UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-80467-CIV-GOODMAN
[CONSENT]

ENRIQUE COLLADO,

Plaintiff,

v.

J. & G. TRANSPORT, INC. et al.,

Defendants.

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ORDER DENYING DEFENDANTS' MOTION TO DISMISS COUNTS II AND III OR, IN THE ALTERNATIVE, MOTION TO COMPEL ARBITRATION

Defendants J & G Transport, Inc., Ivis Guzman, and Javier Guzman ("Defendants") filed a motion to dismiss counts II and III of the second amended complaint or, in the alternative, a motion to compel arbitration. [ECF No. 185]. Plaintiff Enrique Collado ("Plaintiff") filed a response in opposition to the motion [ECF No. 187], and Defendants filed a reply [ECF No. 187]. For the reasons outlined below, the Undersigned **denies** Defendants' motion.

Background

On June 21, 2014, Plaintiff filed an amended complaint alleging two claims under the Fair Labor Standards Act ("FLSA"): (1) unpaid overtime, and (2) minimum wage violations. [ECF No. 36]. In that amended complaint, Plaintiff alleged that Defendants required Plaintiff to sign an independent contractor agreement ("ICA") in order to work

for them and intentionally misclassified him as an "independent contractor" to evade FLSA requirements.

Plaintiff filed a motion for leave to file a second amended complaint, alleging that it was not until June 10, 2015, the day the discovery deadline expired, that Defendants produced discovery about the revenue J & G earned per haul. Plaintiff contends it was only then that he realized Defendants did not pay him pursuant to Addendum B of the ICA. [ECF No. 183]. Plaintiff alleged that Addendum B specifically explains how Plaintiff's compensation *would* be calculated, and it states that Defendants would pay the contractor (Plaintiff) 35% of the adjusted gross revenue received by Defendants for loads accepted and completed by contractor (Plaintiff), as set forth in the ICA.

Further, Plaintiff alleged that it was not until June 24, 2015 that Defendants first stated under oath that the percentage-based compensation amount in the ICA did **not** apply to Plaintiff because he hauled mulch and trash, and not sugar cane. Plaintiff contended that the Court should grant him leave to amend the complaint to include a breach of contract claim because, based on the new information, it was now apparent that Defendants did *not* pay Plaintiff's wages according to the ICA.[1]

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[1] Also, because Plaintiff revised the average hours worked, he sought to eliminate his previous count for minimum wages.

On the other hand, Defendants argued that the Court should not grant leave to amend because Plaintiff's counsel was aware of the potential breach of contract claim before the time to amend pleadings expired.

The Undersigned found that, before Plaintiff received the new information, there was no indication that Defendants could potentially be skimming Plaintiff's wages. Plaintiff could not have known about the potential breach of contract claim until the new evidence surfaced. Once it did, he immediately brought his request to amend the complaint to the Court. The Undersigned ultimately granted the motion for leave to amend the complaint.

In the Order granting the motion to seek leave, the Undersigned also discussed how Defendants were inconsistent with their position on whether the ICA applied and, at various times, switched positions about the applicability of the agreement.

In accordance with the Order, Plaintiff filed his second amended complaint alleging three claims: (1) unpaid overtime under the FLSA; (2) breach of contract against J & G; and (3) in the alternative, *quantum meruit* against J & G. [ECF No. 184]. Defendants then filed their answer and affirmative defenses to the second amended complaint [ECF No. 186] and the present motion [ECF No. 185].

<u>Applicable Legal Principles and Analysis</u>

Congress enacted the Federal Arbitration Act ("FAA") to "declare 'a national policy favoring arbitration of claims that parties contract to settle in that manner." *Vaden*

v. Discover Bank, 556 U.S. 49, 58 (2009) (quoting *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)). The Supreme Court has interpreted this to mean that courts must "rigorously enforce" arbitration agreements. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

However, courts will not compel arbitration when the party that seeks to arbitrate has waived its right to do so. *See In re Checking Account Overdraft Litig.*, 754 F.3d 1290, 1294 (11th Cir. 2014) ("Arbitration should not be compelled when the party who seeks to compel arbitration has waived that right.") (citation omitted).

Defendants admit that they waived their right to arbitrate Plaintiff's original unpaid overtime claim under the FLSA and they do not seek to dismiss this claim. But Defendants do request that the Court either (1) dismiss the breach of contract claim (Count II) and the *quantum meruit* claim (Count III) for lack of subject matter jurisdiction because the claims are subject to arbitration, or (2) stay the action as to those two claims and compel arbitration. They contend that the scope or theory of the case was unexpectedly changed and broadened for a second time[2] (in the second amended complaint) and that fairness dictates that they should be permitted to arbitrate the new claims. They also argue that, despite some similarities between the FLSA claim and the

[2] Defendants state that the scope of the action was previously broadened when a series of drivers who signed the same ICA that Plaintiff signed started opting in to the action. Defendants sought to exercise their option to elect arbitration for the opt-ins and filed a motion to dismiss or, in the alternative, a motion to compel arbitration [ECF No. 135]. The Court granted the motion in part and dismissed the claims of those opt-in plaintiffs that had signed the ICA with the arbitration provision. [ECF No. 162].

two new claims, there are significant differences, particularly related to damages and the elements of proof. Therefore, Defendants say, they are entitled to seek arbitration because their previously waived right to invoke that remedy has been revived by the second amended complaint.

On the other hand, Plaintiff contends that a waived arbitration right should not be revived when the amended complaint does not unexpectedly expand the litigation's scope. He argues that the arbitration right should be revived only in limited circumstances -- where a defendant could not have foreseen that the litigation would have been expanded.

When a defendant waives his right to arbitrate and a plaintiff later files an amended complaint, that defendant's waiver of the arbitration right is *not* automatically nullified by that newly filed amended complaint. *See Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1202 (11th Cir. 2011) (citing to *Gilmore v. Shearson/Am. Express Inc.*, 811 F.2d 108, 112 (2d Cir. 1987), overruled on other grounds by *McDonnell Douglas Fin. Corp. v. Penn. Power & Light Co.*, 849 F.2d 761 (2d Cir. 1988)).

"[C]ourts will permit the defendant to rescind his earlier waiver, and revive his right to compel arbitration, **only if** it is *shown* that the amended complaint **unexpectedly** changes the scope or theory of the plaintiff's claims." *Id.* (emphasis added); *see also Plaintiff's S'holders Corp. v. S. Farm Bureau Life Ins. Co.*, 486 F. App'x 786, 790 (11th Cir. 2012). This is because, "when a plaintiff files an amended pleading that

unexpectedly changes the shape of the case, the case **may** be so altered that the defendant should be relieved from its waiver." *Krinsk*, 654 F.3d at 1203 (emphasis added; inner quotation marks and alterations omitted) (citing *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995) (stating that, when the shape of the case is altered by unexpected developments during discovery or otherwise, it "**might** become obvious that the party should be relieved from its waiver and arbitration allowed to proceed") (emphasis added)).

When a case is unexpectedly altered, fairness dictates that a prior arbitration waiver be nullified and the right to compel arbitration revived. *See Plaintiff's S'holders*, 486 F. App'x at 790 ("where a plaintiff files an amended complaint that 'unexpectedly changes the scope or theory of the plaintiff's claims,' fairness dictates that a defendant's prior waiver of arbitration be nullified and the right to compel arbitration revived.") (quoting *Krinsk*, 654 F.3d at 1202).

The filing of an amended complaint, however, does **not** rejuvenate a defendant's waived arbitration right if it "**does not unexpectedly** expand the litigation's scope." *Id.* (emphasis added); *see also Plaintiff's S'holders Corp.*, 486 F. App'x at 790-91 ("Where, however, an amended complaint only makes minor changes to the factual allegations or legal claims previously asserted, a defendant's right to arbitrate, if waived, will not be rejuvenated by the filing of the pleading.")

Here, Plaintiff's second amended complaint, which raised the new claims of breach of contract and *quantum meruit*, did alter the theory of the case. The ultimate questions, however, are whether Defendants demonstrated that the change was *unexpected* and whether fairness compels revival of a waived arbitration right.

As previously explained, Plaintiff immediately brought his request to amend his complaint upon discovering the potential breach of contract claim. Plaintiff's awareness of this potential claim was delayed because (1) Defendants produced the discovery about J & G's revenue per haul on the last day of discovery, which allowed Plaintiff to finally calculate what he should have been paid if being paid pursuant to Addendum B of the ICA, and (2) Defendants changed their position on how they paid Plaintiff and belatedly stated under oath that he was not paid pursuant to Addendum B because he did not haul the requisite materials covered by that contract document.

Regardless of whether Defendants intentionally or negligently withheld this information that changed how the facts could apply to this case, it is not *Plaintiff's* fault that Defendants altered positions on the ICA's applicability to Plaintiff and took this long to disclose J & G's revenue information. It would be unfair to Plaintiff to now send these new claims to arbitration (and keep the other claim in this Court) when he could not have, in good faith, raised them before.

In a similar vein, it now comes to light that Defendants have again alternated their chosen stance in another aspect of the case. Here, Defendants request that the

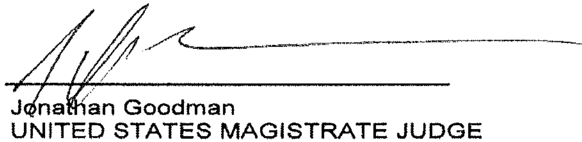
Court dismiss the breach of contract and *quantum meruit* claims because they *unexpectedly* changed the scope and theory of the case. But Defendants previously argued that the Undersigned should not permit Plaintiff to amend the complaint to add a breach of contract claim because Plaintiff's counsel was **aware** of this potential claim, allegedly evidenced by the allegations made in the earlier complaint, and because Plaintiff purportedly explored the issue at Defendant Javier Guzman's deposition in July 2014. Because Defendants previously contended that the potential breach of contract claim was evident to Plaintiff even from the earlier complaint, it is difficult for the Undersigned to believe that **Defendants** could not and did not foresee the new claims.

Moreover, there is room for discretion here. *See Krinsk*, 654 F.3d at 1203 (citing *Cabinetree*, 50 F.3d at 391). Defendants contend that, notwithstanding the similarities, there are significant differences, between the two new claims and the existing claim, particularly related to damages and the elements of proof. Defendants are correct that these claims provide for different damages and elements of proof. Nevertheless, even if the differences are significant, if Defendants are the very reason why Plaintiff did not and could not previously allege the breach of contract and *quantum meruit* claims sooner, then it would be unfair to Plaintiff to dismiss those claims now.

Ultimately, the Undersigned finds that despite any changes in the theory of the case and differences in the damages and elements of proof, the equities favor Plaintiff.

Defendants have failed to show how the new claims of breach of contract and *quantum meruit* **unexpectedly** changed the scope or theory of the case. Defendants' delay in providing discovery and their switching of positions on how Plaintiff was paid directly caused Plaintiff's need to amend the complaint at the time he did. This change in the case was not unexpected. Accordingly, the Undersigned **denies** Defendant's request to dismiss Count II and III of the second amended complaint or to compel arbitration.[3]

DONE AND ORDERED in Chambers at Miami, Florida, October 6, 2015.



Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
All Counsel of Record

[3] The Court will soon issue a notice for a telephone hearing so that the parties and the Court can schedule a special set trial date agreeable to all. In addition, Defendants' argument that Plaintiff cannot take additional discovery because of the pendency of the motion to dismiss is now outdated and academic. Plaintiff may pursue discovery on the two new claims, and Defendants may likewise seek discovery.