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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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SERGE DUBOIS,

Plaintiff,

-against-

MACY'S RETAIL HOLDINGS, INC.,

Defendant.
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REPORT & RECOMMENDATION
11 CV 4904 (NGG)(LB)

BLOOM, United States Magistrate Judge:

Plaintiff, Serge Dubois, brings this *pro se* action against his former employer, Macy's Retail Holdings, Inc. This case is a reprise of plaintiff's previous employment discrimination action, which was referred to arbitration on November 27, 2007.[1] See Dubois v. Macy's East Inc., No. 06-CV-6522 (NGG)(LB), 2007 WL 4224781, (E.D.N.Y. Nov. 27, 2007), aff'd 338 Fed. Appx. 32 (2d Cir. 2009). In that case, plaintiff argued that he had "opted-out" of his employer's binding arbitration program, and he insisted that this Court was the only fair forum for his claims. However, both this Court and the Second Circuit found that arbitration—not this Court—was the proper forum for plaintiff to litigate his discrimination claims. The arbitrator adjudicated and dismissed plaintiff's discrimination claims in an arbitral award issued on September 10, 2011.

Plaintiff moves to vacate the arbitrator's judgment pursuant to the Federal Arbitration Act, 9 U.S.C. § 10, and he re-asserts his dismissed discrimination claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.* ("Title VII"); 42 U.S.C. § 1981; and the New York City Human Rights Law § 8-107, *et seq.* ("NYCHRL"). Plaintiff again alleges that he was sexually harassed by two superiors, treated unfairly, and fired in retaliation for refusing his superiors' sexual advances.

[1] The Court dismissed plaintiff's claims and granted him leave to re-file within thirty days after the arbitration should further relief from the Court be necessary; plaintiff "re-files accordingly." (Pl.'s Aff., ECF No. 1 at 9.)

Plaintiff, a black Haitian man, asserts that defendant discriminated against him because of his race, sex, and national origin.[2]

Defendant moves to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), or in the alternative, for summary judgment pursuant to Rule 56. Defendant also opposes plaintiff's motion to vacate the September 20, 2011 arbitration award and seeks an order confirming the award. Plaintiff opposes defendant's motions. The Honorable Nicholas G. Garaufis referred defendant's motions to me for a Report and Recommendation pursuant to 28 U.S.C. § 636(b). (ECF No. 16.) For the following reasons, it is respectfully recommended that plaintiff's motion to vacate the arbitration award should be denied; defendant's motion to dismiss the complaint and confirm the arbitration award should be granted.

BACKGROUND

I. Plaintiff's Complaints of Discrimination

Plaintiff was employed as a Sales Associate at Macy's Kings Plaza during the holiday season of 2001 to 2002, and again from September 2002 until his termination on June 4, 2004. (Compl. ¶ 8, ECF No. 1 at 4; Arb. Tr. 97, ECF No. 30-5.)[3] Plaintiff alleges that he began experiencing sexual harassment and disparate treatment at some point in 2003 or 2004.[4] He alleges that Daisy Rivera, a Macy's supervisor, made sexual advances towards him, including exposing her breast and panties to him and brushing her breast against him on different occasions. (Am. Claim ¶¶ 5-6.) He states that when he tried to complain about Ms. Rivera's behavior to department manager Mark Joseph, Mr. Joseph also made sexual advances toward plaintiff by putting his hand on plaintiff's shoulder and trying to kiss him. (Id. ¶

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[2] Plaintiff's claim for "color" discrimination, raised before the New York City Commission on Human Rights, was not raised in the arbitration proceeding or in the instant complaint.

[3] In citing to the arbitration transcript filed by plaintiff, defendant states that the arbitration proceeding was confidential. (Def.'s Mem. 4 n.3, ECF No. 27.) However, neither party has requested to seal or restrict access to the transcript on the record, and defendant's reply assumes that plaintiff has "waived confidentiality." (Def.'s Reply 4 n.2, ECF No. 31.)

[4] Plaintiff's complaint lists various dates that the discrimination started. His form complaint states that the "discriminatory acts" occurred from February 2003 through May 2004 (Compl. ¶ 5); his complaint to the New York City Commission on Human Rights states that the discrimination started in February 2004 (Compl. to City Comm'n on Human Rights, "CCHR Compl.," ECF No. 1 at 7); and the "Amended Claim" his former attorney submitted to the arbitrator states the discrimination started in December 2003 (Am. Claim ¶ 7, ECF No. 1 at 60).

7.) Plaintiff alleges that Mr. Joseph continued to make "inappropriate eye contacts" whenever he saw him. (Id.)

Plaintiff states that he complained to two store managers about the sexual harassment, but that no action was taken. (Id. ¶¶ 8-9.) He attaches his February 2003 letter to Macy's store manager Larry Mentzer; the letter states that plaintiff is writing due to problems with certain employees who "hate me because of the appreciation of your administration, concerning the respectful ways I do my works."[5] (Mentzer ltr., ECF No. 1 at 66.)

