Matter of Kelly v Laser Jet
2015 NY Slip Op 30381(U)
March 18, 2015
Supreme Court, New York County
Docket Number: 157120/2014
Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

In the Matter of the Application for an Order Staying Arbitration Between,

KAREN KELLY,

Petitioner,

-against-

LASER JET and VOILA SKINSPA CORP.,

Respondents.

INDEX NUMBER 157120/2014
MOTION DATE 02-18-2015
MOTION SEQ. NO. 002
MOTION CAL. NO.

The following papers, numbered 1 to 11 were read on this petition to/for Art. 75 relief and cross-motion to consolidate and dismiss:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits cross motion	5 - 8, 9 - 10
Replying Affidavits	11

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered and adjudged that the petition pursuant to CPLR §7503, seeking to permanently stay the arbitration sought in the second demand for arbitration dated September 11, 2014, is granted. Respondents' cross-motion pursuant to CPLR §602, seeking to consolidate this proceeding with an action pending in Supreme Court, Kings County, to dismiss this proceeding and the consolidated action pursuant to §3211[a], [1],[2],[7] and pursuant to CPLR §7503 to stay this proceeding, setting down a pre-arbitration discovery schedule, is denied.

Petitioner alleges that on August 12, 2013, she sustained severe burns on her legs while undergoing cosmetic laser treatment at Voila Skinspa , Corp., located at 352 Seventh Avenue, Suite 735, New York, New York. Laser Jet is the parent corporation of Voila Skinspa, Corp.. On March 12, 2014, Petitioner commenced a personal injury action in Supreme Court, Kings County against the Respondents. On June 8, 2014, the Respondents interposed an Answer in the Kings County action. On July 7, 2014, Petitioner received a letter, sent by regular mail from counsel for the Respondents. The letter dated July 1, 2014 demands arbitration of Petitioner's claims.

On July 21, 2014, Petitioner commenced a proceeding under Motion Sequence 001, seeking to permanently stay the arbitration sought by the July 1, 2014 demand. Respondents served a second demand for arbitration dated September 11, 2014, attaching the arbitration agreement sent by certified mail, in an attempt to cure the defects in the first demand for arbitration.

Pursuant CPLR §7503, petitioner seeks to permanently stay the arbitration sought by the second demand for arbitration because it is untimely, improper, and duplicative, and barred by res judicata. The petition also seeks a determination that the second demand for arbitration is void because there is no valid and enforceable arbitration

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

agreement and any purported agreement is void against public policy. Alternatively, the petition seeks a temporary stay of arbitration and a hearing to determine the threshold issues. In the event a valid agreement to arbitrate is found to exist Petitioner seeks an Order temporarily staying the arbitration until pre-arbitration discovery can be completed and Respondents submit to an Examination under Oath.

Petitioner argues that this Court's determination on the petition to stay the first demand for arbitration would have a res judicata effect on the second demand for arbitration. CPLR §7503[c], does not bar re-service of a demand for arbitration and res judicata will not apply when the first demand for arbitration is found to be a legal nullity (Matter of Wasau Ins. Co. v. Predestin, 114 A.D. 2d 900, 495 N.Y.S. 2d 74 [2nd Dept., 1985]). The first demand for arbitration in this action was found to be a legal nullity and Respondents' re-service of the demand for arbitration is not barred by res judicata.

CPLR §7503, directs arbitration where there is a valid agreement to arbitrate. It is for the Court to determine whether a valid agreement to arbitrate exists (Village of Chester v. Local 455 Intern. Brotherhood of Teamsters, 118 A.D. 3d 1012, 988 N.Y.S. 2d 652 [2nd Dept., 2014]). Arbitration agreements are strongly favored as a means of resolving disputes and should be interfered with as little as possible (Matter of Smith Barney Shearson v. Sacharow, 91 N.Y. 2d 39, 689 N.E. 2d 884, 666 N.Y.S. 2d 990 [1997]). Parties will not be compelled to arbitrate absent a clear, explicit and unequivocal agreement to arbitrate (Matter of Waldron [Goddess], 61 N.Y. 2d 181, 461 N.E. 2d 273, 473 N.Y.S. 2d 136 [1984]). Arbitration provisions in an agreement will not be enforced unless it is clear the parties intended to be bound by the agreement (Fiveco Inc. v. Haber, 11 N.Y. 3d 140, 893 N.E. 2d 807, 863 N.Y.S. 2d 391 [2008] and Gods Battalion of Prayer Pentecostal Church Inc. v. Miele Associates, LLP, 6 N.Y.3d 37, N.E. 2d 1265,812 N.Y.S. 2d 435 [2006]).

Petitioner seeks to permanently stay arbitration for lack of a valid and enforceable arbitration agreement. Petitioner argues the agreement is a contract of adhesion because it was deceptively included with medical forms and there was a lack of equality in the ability to bargain. She also argues the arbitration agreement is unconscionable and the Respondents cannot establish that there was an express agreement to arbitrate because the arbitration agreement was not drafted for the specific situation or business conducted by Respondents, or for an average layperson to be able to read and understand. Petitioner contends the agreement fails to directly or unequivocally set forth the intentions of the parties to submit to arbitration.

