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

PRESENT: HON. EILEEN BRANSTEN PART 3

Index Number : 604083/2001
CHENG, ALBERT M.D.
VS.
OXFORD HEALTH PLANS
SEQUENCE NUMBER : 004
VACATE

INDEX NO. 604083/01
MOTION DATE 5/6/09
MOTION SEQ. NO. 004
MOTION CAL. NO.

n this motion to/for

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PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
NOV 05 2009
NEW YORK
COUNTY CLERK'S OFFICE

OTION IS DECIDED IN ACCORDANCE WITH
E ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11/4/09

HON. EILEEN BRANSTEN J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

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ALBERT CHENG, M.D., EDGAR BORRERO, M.D., and ROBERT SCHER, M.D., on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

OXFORD HEALTH PLANS, INC. and OXFORD HEALTH PLANS OF NEW YORK, INC.,

Defendants.

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Index No. 604803/01
Motion Date: 5/6/09
Motion Seq. No.: 004

BRANSTEN, J.:

Defendants Oxford Health Plans LLC (formerly Oxford Health Plans, Inc.) and Oxford Health Plans (NY), Inc. (together, "Oxford"), move for an order, pursuant to CPLR 7511 (b) and Section 10 of the Federal Arbitration Act ("FAA"), 9 USC § 1, *et seq.*, vacating a September 25, 2008 arbitration award (the "Award") in the arbitration entitled *Robert Scher, M.D. on behalf of himself, and those similarly situated v Oxford Health Plans, Inc. and Oxford Health Plans of New York, Inc.* (AAA No. 11 193 00548 05) (the "Arbitration").

BACKGROUND

Plaintiffs are all physicians. Each entered into a contract and became a "participating physician" with Oxford, agreeing to provide medically necessary healthcare services to its plan members in exchange for payments at specified rates. Plaintiffs commenced this action against Oxford on their own behalf and on behalf of other participating physicians in

Oxford's physician network, alleging that Oxford is engaged in a pattern of improper and deceptive conduct and business practices in a scheme to deny, impede, delay and reduce reimbursement owed to the participating physicians, in violation of General Business Law § 349, Public Health Law § 4406-c, and Insurance Law § 3224-a (a), and in breach of contract (*see generally, Cheng v Oxford Health Plans, Inc.*, 15 AD3d 207, 207 - 208 [1st Dept 2005]).

Oxford moved to dismiss the action or to compel arbitration on the ground that the parties' agreements contained arbitration clauses. This court (Moskowitz, J.) enforced the arbitration provisions and stayed the case.

On March 8, 2005, Scher commenced the Arbitration by filing his demand for class arbitration ("Demand") with the American Arbitration Association ("AAA"), on behalf of himself and physicians similarly situated who had contracts with Oxford. In the Demand, Scher alleges that Oxford engaged in a pattern of deceptive conduct and improper business practices that resulted in it denying, impeding, delaying and reducing lawful reimbursement to participating physicians who rendered medically necessary healthcare services to its members.

On March 7, 2006, a AAA panel (the "Panel") concluded that class arbitration was permitted based on the applicable arbitration clauses but made no ruling as to whether a class should actually be certified in the Arbitration. Oxford then moved to vacate that decision.

This court (Moskowitz, J) determined that the Panel's decision was in "manifest disregard of the law" and vacated it. On appeal, however, the Appellate Division, First Department reversed and reinstated the determination, holding that "the 'manifest disregard' standard rarely results in vacatur because it is limited to those 'rare occurrences of apparent 'egregious impropriety' on the part of the arbitrators, which requires 'more than a simple error in law or a failure by the arbitrators to understand or apply it;' in other words, it must be 'more than an erroneous interpretation of the law'" (*Cheng v Oxford Health Plans, Inc.*, 45 AD3d 356 [1st Dept 2007] [citations omitted]).

The parties next engaged in discovery pertaining to class certification. On May 8, 2008, Scher moved for class certification of the Arbitration. The matter was fully briefed and submitted to the Panel, together with extensive evidence to support the parties' respective positions. Oral argument was held in July 2008.

The Panel issued the Award on September 25, 2008. The 24-page Award contains analysis of the facts as well as each of the requirements for class certification. In the lengthy Award, the Panel considered each factor as well as the parties' contentions and concluded that all of the criteria listed in Rule 4(a) and (b) of the Class Arbitration Rules were satisfied. The Award, among other things, provides:

> "1. The class shall include:
>
> "All physicians who were participating physicians in Oxford's physician networks in the State of New York at any time during the period from August

> 15, 1995 through the date of this [Award], whose contracts with Oxford contain or contained arbitration clauses that do not expressly prohibit participation in class arbitrations.
>
> "2. The claims to be determined on behalf of the class are whether Oxford, through improper implementation and application of its computerized automated program for adjudicating claims, has denied and reduced claims of class members using such practices as bundling, downcoding, ignoring modifiers, edits, late payments, and withholding interest on late payments...
>
> * * *
>
> "5. Dr. Robert Scher shall be the class representative.

(Award at 21 -23).

Oxford now moves to vacate the Award, urging that the Panel exceeded its authority and manifestly disregarded the law by, among other things: (a) concluding that Scher established typicality; (b) deciding that he is an adequate class representative; (c) finding that he established predominance of common issues; (d) certifying class claims for state statutory violations that do not support a private cause of action; (e) failing to render a final and definite award; (f) failing to follow the AAA rules governing class notice; and (g) depriving Oxford of its due process right to defend itself.

Scher counters that the unanimous Award is well-reasoned and supported by extensive submissions and argument by both sides. He contends that the Panel carefully considered the parties' arguments and evidence and concluded that all of the prerequisites for class treatment set forth in Rules 4(a) and 4(b) of the AAA's Supplementary Rules for Class

Arbitration ("Class Arbitration Rules") were satisfied.[1] Scher argues that Oxford has failed to demonstrate that the Panel exceeded its powers or acted in manifest disregard of the law.

ANALYSIS

The law is well settled. Judicial "review of arbitration awards is extremely limited" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006]).

The parties agree that the FAA applies to this controversy. Section 10 provides that a court cannot vacate an award unless: (a) it was procured by corruption, fraud, or undue means; (b) there was evident partiality or corruption in the arbitrators, or either of them; (c) 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 (d) the

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[1] These rules require the Panel to determine class-arbitrability after examining whether: (a) the class is so numerous that joinder of separate arbitrations is impracticable (numerosity); (b) there are questions of law or fact common to the class (commonality); (c) the claims of the representative party are typical of the claims of the class (typicality); (d) the representative party will fairly and adequately protect the interests of the class (adequacy of class representative); (e) counsel will fairly and adequately protect the interests of the class (adequacy of counsel); and (f) each member of the class entered into an agreement containing an arbitration clause that is substantially similar to the signed by the representative party (similar arbitration agreements). Additionally, the Panel must find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members (predominance), and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy (superiority)."

arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

In addition to these four grounds, the Second Circuit Court of Appeals authorizes vacatur of an arbitration award when it is "in manifest disregard of the law" based on a finding that the arbitrators knew of a governing legal principle and ignored or refused to apply it and the ignored law was well defined, explicit and clearly applicable to the dispute (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d, at 480).[2] The manifest disregard standard is "severely limited" and is "a doctrine of last resort limited to the rare occurrences of apparent 'egregious impropriety' on the part of the arbitrators, 'where none of the provisions of the FAA apply'" (*id.*, at 480-481 [citation omitted]). A party moving to vacate an award on that ground must meet a "high standard" as confirmation is appropriate "as long as there is barely colorable justification" for the outcome (*Uram v Garfinkel*, 16 AD3d 347, 348 [1st Dept 2005], *lv denied* 5 NY3d 717). The party seeking vacatur bears the burden of

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[2] The continued viability of the "manifest disregard" standard has been called into doubt by the United States Supreme Court in *Hall Street Assocs., L.L.C. v Mattel, Inc.* (552 US 576 [2008] [statutory provisions of the FAA are exclusive grounds for vacatur]). As a result, many Federal Circuit Courts have abandoned the manifest disregard standard (*see e.g. Citigroup Global Markets, Inc. v Bacon*, 562 F3d 349 [5th Cir 2009]; *see also Global Reinsurance Corp. of America v Argonaut Ins. Co.*, 634 F Supp 2d 342 [SD NY 2009]). The Second Circuit, however, continues to recognize manifest disregard of the law as a valid ground to vacate an arbitration award (*see Stolt-Nielsen SA v AnimalFeeds Intl. Corp.*, 548 F3d 85 [2d Cir 2008]), and the Supreme Court has granted *certiorari* to review its *Stolt-Nielsen* decision (__US __, 129 S Ct 2793 [2009]).

proving manifest disregard of the law (*Westerbeke Corp. v Daihatsu Motor Co. Ltd*, 304 F3d 200, 209 [2d Cir 2002]).

Earlier, in addressing the Panel's decision that class arbitration was permissible, the Appellate Division, First Department explained:

> "the panel's majority did not state certain law as controlling and then deliberately ignore it, but instead, after analyzing case law offered by both sides (including *Flynn v Labor Ready*, 6 AD3d 492 [2004] and *Harris v Shearson Hayden Stone*, 82 AD2d 87 [1981], *affd* 56 NY2d 627 [1982]), concluded that defendants could not successfully demonstrate that New York law prohibited class arbitrations under this 1998 agreement that predated *Green Tree Financial Corp. v Bazzle* (539 US 444 [2003]). [Supreme Court] did point to case law prohibiting class arbitrations in 1998, but even if this had constituted an error or mistake of law on the part of the majority arbitrators, such an error does not reach the level of manifest disregard to justify vacatur"

(*Cheng v Oxford Health Plans, Inc.*, 45 AD3d at 357-358 [citations omitted]; *see also Dortheimer v Safir*, 49 AD3d 338 [1st Dept 2008] [nothing in lump-sum award suggested that arbitrators deliberately disregarded Labor Law issues regarding unpaid wages]; *Stolthaven Perth Amboy, Inc. v JLM Marketing, Inc.*, 47 AD3d 414 [1st Dept 2008]).

Applying the manifest disregard standard here, Oxford has not established that the Panel knew of a governing legal principle and ignored or refused to apply it (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471; *see also Larsen & Toubro Ltd. v Millenium Mgt., Inc.*, 37 AD3d 213 [1st Dept 2007]; *Matter of Merrill Lynch, Pierce, Fenner & Smith Inc. v Graef*, 34 AD3d 220 [1st Dept 2006]). Nor has there been any showing that the Panel

exceeded its authority or that the Award was improper in any other respect that would support vacatur under the FAA. Indeed, review of the Award confirms that the Panel carefully considered each of Oxford's objections and nonetheless concluded that class certification was warranted. Oxford has made no showing that the Panel flouted any governing law. At most, it argues that the Panel got the law or facts wrong. Such an error, however, is not sufficiently egregious to rise to the level of manifest disregard and does not support vacatur.

Accordingly, it is ORDERED that Oxford's motion to vacate is DENIED and the Award is confirmed (*see* CPLR 7511 [c] [upon denial of motion to vacate, arbitration award is to be confirmed]).

This constitutes the Decision and Order of the Court.

Dated: New York, New York
November 4, 2009

ENTER

Hon. Eileen Bransten