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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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BOGDAN DUMITRU,

Plaintiff,

- v.-

PRINCESS CRUISE LINES, LTD.,

Defendant.

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MEMORANDUM AND ORDER

09 Civ. 4792 (NRB)
10 Civ. 1790 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Before the Court is the plaintiff's Motion for Relief From Order, which seeks reconsideration of a Memorandum and Order entered by this Court on July 29, 2010.[1] The motion is purportedly brought pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure (respectively, "Rule 59" and "Rule 60"). For the following reasons, the motion is denied.

DISCUSSION

We begin by addressing the relevant standard for a motion for reconsideration of a non-final order -- which the plaintiff does not reference in his moving papers. Applying the relevant standard, the motion could be denied on its face for its

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[1] Dumitru v. Princess Cruise Lines, Ltd., Nos. 09 Civ. 4792(NRB), 10 Civ. 1790(NRB), 2010 WL 3034226 (S.D.N.Y. July 29, 2010).

untimeliness and, even setting that aside, for its obvious failure to satisfy the relevant substantive standard. We nevertheless address the merits of the plaintiff's proffered grounds for reconsideration.

I. Timeliness of Motion for Reconsideration Under Local Civil Rule 6.3

Although the plaintiff styles his motion as one brought under both Rule 59 and Rule 60, neither of these rules is applicable given the procedural posture of this proceeding. These rules apply when litigants seek reconsideration of final orders or judgments. When an order is non-final, a motion for reconsideration must be brought pursuant to Local Civil Rule 6.3.[2] Here, the order at issue granted a motion to compel arbitration and stayed the case pending resolution by arbitration. This was not a final order or judgment, since the Court has yet to enforce any arbitral award.[3]

Under Local Civil Rule 6.3, the plaintiff's motion is clearly untimely. The rule requires a motion for

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[2] See, e.g., McGee v. State Farm Mut. Auto. Ins. Co., 684 F. Supp. 2d 258, 266 n. 2 (S.D.N.Y. 2010) (construing motion brought under Rule 59(e) seeking reconsideration of non-final order as motion under Local Civil Rule 6.3); Aguiar v. State of New York, No. 06 Civ. 03334(THK), 2008 WL 4700030, *1 n.1 (S.D.N.Y. Oct. 24, 2008) (construing motion brought under Rule 60(b) seeking reconsideration of non-final order as motion under Local Civil Rule 6.3).

[3] See generally Jonesfilm v. Lions Gate Films, Inc., 65 Fed. Appx. 361, 362-63 (2d Cir. 2003); Filanto, S.P.A. v. Chilewich Int'l Corp., 984 F.2d 58, 60-61 (2d Cir. 1993).

reconsideration of a non-final order to be served "within fourteen (14) days after the entry of the court's determination of the original motion" (emphasis in original). The instant motion was filed and served on August 26, 2010 -- twenty-eight days after our Memorandum and Order was entered.

II. Proffered Grounds for Reconsideration

Even assuming the plaintiff's motion were timely, it would not satisfy the substantive standard applicable to motions for reconsideration under Local Civil Rule 6.3.

A. Legal Standard

A motion for reconsideration is "an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources," In re Initial Public Offering Sec. Litig., 399 F. Supp. 2d 298, 300 (S.D.N.Y. 2005) (internal citation and quotation marks omitted), aff'd sub nom. Tenney v. Credit Suisse First Boston Corp., Nos. 05 CV. 3430, 05 CV. 4759, & 05 CV. 4760, 2006 WL 1423785, at *1 (2d Cir. 2006), and appropriate only when a court overlooks "controlling decisions or factual matters that were put before it on the underlying motion" and which, if examined, might reasonably have led to a different result. Eisemann v. Greene, 204 F.3d 393, 395 n.2 (2d Cir. 2000).

A motion for reconsideration is not, however, a "second bite at the apple" for a party dissatisfied with a court's

ruling. Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998). Similarly, it is not appropriate to use a motion for reconsideration as a vehicle to advance new theories a party failed to articulate in arguing the underlying motion. See Griffin Ins., Inc. v. Petrojam, Ltd., 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999). The decision to grant or deny a motion for reconsideration is within the sound discretion of the district court. Id. (internal citations omitted).[4]

B. Analysis

We note at the outset that the issues that were the subject of our Memorandum and Order were extensively briefed. The plaintiff filed two cases in New York State court that were removed to this Court -- one in May 2009 and another in March

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[4] We note that even if it were proper to bring a motion for reconsideration of our Memorandum and Order under either Rule 59(e) or Rule 60(b), the motion would still be denied.

