SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

STEWART N. ALTMAN and EMILY ALTMAN,

Plaintiffs,

-against-

MOTION SEQ. NO.: 003, 004
MOTION DATE: 9/25/09

ERIC D. DONNENFELD, M.D., OPHTHALMIC CONSULTANTS of LONG ISLAND and TLC LASER EYE CENTER (NORTHEST, INC.),

INDEX NO.: 12110/07

Defendants.

The following papers having been read on the motion (numbered 1-5):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3
Notice of Cross Motion.....4
Reply Affirmation.....5

Defendants, Eric D. Donnenfeld, M.D. ("Donnenfeld") and Ophthalmic Consultants of Long Island ("OCLI"), move for an Order of this Court: pursuant to CPLR 3025[c], granting them leave to amend their Verified Answer and assert the affirmative defense that any and all disputes arising out plaintiff, Stewart Altman's treatment by defendants are to be exclusively and finally resolved by binding arbitration; pursuant to CPLR 2201, issuing an immediate stay of this action in the Supreme Court, Nassau County; pursuant to CPLR 7503[a], directing that this matter be referred to arbitration.

Defendant, TLC Laser Eye Center (Northeast), Inc. ("TLC"), also moves for an Order of this Court, pursuant to CPLR 2201, issuing an immediate stay of this action and pursuant to CPLR 7503(a) directing that this matter be referred to

arbitration, in the event this Court grants Donnenfeld's motion to direct this matter to arbitration.

The motions are **denied** in their entirety.

This medical malpractice and negligence action arises of a bilateral LASIK surgery performed on the plaintiff, Stewart N. Altman, on December 20, 2004, by defendant Eric D. Donnenfeld, M.D. In connection with his eye operation, plaintiff, Stewart Altman, voluntarily executed a binding Arbitration Agreement which contained clear and unambiguous language that any dispute that he had arising out of his diagnosis, treatment or services rendered by TLC Laser Eye Center or his surgeon, Donnenfeld, would be resolved exclusively and finally by binding arbitration. Specifically, the arbitration agreement states as follows:

> *Arbitration Agreement:* Arbitration is the resolution of a dispute by an impartial third person whose decision is binding on the parties. We have found that resolving disputes by arbitration is a quick and efficient alternative to the court system. As a result, we request that all patients receiving services at TLC sign this agreement. By signing this Arbitration Agreement and consenting to treatment, you agree that:
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> - Any dispute you have arising out of the diagnosis, treatment and services you received by TLC or your surgeon or personal eye care provider, including treatment and services you received before the date of this Arbitration Agreement, or the applicability and scope of this Arbitration Agreement will be resolved exclusively and finally by binding arbitration except for (a) judicial review of the arbitration proceedings or (b) claims within the jurisdictional limit of small claims court.

- This Arbitration Agreement binds all parties whose claims may arise out of, or are related to, treatment or services provided by TLC or your surgeon or personal eye care provider, including any claims of your spouse or heirs.

- The arbitration proceedings will be administered by the National Arbitration Forum, an independent arbitration organization, under its Code of Procedure then in effect which can be found at www.arbitration-forum.com or by calling 1-800-474-2371.

- This Arbitration Agreement is governed by the Federal Arbitration Act.

- If any provision of this Arbitration Agreement is held invalid or unenforceable, the remaining provisions remain in full force and effect and will not be affected by the invalidity of such provision.

The undersigned agrees that he/she waives his/her right to a trial in court for any future malpractice claim he/she may have against TLC, your surgeon and/or personal eye care provider.

At his oral examination before trial, plaintiff testified that above noted Arbitration Agreement contained in his Vision Correction Surgery Informed Consent form required a separate and an additional signature and that he executed said Arbitration Agreement in connection with his December 20, 2004 bilateral LASIK surgery.

Plaintiffs, Stewart and Emily Altman, commenced this action by filing a

Summons with Notice on July 11, 2007. On November 2, 2007, defendants Donnenfeld and OCLI served a Notice of Appearance and Demand for Complaint and in response to said demand, on December 10, 2007, plaintiffs subsequently filed and served a Verified Complaint. Thereafter on or about January 14, 2008, defendants Donnenfeld and OCLI served their Verified Answer and on January 30, 2008, co-defendant TLC served its Verified Answer. Notably, defendants Donnenfeld and OCLI asserted five affirmative defenses within their answers but did not assert a single affirmative defense related in any way to the Arbitration Agreement. Similarly, defendant TLC asserted seven affirmative defenses in its Answer, none of which asserted any right to arbitration in the matter. Further, notably, along with the service of their respective Verified Answers, defendants Donnenfeld and OCLI also included extensive discovery demands including the following: Demand for Bill of Particulars, Notice to Take Deposition upon Oral Examination, Demand for Authorizations, Notice for Discovery and Inspection of Documents, Notice of Discovery and Inspection of Statements, Demand for CPLR §2103(e) Information, Demand for Discovery of Expert Witness, Demand for Names of Witness, Notice Pursuant to CPLR §2103(B)(5) and Notice for Discovery and Inspection of Photographic Evidence.