Plaintiff alleges that his complaints led his supervisors to retaliate against him through further discrimination, and ultimately, plaintiff's termination. He claims that Ms. Rivera called him a "nigger," that his hours were reduced, and that he did not receive raises given to other employees with less seniority. (Am. Claim ¶¶ 3, 10; CCHR Compl. ¶ 7.) Finally, plaintiff alleges that he was improperly fired following a confrontation with a customer. (Am. Claim ¶ 12.) His complaint attaches internal personnel documents describing an incident with a customer on May 26, 2004; the customer cursed at plaintiff, and plaintiff called the customer a "piece of human waste" and notified his supervisor. (Personnel docs., ECF No. 1 at 56-58.) Plaintiff was suspended without pay on May 29, 2004 and was fired on June 4, 2004. Plaintiff alleges that respondent owes him wages for the week prior to his termination, as well as for the vacation pay, unpaid sick pay, and holiday pay that accrued prior to his termination. (Am. Claim ¶ 11.)

II. Plaintiff's Prior Lawsuit

On March 31, 2005, plaintiff filed a discrimination charge based on race, color, national origin, gender, and retaliation with the New York City Commission on Human Rights (CCHR), which was

[5] The letter describes a series of conflicts with Ms. Rivera, supervisor Elvis Bramble, and other employees at the store. Plaintiff states that Ms. Rivera attempted to fire him in October 2002, and that she temporarily assigned him to the "domestic" section of the store to humiliate and punish him. (Mentzer ltr., ECF No. 1 at 66.) He states that other workers close to Ms. Rivera gave plaintiff "dirty looks" or did not greet him because they heard plaintiff tell Ms. Rivera that other workers spend more time talking than working. (Id. at 66-67.) Plaintiff also describes conflicts related to work assignments from "Sherryl" and Elvis; he states that he became Sherryl's "primary target" and that Elvis reduced plaintiff's hours in order to get plaintiff to quit. (Id. at 67-68.) In the letter's conclusion, plaintiff requests to work in a different area of the store "without being interfered with Elvis and his mysterious assistants." (Id. at 68.)

jointly filed with the Equal Employment Opportunity Commission (EEOC). (CCHR Compl.)[6] On December 7, 2005, CCHR dismissed plaintiff's complaint and issued a "Determination and Order after Review." (Det. & Order.) The EEOC adopted CCHR's findings on October 11, 2006 and issued plaintiff a right-to-sue letter. (EEOC ltr., ECF No. 1 at 6.)

On December 6, 2006, plaintiff commenced an action against defendant Macy's in this Court alleging discrimination, sexual harassment, and retaliation. (See Civil Docket 06-cv-6522 (NGG)(LB), ECF. No. 1 at 26.) Defendant responded by filing a motion to compel arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq*. The Court granted defendant's motion on November 26, 2007 and the case was dismissed and referred to arbitration. Dubois, 2007 WL 4224781. Plaintiff appealed that decision, and the Court's judgment was affirmed by the Second Circuit on July 9, 2009. Dubois, 338 Fed. Appx. 32. Plaintiff twice moved to re-open that case; those motions were both denied. (See Orders, Dubois, No. 06-cv-6522 (NGG)(LB), ECF. Nos. 40, 47.)

III. Arbitration

Plaintiff's case proceeded to arbitration before American Arbitration Association ("AAA") Arbitrator Stephen F. Ruffino on July 27, 2011. (Arb. Tr. 1.) Prior to the arbitration hearing, plaintiff retained counsel to file an amended claim on his behalf; the amended claim clarified plaintiff's original *pro se* complaint and sought relief pursuant to Title VII, 42 U.S.C. § 1981, and the NYCHRL. (Am. Claim ¶¶ 1, 13.) Plaintiff appeared at the arbitration hearing *pro se*.[7] At the hearing, plaintiff relied on his previously submitted Amended Claim and other written submissions to present his testimony. The arbitrator informed plaintiff of his right to testify, to call witnesses, and to issue subpoenas, but plaintiff repeatedly declined to do so. (Arb. Award ¶¶ 7-9, ECF No. 1 at 32.) Plaintiff argued on his behalf at the hearing and cross-examined defendant's witnesses. (Id. ¶ 9.) Defendant called three witnesses and

[6] Although plaintiff's form complaint states that he filed his charge with CCHR on December 22, 2004, plaintiff's complaint to CCHR and the Commission's Determination and Order after Review both state the charge was filed on March 31, 2005. (CCHR Compl.; Det. & Order, ECF No. 26-2.)

[7] Plaintiff's attorney stopped representing him in early 2011 due to various conflicts. (Akakwam ltr. Feb. 7, 2011, Dubois, No. 06-cv-6522, ECF No. 35 at 14.)

cross-examined plaintiff. (Arb. Tr. 38-119.) The arbitration transcript reflects testimony about the nature of plaintiff's job and benefits, the alleged incidents of discrimination, whether plaintiff complained about discrimination or knew of Macy's procedures for reporting discrimination, the incident leading to plaintiff's termination, and plaintiff's demand for damages.

On September 20, 2011, Arbitrator Ruffino issued an arbitration award denying and dismissing plaintiff's claims. The award states that, "[u]ltimately, the decision on whether much of the alleged wrongful conduct occurred comes down to a weighing of Claimant's accusations against Respondent's denials that such conduct occurred." (Arb. Award ¶ 9.) Ruffino states that "Respondent's witnesses were credible and Claimant was not"; he specifically notes instances where plaintiff's testimony was not credible, contradicted plaintiff's earlier written allegations, or was vague. (Id. ¶¶ 10, 11, 13.) The arbitrator also found that plaintiff's confrontation with the customer in May 2004 justified his termination; the award concludes that, "I find that no discriminatory acts occurred and Claimant has not proven his claims." (Id. ¶¶ 14-15.)

Six days after the award was issued, plaintiff wrote to AAA Case Manager Carol Placella to request a transcript of the hearing; he cited Judge Garaufis' 2006 Memorandum and Order and stated that "further relief from the Court is necessary." (Pl.'s Sept. 26, 2011 ltr, ECF No. 1 at 49-50.) Plaintiff's letter reflects several of the complaints he raises to the Court in the instant action—he accuses defendant's witnesses of lying under oath; asserts that "[i]gnoring and excluding substantiated evidences, facts and information issued by the Claimant, in order to enter a decision in favor of the Respondent, is wrong, unfair, outrageous, unjustified and unacceptable"; and argues that "apparently, it is an embarrassment for [Arbitrator Ruffino] and the AAA to admit and consider the relative uncredibility of the witnesses as an important determinative factor." (Id.)

IV. Plaintiff's Instant Complaint

On October 11, 2011, plaintiff filed the instant complaint in this Court.[8] Although his form complaint mirrors the complaint he filed in his 2006 employment discrimination action,[9] plaintiff also attaches an "affidavit of support" asserting new allegations related to the arbitration proceedings. (Pl.'s Aff., ECF No. 1 at 9-20.) He asserts that Arbitrator Ruffino was unfairly biased against him, ignored credible evidence in plaintiff's favor, and failed to sanction defendant's improper conduct during and after the hearing. Plaintiff further accuses the arbitrator of fraud and criticizes the arbitrator's reasoning in the award. He repeatedly argues that the arbitrator's award was unlawful and unfair because the arbitrator did not find in his favor. Plaintiff requests that the Court vacate the arbitrator's award and grant plaintiff's discrimination claims under Title VII, 42 U.S.C. § 1981, and the New York City Human Rights Law. He seeks monetary damages for lost wages and benefits, emotional distress and pain and suffering, and "on the basis of malice and spite." (Id. ¶ 17.)

On February 24, 2012, defendant moved to dismiss plaintiff's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and requested an order confirming the arbitration award pursuant to the Federal Arbitration Act. Plaintiff opposes defendant's motions. (ECF Nos. 24-33.)

DISCUSSION

I. Motions to Vacate and Confirm the Arbitration Award

The Court liberally construes the affidavit attached to plaintiff's complaint as a motion to vacate the arbitration award pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 10.[10] "Under the FAA's

[8] Plaintiff's case, originally assigned to Magistrate Judge Levy, was reassigned to me on November 15, 2011.
[9] There are only minor differences between the statements of facts in plaintiff's two form complaints, and plaintiff did not check the box to allege retaliation on his 2006 form complaint.
[10] "[A] party seeking to vacate an arbitration award [under the FAA] must proceed by motion to the court." U.S. Ship Mgmt., Inc. v. Maersk Line, Ltd., 188 F. Supp. 2d 358, 362–63 (S.D.N.Y. 2002); see also 9 U.S.C. § 6 ("[a]ny application to the court . . . shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided."). Although plaintiff has styled his complaints regarding the arbitration as an affidavit rather than a motion, defendant has "placed this action in the proper procedural posture" by responding to plaintiff's complaint with its cross-motion to confirm the award. U.S. Ship Mgmt., 188 F. Supp. 2d at 363 (where request for vacatur filed as complaint); see also Finkelstein v. UBS Global Asset Mgmt. (US) Inc., No. 11 CV 00356 (GBD), 2011 WL 3586437, at *4 (S.D.N.Y. Aug. 9, 2011); Orange & Rockland Util., Inc. v. Local 503, Int'l Bhd. of Elec. Workers, No. 05 Civ. 6320 (WCC), 2006 WL 1073049, at *3 (S.D.N.Y. Apr. 21, 2006). Further, although plaintiff at times states that he seeks to either vacate *or modify*

motion procedure, the Court may consider an arbitration action by summary proceeding on the basis of the fully briefed motion papers and without the requirement of a hearing." U.S. Ship Mgmt., 188 F. Supp. 2d at 363.[11]

A. Plaintiff's Motion to Vacate the Arbitration Award

1. Standard of Review

"This Court has repeatedly recognized the strong deference appropriately due arbitral awards and the arbitral process." Scandinavian Reins. Co. v. Saint Paul Fire & Marine Ins. Co., 668 F.3d 60, 72 (2d Cir. 2012) (quoting Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC, 497 F.3d 133, 138 (2d Cir. 2007)). "A court's review of an arbitration award is . . . severely limited so as not to frustrate the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." Id. at 71-72 (internal quotation marks and citations omitted); see also Wallace v. Buttar, 378 F.3d 182, 189 (2d Cir. 2004) (motion to vacate "is not an occasion for *de novo* review of an arbitral award."); Fairchild Corp. v. Alcoa, Inc., 510 F. Supp. 2d 280, 285 (S.D.N.Y. 2007) (arbitration awards are to be accorded "substantial latitude and extensive deference").

"A party seeking vacatur of an arbitration award 'bears the heavy burden of showing that the award falls within a very narrow set of circumstances delineated by statute and case law.'" AmeriCredit Fin. Servs., Inc. v. Oxford Mgmt. Servs., 627 F. Supp. 2d 85, 92 (S.D.N.Y. 2008) (quoting Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 388 (2d Cir. 2003)). Indeed, the four

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the arbitration award (see Pl.'s Aff. in Opp'n ("Pl.'s Opp'n") ¶¶ 3, 6, ECF No. 29), he does not make any claims related to 9 U.S.C. § 11, which provides the statutory bases for modifying or correcting an arbitration award "so as to effect the intent thereof and promote justice between the parties":

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11. The Court thus construes plaintiff's motion as one for vacatur only.