The substantive standard applicable to Rule 59(e) motions for reconsideration is identical to that governing motions under Local Civil Rule 6.3. See, e.g., Manhattan Telecomms. Corp. v. Global Naps, Inc., No. 08 Civ. 3829(JSR), 2010 WL 2976498, *1 (S.D.N.Y. July 12, 2010).

Rule 60(b) permits the court to relieve a party from an order in the event of mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, or in exceptional or extraordinary circumstances. House v. Sec'y of Health and Human Servs., 688 F.2d 7, 9 (2d Cir. 1982). Like Local Civil Rule 6.3 and Rule 59(e), Rule 60(b) is not a vehicle for rearguing the merits of the challenged decision. Fleming v. New York Univ., 865 F.2d 478, 484 (2d Cir. 1989). The Second Circuit has instructed district courts that Rule 60(b) provides "extraordinary judicial relief" and can only be granted "upon a showing of exceptional circumstances." Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986) (citations omitted).

2010 -- and consolidated before us. In each case, the defendant moved to compel arbitration, and the plaintiff cross-moved to remand the case to state court. Between the two cases, eight briefs were filed, totaling nearly 150 pages, in addition to several notices of supplemental authorities that were filed by the plaintiff while the motions were pending. The Court also held a lengthy oral argument on July 12, 2010.

In light of the attention given to the plaintiff's case, we find it particularly nettlesome that plaintiff's counsel would file the instant motion, which, in addition to being untimely, raises numerous arguments that were previously made -- and rejected.[5] In particular, the plaintiff argues: (1) that we have "overlook[ed] or ignore[d]" the claim that Dumitru did not sign the Crew Agreement applicable to his service on the ship and that this therefore precludes arbitration (Pl. Mem. at 2); (2) that we "overlooked" pertinent sections of Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 714 (1985), to

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[5] Indeed, the motion appears to have been written on the assumption that because we did not specifically address each of the arguments made in the plaintiff's sixty-nine pages of briefs, that we somehow overlooked or misapprehended them. This is not the case, and if the plaintiff's assumption were accepted, the "definition of an order deserving of reargument would encompass any decision in which the court failed to respond to every allegation . . . or otherwise interlineate a party's brief." Compagnia Importazioni Esportazioni Rappresentanze v. L-3 Commc'ns Corp., No. 06 Civ. 3157(NRB), 2010 WL 1378992, *1 (S.D.N.Y. Mar. 30, 2010). To grant such a motion "would set an impossible standard," particularly given the numerous and lengthy briefs in this proceeding. Id.

the effect that the arbitration of statutory rights is inappropriate where Congress has precluded a waiver of judicial remedies (Pl. Mem. at 2); and (3) that we "failed to appropriately appreciate" certain legislative history surrounding the United States' accession to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") (id. at 3). We have already addressed these arguments and decline to do so further. See Dumitru, 2010 WL 3034226, at *4, 8, 9-14.

The plaintiff also suggests that we failed to recognize that the "overweening bargaining power" of a party may serve as "a basis to avoid a forum selection/arbitration provision." (Pl. Mem. at 3.) This is true as a broad proposition of law,[6] but the plaintiff has pointed to no controlling authority warranting such a finding purely on the basis of an employer/employee relationship, which is inherently subject to some disparity in bargaining power.[7] Furthermore, the Court's decision indirectly addresses the unequal bargaining power by severing legally unenforceable provisions from the arbitration agreement -- in particular, the provisions specifying that

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[6] See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 632 (1985); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13 (1972).

[7] Indeed, as a general matter, unequal bargaining power is not a defense that can preclude an otherwise proper arbitration under the Convention. See Bautista v. Star Cruises, 396 F.3d 1289 (11th Cir. 2005).

Bermuda law would apply and that venue would lie in Bermuda. Dumitru, 2010 WL 3034226, at *14.

