Plaintiff any uplift pay for hours that he worked in excess of 40 per week, although he often worked more than 40 hours per week.

Plaintiff filed an initial Complaint on September 30, 2015, and an Amended Complaint on February 26, 2016. Trial was scheduled for August 15-17, 2016, but on August 16th Plaintiff took a voluntary nonsuit. Plaintiff then initiated the instant action on December 14, 2016. He alleges one Count in his Complaint: breach of the June 24, 2012, written offer letter based on Defendant's failure to pay Plaintiff the 35% uplift and failure to pay any hardship uplift or danger pay for hours that exceeded 40 per week.

Defendant filed a Plea in Bar and Demurrer, both of which were heard by this Court on July 7, 2017. Defendant correctly asserts that if the Plea in Bar were to be sustained, the Demurrer would become moot. The Court considers the Plea in Bar first.

ARGUMENTS

Defendant's Plea in Bar

Defendant contends that Plaintiff's breach of contract claim is subject to the unambiguous terms of both the Offer Letter and Letter of Assignment. See Def. Br. Ex. 1, 2; Compl. Ex. A(1), A(2). Defendant argues the Court must consider these agreements collectively because "'[W]hen parties have entered into two documents relating to a business transaction, the writings will be construed together to determine the parties' intent.'" *First Am Bank of Va v J.S C. Concrete Constr., Inc.*, 259 Va. 60, 67 (2000) (*quoting Doswell Ltd. P'ship v. Va Elec & Power Co.*, 251 Va. 215, 222 (1996)); *see also Daugherty v. Diment*, 238 Va. 520, 524-25 (1989) The Offer Letter states that Plaintiff's hiring was subject to his "review, understanding of, and agreement to adhere to the practices of [Defendant]." Def. Br. Ex. 1 at 2. The Letter of Assignment states, "This Letter of Assignment is to confirm our mutual understanding of the terms and conditions applying to your Forthcoming International assignment with [Defendant]..." Def. Br. Ex. 2 at 1. The Letter of Assignment provides in relevant part,

> The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by confidential mediation. If the dispute has not been resolved by mediation within 60 days of a written

> request to mediate made by one of the parties, then either party may bring suit in the state or federal courts located in Fairfax County, Virginia. The parties consent to the exclusive jurisdiction of the state and federal courts located in Fairfax County, Virginia.

See Def. Br. Ex. 2 at 4-5. Plaintiff signed the Letter of Assignment on November 8, 2012, showing his receipt and acceptance of its terms. Id. at 5.

Defendant claims that Plaintiff failed to make a written request to mediate prior to filing suit and subsequently, he failed to satisfy a condition precedent to bringing this action. "A party seeking to recover on a contract right must allege and prove performance of any express conditions precedent upon which his right of recovery depends." *Lerner v. Gudelsky Co.*, 230 Va. 124, 132 (1985). Defendant argues that Virginia courts have routinely upheld mediation provisions as valid conditions precedent to filing suit in court. *See King v. Beale,* 198 Va. 802, 808 (1957) (citing *Bernard v Jones*, 156 Va. 476, 481 (1931); *see also Mathews v PHH Mortg Corp* , 283 Va. 723, 728-31 (2012).

In this case, the plain language of the Letter of Assignment shows the parties intended mediation to be a condition precedent to filing suit. The use of the word "shall" mandates that either aggrieved party at least engage in a good faith effort to resolve any disputes outside of court and requires a written request to mediate 60 days before filing suit. Def. Br. Ex. 2 at 4-5. Plaintiff admitted that he never sent a claim to Defendant for the damages he seeks in this action. Def Br. Ex. 3 at 96:1-4. Defendant also notes Plaintiff does not allege anywhere in the Complaint or elsewhere that he attempted to mediate his claims against Defendant or made a written request to do so.

Plaintiff's assertion that this provision is a condition collateral is wrong. Dispute resolution clauses are classic examples of condition precedents. Plaintiff argues that a condition collateral has no necessary relation the agreement itself, but compliance with the terms of a dispute resolution clause are a necessary prerequisite to seeking redress in the courts. The mandatory "shall" language used in this dispute resolution clause highlights that. The only reasonable interpretation of the dispute resolution clause is that it is a condition precedent.

