City of Waterbury v. Eccleston

Superior Court of Connecticut, Judicial District of Waterbury At Waterbury

October 5, 2018, Filed

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City of Waterbury v. Thomas Eccleston et al.

Opinion

[*1] Short Name:Waterbury v. Eccleston

Other Parties:

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Judge (with first initial, no space for Sullivan, Dorsey, and Walsh):Brazzel-Massaro, Barbara, J.

Opinion Title:MEMORANDUM OF DECISION RE APPLICATION FOR TEMPORARY INJUNCTION

I. PROCEDURAL BACKGROUND

The plaintiff, the city of Waterbury, (Waterbury) filed this two-count complaint on April 19, 2018, against the defendants, Thomas Eccleston (Eccleston), the Waterbury Fire Fighters Association, Local 1339 (Union), and the State Board of Mediation and Arbitration (Board).[1] The plaintiff alleges the following facts in count one of its verified complaint, which seeks declaratory relief. Eccleston was arrested and charged with third degree assault and breach of the peace in the second degree, which caused the plaintiff to place Eccleston on paid administrative leave pending the completion of an investigation On October 8, 2015, Eccleston was advised of his *Garrity* rights[2] and participated in an interview. On November 19, 2015, Eccleston and the president of the Union, signed a "Last Chance [*2] Agreement." The last chance agreement states, in relevant part, that "Eccleston shall be subject to mandatory random testing . . . for the purpose of discovering drug or alcohol use." The last chance agreement further states, in relevant part: "Eccleston is subject to immediate termination upon" if he tests positive for a controlled substance or violates any of the plaintiff's policies or engages in any misconduct. The last chance agreement placed Eccleston on a probationary period, but after twenty-four months from the effective date of the contract, Eccleston "may request the City remove him from the probationary status . . ." On March 20, 2018, Eccleston was subjected to random drug testing and on March 27, 2018, was confirmed positive for marijuana use. On March 28, 2018, Eccleston was placed on unpaid administrative leave and, in an interview with Adam Rinko, admitted he used marijuana pursuant to a medical marijuana card. Eccleston admitted in two separate interviews that he used marijuana, pursuant to a medical marijuana card, but nevertheless violated Article XXX "Substance abuse testing" of the collective bargaining agreement (CBA) between the Union and the plaintiff by testing [*3] positive for marijuana. The plaintiff has a particular interest in declarative relief because the defendants should be enjoined from proceeding with a grievance arbitration.

The plaintiff alleges the following additional facts in count two of its verified complaint, which seeks injunctive relief. The Board should be enjoined from requiring this matter to proceed through the grievance arbitration proceeding until the court resolves by declaratory relief the issue of whether the defendants have the right to the grievance arbitration process. The plaintiff contends it will be severely prejudiced if forced to go through the time consuming and costly grievance

arbitration process because the defendants no longer have a right to the grievance arbitration process. Lastly, the plaintiff contends there is no adequate remedy at law.

In its prayer for relief, the plaintiff prays for the court to issue a declaratory judgment holding that the defendants have no right in the grievance arbitration process under the CBA. Additionally, the plaintiff also prays that the court issue a temporary and permanent injunction enjoining the defendants from proceeding with the grievance arbitration proceeding between [*4] the plaintiff and Eccleston and the Union until the court has issued its declaratory ruling.

The plaintiff filed an application for temporary injunction on April 19, 2018, seeking to restrain the defendants from proceeding with a grievance arbitration between the plaintiff and Eccleston as provided in the CBA. On September 18, 2018, the Union filed a brief in opposition to the plaintiff's application for a temporary injunction. The Union submitted the following evidence: (1) an excerpt of the CBA between the plaintiff and the union; (2) a letter dated March 6, 2018 from the commissioner of the department of consumer protection to Eccleston regarding his certification to use of medical marijuana; and (3) a photocopy of Eccleston's medical marijuana registration certificate card. On September 24, 2018 the plaintiff filed a memorandum of law in support of its application for a temporary injunction and attached, as exhibit A, a copy of the last chance agreement. Also, on September 24, 2018, Eccleston filed a brief regarding the plaintiff's request for a temporary injunction. On September 25, 2018, the Union filed a reply brief in response to the plaintiff's memorandum of law in support [*5] of its application for a temporary injunction. The court heard oral argument on the plaintiff's application for temporary injunction on September 26, 2018.

