SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. Marcy L. Kahn PART 50K
Justice

STEPHEN KELLY, M.D.

Petitioner,

- v -

OXFORD HEALTH PLANS (NY), INC.

Respondent.

INDEX NO. 602189/07

MOTION DATE 7/2/07

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion to STAY ARBITRATION

(CPLR § 7503 [b])

	Papers Numbered
Notice of Motion/Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2, 3, 4
Replying Affidavits	5, 6, 7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: PT.50K MAR 19 2008

ENTER: _____ J.S.C.

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CIVIL TERM: IAS PART 50K

----------x

STEPHEN KELLY, M.D.,

Petitioner,

-against-

OXFORD HEALTH PLANS (NY), INC.,

Respondent.

DECISION AND ORDER ON MOTION TO STAY ARBITRATION

Index No. 602189/07

----------x

MARCY L. KAHN, J.:

In this Article 78 proceeding, petitioner Stephen Kelly ("Kelly" or "petitioner") seeks an order and judgment pursuant to section 7503(b) of the Civil Practice Law and Rules ("CPLR") permanently staying the arbitration between him and respondent Oxford Health Plans (NY), Inc. ("Oxford" or "respondent"). By decision and order dated January 14, 2008, this court granted petitioner's related application in Stephen Kelly, M.D. v. Oxford Health Plans (NY), Inc., Index No. 602457/07 (the "related proceeding"), seeking a temporary stay of the same arbitration pending resolution of the instant petition. Oxford has opposed this petition. For the reasons stated below, the petition for a permanent stay of the subject arbitration is denied, and the temporary restraining order is dissolved.

I. FACTUAL AND PROCEDURAL BACKGROUND

The underlying dispute between the parties arises from the allegations by Oxford, a healthcare insurer, that Kelly, a

physician, employed improper practices in billing the insurer for his services in violation of the parties' contractual agreement. Oxford claims that on or about June 27, 1998, petitioner, a physician, signed a primary care physician agreement with Oxford[1] (the "1998 Primary Agreement") (Petition ["Pet."], Exh. A) to provide medical services to Oxford patients, for which Kelly would receive compensation from Oxford. Oxford further alleges that petitioner entered into two consultant physician agreements with Oxford, one of which was signed by petitioner on August 19, 1997 (the "1997 CP Agreement")(Affidavit of Maria Pilarinos dated August 2, 2007 ["Pilarinos Affid."], Exh. A) and the other of which was signed by petitioner on June 30, 1998 (the "1998 CP Agreement") (Pilarinos Affid., Exh. D). In identical language, the 1998 Primary Agreement, 1997 CP Agreement and 1998 CP Agreement each provide for disputes arising under their respective terms to be settled through arbitration, by inclusion of the following arbitration clause:

> Arbitration. No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New York, pursuant to the rules of the American Arbitration Association with one arbitrator.

(Pet., Exh. A; Pilarinos Affid., Exhs. A and D).

---

[1] The 1998 Primary Agreement was signed on behalf of Oxford on or about July 17, 1998.

Oxford further alleges that in 2005, petitioner entered into an agreement with United HealthCare Insurance Company ("United") which constituted an amendment to the 1998 Primary Agreement, and which reflected Oxford's affiliation with United (the "United Amendment"). (Pet., Exh. A). Oxford also claims that, for the period from July 1, 2001 through June 30, 2006, petitioner repeatedly violated the 1998 Primary Agreement and the United Amendment by assigning incorrect codes for medical services provided to his patients, thereby overstating the nature of the services he had provided, resulting in overpayments to him by Oxford. (Id., ¶ 15).

Claiming that both the 1998 Primary Agreement and the United Amendment provide for the submission of any disputes with petitioner to binding arbitration, Oxford filed a demand for arbitration (the "demand") and statement of claims with the American Arbitration Association ("AAA") on or about June 13, 2007. (Pet., Exh. A). Oxford annexed to its statement of claims copies of the 1998 Primary Agreement and of the United Amendment, but did not include copies of the 1997 CP Agreement or the 1998 CP Agreement.

On or about June 14, 2007, Oxford served the demand for arbitration on Kelly. By letter dated June 27, 2007, Kelly notified the AAA that he denied Oxford's allegations and would seek a stay of arbitration. (Letter of Stephen Kelly, M.D., dated June 27, 2007 ["Kelly June 27 letter"], attached to

Affirm. of Melissa F. Savage, Esq. in Opposition to Order to Show Cause and Temporary Restraining Order, dated Aug. 2, 2007 ["Aff. in Opp."], as Exh. B). In that letter, Kelly stated:

> I am filing a Petition to Stay the Arbitration in New York State Supreme Court, and I expect to be successful with this petition. In addition, I deny this claim.
>
> . . . I think that it would be more appropriate for the A.A.A. to hold off on any further work on this case, until it is decided if there is going to be an arbitration.

(Kelly June 27 letter).

On July 2, 2007, eighteen days after service of the demand, petitioner, pro se, commenced this proceeding by filing a notice of petition and verified petition seeking a permanent stay of the arbitration.

On July 20, 2007, Kelly participated in a conference call with the AAA and Oxford's counsel in which the desired qualifications of an arbitrator were discussed. (Aff. in Opp., Exh. C). On July 23, 2007, Kelly sent an email message to Ms. Paula Yelland of the AAA with additional comments concerning his preferred criteria for selection of an arbitrator. (Id.).

Apparently realizing that filing a petition for a permanent stay of arbitration would not afford him any interim relief, on July 26, 2007, petitioner, again proceeding pro se, commenced the related proceeding by order to show cause seeking a temporary stay of the arbitration pending resolution of petitioner's application for permanent relief in this proceeding. On that date, this court issued the order to show

cause and temporarily stayed the arbitration pending resolution of the application for the temporary restraining order in the related proceeding.

On August 3, 2007, Oxford appeared and submitted papers in opposition to both proceedings, and oral argument was heard.[2] During the argument, petitioner maintained that the signature on the 1998 Primary Agreement was not his, notwithstanding his office address having apparently been stamped beneath the signature, and that accordingly, the demand for arbitration was not predicated on any agreement by him to enter into arbitration. Apparently conceding that Kelly had not signed the 1998 Primary Agreement, Oxford responded that the two CP Agreements, although not submitted to the arbitrator, were sufficient to demonstrate Kelly's intent to arbitrate disputes between him and Oxford, given his longstanding relationship with the insurer. On August 16, 2007, petitioner, now represented by counsel, submitted a reply affirmation, also in both proceedings. On September 27, 2007, petitioner submitted an amended reply affirmation and on October 15, 2007, Oxford submitted a reply affirmation in opposition.[3]

---

[2] The parties subsequently agreed to a continuance of the temporary stay pending the court's resolution of the application for preliminary relief.

[3] The submissions of both parties subsequent to the initial petition in this matter addressed both this and the related proceeding.

arbitration is stayed where [the FAA] would otherwise permit it to go forward." (Smith Barney, Harris Upham & Co. v. Luckie, supra, 85 NY2d at 206, quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, supra, 489 US at 479). Indeed, the primary purpose of the FAA is to ensure "that private agreements to arbitrate are enforced according to their terms." (Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, supra, 489 US at 479).

In the instant case, the 1998 Primary Agreement, the 1997 CP Agreement and the 1998 CP Agreement each includes a choice of law provision stating: "This Agreement shall be governed in all respects by New York law". (Pet., Exh. A; Pilarinos Affid., Exhs. A and D). Therefore, the choice of law provision of each agreement is applicable to the agreement in its entirety, as well as to its enforcement. Thus this court must look to New York law to determine the enforceability of the arbitration clauses. (Smith Barney, Harris Upham & Co. v. Luckie, supra).

B. New York Standard for Stay of Arbitration

Under New York law, to be entitled to a stay of arbitration, a party must satisfy four preconditions:

> [A] party who has not participated in the arbitration . . . may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.

(CPLR §7503[b]).[4] Each of these requirements will be examined in turn.

1. Did Petitioner Participate in the Arbitration?

Petitioner alleges that his June 27 letter to the AAA denying Oxford's claim and expressing his intent to seek a stay of arbitration demonstrated his objection to participating in the arbitration proceeding, expressed his view that it should not proceed until the stay application was resolved and did not constitute a waiver of his right to a stay of the arbitration. (Reply Affirm. of Lawrence Kobak, Esq., dated August 14, 2007, Exh. 1). Oxford contends that Kelly's June 27 letter together with his July 20 and 23 participation in telephonic and email discussions regarding the parameters for the selection of arbitrators constituted participation sufficient to waive his right to avoid the arbitration. (Mem. in Opp. at 14-15). In support of its waiver argument, Oxford relies upon Morfopoulos v. Lundquist, 191 AD2d 197 (1st Dept. 1993). That case is distinguishable from the instant one, however.

In Morfopoulos, the Appellate Division, First Department affirmed the trial court's denial of a stay of arbitration, where the party seeking to avoid arbitration submitted a notice of appearance in the arbitration; participated in the selection

---

[4] CPLR §7502(b) provides that the same limitations of time that would apply to claims made in a court of law may also be made with respect to claims submitted to arbitration.

of the arbitrator; agreed to have the issue of arbitrability determined by the arbitrator; sought an extension of time to submit its brief; and waited until the date on which the submission was due before seeking a stay. (Morfopoulos v. Lundquist, supra, 191 AD2d at 198). Here, by contrast, after receiving the demand on June 14, Kelly made clear in his June 27 letter that he intended to seek a stay of the arbitration. On July 2, Kelly carried out his stated intention by commencing this proceeding. It was not until July 20, fully 18 days after this proceeding was commenced, that Kelly participated in a conference call with the AAA and Oxford's counsel, followed by a single response email message to the AAA on July 23, in which he merely opined that the chosen arbitrator should be free from apparent bias. At that time, no arbitrator had been selected and no arbitration hearing had been scheduled or held. Unlike the petitioners in Morfopoulos, therefore, Kelly took no affirmative steps to further the arbitration process. Rather, Kelly acted as swiftly as he could, without benefit of counsel, to stay the arbitration while preserving his rights in the event that his application for a stay were denied. Under these circumstances, it cannot be said that Kelly waived his right to contest the arbitration by having participated in it.

2. Was There a Valid Agreement to Arbitrate?

The next factor to be considered is whether the parties entered into a valid agreement to arbitrate. Petitioner

strenuously argues that he did not sign the 1998 Primary Agreement with Oxford, the sole agreement submitted to AAA containing an arbitration clause, and therefore is not bound by it. Oxford initially urged that the signature on the 1998 Primary Agreement, although clearly not matching those on the CP Agreements, was that of the petitioner (Memorandum of Law in Opposition to Order to Show Cause and Temporary Restraining Order ["Mem. in Opp."] at 5-6), but all but abandoned that position at oral argument. Respondent nevertheless maintains that because petitioner, by his own admission, signed the 1997 CP Agreement and 1998 CP Agreement, he is bound to arbitration in his dealings with the company. Kelly responds that as the 1998 Primary Agreement, which was the only agreement submitted to AAA containing an arbitration clause, was not signed by him, Oxford's claim of arbitrability of the dispute in the demand is without a legal basis. (Amended Reply Affirm. of Jeanne Anne Norton, Esq., dated September 27, 2007 ["Amended Reply"], at ¶7). Oxford answers that the 1997 CP Agreement and 1998 CP Agreement could easily be submitted to AAA as supplemental filings, thereby curing any defect in Oxford's initial submission of its statements of claims.

a. Common Law Rule

New York law is well-settled that courts will decline to infer an intention to arbitrate:

It has long been the rule in this State that the parties to

> a commercial transaction 'will not be held to have chosen arbitration as the forum for the resolution of their disputes in the absence of an express, unequivocal agreement to that effect; absent such an explicit commitment neither party may be compelled to arbitrate' . . . . . The reason for the requirement, quite simply, is that by agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent . . . .

(Marlene Indus. Corp. [Carnac Textiles], 45 NY2d 327, 333-334 [1978][citations omitted]).

Notwithstanding this requirement, courts retain jurisdiction over the enforcement of arbitration agreements, even absent a signed contract expressly agreeing to arbitration, so long as "it is evident from the totality of circumstances that the parties intended to be bound by documents containing arbitration obligations." (Flores v. Lower East Side Serv. Center, Inc., 4 NY3d 363, 370 [2005]). Thus, the absence of a party's signature on a contract does not necessarily vitiate the enforceability of its arbitration clause.

In God's Battalion of Prayer Pentecostal Church v. Miele Associates, LLP, 6 NY3d 371 (2006), the Court of Appeals held that the arbitration clause of a standard form of contract between two parties was enforceable notwithstanding the fact that neither party had actually signed the contract. (Id. at 374). The Court found that a signature on such an agreement was not necessary, so long as it was evident that the party intended to be bound by its terms. (Id.; see Crawford v. Merrill Lynch,

Pierce, Fenner and Smith, 35 NY2d 291, 299 [1974]). In God's Battalion, although neither party had signed the agreement in question, both parties had operated under its terms. (Id. at 373). In addition, the party seeking to disclaim the validity of the agreement and its arbitration clause had advanced its own breach of contract claims under the agreement, thereby acknowledging its validity. (Id. at 374).

Even where a party signs only one of multiple, identical contract forms with admitted knowledge that the form included an arbitration clause, that party is bound to arbitrate all disputes arising out all of the contracts. (Ernest J. Michel & Co., Inc. v. Anabasis Trade, Inc., 50 NY2d 951, 952 [1980]). In Michel, the Court of Appeals held that a party who signed one confirmation of order form and retained six other identical, but unsigned forms was bound by the arbitration clauses of all seven forms. (Id.).

By contrast, in Marlene Indus. Corp. (Carnac Textiles), supra, the Court of Appeals held a stay of arbitration appropriate, where the parties had exchanged contradictory contract forms, neither party had admitted to having signed the other's form and there was no evidence that the contract recipient had known of or agreed to the arbitration clause.

In this case, the 1998 Primary Agreement is a standard form of contract, not specially negotiated by the parties, which is identical in all material respects to the 1997 and 1998 CP

Agreements, as to which Kelly admits being bound. And Kelly acted in conformity with the terms of each of these agreements, by providing services to patients insured by Oxford and submitting claims to Oxford for payment for those services, and by accepting payment from Oxford accordingly. In like fashion, when Oxford requested that petitioner provide additional detail as to his claims, he did so. His behavior was thus consistent with all three of these materially indistinguishable agreements.

The instant case is closer to Michel than to Marlene, in that here the forms are materially the same, both parties signed at least two of the three agreements in question, and petitioner was aware that the agreements included arbitration clauses and demonstrated his assent to them by signing the two subsequent agreements. By signing two standard form contracts including arbitration clauses identical to that of the 1998 Primary Agreement, petitioner agreed to submit all disputes under all three contracts to arbitration.

Accordingly, in this case, the totality of circumstances clearly demonstrates that Kelly entered into the 1998 Primary Agreement and intended to be bound to arbitrate any recovery claims advanced by Oxford under any of the three contracts.

b. Procedural Considerations

Nevertheless, Kelly dismisses the applicability of the 1997 and 1998 CP Agreements to this proceeding on the ground that neither contract was submitted to the AAA. Oxford avers that,

were the court to lift the temporary stay of arbitration imposed in the related proceeding, Oxford would immediately file an amended claim with the AAA pursuant to AAA Commercial Arbitration Rule R-6, which provides in pertinent part:

> After filing of a claim, if either party desires to make any new or different claim or counterclaim, it shall be made in writing and filed with the AAA. . . .

(AAA Commercial Arbitration Rule R-6).

In practice, therefore, Rule R-6 would permit the filing of the same claim based upon the 1997 and 1998 CP Agreements as an amendment of the demand as of right. The amendment, moreover, would be merely a ministerial matter, where, as here, it is undisputed that Kelly agreed to arbitration when he signed the 1997 and 1998 CP Agreements with Oxford, and it is clear that those agreements were effective throughout the entire period covered by Oxford's underlying claims, namely, July 1, 2001 through June 30, 2006.[5]

Accordingly, both applying settled common law principles and viewing this dispute in practical procedural terms, a valid agreement exists between the parties to this proceeding to arbitrate the disputed claims set forth in Oxford's demand for arbitration.

---

[5] Each of the consulting physician agreements is effective for a one-year term commencing on the date countersigned by Oxford, and each is automatically renewed from year-to-year thereafter. (Pilarinos Affid., Exhs. A and D).

3. Did Respondent Comply with the Agreement?

The third of the preconditions to a stay under CPLR §7503 (b) is whether Oxford has complied with the agreement.

Kelly makes no colorable claim that Oxford has failed to comply with its contractual obligations. Indeed, by submitting its claims against Kelly for breach of contract to arbitration, Oxford has adhered both to the terms of the arbitration clauses of the 1998 Primary Agreement, 1997 CP Agreement and 1998 CP Agreement, which require that Oxford submit "all disputes" arising under the agreement "to final and binding arbitration in New York" before a single AAA arbitrator (Pet., Exh. A; Pilarinos Affid., Exhs. A and D), and to the common law principle that a claim of breach of a contract that includes an arbitration clause is arbitrable. (See I.D.J. Fabrics v. Dan River Inc., 81 AD2d 525, 526 [1st Dept. 1981], aff'd, 56 NY2d 755 [1982]).

4. Are Respondent's Claims Time-Barred?

The final inquiry under the statute is whether Oxford's underlying claims for recovery claims against Kelly are time-barred.

Oxford claims that it is for the arbitrator, and not the court, to consider Kelly's defenses to Oxford's claims, including any statute of limitations bar. (Mem. in Opp. at 15). Kelly contends that the 1998 Primary Agreement is, by its own

terms, "governed in all respects by New York law" and that, under New York law, it is for the court, and not the arbitrator, to decide the statute of limitations issue. (Amended Reply at 7-8).

Where the agreement includes a choice of law provision stating that New York law governs "in all respects," which would include the agreement and its enforcement, it is for the courts, and not the arbitrator, to decide the applicability of statute of limitations issues to arbitration claims. (See Smith Barney, Harris Upham & Co. v. Luckie, supra, 85 NY2d at 202; CPLR §7502 [b]; cf. Edward D. Jones & Co. v. American Stock Exchange, 22 AD3d 319, 320 [1st Dept. 2005][arbitrators determine issues of timeliness in absence of express New York choice-of-law provision in arbitration agreement]). Accordingly, this court will determine the statute of limitations issue, applying New York law.

The parties disagree, however, as to which New York statute of limitations governs. Petitioner contends that the issue is subject to the recently-enacted limitations provision of Insurance Law §3224-b, which establishes a statute of limitations for recovery of overpayment claims by healthcare plans of 24 months from the date of payment to the physician. Oxford maintains that section, effective January 1, 2007, has only prospective application and does not govern its claims for overpayments made prior to that date. Oxford argues that the

six-year statute of limitations for contract disputes found in CPLR §213(2) applies to the dispute. Alternatively, Oxford asserts that its claims are relieved from the twenty-four-month limitations period, because by continually upcoding his claims for payment submitted to Oxford, Kelly engaged in a consistent course of conduct sufficient to constitute "abusive billing," thereby triggering an exception to the limitations period of section 3224-b(b)(2). Submitting a detailed response on this point, Kelly denies that he engaged in abusive billing. He claims that his decisions as to the appropriate code assignments for services to his patients were a matter of subjective, professional judgment, offering examples and furnishing this court with his own expert's review of his coding practices, and urges that the underlying controversy is merely a coding dispute, subject to the twenty-four-month limitations period. (Amended Reply, passim., and Exh.2).

Oxford also argues that its claims are exempt from the twenty-four-month limitations period pursuant to Insurance Law §3224-b(b)(3), which created a savings clause for actions to recover overpayments made prior to January 1, 2007, where the insurer has provided notice to the physician of its intended recovery efforts prior to the statute's January 1, 2007 effective date. The parties vigorously dispute whether Kelly received such timely notice (Kobak Reply ¶9; Amended Reply at 2; Reply Affirm. of Melissa F. Savage, Esq. in Opposition to Order

to Show Cause and Temporary Restraining Order, dated Oct. 15, 2007 ["Reply Affirm. in Opp."], ¶17 and Exh. B), with Oxford maintaining that it served the notice on Kelly on November 13, 2006 and Kelly countering that no notice was received until January 23, 2007. Kelly further argues that the fact that Oxford's notice was served after the effective date of section 3224-b brings the parties' dispute within its terms.

a. Insurance Law §3224-b

In 2006, the Legislature enacted Insurance Law §3224-b in an effort to resolve difficulties faced by physicians in dealing with health insurance plans. Among the areas marked for redress was the problem of "excessive demands for refunds of claims paid several years in the past [and] the lack of meaningful notice to physicians of refund claims . . . ." (Senate Introducer's Memo. in Support, S. 8417 [June 27, 2006]). The statute shortened the limitations period for recovery by health plans of their overpayments to providers to 24 months from six years, and states in pertinent part:

> A health plan shall not initiate overpayment recovery efforts more than twenty-four months after the original payment was received by a physician. Provided, however, that no time limit shall apply to overpayment recovery efforts which are: (1) based on a reasonable belief of fraud or other intentional misconduct, or abusive billing . . . . For purposes of this paragraph, "abusive billing" shall be defined as a billing practice which results in the submission of claims that are not consistent with sound fiscal, business, or medical practices and at such frequency and for such a period of time as to reflect a

consistent course of conduct.

(Ins. L. §3224-b[b][2]). The statute by its terms "shall take effect January 1, 2007 and shall apply to physician health care claims submitted for payment after such date." (2006 N.Y. Laws c. 551, §4).