[11] Neither party disputes that the Court has jurisdiction over plaintiff's claims under the FAA. Moreover, the Court notes that "[t]he Second Circuit has held that 'a court which orders arbitration retains jurisdiction to determine any subsequent application involving the same agreement to arbitrate.'" Krantz & Berman, LLP v. Dalal, No. 09 Civ. 9339 (DLC), 2011 WL 1810490, at *2 (S.D.N.Y. May 12, 2011) (citation omitted) (quoting Stolt–Neilsen SA v. Celanese AG, 430 F.3d 567, 573 (2d Cir. 2005)). Therefore, because this Court ordered the parties to submit to arbitration in plaintiff's previous case, the instant applications are properly before the Court.

statutory grounds for vacatur under the FAA address "egregious departures from the parties' agreed-upon arbitration," and emphasize "extreme arbitral conduct" or impropriety. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 586 (2008). Under Section 10(a), a district court may vacate an arbitration award:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). The Second Circuit also recognizes an additional, "severely limited," ground for vacatur where an arbitration award constitutes a "manifest disregard of the law." Giller v. Oracle USA, Inc. , No. 11 Civ. 02456 (JGK), 2012 WL 467323, at *4 & n.1 (S.D.N.Y. Feb. 14, 2012) (citations omitted) (quoting Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 202 (2d Cir. 1998)) .

In short, the party seeking vacatur "must clear a high hurdle." Scandinavian Reins. Co., 668 F.3d at 72 (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1767 (2010)). Plaintiff's allegations here focus on the first three statutory grounds for vacatur.

2. "Corruption, Fraud, or Undue Means"

"To vacate an arbitration award on the basis of fraud, the challenging party must show [by clear and convincing evidence] that there was a fraud, that it could not have been discovered using due diligence during the arbitration proceedings and that there was a material relation between the fraud and the award." Finkelstein, 2011 WL 3586437, at *8 (alteration in original) (quotation omitted).[12] "The purpose of requiring fraud to be 'newly discovered' before vacating an arbitration award on that ground

[12] "A fraud claim requires a plaintiff to demonstrate (1) a misrepresentation or material omission of fact which was false and known to be false by defendant, (2) made for the purpose of inducing the other party to rely upon it, (3) justifiable reliance of the other party on the misrepresentation or material omission, and (4) injury." Finkelstein, 2011 WL 3586437, at *8 n.11 (citations omitted).

is 'to avoid reexamination, by the courts, of credibility matters which either could have been or were in fact called into question during the course of the arbitration proceedings.'" Hakala v. Deutsche Bank AG, No. 01 Civ. 3366 (MGC), 2004 WL 1057788, at *3 (S.D.N.Y. May 11, 2004) (quotation omitted).[13]

First, plaintiff alleges that the award should be vacated based on fraud related to the witnesses at the arbitration. He alleges that "it is a fraudulent outcome" for the arbitrator "to conclude that the relative credibility of the witnesses is an important determinative factor, because . . . the witnesses testimonies have no basis and do not consist any credibility." (Pl.'s Aff. ¶ 12.) Further, plaintiff argues that he chose not to call witnesses because defendant and its counsel "would always force them to lie during their testimonies, in the same manner that [defendant's witnesses] were forced to lie under oath" during the hearing, and that defendant intentionally failed to produce other witnesses "in order to create confusions." (Id. ¶ 11.) Plaintiff states that the Arbitrator's statements regarding plaintiff's choice not to call witnesses are "vague, meaningless, and inconsistent" (id. ¶ 11), and plaintiff specifically accuses the arbitrator of "fraud" for stating that plaintiff chose not to call store manager Nicole Olsen as a witness (id. ¶ 15). Plaintiff repeatedly raised these concerns to the arbitrator at the hearing and was allowed to submit supplemental evidence to support his arguments. (Arb. Tr. 45, 48, 54-57, 80-81; Pl.'s July 28, 2011 ltr. to AAA, ECF Nos. 1 at 39, 30-2 at 16 (attaching documents and stating that "the enclosed documents . . . also establish the fact that [Elvis Bramble and Daisy Rivera] have lied under oath."))

Second, plaintiff faults the arbitrator for failing to sanction or rule against defendant for producing two "fraudulent" documents during the arbitration hearing—a form related to plaintiff's final check for vacation pay, and a signed "Associate Acknowledgment" statement related to Macy's employee handbook. (Pl.'s Aff. ¶¶ 3, 13; Pl.'s Opp'n ¶ 24.) At the hearing, plaintiff claimed that he had never seen the documents before and that his signature on the "Associate Acknowledgment" was forged. (Arb. Tr. 90, 97-100.) The arbitrator noted plaintiff's objections (id.), and his award found that plaintiff's testimony about the acknowledgment form was "not credible." (Arb. Award ¶ 10.)

[13] The Clerk of Court is directed to send copies of the attached unreported decisions cited herein to plaintiff with this Report.