Plaintiff argues that the Letter of Assignment lacked additional consideration, but it is well-settled that when parties have entered into two writings related to a business transaction, the writings will be construed together to determine the parties' intent. *First Am. Bank of Va. v. J.S.C. Concrete Constr., Inc.*, 259 Va. 60, 67 (2000). The Offer Letter is clear that it is a contingent offer, and mentions that it is contingent twice. Further, the Letter of Agreement references the Offer Letter and states that the purpose is to confirm the terms and conditions applying to the upcoming assignment. Both documents govern the rights and obligations of the parties and as such, no additional consideration was needed.

Defendant further argues that it complied with all of its contractual obligations and was not in breach at the time of Plaintiff's breach. Even if one were to assume that Defendant

somehow breached the agreement, the entire point of a dispute resolution clause is for the parties to have an avenue to resolve their disputes without going to court. Under Plaintiff's view, a court would have to make a finding that one of the parties breached the agreement and then determine whether that party is entitled to enforce the dispute resolution clause.

Plaintiff's Opposition to Plea in Bar

Plaintiff first responds that he did in fact request mediation on February 1, 2016, satisfying any condition precedent to the filing of his Complaint on December 14, 2016. During the pendency of the prior lawsuit, Defense counsel sent Plaintiff's counsel an email notifying him of the mandatory mediation provision in the Letter of Assignment. Pl. Br. Ex. I. Plaintiff's counsel responded by stating,

> . . . I would not be opposed to pursuing mediation concurrently with the court proceedings, so long as [Plaintiff] does not have to incur any portion of the expense related to that process. I believe mediation may be fruitful toward settlement of this dispute, and the pendency of this lawsuit may impel the parties toward settlement.

Pl. Br. Ex. J at 1. According to Plaintiff, this statement satisfies the provision in the Letter of Assignment. Plaintiff argues that Defendant waived enforcement of the mandatory mediation provision because it did not raise this issue in the prior lawsuit although it filed numerous pretrial motions including a demurrer. Thus, Defendant slept on its rights by failing to enforce the mediation provision, which constitutes a waiver and Defendant is barred from raising the issue now. The employment agreements, which were drafted by Defendant, did not contain a "non-waiver" provision, and it was reasonable for Plaintiff to infer that Defendant waived the alternative dispute resolution provision through its course of dealing. *Reid v Boyle*, 259 Va. 356, 370 (2000); *Stanley's Cafeteria, Inc. v. Abramson*, 226 Va. 68, 73 (1983).

The second reason argued that the mediation provision does not bar Plaintiff's claim is that the written request for mediation is not a "condition precedent" to filing suit as Defendant argues. Plaintiff asserts his breach of contract claim is based on the Offer Letter, not the Letter of Assignment, and the Offer Letter is silent with respect to any mediation requirement. Plaintiff argues the Letter of Assignment is separate and distinct from the Offer Letter, which makes no mention of any other agreement or letter other than an attached benefits summary. The only valid and enforceable agreement that governs the terms of Plaintiff's employment is the Offer Letter, and subsequently, the mediation provision is inapplicable to this action.

Alternatively, if the Court were to find that both agreements govern the parties' employment relationship, Plaintiff contends the mediation provision is a condition collateral, not a condition precedent. A condition precedent is defined as a condition "that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act after the terms of the contract have been arrested on, before the contract shall be binding on the parties." Black's Law Dictionary, 6th edition at pp 293(B) - 294(M)

(1990). In contrast, "[a] condition collateral is one requiring the performance of a collateral act having no necessary relation to the main subject of the agreement." Id. The mediation provision at issue in this case fits the latter definition rather than the former because mediating a dispute arising under the terms of any employment agreement presupposes the existence and binding nature of that agreement. In other words, the mediation provision can only be triggered during or at the conclusion of the contractual relationship, not at its inception as a condition precedent is.

