Gallagher v CWCapital Asset Mgt., LLC
2016 NY Slip Op 31597(U)
August 18, 2016
Supreme Court, New York County
Docket Number: 156733/14
Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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NANCY GALLAGHER, as Power of Attorney for ANNELIESE ESTRADA,

Plaintiff,

-against-

CWCAPITAL ASSET MANAGEMENT, LLC, ST OWNER, LP, PCV ST OWNER, LP, STUYVESTANT TOWN-PETER COOPER VILLAGE TENANTS ASSOCIATION, INC., ROSE ASSOCIATES, INC., COMPASSROCK REAL ESTATE, LLC, TISHMAN SPEYER PROPERTIES, INC., BRONX COMMUNITY HOME CARE, INC. d/b/a NEIGHBORS HOME CARE, MARGARET CLARKE, and ABC CORPORATION(S) 1-10 contractor(s) and/or builder(s) who designed, manufactured and/or installed the wooden ramp at the entrance to 240 1st Avenue,

Defendants.

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BRONX COMMUNITY HOME CARE, INC. d/b/a NEIGHBORS HOME CARE, INC., and MARGARET CLARKE,

Third-Party Plaintiffs

-against-

INDEPENDENCE CARE SYSTEM, INC.

Third-Party Defendant.

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Index No. 156733/14
Motion Sequence 001

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

In this personal injury action, third-party defendant Independence Care System, Inc. ("ICS") moves pursuant to CPLR 3211(a)(1) and 3211(a)(5) to dismiss the third-party complaint in its entirety on the ground, among others, that ICS and third-party plaintiff Bronx Community Home Care, Inc. d/b/a Neighbors Home Care, Inc. ("Neighbors") entered into a participating provider agreement which requires them to arbitrate any disputes that arise out of or relate thereto. In the

alternative, pursuant to CPLR 603 and CPLR 7503, ICS seeks to sever the third-party action from the main action and to stay the third-party action in favor of arbitration.

BACKGROUND

Under the auspices of the New York State Department of Health, ICS administers health care benefit plan services for Medicaid and Medicare eligible individuals who require long-term healthcare by contracting with a network of health care providers who employ home health aides and provide capitated services to facilitate treatment for ICS members. ICS's relationship with each health care provider is governed by a Participating Provider Agreement ("PPA").[1] Pursuant to the PPA between ICS and Neighbors, ICS is responsible for creating care plans for eligible individuals and coordinating their individual needs (Exh. A, ¶ 3.1). Neighbors is "solely and exclusively" responsible for delivering plan services to such individuals (Exh. A, ¶ 2.9).

On January 4, 2012 ICS created a care plan for the plaintiff, Anneliese Estrada ("Plaintiff"), who has multiple sclerosis. The care plan addresses Neighbors as Plaintiff's provider. It indicates that Ms. Estrada was non-ambulatory, that her home health aide was required to transport her in a manual wheelchair, and that she needed maximum assistance due to the fact that she was prone to falling.[2] Approximately eight months earlier, the Mount Sinai Rehabilitation Center had recommended that a power wheelchair be assigned to the Plaintiff:

> Therefore, since she can't walk, can't propel a Manual Wheelchair and can't control a Scooter, the only option at this time for safe and independent mobility in the home is with a Power Wheelchair. Anneliese will only be able to access her kitchen for food and bathroom for hygiene with a power wheelchair.[3]

[1] A copy of the PPA between ICS and Neighbors is annexed as exhibit A to the moving papers.

[2] Reply Affirmation of Robert Andrew Von Hagen, dated June 27, 2016, exhibit A.

[3] Reply Affirmation of Robert Andrew Von Hagen, dated June 27, 2016, exhibit B, p. 1.