II. DISCUSSION

"In general, a court may, in its discretion, exercise its equitable power to order a temporary injunction pending final determination of the order, upon a proper showing by the movant that if the injunction is not granted he or she will suffer irreparable harm for which there is no adequate remedy at law . . . A party seeking injunctive relief must demonstrate that: (1) it has no adequate remedy at law; (2) it will suffer irreparable harm without an injunction; (3) it will likely prevail on the merits; and (4) the balance of equities tips in its favor . . . The plaintiff seeking injunctive relief bears the burden of proving facts which will establish irreparable harm as a result of that violation . . . Moreover, [t]he extraordinary nature of injunctive relief requires that the harm complained of is occurring or will occur if the injunction is not granted. Although an absolute certainty is not required, it must appear that there is a substantial probability that but for the issuance of the injunction, the party seeking [*6] it will suffer irreparable harm." (Citation omitted; internal quotation marks omitted.) *Aqleh v. Cadlerock Joint Venture II, L.P.,* 299 Conn. 84, 97-98, 10 A.3d 498 (2010).

The plaintiff moves the court to grant its application for a temporary injunction on the grounds that it will likely succeed on the merits because it is uncontested the last chance agreement was violated, it will suffer irreparable harm if it were forced to attend the grievance arbitration procedure, it has no equity in law, and the balance of the equities favor the plaintiff. The defendants argue, inter alia, that the court does not have subject matter jurisdiction as the plaintiff has failed to exhaust its administrative remedies by failing to arbitrate pursuant to the CBA because it has not arbitrated the underlying facts. The plaintiff responds that the court has subject matter jurisdiction because the last chance agreement is a settlement agreement, which expressly provides that a just cause determination is not arbitrable under the grievance arbitration procedures outlined in the CBA.

"[A]s soon as the jurisdiction of the court to decide an issue is called into question, all other action in the case must come to a halt until such a determination is made." *Gurliacci v. Mayer,* 218 Conn. 531, 545, 590 A.2d 914 (1991). "It is well settled under both federal [*7] and state law that, before resort to the courts is allowed, [a party] must at least attempt to exhaust exclusive grievance and arbitration procedures, such as those contained in [a] collective bargaining agreement . . . Failure to exhaust the grievance procedure deprives the court of subject matter jurisdiction . . . The purpose of the exhaustion requirement is to encourage the use of grievance procedures, rather than the courts, for settling disputes." (Citation omitted; internal quotation marks omitted.) *Hunt v. Prior,* 236 Conn. 421, 431, 673 A.2d 514 (1996). "Under our exhaustion of administrative remedies doctrine, a trial court lacks subject matter jurisdiction over an action that seeks a remedy that could be provided through an administrative proceeding, unless and until that remedy has been sought in the administrative forum . . . In the absence of exhaustion of that remedy, the action must be dismissed . . . Because the exhaustion [of administrative remedies] doctrine implicates subject matter jurisdiction, [the court] must

decide as a threshold matter whether that doctrine requires dismissal of the [plaintiff's] claim . . . [Our Supreme Court has] recognized that a party aggrieved by a decision of an administrative agency may [*8] be excused from exhaustion of administrative remedies if recourse to the administrative remedy would be futile or inadequate . . . or injunctive relief from an agency decision is necessary to prevent immediate and irreparable harm." (Internal quotation marks omitted.) *Levine v. Sterling,* 300 Conn. 521, 528, 16 A.3d 664 (2011). "[T]he plaintiff bears the burden of proving subject jurisdiction, whenever and however raised." *Fort Trumbull Conservancy, LLC v. New London,* 265 Conn 423, 430 n.12, 829 A.2d 801 (2003).