To the extent that plaintiff alleges that the arbitration award was based on perjured testimony or fraudulent documents, plaintiff had ample opportunity to present those arguments to the arbitrator, and he asserts no new evidence here. See Salzman v. KCD Fin., Inc., No. 11 Civ. 5865 (DLC), 2011 WL 6778499, at *3 (S.D.N.Y. Dec. 21, 2011) (quoting Karppinen v. Karl Kiefer Mach. Co., 187 F.2d 32, 35 (2d Cir. 1951)) (party alleging fraud based on perjured testimony "must first show that he could not have discovered it during the arbitration, else he should have invoked it as a defense at that time."); Hakala, 2004 WL 1057788, at *3 ("[plaintiff] had the opportunity to present to the arbitrators evidence of this alleged fraudulent behavior of respondents. . . . Accordingly, [plaintiff] may not now seek review of those issues in this court."). Further, plaintiff had the opportunity—and adamantly refused—to call or subpoena witnesses at the hearing. (Arb. Tr. 13-14, 33-37.) Plaintiff unfortunately seems to have believed that if he did not present witnesses or evidence at the arbitration, he would still be able to do so in Court. Plaintiff was mistaken. As plaintiff fails to state a claim of "fraud" under 9 U.S.C. § 10(a)(1), his motion to vacate should be denied.

3. "Evident Partiality or Corruption"

Under Section 10(a)(2) of the FAA, a district court may vacate an arbitration award where there was "evident partiality or corruption" by the arbitrator. 9 U.S.C. § 10(a)(2). In the Second Circuit, "evident partiality within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." Scandinavian Reins. Co., 668 F.3d at 72 (quotation omitted). "Although proof of actual bias is not required . . . , the party moving to vacate an arbitration award must show more than the mere appearance of bias." Rai v. Barclays Capital Inc., 739 F. Supp. 2d 364, 370 (S.D.N.Y. 2010). "Of course, a showing of evident partiality may not be based simply on speculation." Scandinavian Reins. Co., 668 F.3d at 72 (quotation marks and citation omitted). Further, this Circuit "precludes attacks on the qualifications of arbitrators on grounds previously known but not raised until after an award has been rendered." Rai, 739 F. Supp. 2d at 370 (quotation omitted). The parties may assess an arbitrator's impartiality prior to the hearing,

and they may reject an arbitrator at that time. "Where a party has knowledge of facts possibly indicating bias or partiality on the part of the arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection." Id. at 371 (quotation omitted).

Plaintiff alleges that the arbitrator was biased against him. He states that Mr. Ruffino repeatedly ignored evidence because it supported plaintiff's claims (Pl.'s Aff. ¶¶ 1-7, 15); made decisions "in order to take the Respondent off the hook" (id. ¶ 6); and issued a "treacherous" award to destroy and sabotage plaintiff's claims (id. ¶ 12). In plaintiff's affidavit in opposition to defendant's motion to dismiss, he asserts his argument more vigorously. He argues that Mr. Ruffino made a "planning attempt" to dismiss plaintiff's claims if plaintiff could not locate and produce witnesses (Pl.'s Opp'n ¶ 12); that the arbitrator's partiality was evidenced by a conflict of interest reported in Mr. Ruffino's supplemental disclosures to the parties prior to the hearing (id.); that Mr. Ruffino "acted as a witness and lawyer for Macy's" (id. ¶ 13); that "Ruffino's comportment" established that he was a "biased arbitrator" (id. ¶ 21); that as a Haitian-American citizen, plaintiff was "discriminated and deprived by Arbitrator Ruffino who took the oath to be fair, neutral and impartial" (id. ¶ 22); and that "the one sided manner in which [the arbitrator] examined the evidences and failed to sanction the Defendant for failure to comply, makes him partial, raises some serious questions in the arbitration procedures, and establishes evidences of corruption and abusive of power, fraud and conflict of interests" (id. ¶ 21).

Despite his adamant arguments, plaintiff offers no evidence of Mr. Ruffino's bias, partiality, or corruption beyond conclusory statements and speculation. First, an adverse ruling alone "rarely evidences partiality." Scandinavian Reins. Co., 668 F.3d at 75 (collecting cases). "Bias is not even established by showing that an arbitrator consistently agrees with the arguments of one side and repeatedly finds in their favor." Polin v. Kellwood Co., 103 F. Supp. 2d 238, 260 (S.D.N.Y. 2000) (citation omitted). Second, to the extent plaintiff's argument is based on the conflict of interest reported by Mr. Ruffino (see Arb.'s Suppl. Discl., ECF No. 30-2 at 15), plaintiff clearly had the opportunity to

raise that issue at or prior to the hearing, and he has now waived his opportunity to do so. The Court finds no basis for plaintiff's claim that Mr. Ruffino was biased in favor of defendant. Plaintiff's motion to vacate should therefore be denied on this ground.

4. "Refus[al] to hear evidence pertinent and material to the controversy"

"It is the role of the arbitrators to make factual findings, weigh evidence, and assess the credibility of witnesses." Moorning-Brown v. Bear, Stearns & Co., No. 99 CV 4130 (GBD), 2005 WL 22851, at *3 (S.D.N.Y. Jan. 5, 2005) (citation omitted). Although Section 10(a)(3) of the FAA provides for vacatur "where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy," 9 U.S.C. § 10(a)(3), "[c]ourts have interpreted section 10(a)(3) to mean that except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review." Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997); see also Rai 739 F. Supp. 2d at 371 ("This provision has been narrowly construed so as not to impinge on the broad discretion afforded to arbitrators to decide what evidence should be presented.") (citation omitted)); Fairchild Corp., 510 F. Supp. 2d at 286 ("a court may not conduct a reassessment of the evidence or vacate an arbitral award because the arbitrator's decision may run contrary to strong evidence favoring the party seeking to overturn the award."). "In making evidentiary determinations, an arbitrator need not follow all the niceties observed by the federal courts. . . . [A]lthough not required to hear all the evidence proffered by a party, an arbitrator must give each of the parties to the dispute an adequate opportunity to present its evidence and argument." Tempo Shain Corp., 120 F.3d at 20. Further, "manifest disregard of the evidence [is not a] proper ground for vacating an arbitrator's award. Vacatur is only permitted where the arbitrator's exclusion of evidence prejudices one of the parties." Rai, 739 F. Supp. 2d at 372 (alteration in original) (internal quotation marks and citations omitted).