The plaintiff further argues that if he is compelled to arbitrate, he may be forced to pay an exorbitant filing fee under the rules of the International Center for Dispute Resolution. This, he claims, would "strip[]" him of another statutory protection of the Jones Act -- an exemption from the pre-payment of court costs and fees. (Pl. Mem. at 3.) The plaintiff, however, concedes that this was "not argued in the briefs or at time of hearing." (Id.) In other words, the plaintiff's counsel, having failed to fully survey the potential arguments available to their client, asks us to begin the decisional process anew and ignore their failure. This is not an appropriate basis for granting a motion for reconsideration.[8]

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[8] In any event, we note that the plaintiff has provided no support for the exorbitant filing fee he claims would be required. (See Pl. Mem. at 3 ("between $13,450 and $65,000").) If the fee is calculated as a function of the damages being sought, the large sum may be attributable to an unduly optimistic assessment of the damages that might reasonably be available to the plaintiff.

We also note that arbitration fees will virtually always substantially exceed the filing fees and costs in federal court. We do not think this should defeat an otherwise enforceable arbitration agreement, both as a general matter and where, as here, the plaintiff would have been excused from the pre-payment of court costs and fees. See Gawin v. Princess Cruise Lines Ltd., No. 09-23059-CIV, 2009 WL 6364038, *3 (S.D. Fla. 2009).

Moreover, as is often done in court proceedings, we assume that plaintiff's counsel is free to advance their client the costs of the arbitration.

Finally, the plaintiff takes issue with the statement in our opinion that he had "not cited any case in which a district court has remanded a Jones Act claim in the face of an arbitration agreement that falls under the Convention." (Pl. Mem. at 1 (quoting Dumitru, 2010 WL 3034226, at *15).) He claims that this is "not correct" and points to three decisions that were cited in the earlier briefing: (1) Thomas v. Carnival Corp., 573 F.3d 1113 (11th Cir. 2009); (2) Kovacs v. Carnival Corp., No. 09-22630-CV, 2009 WL 4980277 (S.D. Fla. Dec. 21, 2009); and (3) Pavon v. Carnival Corp., No. 09-22935-CV (S.D. Fla. Jan. 20, 2010). As an initial matter, none of these cases are controlling caselaw in this District and thus they are, on their face, inappropriate predicates for a motion for reconsideration.

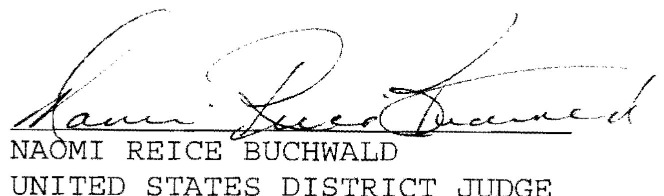
In any event, Thomas, Kovacs, and Pavon are all distinguishable from the case at bar in crucial respects. It is true that in Thomas, the Eleventh Circuit held that a Jones Act claim should be remanded to state court, but, as we noted in our earlier decision, the court also held that the plaintiff's Jones Act claim did not fall under the relevant arbitration clause. Thomas, 573 F.3d at 1120 & n.9; Dumitru, 2010 WL 3034226, at *10 n.12. Here, we held that Dumitru's Jones Act claim did indeed fall within the parties' arbitration agreement. Both Kovacs and Pavon are distinguishable because the courts were ruling on the

appropriateness of compelling arbitration on the assumption that foreign law would necessarily govern the proceedings.[9] Neither case appears to have involved an agreement, such as the one in this proceeding, that contained both a choice-of-law provision and a severability clause. Thus, we were able to address the concern over the restrictiveness of foreign law by severing the Bermuda choice-of-law provision from the arbitration agreement and holding that United States law shall apply to the plaintiff's Jones Act claim. Dumitru, 2010 WL 3034226, at *12.

CONCLUSION

For the foregoing reasons, the motion (docket no. 25 in 10 Civ. 1790) is denied.

Dated: New York, New York
September 10, 2010



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UNITED STATES DISTRICT JUDGE

[9] See Kovacs, 2009 WL 4980277, at *1 ("the Court finds it would be against public policy to compel arbitration of Plaintiff's Jones Act claim according to Panamanian law because to do so would deprive her of important statutory rights").

Copies of the foregoing Order have been mailed on this date to the following:

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