"Arbitration is a creature of contract . . . It is designed to avoid litigation and secure prompt settlement of disputes and is favored by the law . . . [A] person can be compelled to arbitrate a dispute only if, to the extent that, and in the manner which, he has agreed to do so, . . . No one can be forced to arbitrate a contract dispute who has not previously agreed to do so." (Citations omitted; internal quotation marks omitted.) *Stack v. Hartford Distributors, Inc.,* 179 Conn.App. 22, 28, 177 A.3d 1201 (2017). "As set forth in *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960), judicial review under the positive assurance test must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not [*9] susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (Internal quotation marks omitted.) *New Britain v. AFSCME, Council 4, Local 1186,* 304 Conn. 639, 644 n.5, 43 A.3d 143 (2012).

"It is well established that absent the parties' contrary intent, it is the court that has the primary authority to determine whether a particular dispute is arbitrable, not the arbitrators . . . [I]t is [similarly] well established . . . that parties may agree to have questions concerning the arbitrability of their disputes decided by a[n] arbitrator . . . The intention to have arbitrability determined by an arbitrator can be manifested by an express provision or through the use of broad terms to describe the scope of arbitration, such as all questions in dispute and all claims arising out of the contract or any dispute that cannot be adjudicated." "Courts should not assume [however] that the parties agreed to arbitrate arbitrability unless there is [clear] and unmistakabl[e] evidence that they did so." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *AFSCME, Local 4, Local 1303-325 v. Westbrook,* 309 Conn. 767, 773-74, 75 A.3d 1 (2013). "The manifestation of arbitrability may be by express provision to that effect or the use of broad term . . . and courts must look to the plain language of the [*10] contract and construe the contract as a whole when determining the intent of the parties . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written word and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms . . . Although the intention of the parties typically is a question of fact, if their intention is set forth clearly and unambiguously, it is a question of law." (Citations omitted; internal quotation marks omitted.) *Stack v. Hartford Distributors, Inc., supra*, 28-29.

In support of its brief in opposition, the Union has submitted as evidence excerpts of the CBA between the plaintiff and itself. Article IV, Section I of the CBA, entitled "Disciplinary Action" provides in relevant part: "No regular employee . . . shall be . . . discharged . . . except for just cause. Any such disciplinary action . . . shall be subject to the appeal procedures of Article V . . . of this Agreement . . ." Article V, Section I of the CBA entitles "Grievance Procedure" [*11] provides in relevant part: "The grievance procedure prescribed by this Article is established to seek an equitable resolution of grievances, which shall be defined as disputes between the City and the Union or between the City and any employee or group of employees concerning the misinterpretation, misapplication, or violation of a provision of this Agreement . . . the grievance procedure shall be the exclusive remedy, for any disputes defined herein." Article V, Section 6 provides that "[t]he authority of the arbitrator shall be limited to the interpretation and application of this Contract . . . The decision of the arbitrator shall be final and binding on both parties."

In support of its application for a temporary injunction, the plaintiff has submitted the last chance agreement as evidence. The last chance agreement provides, in relevant part: "This agreement is entered into between [the plaintiff], [the Union], and . . . Eccleston . . . Effective upon return to active employment . . . Eccleston shall be placed on probation [and] . . . shall be subject to mandatory random testing . . . for the

purpose of discovering drug or alcohol use . . ." The agreement further provides that "Eccleston may be subject [*12] to immediate termination upon the occurrence of . . . [his failure] to or refuse[al] to participate in mandatory drug/alcohol testing . . . if [he] tests positive for . . . a controlled substance . . . [Or] [i]f [he] violates any City of Waterbury Fire Department . . . policy(ies) or engages in any misconduct." Finally, the last chance agreement provides that "[u]pon completion of twenty-four months from the effective date [of] the probationary period . . . Eccleston may request the City remove him from probationary status . . . [which] shall be at the City's discretion . . . The parties agree that this [a]greement is specific to . . . Eccleston."

Reading the submitted CBA provisions in a fair and reasonable manner, it is clear that the agreement establishes arbitration for disputes involving discharge as the exclusive remedy. In fact, the language of the CBA grants to an arbitrator the authority to resolve issues concerning the "interpretation and application of" the CBA to the parties. However, in the instant action the defendant Eccleston is obligated to follow the last chance agreement for his continued employment. Thus the last chance in addition to the CBA provides the process [*13] if there is a challenge to discharge. The plaintiff contends there is no arbitration available to Eccleston if he is determined to test positive for drug and alcohol in accordance with the last chance but he is subject to just cause discharge. The plaintiff interprets this provision in a myopic view and does not recognize the language of the last chance agreement which provides in Paragraph 2(d) that: "The Union and Thomas F. Eccleston acknowledge that the occurrence of any of the events set forth in subparagraph c.1. through c.iv. shall constitute just cause for termination, and he may be subjected to immediate termination and such termination will be without recourse to the grievance and arbitration procedure of the collective bargaining agreement *except as to whether the underlying conduct occurred*." (Emphasis added.) The last chance agreement clearly indicates that one of the four conditions for just cause is automatically established upon the occurrence of any of the four conditions outlined in the agreement including Eccleston testing positive for a controlled substance pursuant to random drug testing. But the last chance agreement adds language which clearly indicates the availability [*14] of recourse to the grievance and arbitration procedures in the collective bargaining agreement if there was a question as to whether the underlying conduct occurred. Here the underlying conduct is testing positive for drug use which Eccleston denies was accurately reported because of the failure to follow the law as to his medical marijuana certificate. "When the intention conveyed by the terms of an agreement is 'clear and unambiguous' there is no room for construction." *Levine v. Massey,* 232 Conn. 272, 279, 654 A.2d 737 (1995), quoting *Gino's Pizza of East Hartford, Inc. v. Kaplan,* 193 Conn. 135, 138, 475 A.2d 305 (1984). " . . . [T]he contract must be construed to give effect to the intent of the contracting parties . . . This intent must be determined from the language of the instrument and not from any intention either of the parties may have secretly entertained . . . [I]ntent . . . is . . . to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract . . . [W]here there is clear and definitive contract language, the scope and meaning of that language is not a question of fact but a question of law." (Citation omitted, Internal quotation [*15] marks omitted.) *Schwartz v. Family Dental Group, P.C.,* 106 Conn.App. 765, 771, 943 A.2d, 1122, cert. denied, 288 Conn. 911, 954 A.2d 184 (2008). In this instance the court must view the provisions in a manner that no provision is superfluous. *Ramirez v. Health Net of the Northeast, Inc.,* 285 Conn. 1, 14, 938 A.2d 576 (2008).

This last chance agreement and language implicitly answers the question of what issues are arbitrable: just cause is not arbitrable, but any dispute regarding the underlying conduct is subject to arbitration.[3] Thus, the court in the instant action considers the parties' arguments not only as to the terminology but as to the interrelationship of the provisions of the last chance agreement and the CBA agreement as they apply to the just cause discharge and the availability of the grievance or arbitration procedures.

The plaintiff has, however, moved for a temporary injunction that would preclude the defendants from arbitrating any issue related to Eccleston's termination because the defendants have, according to the plaintiff, "waived the right" to arbitrate issues related to Eccleston's termination. At oral argument, though, counsel for the plaintiff conceded that the determination of whether the underlying conduct occurred and whether the plaintiff has just cause are two separate inquiries. Counsel for the plaintiff further conceded that the plaintiff [*16] had not sought to arbitrate whether the underlying circumstances had occurred. By the plaintiff's own words, there are two separate inquiries to be made in this case. The first is whether the underlying facts

satisfied one or more of the conditions outlined in the last chance agreement. This issue is arbitrable pursuant to the last chance agreement. The second issue is whether the plaintiff had just cause to terminate Eccleston, which, under the last chance agreement, the plaintiff has just cause to terminate Eccleston should any of the four conditions be satisfied.[4] This issue is explicitly not arbitrable pursuant to the terms of the last chance agreement if one of the four conditions violated. Given the plaintiff's concessions, and in light of the written agreements submitted to the court, it is clear that the plaintiff is attempting to preclude the defendants from exercising their contractual rights to arbitrate a single issue of underlying conduct. The plaintiff has not attempted to resolve this issue in arbitration, which indicates the plaintiff has not exhausted its arbitral remedies, thereby implicating the subject matter jurisdiction of this court.

Nevertheless, the plaintiff [*17] contends that it is an uncontested fact that Eccleston used marijuana, which is a controlled substance under federal law and violates the plaintiff's policy against the use of a controlled substance. While the plaintiff may be reluctant to arbitrate the issues of what underlying conduct Eccleston engaged in and whether such conduct satisfied one of the four conditions outlined in the last chance agreement, the court can say with positive assurance that a fair construction of the last chance agreement indicates that the plaintiff specifically agreed to arbitrate these matters. *New Britain v. AFSCME, Council 4, Local 1186, supra*, 304 Conn. 644 n.5. If the plaintiff is correct that Eccleston's alleged use of medical marijuana amounted to the use of a controlled substance under the relevant laws or violated the plaintiff's policies then it should have no difficulty establishing such in the proper forum.

Additionally, the plaintiff argues that it will suffer irreparable harm if it is forced to attend arbitration to determine the underlying facts because proceeding with arbitration and litigating the underlying facts is time consuming and costly. The plaintiff has produced no evidence of irreparable harm. "It [*18] is well established that representation of counsel are not evidence." *Hinde v. Specialized Education of Connecticut, Inc.,* 147 Conn.App. 730, 741, 84 A.3d 895 (2014). Without any support, the plaintiff has failed to demonstrate it will suffer irreparable harm should the present case be dismissed. Therefore, the plaintiff does not qualify for one of the limited exceptions to the exhaustion rule. *Levine v. Sterling, supra*, 300 Conn. 528. Accordingly, the plaintiff has failed to carry its burden of proving that the court has subject matter jurisdiction. *Fort Trumbull Conservancy, LLC v. New London, supra*, 265 Conn. 430 n.12. Based upon the above the action must be dismissed.

III. CONCLUSION

For the foregoing reasons, the court lacks subject matter jurisdiction and the action is dismissed.

THE COURT

Brazzel-Massaro, J.

[1] Pursuant to Article IV, Section 5 of the submitted collective bargaining agreement, the Board is the organization tasked with providing arbitration services to the parties. The Board is presumably joined as a defendant to this action to enjoin it from carrying out a grievance arbitration proceeding the Union allegedly filed. All further references to "the defendants" will exclude the Board unless stated otherwise.

[2] The case of *Garrity v. New Jersey,* 87 S.Ct. (1967) involves the procedure where police officers (here firefighter) [*19] are being investigated are given the choice of incriminating themselves or forfeit their jobs and thus the statements cannot be used in subsequent criminal prosecutions.

[3] The last chance agreement expressly provides that this arbitrability scheme applies only to Eccleston. Furthermore, at the time Eccleston was terminated, he was still covered by the provisions of the last chance agreement because the burden was on Eccleston to affirmatively request that the plaintiff remove him from the provisions of the last chance agreement by requesting he be taken off probationary status after twenty-four months from the effective date of the last chance agreement. The effective date of the submitted last chance agreement was, at the latest, November 23, 2015. Twenty-four months from that date was November 22, 2017. Eccleston was terminated sometime after April 6, 2018. At oral argument, all counsel confirmed there was no dispute that Eccleston had failed to request that he be removed from probationary status, which would have exempted him from the provisions of the last chance agreement.

[4] Simply stating that Eccleston tested positive does not satisfy one of the conditions because in accordance [*20] with the defendants' arguments there were irregularities in the process or procedures for reporting because the company refused to recognize

the medical marijuana certificate which if honored would have resulted in a report of no positive signs.

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