An arbitration agreement may be stricken if it is an adhesion contract or is unconscionable. An adhesion contract exists when a party is forced to sign due to high pressure tactics, or deceptive language together with a lack of equality in the ability to bargain (Morris v. Snappy Car Rental, 84 N.Y. 2d 21, 637 N.E. 2d 253,614 N.Y.S. 2d 362 [1994] and Brower v. Gateway 2000, Inc., 246 A.D. 2d 246, 676 N.Y.S. 2d 569 [1st Dept., 1998]). An arbitration agreement may be found unconscionable upon consideration of grossly unreasonable terms that only favor one party to the agreement, the size and commercial setting of the transaction, the experience and education of the party claiming unconscionability, and the inability to make a meaningful choice (Gillman

v. Chase Manhattan Bank, N.A., 73 N.Y. 2d 1, 534 N.E. 2d 824, 537 N.Y.S. 2d 787 [1988]). The failure to provide notification and at least some explanation of the arbitration agreement prevents a finding that there was an exercise of "real choice" in selecting arbitration (Sanchez v. Sirmons, 121 Misc. 2d 249, 467 N.Y.S. 2d 767 [Sup. Ct., Bronx County, 1983], and Wolfman v. Herbstritt, 114 A.D. 2d 955, 495 N.Y.S. 2d 220 [2nd Dept., 1985]).

Petitioner argues that the arbitration agreement is void as a matter of public policy because the arbitration provisions were not called to her attention, that the legal language it contained was difficult for her as a layperson to understand, and she has not made an informed and knowledgeable waiver of her constitutional right to a trial by jury, the Respondents failed to explain the waiver of her constitutional right to a jury trial.

Respondents argue that staff was available to answer any questions at the time it was signed by Petitioner. Respondents contend that public policy favors and encourages arbitration agreements and both parties gave up the right to litigate in Court .

Arbitration agreements may be set aside due to overriding public policy. Courts must address public policy concerns on a case by case basis (Spritzen v. Nomberg, 46 N.Y. 2d 623, 389 N.E. 2d 456, 415 N.Y.S. 2d 974 [1976]) and Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Benjamin, 1 A.D. 3d 39, 766 N.Y.S. 2d 1 [1st Dept., 2003]). Public policy applies to substantive rights embodied by statute that must be enforced by the Courts (Harris v. Iannaconne (107 A.D. 2d 429, 487 N.Y.S. 2d 562 [1st Dept. 1985]). The state has a substantial interest in protecting the welfare of citizens and to ensure that minimum standards of professional care are provided for services which are regulated in a manner to prevent the public from having to suffer the consequences and,"the ministrations of incompetent, incapable, ignorant persons." (Ash v. New York University Dental Center, 164 A.D. 2d 366, 564 N.Y.S. 2d 308 [1st Dept., 1990]). A party needs to be advised of the waiver of the constitutional right to a jury trial related to malpractice and negligence claims (Wolfman v. Herbstritt, 114 A.D. 2d 955, supra).

Petitioner was not advised that by signing the agreement she would be waiving her constitutional right to a jury trial or given the opportunity to ask questions. Respondents contention that an employee was available to answer questions does not state which employee Petitioner could go to, or whether she was informed of same. The waiver provision violates the State's interest in protecting the welfare of citizens and ensuring the minimum standard of professional care. Petitioner was not advised of the waiver of her right to a jury trial in violation of public policy, taking the agreement outside of the arbitrator's ability to render a determination.

Arbitration may be deemed waived by participation in litigation that prejudices the other party including economic prejudice. Factors to be considered are the time that elapsed from commencement of the litigation to the demand for arbitration and the extent of litigation (Advest Inc. v. Wachtel, 253 A.D. 2d 659, 677 N.Y.S. 2d 549 [1st Dept., 1988]). Prejudice can be substantive, result from costs or excessive delay, or through engaging in discovery that is unavailable in arbitration (Cusimano v. Schnurr, 120 A.D. 3d 142, 991 N.Y.S. 2d 400 [1st Dept., 2014]). Respondents have participated in the litigation pending in Supreme Court, Kings County prior to serving Petitioner with the demand for arbitration. Petitioner claims that she has exchanged discovery with the Respondents, and sought discovery that they have refused to exchange, in the Supreme Court, Kings County action. Respondents have failed to establish that Petitioner would not be prejudiced by submitting to arbitration. Respondents have waived the right to seek arbitration.

Respondents cross-move pursuant to CPLR §602, seeking to consolidate this proceeding with an action pending in Supreme Court, Kings County, to dismiss this proceeding and the consolidated action pursuant to §3211[a], [1],[2],[7] and pursuant to CPLR §7503 stay this proceeding, any pending action and compelling Petitioner to proceed with arbitration, setting down a pre-arbitration discovery schedule and allowing them to conduct an examination under oath of Petitioner. Having found that a valid agreement to arbitrate does not exist, the merits of Respondents cross-motion which is derived from the existence of a valid agreement to arbitrate need not be addressed.

Accordingly, it is ORDERED and ADJUDGED that the petition pursuant to CPLR §7503, seeking to permanently stay the arbitration sought in the second demand for arbitration dated September 11, 2014, is granted, and it is further,

ORDERED and ADJUDGED that the arbitration is permanently stayed, and it is further,

ORDERED, that Respondents' cross-motion pursuant to CPLR §602, seeking to consolidate this proceeding with a negligence action commenced by Petitioner that is pending in Supreme Court, Kings County, to dismiss this proceeding and the consolidated action pursuant to §3211[a], [1],[2],[7] and pursuant to CPLR §7503 compelling Petitioner to proceed with arbitration, setting down a pre-arbitration discovery schedule, is denied.

ENTER: MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ,
J.S.C.

Dated: March 18, 2015

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE