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*2007 U.S. Dist. LEXIS 287, **

SUSAN STOWELL, Plaintiff, v. TOLL BROTHERS, Defendant.

No. 06-cv-2103

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2007 U.S. Dist. LEXIS 287

January 4, 2007, Decided

COUNSEL: [*1] For SUSAN STOWELL, Plaintiff: ANDREW S. ABRAMSON, LEAD ATTORNEY, LAW OFFICES OF ANDREW S. ABRAMSON, JENKINTOWN, PA.

For TOLL BROTHERS, Defendant: JILL M. LASHAY, LEAD ATTORNEY, BUCHANAN INGERSOLL & ROONEY P, HARRISBURG, PA.

JUDGES: CLIFFORD SCOTT GREEN, S.J.

OPINION BY: CLIFFORD SCOTT GREEN

OPINION

MEMORANDUM

Presently pending is Defendant's Motion to Compel Arbitration, and the response thereto. For the following reasons, Defendant's Motion will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Susan Stowell, commenced the instant action against Defendant, Toll Brothers Inc., her former employer, alleging that Defendant discriminated against her on the basis of her sex, in retaliation for opposing unlawful sexual harassment, and in retaliation for exercising her rights under the Family and Medical Leave Act.

As part of Plaintiff's employment contract, the parties agreed to resolve all disputes arising as a result of, or in connection to, Plaintiff's employment through arbitration. Pursuant to that clause, the dispute was submitted to the American Arbitration Association (hereinafter "AAA"). The AAA contacted the parties, by letter, on August 11, 2004, and requested[*2] that Defendant remit a filing fee of \$ 750 on or before August 25, 2004. (Pl.'s Exhibit B). Ultimately, the AAA declined to administer the case after not receiving the filing fee, and informed the parties, by letter, on September 17, 2004. (Pl.'s Exhibit C).

II. DISCUSSION

The Federal Arbitration Act (hereinafter "FAA"), 9 U.S.C. §§ 1-14, provides for the enforcement of arbitration agreements in contracts. 9. U.S.C. § 2. Section 4 of the FAA permits a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to petition a United States District Court for an order "directing that such arbitration proceed in the manner provided for in such agreement."

9 U.S.C. § 4. Section 3 allows a court to stay a pending action until the disposition of arbitration, "providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3 (emphasis added). Plaintiff agrees that the FAA controls, but argues that Defendant waived its right to arbitration when it defaulted on the pending arbitration by failing[*3] to remit the filing fee. Defendant argues that a failure to remit the fees is insufficient evidence of waiver.

The question of whether Defendant's admitted failure to remit the filing fee constitutes default has heretofore been decided. See *Sink v. Aden Enters.*, 352 F.3d 1197 (9th Cir. 2003). Defendant's admission that the filing fee was not paid is sufficient for the court to conclude that Defendant defaulted. In *Sink*, the Ninth Circuit considered the same relevant facts as are present in this case, and concluded that,

.... it cannot sensibly be maintained that a district court is required to enter an order under § 4 compelling parties to return to arbitration under circumstances where § 3 precludes the district court from staying its own proceeding. *Id.* at 1200. The court agrees, and concludes that since Defendant's default in the arbitration proceeding by failing to file the required fee would preclude the court from staying proceedings under Section 3, that Section 4 cannot require the court to compel arbitration. As such, the court concludes that Defendant has waived its right to compel arbitration. The court would reach[*4] the same conclusion, even if, as Defendant argues, prejudice to opposing party is the benchmark of whether waiver has occurred. The court concludes that compelling arbitration after Defendant's prevented the arbitration from going forward by failing to remit the proper fee would prejudice Plaintiff, who, as a result of Defendant's failure, went forward with all of the administrative procedures required before filing a complaint in the District Court.

An appropriate order follows.

ORDER

AND NOW, this 4th day of January, 2007, **IT IS HEREBY ORDERED** that Defendant's Motion to Compel Arbitration (Dkt. # 6) is **DENIED**.

BY THE COURT:

s/ CLIFFORD SCOTT GREEN, S.J.

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