Plaintiff contends the cases Defendant cites in support of its argument all concern conditions precedent and Defendant cannot cite any case supporting the proposition that a party seeking to recover on a contract must allege and prove performance of a condition collateral. The contract at issue in *Lerner v Gudelsky Company* is distinct from the employment agreements here because that contract contained a provision entitled "Conditions Precedent to the Obligations of the Purchaser" that provided "The obligation of the Purchaser to purchase the Seller's Partnership Interests shall be subject to the satisfaction of each of the following conditions..." 230 Va. 124, 128-29 (1985). The condition at issue in *Lerner* was thus very clearly an express condition precedent upon which the seller's right to recovery depended. Conversely, in this case the terms of Plaintiff's employment did not depend on the mediation provision.

The provision in *L. White & Company, Inc v. Culpeper Memorial Hospital* is also argued to be distinguishable from the provision in this case because there the parties explicitly stated "exhaustion of dispute resolution" was a "condition precedent to the filing on any litigation..." and the court emphasized the use of the phrase "condition precedent" when it granted the plea in bar. 81 Va. Cir. 27, 29-30 (2010) (emphasis added). The other two cases Defendant relies upon, *Performance Food Group Company v. Java Trading Company* and *American Technology Services v. Universal Travel Plan*, are both inapposite to the instant case because the Eastern District of Virginia was influenced by the Federal Arbitration Act, which provides a broad statement of congressional intent to uphold dispute resolution clauses in contracts. 2005 WL 2456980, at *4 (2005); 2005 U.S. Dist. LEXIS 49901, *5 (2005).

Because the mediation provision is not a condition precedent and because in any event, Defendant waived its right to enforce the mediation provision by failing to raise it in the prior lawsuit, Defendant's Plea in Bar should be denied. However, if the Court finds the mediation provision is a condition precedent that Plaintiff was bound by, he satisfied such a condition on February 1, 2016.

Next, Defendant argues that Plaintiff committed the first material breach, and as such, cannot assert Plaintiff's alleged breach of the mediation agreement as a defense. Plaintiff's alleged breach would have occurred on December 14, 2016, the date he filed this Complaint. Plaintiff argues that it would be improper to "relate back" the date of breach to Plaintiff's first suit, filed on September 30, 2015. However, the conduct alleged in the Complaint by Defendant occurred as early as December 1, 2012, when Defendant breached the parties' agreement when it issued its first paycheck to Plaintiff. The absolute latest time Defendant could be found in breach was on September 19, 2014 when Primov resigned because he received less compensation than

what Defendant had promised him. Either way, Defendant was the first to breach – no matter whether Plaintiff's alleged breach was a condition precedent or condition collateral. Generally speaking, the first party to commit a material breach of an Agreement can neither enforce that Agreement nor maintain an action for its breach. *See Countryside Orthopedics, P.C. v Peyton*, 261 Va. 142, 154 (2001). Plaintiff contends there is no question that Defendant was the first to breach, and as such, they cannot assert Plaintiff's alleged breach as a defense now.

Defendant also argues three different ways that Defendant breached the parties' agreement. First, Defendant argues that there is a patent ambiguity between the Offer Letter and the Letter of Assignment on whether or not Plaintiff was to receive a 35% or 15% uplift in his compensation. *See* Pl.s' Opp. at p. 9, 10. Second, Defendant argues that the ambiguity must be construed against the drafter, in this case, the Defendant. Whether contract ambiguity exists is a question of law. *Tuomala v. Regent Univ.*, 252 Va. 368, 374 (1996). The Court must look at the contract as a whole, with all parts assembled as a unitary expression of the parties. *Berry v. Klinger*, 225 Va. 201, 208 (1983). Reading these parties' agreements together, it is clear that Defendant breached first when it did not pay Plaintiff the 35% hardship uplift. *See* Pl.'s Opp, p. 11, 12. Third, Plaintiff argues that Defendant committed two other independent breaches when it imposed a 40 hours/week ceiling on its payment of either uplift.

