

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Thurgood Marshall United
3 States Courthouse, 40 Foley Square, in the City of New York,
4 on the 1st day of July, two thousand sixteen.

5
6 **PRESENT: DENNIS JACOBS,**
7 **GUIDO CALABRESI,**
8 **REENA RAGGI,**
9 **Circuit Judges.**

10
11 - - - - -X
12 **AMARJIT S. VIRK, M.D.,**
13 **Plaintiff-Appellant,**

14
15 **-v.-** **15-513-cv**

16
17 **MAPLE-GATE ANESTHESIOLOGISTS, P.C. and**
18 **JON GRANDE, M.D.,**
19 **Defendants-Appellees.**

20 - - - - -X

21
22 **FOR APPELLANT:** GERALD T. WALSH, Zdarsky,
23 Sawicki & Agostinelli LLP,
24 Buffalo, New York.

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26 **FOR APPELLEES:** ROBERT C. WEISSFLACH, Harter
27 Secrest & Emery LLP, Buffalo,
28 New York.

1
2 Appeal from a judgment of the United States District
3 Court for the Western District of New York (Skretny, J.).
4

5 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
6 **AND DECREED** that the judgment of the district court be
7 **AFFIRMED IN PART** and **VACATED AND REMANDED IN PART** with
8 instructions to stay the action pending arbitration.
9

10 Plaintiff Dr. Amarjit S. Virk appeals from the judgment
11 of the United States District Court for the Western District
12 of New York (Skretny, J.), granting defendants' motion to
13 compel arbitration and dismissing Virk's complaint alleging
14 breach of contract and unlawful discrimination in connection
15 with Virk's termination from his employment. We assume the
16 parties' familiarity with the underlying facts, the
17 procedural history, and the issues presented for review.
18

19 Defendants' motion to compel arbitration sought either
20 a stay or dismissal. Now, however, they challenge appellate
21 jurisdiction on the ground that the district court lacked
22 discretion to dismiss and was instead required to stay the
23 action pending the outcome of arbitration, an order from
24 which no appeal would lie. See 9 U.S.C. § 16(b)(1)-(2).
25 They rely on Katz v. Cellco Partnership, 794 F.3d 341 (2d
26 Cir. 2015), which was decided after the conclusion of
27 proceedings below. Accordingly, defendants ask us to vacate
28 the dismissal of Virk's complaint and remand with
29 instructions to enter a stay, and to decline to reach the
30 substance of Virk's appeal.
31

32 We agree that the district court lacked discretion to
33 dismiss the case under Katz as well as the plain language of
34 9 U.S.C. § 3. See § 3 ("[T]he court . . . , upon being
35 satisfied that the issue involved in such suit or proceeding
36 is referable to arbitration under such an agreement, *shall*
37 on application of one of the parties stay the trial of the
38 action until such arbitration has been had"
39 (emphasis added)); see generally Katz, 794 F.3d 341 (holding
40 that district courts lack discretion to dismiss, rather than
41 stay, an action when all claims are referred to arbitration
42 and a stay requested by any party).¹ We therefore vacate

¹ Cf. Benzemann v. Citibank, N.A., 622 F. App'x 16, 18
(2d Cir. 2015) (summary order) (concluding that dismissal in
favor of arbitration was not error where no party requested
a stay).

1 the dismissal of the case and remand with instructions to
2 enter a stay pending the outcome of arbitration.²
3

4 However, because we have undoubted appellate
5 jurisdiction over the district court's final order
6 dismissing the case, see id. § 16(a)(3); Green Tree Fin.
7 Corp.-Ala. v. Randolph, 531 U.S. 79, 82, 85-89 (2000), we
8 may review the grant of the motion to compel arbitration, as
9 was done in Katz itself, 344 F.3d at 344 (affirming district
10 court's grant of motion to compel arbitration while vacating
11 and remanding dismissal of case).
12

13 We review de novo the grant of an order compelling
14 arbitration. Cohen v. UBS Fin. Servs., Inc., 799 F.3d 174,
15 177 (2d Cir. 2015). A court adjudicating a motion to compel
16 arbitration applies "a standard similar to that applicable
17 for a motion for summary judgment," considering whether
18 there is any "triable issue of fact" as to the making of an
19 agreement to arbitrate. Bensadoun v. Jobe-Riat, 316 F.3d
20 171, 175 (2d Cir. 2003); see 9 U.S.C. § 4 ("[U]pon being
21 satisfied that the making of the agreement for arbitration
22 or the failure to comply therewith is not in issue, the
23 court shall make an order directing the parties to proceed
24 to arbitration in accordance with the terms of the
25 agreement."). "In deciding whether a dispute is arbitrable,
26 we must answer two questions: (1) whether the parties agreed
27 to arbitrate, and, if so, (2) whether the scope of that
28 agreement encompasses the claims at issue." Holick v.
29 Cellular Sales of N.Y., LLC, 802 F.3d 391, 394 (2d Cir.
30 2015).³