Plaintiff repeatedly argues that the Arbitrator failed to consider facts and evidence supporting his case. Although plaintiff recites a litany of specific facts that the arbitrator "ignored,"[14] plaintiff most essentially argues that,

> Mr. Ruffino is well aware of the fact that the Respondent's decision to fire me is wrong, very weak and also lack of supporting facts, evidences and information. As a result, it is obvious that the only option he had, is to ignore and exclude the Claimant's substantiated facts, evidences and information in order to find in favor of the Respondent.

(Pl.'s Aff. ¶ 8.) To support his claims that Mr. Ruffino failed to consider or properly weigh the evidence, plaintiff asks the Court to reconsider a variety of facts related to the merits of plaintiff's discrimination claims. (See e.g., id. at ¶¶ 8, 9, 16.)

The record belies plaintiff's arguments that the arbitrator refused or excluded any evidence he presented. To the contrary, both during and after the arbitration hearing, plaintiff was given every opportunity to present his testimony, documentary evidence, and witnesses. (Arb. Tr. 8-9, 13-14, 16-17, 31-37, 56-57, 119-21.) Plaintiff chose not to call witnesses or present evidence other than his own testimony. "[D]isagreeing with the [arbitrator]'s assessment of the evidence and [his] conclusions is not sufficient to vacate an arbitration award under § 10(a)(3)." Polin, 103 F. Supp. 2d at 262; see also AmeriCredit Fin. Servs., Inc., 627 F. Supp. 2d at 101 (denying claim where party disagreed with weight arbitrator accorded the evidence).

5. "Any other misbehavior by which the rights of any party have been prejudiced"

Section 10(a)(3) also provides for vacatur for "any other misbehavior by which the rights of any party have been prejudiced." Again, plaintiff must demonstrate that "fundamental fairness" has been violated.

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[14] Specifically, plaintiff argues that the Arbitrator failed to consider the following: (1) defendant provided "confusing" information by submitting internal personnel documents referring to various Macy's entities (Pl.'s Aff. ¶ 4); (2) defendant's witnesses lied throughout their testimony (id. ¶¶ 5, 9, 16); (3) two witnesses did not have copies of the written complaint submitted by the customer involved in the 2004 confrontation with plaintiff (id. ¶ 6); (4) plaintiff did not sign the document presented to him when he was terminated because he did not admit calling the customer a piece of "shit" rather than a piece of "human waste" (id.); (5) plaintiff's supervisor testified that plaintiff had not been in trouble at work previously (id. ¶ 7); and (6) plaintiff's letter to Larry Mentzer (id. ¶ 15).

Plaintiff makes a variety of other allegations about the arbitrator's misconduct. He states that the arbitrator attempted to exclude his wife from the arbitration hearing because she knew of the alleged incidents of discrimination (Pl.'s Aff. ¶ 14); that plaintiff was intimidated by the arbitrator and opposing counsel (Pl.'s Opp'n ¶ 13); that the arbitrator provided his award without a copy of the transcript (id. ¶ 21); and that the need for vacatur is evidenced by the "mysterious and confusing nature of the Transcript and the inappropriate behavior of Arbitrator Ruffino" (id. ¶ 15). While plaintiff maintains that he could not receive a fair hearing outside of the Court, the Court repeatedly told plaintiff that arbitration was the proper forum for his claims. There is simply no evidence demonstrating that plaintiff was unfairly prejudiced during the arbitration process or that fundamental fairness was violated.

As plaintiff makes only conclusory allegations of fraud, bias, and refusal to hear the evidence, plaintiff fails to meet the stringent requirements for the Court to vacate an arbitration award, and his motion to vacate the arbitration award should therefore be denied.

B. Defendant's Motion to Confirm the Arbitration Award

"Upon the denial of a motion for vacatur, the Court must confirm an arbitration award." AmeriCredit Fin. Servs., Inc., 627 F. Supp. 2d at 102; see also 9 U.S.C. § 9 ("the court must grant [an order seeking confirmation] unless the award is vacated, modified, or corrected."). "The arbitrator's rationale for an award need not be explained, and the award should be confirmed if a ground for the arbitrator's decision can be inferred from the facts of the case. Only a barely colorable justification for the outcome reached by the arbitrator[] is necessary to confirm the award." D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006) (internal quotation marks and citations omitted); see also STMicroelectronics, N.V. v. Credit Suisse Secs. (USA) LLC, 648 F.3d 68, 74 (2d Cir. 2011).

Defendant's motion to confirm the arbitration award should be granted, as the outcome reached by the arbitrator more than meets the standard for confirmation.

II. Defendant's Motion to Dismiss Plaintiff's Discrimination Claims

To the extent that plaintiff seeks to raise his employment discrimination claims again in this action, defendant moves to dismiss plaintiff's state law claims for lack of subject matter jurisdiction under Rule 12(b)(1). Defendant also moves to dismiss plaintiff's federal and state discrimination claims for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

A. Standards of Review under Rule 12(b)(1) and 12(b)(6)

Under Rule 12(b)(1), "[a] case is properly dismissed for lack of subject matter jurisdiction . . . when the district court lacks the statutory or constitutional power to adjudicate it." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). "[T]he court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff, but jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." Morrison v. Nat'l Australia Bank Ltd., 547 F.3d 167, 170 (2d Cir. 2008). "The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." Aurecchione v. Schoolman Transp. Sys. Inc., 426 F.3d 635, 638 (2d Cir. 2005). In deciding the threshold jurisdictional question, the Court may rely on evidence outside the pleadings. Morrison, 547 F. 3d at 170.

On a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); see also Iqbal, 556 U.S. at 679. In deciding a motion to dismiss under Rule 12(b)(6), the Court may only consider, in addition to the complaint, documents attached to the pleadings, documents referenced in the complaint, documents that plaintiff relied on in bringing the

action which were in plaintiff's possession or of which plaintiff had knowledge, and matters of which judicial notice may be taken.[15] Halebian v. Berv, 644 F.3d 122, 131 n.7 (2d Cir. 2011) (quoting Chambers , 282 F.3d at 152-53).

The Court has the "obligation to construe pro se complaints liberally, even as [it] examine[s] such complaints for factual allegations sufficient to meet the plausibility requirement." Hill v. Curcione, 657 F.3d 116, 122 (2d Cir. 2011) (citation omitted). "It is well-established that the submissions of a *pro se* litigant must be construed liberally and interpreted 'to raise the strongest arguments that they suggest.'" Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)) (other citations omitted); see also Erickson v. Pardus, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.") (internal quotation marks and citation omitted).

B. Subject Matter Jurisdiction

Defendant argues that the Court lacks subject matter jurisdiction over plaintiff's city law claims based on the New York City Human Rights Law's election of remedies provision (Def.'s Mem. 7-8), which states that

> any person claiming to be aggrieved by an unlawful discriminatory practice as defined in chapter one of this title or by an act of discriminatory harassment or violence as set forth in chapter six of this title shall have a cause of action in any

[15] A Court may also take judicial notice of public records, including records of administrative proceedings and documents filed in plaintiff's previous lawsuit. See Mangiafico v. Blumenthal, 471 F.3d 391, 398 (2d Cir. 2006) (docket sheets); Colquitt v. Xerox Corp., No. 05-CV-6405, 2010 WL 3943734, at *1 (W.D.N.Y. Oct. 7, 2010) (documents from administrative proceedings); Lawrence v. Wilder Richman Secs. Corp., 359 F. Supp. 2d 161, 167 (D. Conn. 2005) (court records from related litigation). Thus, the Court shall consider the documents attached to plaintiff's complaint and the administrative and court records submitted by the parties, as well as two additional documents attached to plaintiff's opposition to defendant's motion—the transcript of the arbitration hearing (ECF Nos. 30-4–30-6), and the "Associate Acknowledgement" form dated August 30, 2002 (ECF No. 30-3 at 2), which were both referenced in plaintiff's complaint. Plaintiff also attaches the following documents to his opposition to defendant's motions: an affidavit from plaintiff's wife (ECF No. 30-1 at 2), an affidavit from the Macy's customer and family friend who states she witnessed plaintiff's 2004 confrontation (ECF No. 30-2 at 33), and a list of "additional claims for expenses and damages" from February 22, 2003 to the present (ECF No. 30-3 at 9). As these documents were not referenced in plaintiff's complaint and were created after the complaint was filed, the Court does not consider these documents in evaluating the parties' motions. Although defendant provided plaintiff with notice under Local Civil Rule 12.1 (ECF No. 24), the Court should not convert the instant motion to one for summary judgment.

> court of competent jurisdiction for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate, *unless such person has filed a complaint with the city commission on human rights* or with the state division of human rights with respect to such alleged unlawful discriminatory practice or act of discriminatory harassment or violence.

N.Y.C. Admin. Code § 8-502(a) (emphasis added). "This provision 'preclude[s] a claimant who has filed a complaint with any local human rights agency from pursuing the same claims in a judicial forum,'" unless any of the exceptions listed in the Code apply. Musaji v. Banco do Brasil, No. 10 Civ. 8541(RJH), 2011 WL 2507712, at *4 (S.D.N.Y. Jun. 21, 2011) (quoting Petrisch v. JP Morgan Chase, No. 08 Civ. 4479 (RJS), 2011 WL 167629, at *13 (S.D.N.Y. Jan. 11, 2011); see also N.Y.C. Admin. Code §§ 8-502(b), 8-113(a)-(c) (exceptions if claim dismissed by the City Commission on Human Rights for administrative convenience or lack of jurisdiction).

Plaintiff filed his charge with the New York City Commission on Human Rights on March 31, 2005. (CCHR Compl.) None of the three statutory exceptions to the election of remedies provision in § 8-502(b) apply to this case. Therefore, the Court lacks subject matter jurisdiction over plaintiff's city law claims, see Moodie v. Fed. Reserve Bank of N.Y., 58 F.3d 879, 883-84 (2d Cir. 1995), and those claims should be dismissed.[16] See Guardino v. Village of Scarsdale Police Dept., 815 F. Supp. 2d 643, 646 (S.D.N.Y. 2011) ("The [election of remedies] bar is jurisdictional, and the claims must be dismissed pursuant to Rule 12(b)(1), Fed. R. Civ. P.") (quotation omitted); Jackson v. NYS Dept. of Labor, 709 F. Supp. 2d 218, 224 (S.D.N.Y. 2010) (granting Rule 12(b)(1) motion based on election of remedies provision).