On June 19, 2012, Home Medical Equipment issued an invoice to ICS for such a power wheelchair.[4] ICS authorized the purchase on June 28, 2012[5] and Plaintiff received the wheelchair on July 30, 2012. ICS addressed an updated care plan to Neighbors for the Plaintiff on August 1, 2012. In relevant part the updated care plan indicates that the "[Plaintiff] has a new power [wheelchair]. She needs assistance in using it."[6] On August 2, 2012, Plaintiff was propelled backwards in her motorized wheelchair down a set of exterior stairs at her apartment complex. She sustained several injuries as a result of the fall, including a fractured clavicle and scapula. Thereafter she underwent surgery for the placement of a spinal cord stimulator and pulse generator for pain management.

Plaintiff commenced this action on July 10, 2014 to recover for personal injuries sustained as a result of her August 2, 2012 fall. Among other things, the complaint alleges that Neighbors and Margaret Clarke, who is employed by Neighbors as Plaintiff's home health aide, negligently failed to ensure that she traversed the entrance ramp to her apartment building safely on the date of her accident. Plaintiff's complaint does not name ICS as a party defendant and the statute of limitations for her to do so has expired.

It was not until March 2, 2016 that Neighbors filed its third-party complaint against ICS. The third-party complaint alleges five causes of action against ICS, sounding in indemnification, contribution, and negligence. Generally, Neighbors alleges that ICS's failure to timely develop an updated care plan for Plaintiff before she began using her motorized wheelchair contributed to her injuries and that ICS breached its contract with Neighbors by refusing to defend and indemnify Neighbors in the main action.

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[4] Sur-Reply Affirmation of Ryan D. Lang, Esq., dated August 1, 2016, exhibit D.

[5] Sur-Reply Affirmation of Ryan D. Lang, Esq., dated August 1, 2016, exhibit E.

[6] Sur-Reply Affirmation of Ryan D. Lang, Esq., dated August 1, 2016, exhibit G.

ICS contends that the third-party complaint must be dismissed outright because ICS did not provide Plaintiff with any direct care or treatment and therefore cannot be deemed responsible for her injuries. ICS further contends that dismissal is required given the clear mandate of the PPA to arbitrate any disputes arising thereunder. As an alternative to dismissal ICS seeks to sever and stay the third-party action from the main action to allow the parties to pursue arbitration. In opposition Neighbors argues that dismissal on the merits is inappropriate because there is a genuine dispute whether ICS's failure to timely provide an updated care plan for Plaintiff contributed to her injuries; a CPLR 3211(a)(5) dismissal in favor of arbitration is only permissible where there has already been an arbitration and award; and it would be more efficient to allow both the main action and third-party action to proceed as one to promote judicial economy. Plaintiff takes no position with regard to ICS's application for dismissal, but joins ICS's request to sever the third-party action to allow the main action to proceed to trial in light of the prior proceedings that have already taken place herein.

DISCUSSION

CPLR 3211(a)(1) and CPLR 3211(a)(5) collectively provide, in relevant part, that a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . [a] defense is founded upon documentary evidence . . . .[or] the cause of action may not be maintained because of arbitration and award."

In order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim." *Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 (1st Dept 1995). "Such a motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 (2002). The documentary evidence submitted on this motion does not conclusively disprove Neighbor's

claims against ICS as a matter of law. While ICS claims it was not responsible for and in fact did not provide any direct care to Plaintiff, the PPA indicates that ICS was responsible for assessing Plaintiff's health care needs and providing a care plan to Neighbors. In this respect, we know that ICS authorized Plaintiff's motorized wheelchair on June 28, 2012 and that she received it on July 30, 2012. However, ICS only generated an update to her care plan to reflect that change on August 1, 2012, two days after she received it.[7] There is nothing in the record to show whether Neighbors and/or Margaret Clarke actually received the updated care plan before the August 2, 2012 accident. Thus, whether ICS somehow contributed to Plaintiff's injuries as claimed by Neighbor's is a genuine issue that is not disproved by the documentary evidence submitted on this motion.