All of Defendant's breaches went to the root of the contract – and therefore were material breaches; and therefore Plaintiff's alleged subsequent breach was collateral. Defendant's breach was material to the key terms of the contract, whereas Plaintiff's alleged breach was a breach of a collateral term of the contract, not a material one.

Lastly, Defendant argues that the Offer Letter and Letter of Assignment presumably form an indivisible contract and unitary agreement. The Letter of Assignment, although signed by both parties, did not require any additional consideration by Plaintiff, and is therefore not valid and enforceable. Defendant makes its condition precedent argument based on the Letter of Assignment; and therefore, that term and argument is moot. Plaintiff relies on *Alaska Packers Ass'n v. Domemco*, 117 F. 99 (9th Cir. 1902) to support this contention.

ANALYSIS

The main issue to be determined on Defendant's Plea in Bar is whether or not the demand to mediate was a condition precedent to litigation. There are two stages of analysis here. The first is whether the mediation provision of the Assignment Letter applies to Plaintiff's breach of contract claim and is a condition precedent to filing suit. If not, Defendant's Plea in Bar should be denied. However, if the mediation provision is a condition precedent to Plaintiff filing suit, the Court must then determine whether Plaintiff ever made a written request to mediate his claim prior to filing his Complaint on December 14, 2016.

Mediation Provision as Part of Employment Agreement

In this case, the Offer Letter signed by both parties on June 24, 2012, and the Assignment Letter signed by both parties on November 8, 2012, should both be construed to govern the terms of Plaintiff's employment. As Defendant noted, "[W]hen a business transaction is based on more than one document executed by the parties, we will construe the documents together to determine the intent of the parties." *Musselman v. Glass Works, L L.C.*, 260 Va. 342, 346 (2000) (citing *First Am. Bank of Va. v J.S.C. Concrete Constr., Inc.*, 259 Va. 60, 67 (2000)). "In ascertaining the parties' intent, we consider the plain meaning of the language the parties used in the documents." *Id.* (internal citations omitted). The Offer Letter refers to the "policies and practices of [Defendant]" but does not enumerate all of them in the letter itself, showing that additional terms outside of the Offer Letter govern Plaintiff's employment. Def. Br. Ex. 1 at 2.

The Offer Letter also states "neither this letter nor any other oral or written representations may be considered a contract for any specific period of time" when explaining the duration of Plaintiff's employment Id. The reference to other oral or written representations implies that other agreements outside the Offer Letter may apply to the terms and conditions of Plaintiff's employment. The language of the Assignment Letter stating that its purpose is to confirm the parties' "mutual understanding of the terms and conditions" applying to Plaintiff's position shows the parties intended for the Assignment Letter to govern their employment relationship. Def. Br. Ex. 2 at 1. The Offer Letter and Assignment Letter both discuss the nature of Plaintiff's assignment and his compensation among other matters, so they should be seen as one integrated employment contract.

Further, the basis of Plaintiff's claim is that he did not receive the correct amount of uplift pay as proscribed by Department of State regulations, which is addressed in both the Offer Letter and the Letter of Assignment. Subsequently, both documents should be considered applicable to Plaintiff's claim. This means the mediation provision of the Assignment Letter is applicable to this suit. The next question is whether the mediation provision is a condition precedent or a condition collateral.

Condition Precedent vs. Condition Collateral

Plaintiff is correct that the parties in *Culpeper Memorial Hospital* used the actual phrase "condition precedent" in their mandatory alternative dispute resolution provision. 81 Va. Cir. 27, 30 (2010). The court there upheld the requirement to mediate before filing suit to be a condition precedent. *Id.* This holding contradicts Plaintiff's argument that a condition precedent must be performed prior to execution of the contract rather than being triggered during or after performance of the contract. If Plaintiff were correct, a mandatory mediation provision would never be held enforceable as a condition precedent. Yet Virginia courts have enforced mandatory mediation provisions or time period restriction provisions as conditions precedent to filing suit. *See, e.g , Tattoo Art, Inc v TAT Int'l, LLC*, 711 F. Supp. 2d 645, 652 (2010) (granting defendant's motion to dismiss because plaintiff failed to satisfy the condition precedent necessary to trigger the right to initiate litigation as the parties had agreed); *see also TC*