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[16] To the extent that plaintiff asserts any state law claims (see Pl.'s Opp'n ¶ 20), those claims would also be dismissed on election of remedies grounds. See York v. Assoc. of Bar of City of New York, 286 F.3d 122, 127 (2d Cir. 2002) ("the language of the [New York City Human Rights Law] is nearly identical to that of [the New York State Human Rights Law]" and "discussion of the latter applies equally to the former."); Musaji, 2011 WL 2507712, at *5 n.5. ("To the extent [plaintiff] also asserts state-law claims, N.Y. Exec. Law § 297(9) would operate to bar those claims from being heard by this Court as well.").

C. Res Judicata

Defendant argues that plaintiff's discrimination claims are barred by the doctrine of res judicata because the same claims were dismissed in the September 20, 2011 arbitration award.[17] Plaintiff disputes that his claims are barred and simply argues that "the elements" presented by defendants "are not related to the Plaintiff's Claims in nature." (Pl.'s Opp'n ¶ 21.) He also argues that he has authority to re-assert his discrimination claims based on this Court's November 26, 2007 Order granting him leave to re-file, as well as his right-to-sue letter from the EEOC. (Id. ¶¶ 5-6, 17-19, 26.)

Under res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94 (1980). "It is well settled that this doctrine serves to bar certain claims in federal court based on the binding effect of past determinations in arbitral proceedings." Pike v. Freeman, 266 F.3d 78, 90-91 (2d Cir. 2001); see also Fairchild Corp., 510 F. Supp. 2d at 294. To determine whether res judicata applies to preclude later litigation, a court must find that "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the same parties or those in privity with them; and (3) the claims asserted in the subsequent action were, or could have been, raised in the previous action." Monahan v. New York City Dep't of Corr., 214 F.3d 275, 285 (2d Cir. 2000) (citations omitted).

The adjudication of plaintiff's claims in the arbitration proceeding satisfies the requirements to bar plaintiff from re-asserting those claims here. The same parties were involved in the arbitration and the same claims that plaintiff raises here were adjudicated by the Arbitrator. (Arb. Award ¶¶ 3-5.) Finally, the arbitrator denied and dismissed all of plaintiff's claims on the merits. (Id. ¶¶ 16-17.) Although plaintiff is correct that this Court granted him leave to "re-file," the Court's Order was not authorization to re-file his original claims should he be unhappy with the outcome of the arbitration. The

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[17] "A court may dismiss a claim on res judicata or collateral estoppel grounds on a motion to dismiss." Mitra v. Global Fin. Corp., No. 09-CV-4387 (DLI)(RLM), 2010 WL 1529264, at *1 (E.D.N.Y. Apr. 15, 2010) (citing Salahuddin v. Jones, 992 F.2d 447, 449 (2d Cir. 1993)).

Court does not redetermine claims decided by the arbitration. Rather, courts routinely dismiss or stay an adversarial action when the parties' claims are submitted to arbitration. See, e.g., Guida v. Home Savings of Am., Inc., 793 F. Supp. 2d 611, 620 (E.D.N.Y. 2011) (citing Salim Oleochemicals v. M/V Shropshire, 278 F.3d 90, 92–93 (2d Cir. 2002). It is for the *arbitrator* to adjudicate the underlying claims; if an arbitration award is issued, the FAA only allows the parties to petition the Court to confirm, vacate, or modify that award.[18] See 9 U.S.C. §§ 9-11.

Accordingly, plaintiff's instant action is barred by the doctrine of res judicata and it should be dismissed on that ground. Although defendant raises several other grounds for dismissal under Rule 12(b)(6),[19] the Court need not reach those grounds here.

III. Conclusion

For the reasons set forth above, it is respectfully recommended that plaintiff's request to vacate the arbitration award should be denied, that defendant's motion to confirm the arbitration award should be granted, and that defendant's motion to dismiss plaintiff's complaint should be granted.

[18] "Even if the award were not confirmed, . . . it would still have preclusive effect." Batlle v. Assoc. for Women's Medicine, PLLC, No. 05 Civ. 8373(DC), 2006 WL 2642137, at *4 n.5 (S.D.N.Y. Sept. 15, 2006) (citing Jacobson v. Fireman's Fund Ins. Co., 111 F.3d 261, 267-68 (2d Cir. 1997) and quoting that Court: "res judicata and collateral estoppel apply to issues resolved by arbitration where there has been a final determination on the merits, notwithstanding a lack of confirmation of the award.").

[19] Defendant also raises that plaintiff's discrimination claims are time-barred and should be dismissed under the law of the case doctrine. (Def.'s Mem. 5-7.)

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court. Any request for an extension of time to file objections must be made within the fourteen-day period. Failure to file a timely objection to this Report generally waives any further judicial review. Marcella v. Capital Dist. Physicians' Health Plan, Inc., 293 F.3d 42, 46 (2d Cir. 2002); Small v. Sec'y of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); see Thomas v. Arn, 474 U.S. 140 (1985).

SO ORDERED.

S/Judge Lois Bloom

LOIS BLOOM
United States Magistrate Judge

Dated: August 17, 2012
Brooklyn, New York