Thereafter, on May 7, 2008, defendants Donnenfeld and OCLI, sought affirmative relief from this Court by serving a Notice of Motion, pursuant to CPLR §§3124 and 3042[c], seeking to compel and enforce discovery in this matter.

On May 14, 2008, plaintiffs served a Verified Bill of Particulars with respect to Donnenfeld and OCLI. On June 6, 2008, all parties by their respective attorneys appeared and participated in the Preliminary Conference, at which there was no mention of the reservation of any alleged right to arbitration contained in said Order.

On November 6, 2008, the parties appeared before this Court and had extensive discussions and argument regarding outstanding items of discovery in this matter. The directives of this Court were memorialized in writing by counsel for defendants, Donnenfeld and OCLI. Again, absent from said memorialization is any mention of any right to arbitration.

On December 5, 2008, plaintiff Stewart Altman appeared for his examination before trial. Said deposition was suspended however upon testimony concerning the Arbitration Agreement which forms the basis for defendants' instant motion. Notably, by letter dated February 3, 2009, counsel for defendant, TLC, expressly waived any alleged right to arbitration in this matter. Instead, in it's cross motion, TLC seeks an Order directing an immediate stay of this action in this Court and directing this entire matter and all parties be referred to arbitration in the event that this Court grants Donnenfeld's motion to direct this matter for arbitration.

Since the circumstances surrounding plaintiff's execution of the Arbitration Agreement were disclosed at his December 5, 2008 examination before trial, discovery in this action has ceased. Indeed, the last two compliance conferences attended by counsel on January 15, 2009 and February 26, 2009 were specifically adjourned due to the arbitration issue and to permit the defendants to file the instant motion.

A party will not be compelled to arbitrate unless the evidence establishes a clear, explicit and unequivocal agreement to resolve disputes through arbitration (*God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 6 NY3d 371 [2006]; *Riverside Capital Advisors, Inc. v. Winchester Global Trust Co ., Ltd.*, 21 AD3d 887 [2nd Dept. 2005]). Arbitration clauses, as contractual provisions, will be enforced in accordance with their terms (*Primavera Laboratories, Inc. v. Avon Products, Inc.*, 297 AD2d 505 [1st Dept. 2002]). An

agreement that is clear and unambiguous will be enforced in accordance with its terms (*Greenfield v. Philles Records, Inc.*, 98 NY2d 562 [2002]). The court must determine the intent of the parties from the language of the agreement (*Greenfield v. Philles Records, Inc.*, supra). Terms of a contract are to be interpreted in accordance with their plain meaning (*Computer Associates International, Inc. v. U.S. Balloon Manufacturing Co., Inc.*, 10 AD3d 699 [2nd Dept. 2004]); *Tikotzky v. New York City Transit Auth.*, 286 AD2d 493 [2nd Dept. 2001]). The Court is to give "... practical interpretation to the language employed and the parties reasonable expectations" (*Slamow v. Del Col*, 174 AD2d 725, 726 [2nd Dept.1991]), *aff'd.*, 79 NY2d 1016 [1992]; *see also, AFBT-II, LLC v. Country Village on Mooney Pond, Inc.*, 305 AD2d 340 [2nd Dept. 2003]; *Del Vecchio v. Cohen*, 299 AD2d 426 [2nd Dept. 2001]).

The arbitration clause in this agreement provides that the parties "will" resolve any dispute arising out of the "diagnosis, treatment and services" rendered by TLC or the surgeon "exclusively and finally" by binding arbitration. Thus, arbitration is mandatory. Such an interpretation is in accordance with the language of the agreement.

However, and "[a]lthough arbitration is favored as a matter of public policy" (*TNS Holdings, Inc. v. MKI Securities Corp.*, 92 NY2d 335-339 [1998]), "[l]ike contract rights generally, a right to arbitration may be modified, waived or abandoned" (*Sherrill v. Grayco Builders, Inc.*, 64 NY2d 261, 272 [1985]; *Zimmerman v. Cohen*, 236 NY 15, 19 [1923]). More particularly, "[a] determination that a party has waived the right to arbitrate requires a finding that the party engaged in litigation to such an extent as to manifest[ ] a preference 'clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration' * * * and thereby elected to litigate rather than arbitrate" (*Les Constructions Beauce Atlas, Inc. v. Tocci Bldg. Corp. of New York,*

Inc., 294 AD2d 409, 410 [2nd Dept. 2002], *quoting Sherrill v. Grayco Builders, Inc.*, supra at 272; *Zimmerman v.. Cohen*, supra at 19).