MidAtlantic Dev., Inc. v. Commonwealth, 280 Va. 204, 210 (2010) (finding a contract provision limiting initiation of a legal action to a certain time after submission of a claim was a condition precedent to instituting legal action); *see also Am. Tech. Servs. v. Universal Travel Plan, Inc.*, 2005 U.S. Dist. LEXIS 49901, *5 (2005) (finding the parties' agreement to first attempt alternative dispute resolution was a condition precedent to initiating legal action).

Plaintiff appears to confuse a condition precedent to the execution of a contract with a condition precedent to instituting or "triggering" legal action as provided for in a contract. The latter is recognized in Virginia. The plain language of the mandatory mediation provision in the Assignment Letter clearly states the parties must attempt mediation outside of court at the written request of the aggrieved party at least 60 days prior to initiating litigation. Def. Br. Ex. 2 at 4-5.

Next, the Court must consider whether or not there is merit to Plaintiff's argument that additional consideration was required for the Letter of Agreement, dated November 6, 2012. Plaintiff cites to no Virginia case law that supports his argument. Defendant relies on *First Am Bank of Va. v J.S.C. Concrete Constr., Inc.*, 259 Va. 60, 67 (2000). In that case, the Court held, "Additionally, 'when parties have entered into two documents relating to a business transaction, the writings will be construed together to determine the parties' intent.'" *Id., quoting Doswell Ltd Partnership v. Virginia Elec and Power Co.*, 251 Va. 215, 222 (1996). This language has been cited positively in two other Virginia Supreme Court cases. *See Countryside Orthopedics, P.C. v. Peyton*, 261 Va. 142 (2001); *Musselman v Glass Works LLC*, 260 Va. 342 (2000). As such, Plaintiff's argument that additional consideration was required for the second letter is without merit.

Since the Assignment Letter is applicable to Plaintiff's claim and the mediation provision is a condition precedent to filing suit for either party, the last consideration of the Court is whether Plaintiff satisfied this condition as he argues. Plaintiff asserts that his counsel's email response in February of 2016 where he stated Plaintiff would not be opposed to mediation under certain circumstances was sufficient to satisfy the obligation to request mediation. However, that response is not a request to mediate but rather an expression of willingness to do so. Under terms not a part of the parties contract, Plaintiff's counsel states he is willing to explore mediation "concurrently" with litigation, which means the request would not be at least 60 days prior to commencing litigation as the provision requires. Plaintiff's counsel's email response was not a request for mediation as required by the mandatory mediation provision, and he has not satisfied the condition precedent.

The appropriate remedy when a party fails to satisfy a condition precedent triggering the right to litigation is dismissal.

CONCLUSION

For the reasons stated above, the Offer Letter and Letter of Agreement are the governing documents for the parties' agreement, and as such, there was a condition precedent of demanding mediation before filing the instant suit, and Defendant's Plea in Bar is granted, and the

Complaint is dismissed with prejudice. Consistent with general principles of review, the Court finds it unnecessary to consider the merits of the Demurrer in as much as the ruling to the Plea in Bar is dispositive to the case.

An Order reflecting the above decision is enclosed.

Very truly,

[redacted]

Bruce D. White

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

George Primov,	)	
	)	
Plaintiff,	)	
v.	)	**CL-2016-17124**
	)	
Serco, Inc.,	)	
	)	
Defendant.	)	

ORDER

THIS MATTER CAME BEFORE THE COURT on Defendant's Plea in Bar; upon the opposition thereto, and upon the appearance and argument of counsel, it is therefore

ORDERED that Defendant's Plea in Bar is GRANTED and Plaintiff's Complaint is dismissed with prejudice.

ENTERED THIS 19th day in of July, 2017.

[redacted]
Judge Bruce D. White

Endorsement of this Order is waived in the discretion of the court pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia.