United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Harry D. Leinenweber	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	06 C 1811	**DATE**	July 10, 2006
CASE TITLE	Webster vs. A.T. Kearney, Inc. et al		

DOCKET ENTRY TEXT

For the reasons stated below, Defendants A.T. Kearney, Inc. and Electronic Data Systems Corporation's Motion to Dismiss Plaintiff David Webster's Complaint to Vacate and Set Aside Arbitration Award [8-1] **is granted.**

■[For further details see text below.]

Notices mailed by Judicial staff.
*Mail AO 450 form.

STATEMENT

Defendants A.T. Kearney, Inc. and Electronic Data Systems Corporation ("Defendants") move to dismiss Plaintiff David Webster's Complaint to Vacate and Set Aside Arbitration Award. For the reasons discussed herein, Defendants' Motion to Dismiss **is granted**.

Webster was terminated from his position as general counsel of A.T. Kearney, Inc. in November 2002. Webster then filed an age discrimination charge with the EEOC. On October 9, 2003, Webster filed a Demand for Arbitration with the American Arbitration Association ("AAA"). Webster argued that he had been terminated unlawfully based on his age and in violation of a 1995 Employment Agreement. After discovery and a four day trial, the arbitrator issued a 12-page award finding Defendants were not liable to Webster on any of his claims. The opinion was sent by email and regular mail to the parties on January 4, 2006.

On April 5, 2006, Defendants were served with a Summons and "Complaint to Vacate and Set Aside Arbitration Award." Webster claims that the arbitrator exceeded his authority by denying Webster's breach of contract claims under the 1995 Employment Agreement. Specifically, the arbitrator denied that the 1995 Employment Agreement, which granted him authority, existed as an enforceable contract. Instead, the arbitrator found that a later agreement, the Equity Related Agreement, replaced the 1995 agreement. The Equity Related Agreement did not contain an arbitration clause.

A Rule 12(b)(6) motion is designed only to "test the sufficiency of the complaint, not to decide its merits." *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). The Court must take the facts alleged by the plaintiffs as true and must construe all allegations in the complaint in the light most favorable to the plaintiffs. *Colfax Corp. v. Illinois State Toll Highway Auth.*, 79 F.3d 631, 632 (7th Cir. 1996).

STATEMENT

Defendants argue that under the Federal Arbitration Act (the "FAA"), Webster's challenge to the arbitration award is untimely and must be denied. Section 12 of the FAA provides, "any notice of a motion to vacate, modify or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. "The plain language of § 12 does not provide for any exceptions to the three-month window and says nothing about tolling." *Olson v. Wexford Clearing Serv. Corp.*, 397 F.3d 488, 490 (7th Cir. 2005) ("A party who is uncertain about the finality of appealability of an arbitration award should err on the side of compliance with FAA § 12, which is not onerous.")

Webster argues that his attorney never agreed to accept delivery by email and did not see the email until January 5, 2006. Therefore, Webster contends that the award was not delivered under the meaning of the FAA until his attorney received it in the mail, on January 9, 2006. The FAA has been interpreted as encouraging the parties to "specify by contract the rules under which [their] arbitration will be conducted." *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). The Rules of the AAA, which both parties agreed to abide by, allow the AAA or the parties to serve notice by mail or "facsimile transmission, telex, telegram, or *other written forms of electronic communication* to give the notice required." AAA "National Rules for the Resolution of Employment Disputes," Rule 33 (emphasis added). Thus, email was an acceptable form of delivery under the AAA rules.

Webster received the arbitrator's decision on January 4, 2006, the day that it was emailed by the arbitrator. According to § 12 of the FAA, Webster had three months, or until April 4, 2006, to serve Defendants with notice of a motion to vacate the award. Webster served Defendants one day too late. If a party fails to serve notice of its court filing on the adverse party within three months after the award was issued, the motion must be dismissed as untimely. *ARCH Dev. Corp. V. Biomet, Inc.*, No. 02 C 9013, 2003 U.S. Dist. LEXIS 12300, at *7-8 (N.D. Ill. July 17, 2003) (citations omitted). Accordingly, the motion to dismiss **is granted.**