A waiver may result where the claims sought to be redressed in a "judicial action or proceeding * * *embrace the same issues as those contained in the claim for which arbitration is sought" (*Great Neck Assocs. v. Continental Cas. Co.*, 192 AD2d 976, 979 [3rd Dept. 1993]; *see also Kobak v. Schultz*, 117 AD2d 714, 715 [2nd Dept. 1986]). Conversely, litigation of separate and distinct claims even if involving overlapping factual issues will not constitute a waiver of the right to arbitrate (*Denihan v. Denihan*, 34 NY2d 307, 310-311 [1974]); *Court v. MacWeeney*, 195 AD2d 381, 382 [1st Dept. 1993]).

In this case, defendants' active, zealous and affirmative participation in the subject litigation without any reservation or assertion of their right to arbitration in this matter constitutes a waiver and forfeiture of their right to arbitrate. The facts in this case show that the parties elected to settle the subject dispute, not by arbitration, but in a court of law. Specifically, defendants' active participation in this litigation is evidenced by the following: the serving of verified answers containing at least five affirmative defenses without asserting any affirmative defense relating to the arbitration agreement; serving extensive discovery demands pursuant to CPLR Article 31; affirmatively requesting judicial intervention by making a motion seeking to compel discovery; participating in a pretrial conference before this Court; attending further court compliance conferences and procuring a subsequent order for discovery; commencing the examination before trial of the plaintiff; and otherwise participating in the litigation for over 17 months without any demand for arbitration, notice of intention to arbitrate or motion to compel same. Throughout all of these events, defendants never reserved or asserted any alleged right to arbitration in this matter.

This Arbitration Agreement was in existence long before this action was

commenced and was obviously part of the defendants' own medical records since the plaintiff advanced allegations of malpractice and negligence by the defendants. Further, it cannot be overlooked by this Court that the defendants litigated and defended this case on the merits long before plaintiff was presented for examination before trial at which point the issue of the arbitration agreement was uncovered. Defendants have clearly availed themselves of the fruits of litigation, to wit: CPLR Article 31 disclosure, and have defended the case on the merits in the instant litigation.

Although "[n]ot every foray into the courthouse effects a waiver of the right to arbitrate" (*Sherrill v. Grayco Builders, Inc.*, supra at 273), it has also been observed that "[t]he courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration" (*Sherrill v. Grayco Builders, Inc.*, supra at 274, *quoting from, De Sapio v. Kohlmeyer*, 35 NY2d 402, 406 [1974]). Here, defendants have effectively chosen to litigate their allegations relating to malpractice and negligence in a single action. The significant effort devoted to the litigation of this matter prior to the service of the plaintiffs' demand for arbitration (*Cf.*, *Johanson Resources Inc. v. La Vallee*, 271 AD2d 832, 836 [3rd Dept. 2000]), is inconsistent with the presently asserted argument that the parties are now obligated to arbitrate their claims (*Sherrill v. Grayco Builders, Inc.*, supra at 272; *Figueroa v. Flatbush Women's Services, Inc.*, supra).

Therefore, and in light of defendants' unequivocal waiver and forfeiture of their right to arbitration, defendants', Donnenfeld and OCLI's motion for leave to amend their verified answers to assert an affirmative defense of arbitration is **denied**. Accordingly, that part of defendants' motion which seeks an order pursuant to CPLR 2201 issuing a stay of this action and an order, pursuant to CPLR 7503(a) "directing that this matter be referred to arbitration" is **denied**.

Insofar as TLC's cross motion for contingent relief requesting an order, pursuant to CPLR 2201, issuing a stay of this action and pursuant to CPLR 7503(a) directing that the matter be referred to arbitration only in the event that this court grants defendants', Donnenfeld and OCLI's motion to compel arbitration in this matter, said cross motion is **denied** in its entirety. Further, as stated above, it cannot be overlooked that counsel for TLC, in a letter dated February 3, 2009, independently and expressly waived any right to arbitration in this matter and that this waiver was not made contingent or conditional upon any right of defendants' Donnenfeld and OCLI. For this additional reason, defendant, TLC's cross motion is **denied** in its entirety.

This Constitutes the Order of the Court.

Dated: December 3, 2009

ENTER:

J.S.C.