The conclusion which emerges from the language quoted above is that the limitations provisions of section 3224-b(b)(2) apply only to claims for payment (and, a fortiori, requests for reimbursement of overpayment) made after January 1, 2007. Although this court is required to determine issues involving statutory limitations of time as a threshold issue where an application to stay arbitration is sought (CPLR §7503[b]; County of Rockland [Primiano Constr. Co.], 51 NY2d 1 [1980]), in this case, there is no need for it to apply, construe or interpret subsection 3224-b(b)(2), since the claims by Kelly for payment which are at issue here were submitted during the period from July 1, 2001 through June 30, 2006, antedating the effective date of both the statute's shorter limitations period and the exceptions to it found in that subsection. Subsection 3224-b(b)(2), therefore, is entirely inapplicable to this dispute, and it is unnecessary for this court to determine whether Oxford can avail itself of the exception for abusive claims.[6]

---

[6] Kelly's argument that the service of the notice by Oxford after January 1, 2007 triggered the statute's application is unavailing. The statute applies to physician health care claims submitted for

In addition to the limitations provision, the statute also contains the following savings clause and proviso:

> Nothing in this section shall be deemed to limit an insurer's right to pursue recovery of overpayments that occurred prior to the effective date of this section where the insurer has provided the physician with notice of recovery efforts prior to the effective date of this section.

(Ins. L. §3224-b[b][3]).

Oxford and Kelly vigorously disagree as to whether Oxford has satisfied the notice proviso of this subsection. The determination of that issue may, in fact, be of great import in the resolution of the parties' dispute. With respect to arbitrable claims, however, "it is not for the courts . . . to determine the merits of the dispute." (United Federation of Teachers, Local 2, AFT, AFL-CIO v. Board of Educ. of the City of N.Y., 1 NY3d 72, 82 [2003] [quoting Board of Educ. Lakeland Cent. School Dist. of Shrub Oak v. Bari, 51 NY2d 894, 895 (1980)]). Here, subsection (3) is a savings clause which creates a right of action for pre-statute claims under pre-statute law, with the proviso that the right of action will be conditioned upon the insurer's notification of the provider of the recoupment effort prior to January 1, 2007. Whether Oxford

---

payment after that date. Oxford's claims relate to 41 dates of service between July 1, 2001 and June 30, 2006, all of which were submitted for payment, and indeed, paid by the insurer, prior to November 13, 2006. (See Aff. in Opp., Exh. A; Mem. Of Law in Opp. to Order to Show Cause and Temporary Restraining Order dated August 2, 2007 at 3-4; Pilarinos Aff., ¶¶ 10-15).

provided the notice in a manner sufficient to preserve its right of action against Kelly under that subsection is not a statute of limitations issue within the jurisdiction of this court to resolve. The limitations provisions of the statute are found in subsection (2); the savings clause in subsection (3) addresses whether a right of action exists, and goes directly to the merits of the controversy. As such, its application is for the arbitrator to determine. (See United Federation of Teachers, Local 2, AFT, AFL-CIO v. Board of Educ. of the City of N.Y., supra). Accordingly, CPLR §7503(b) does not confer jurisdiction on this court to address the issue of the propriety of service of the notice of intended recoupment under Insurance Law §3224-b(b)(3), and that question is referred to the arbitral authority.

b. CPLR §213(2)

As the particular limitations provisions of section 3224-b do not apply to these pre-2007 claims, the court must examine Oxford's claims with reference to the six-year limitations period for actions upon contractual liabilities provided by CPLR §213(2). Oxford's earliest claim is dated July 1, 2001 and is thus within the six-year statutory period preceding the filing of its arbitration demand on June 13, 2007. Thus, respondent's claims are not time-barred under CPLR §213(2).

Accordingly, because respondent's arbitration claim was made pursuant to valid arbitration agreements between it and

petitioner, with which respondent has complied, and because the claims are not time-barred, there is no legal basis for this court to grant Kelly's application to stay the arbitration.

III. CONCLUSION

For all the foregoing reasons, petitioner's application for a permanent stay of the arbitration proceeding commenced by respondent on June 13, 2007 is denied. The temporary restraining order issued by this court in the related proceeding on January 14, 2008 is hereby dissolved.

The foregoing constitutes the decision, order and judgment of this court.

E N T E R:

Marcy L. Kahn, J.S.C.

HON. MARCY KAHN

Dated: New York, New York
March 19, 2008

FILED MAR 19 2008

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room