² Virk points out that defendants did not file a cross-
appeal. Defendants likely lacked standing to cross-appeal,
having sought either a stay or dismissal. See Deposit Guar.
Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 333
(1980) ("A party who receives all that he has sought
generally is not aggrieved by the judgment affording the
relief and cannot appeal from it."). We have jurisdiction
to review the district court's judgment compelling
arbitration and dismissing Virk's claims, and we may
exercise our discretion to correct the error identified by
defendants. See Adair Bus Sales, Inc. v. Blue Bird Corp.,
25 F.3d 953, 955-56 (10th Cir. 1994).

³ The dicta of Ragone v. Atlantic Video at Manhattan
Center, 595 F.3d 115 (2d Cir. 2010), raises issues that do
not bear upon whether there is an agreement to arbitrate or

1 As the district court determined, Virk raised no issue
2 of fact regarding his agreement to arbitrate.⁴ Virk does
3 not dispute that he agreed to arbitrate future claims when
4 he signed the 2000 Employment Agreement; and he has shown no
5 evidence that would create a "substantial issue" as to
6 whether that agreement was terminated or superseded by
7 another. Almacenes Fernandez, S.A. v. Golodetz, 148 F.2d
8 625, 628 (2d Cir. 1945); see also Doctor's Assocs., Inc. v.
9 Jabush, 89 F.3d 109, 114 (2d Cir. 1996).

10
11 The 2000 Employment Agreement stated that its term
12 "shall continue until termination as provided in Article 9
13 of this Agreement," and any amendment was required to be "in
14 writing, signed by both parties." J.A. 9 ¶ 2; J.A. 4 ¶ 12.
15 If the agreement had been intended to terminate
16 automatically upon Virk attaining shareholder-employee
17 status, it could have stated as much--but it does not. And
18 the only written, signed amendment put into the record by
19 either party is an undated "Non-Compete, Non-Solicitation,
20 and Non-Disclosure Agreement," signed by Virk, that amends
21 any prior employee agreement but specifically limits its
22 superseding effect to non-compete, non-solicitation, and
23 non-disclosure provisions.⁵ J.A. 99. Virk submitted no
24 evidence to support his allegation that the unsigned 2005
25 draft employment agreement (which bears the name of a
26 different employee) ever went into effect with respect to
27 any shareholder-employee; and defendants submitted evidence
28 that it did not. His partial performance theory is flawed
29 because he relies on compensation he received in 2004--
30 before the 2005 draft agreement was circulated in August
31 2005. Finally, Virk has not demonstrated that the corporate
32 by-laws are, as he contends, incompatible with the 2000

the scope of such an agreement. Issues of arbitrability
related to Ragone are reserved for the arbitrator in the
first instance. See infra pages 5-7.

⁴ Virk does not challenge the district court's
determination that his claims are within the scope of the
arbitration clause.

⁵ The lack of an arbitration clause in the Non-Compete,
Non-Solicitation, and Non-Disclosure Agreement is
unsurprising, given that the arbitration clause in the 2000
Employment Agreement specifically excluded any claims
relating to "the Non-Competition During Employment Clause .
. . and the Covenant Not to Compete" in the agreement. J.A.
12 ¶ 16.

1 Employment Agreement such that the 2000 Employment Agreement
2 was silently terminated upon Virk's attaining shareholder
3 status.⁶
4

5 The parties to the 2000 Employment Agreement were Virk
6 and Maple-Gate Anesthesiologists, P.C. In district court
7 proceedings, Virk did not respond to defendants' argument
8 that the arbitration agreement also applies to Virk's claims
9 against the individual defendant because Dr. Grande's
10 potential "liability arises out of the same misconduct
11 charged against" the entity. See Roby v. Corp. of Lloyd's,
12 996 F.2d 1353, 1360 (2d Cir. 1993); see also, e.g.,
13 Hirschfeld Prods. v. Mirvish, 673 N.E.2d 1232, 1233 (N.Y.
14 1996). The district court compelled arbitration with
15 respect to all of Virk's claims. We will not consider
16 Virk's challenge to this ruling, which is made for the first
17 time in his appellate reply brief. See In re Nortel
18 Networks Corp. Sec. Litig., 539 F.3d 129, 132-33 (2d Cir.
19 2008) (arguments not presented to the district court are
20 considered forfeited); Norton v. Sam's Club, 145 F.3d 114,
21 117-18 (2d Cir. 1998) (issues raised for the first time in a
22 reply brief are not adequately preserved for review).
23

24 Finally, Virk relies on Ragone v. Atlantic Video at
25 Manhattan Center, 595 F.3d 115 (2d Cir. 2010), to argue that
26 the arbitration agreement is unenforceable as applied to his
27 Title VII and Americans with Disabilities Act claims because
28 administrative exhaustion of these claims could take longer
29 than the six-month limitations period set forth in the
30 arbitration clause. In dicta, Ragone supposed that it was
31 "at least possible that [the plaintiff] would be able to
32 demonstrate" that a 90-day limitations period and a fee-
33 shifting provision contained in the parties' arbitration
34 agreement "were incompatible with her ability to pursue her
35 Title VII claims in arbitration, and therefore void" under

⁶ For example, Virk contends that the termination provisions in the 2000 Employment Agreement are inconsistent with the by-laws. But he points to by-laws governing procedures for purchase or redemption of shares upon death or disqualification of shareholders. J.A. 147. These procedures are not by their terms inconsistent with a contractual clause providing for other contingencies. Furthermore, the termination provisions are materially similar to those contained in the draft 2005 agreement, which Virk argues applied during his 2005-2013 shareholder-employment. See J.A. 11 ¶ 9; J.A. 80 ¶ 12.

1 the Federal Arbitration Act's "effective vindication"
2 doctrine. Id. at 126; see Am. Express Co. v. Italian Colors
3 Rest., 133 S. Ct. 2304, 2310-11 (2013) (discussing
4 "'effective vindication' exception" to required enforcement
5 of arbitration agreements). The Ragone panel did not have
6 occasion to determine whether the plaintiff had in fact made
7 such a showing, because the defendants agreed to waive
8 enforcement of those provisions in arbitration.

9
10 Virk has not sustained his burden to show that he would
11 be unable to vindicate his statutory rights in arbitration.
12 Cf. Green Tree, 531 U.S. at 90-92 (a party seeking to
13 invalidate an arbitration agreement under effective
14 vindication doctrine on ground that arbitration would be
15 prohibitively expensive bears burden to show likelihood of
16 incurring such costs). First, it is not clear that Virk
17 would be required to exhaust administrative remedies prior
18 to arbitration. Title VII and the ADA provide that within
19 90 days of receipt of a right-to-sue letter, "a *civil action*
20 may be brought" 42 U.S.C. § 2000e-5(f)(1) (emphasis
21 added); see id. § 12117(a). It does not, by its terms,
22 require exhaustion before engaging in private arbitration.
23 And even if it would otherwise apply to an arbitration, the
24 district court explained that "an arbitration provision that
25 requires an employment discrimination claim to be arbitrated
26 before statutory exhaustion procedures could possibly be
27 completed is easily construed as reflecting the parties'
28 agreement to waive such requirement, as well as any defense
29 based on that requirement." Virk v. Maple-Gate
30 Anesthesiologists, P.C., 80 F. Supp. 3d 469, 480 (W.D.N.Y.
31 2015); see Sole Resort, S.A. de C.V. v. Allure Resorts
32 Mgmt., LLC, 450 F.3d 100, 104 (2d Cir. 2006) ("Arbitration
33 is entirely a creature of contract. The rules governing
34 arbitration, its location, the law the arbitrators will
35 apply, indeed, even which disputes are subject to
36 arbitration, are determined entirely by an agreement between
37 the parties."). Second, the arbitrator would seem to be the
38 appropriate party to determine these issues and related
39 ones, including: whether the exhaustion requirement applies;
40 whether the parties' contract should be construed to waive
41 that requirement; whether Virk's EEOC filing should be
42 considered to have "commenced" the arbitration under the
43 agreement, J.A. 12 ¶ 16; and whether the six-month statute
44 of limitations should be enforced (with respect to Virk's

1 federal discrimination claims or otherwise⁷). See Howsam v.
2 Dean Witter Reynolds, Inc., 537 U.S. 79, 84-85 (2002) (the
3 arbitrator should decide "procedural," "gateway" questions
4 of arbitrability such as applicability of time limitation).
5

6 For the foregoing reasons, and finding no merit in
7 Virk's other arguments, we hereby **AFFIRM** the district
8 court's judgment compelling arbitration, **VACATE** the district
9 court's dismissal of the action, and **REMAND** with
10 instructions to stay the action pending arbitration.
11

12 FOR THE COURT:
13 CATHERINE O'HAGAN WOLFE, CLERK
14
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16
17

⁷ Virk argues that one requirement of the 2000 Employment Agreement--that the employee abide by Kaleida Health policies and procedures--is inconsistent with the six-month limitations period because hearings held in accordance with those procedures may take a year or longer. Virk can raise such an argument in arbitration in response to defendants' stated intention to defend the arbitration on grounds of untimeliness. See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84-85 (2002).