ICS's reliance on CPLR 3211(a)(5) is also misplaced. The mere presence of an arbitration agreement between two parties is not grounds for dismissal (See Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:21, at 39):

> When arbitration and award is the ground used, the words "and award" should be stressed. This ground is available only when the dispute has already gone to arbitration and an award has been made. When what is sought is merely to preclude litigation of the instant dispute on the ground that there is outstanding an unfulfilled obligation to arbitrate it, the remedy is not a motion to dismiss . . . but a motion to compel arbitration under CPLR 7503(a), which merely stays the litigation in deference to arbitration. The words "and award" were added to "arbitration" in a 1964 amendment of paragraph 5 to make these conclusions clear. . . .

See also Hui v New Clients, Inc., 126 AD3d 759, 760 (2d Dept 2015); *Ogoe v New York Hospital,* 99 AD2d 968, 969 (1st Dept 1984); *Langemyr v Campbell*, 23 AD2d 371, 374 (2d Dept 1965).

ICS has also moved pursuant to CPLR 603 and CPLR 7503. CPLR 603 provides that, "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others." CPLR 1010, which applies specifically to third-party

[7] Sur-reply affirmation of Ryan D. Lang, Esq. dated August 1, 2016, exhibit H.

actions, provides that "[t]he court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim. . . [and] in exercising such discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party." In determining whether to sever a third-party action the court must not only consider issues of judicial economy and prejudice to the third-party plaintiff (*see Vasquez v G.A.P.L.W. Realty, Inc.*, 254 AD2d 232, 233 [1st Dept 1998]), but also whether the main action will be delayed because of undue or inexcusable delay in prosecuting the third-party claims (*see Garcia v Gesher Realty Corp.*, 280 AD2d 440, 440-41 [1st Dept 2001]; *Blechman v I.J. Peiser's and Sons, Inc.*, 186 AD2d 50, 52 [1st Dept 1992]).

Admiral Indem. Co. v Popular Plumbing & Heating Corp., 127 AD3d 419 (1st Dept 2015), is directly on point. In that case, the plaintiff sued for property damages allegedly caused by a sprinkler system that had been improperly repaired by the defendant/third-party plaintiff, Popular Plumbing and Heating Corp. Popular impleaded Yeung Contracting LLC, the general contractor which hired Popular to perform the repairs. The First Department determined that the trial court properly exercised its discretion in severing the third-party action because Popular impleaded Yeung more than one month after the note of issue was filed in the main action, provided no reasonable justification for its delay, and was aware of Yeung's role in the project from the outset of the main action. There was substantial outstanding discovery in the third-party action while the main action was trial ready, and "although the main action and the third-party action are based on the same nucleus of facts, they involve disparate issues of law. . . . there is no possibility of inconsistent verdicts since Yeung's liability for common-law indemnification and contribution in the third-party action is contingent upon a finding that Popular is liable in the main action." *Id.* at 419.

Having entered into the PPA in 2011, Neighbors was clearly aware of ICS's potential involvement from the moment the main action was commenced in 2014, yet waited almost two years more to file its third-party action. During those two years the parties to the main action engaged in substantial discovery to which ICS was not privy. All party depositions were completed. Due to her medical condition the Plaintiff was deposed in set blocks of time over the course of eight days in August, September, October, and November of 2015. Her caretaker, Ms. Gallagher, was deposed on November 17, 2015. Eight individuals were deposed on behalf of the Defendants. Substantial document discovery was also exchanged, both before and after the depositions. The court's note of issue filing date has expired. As in *Admiral*, ICS's liability is contingent upon a finding that Neighbors is liable in the main action. Taken together - the delay in filing the third-party action, the fact that discovery in the main action is essentially complete, ICS's own need for discovery, and the impossibility of inconsistent verdicts - warrant a severance of the third-party action in order to avoid prejudice to the Plaintiff. *See Admiral, supra.*

Moreover, the agreement between Neighbors and ICS provides for arbitration of any disputes that arise under the PPA (Exh. A, ¶ 9.1):

> If any claim, dispute, difference or controversy ("Dispute") occurs between the parties to this Agreement which *arises out of or relates to* this Agreement and cannot be resolved by the parties within forty-five days of either party's notice to the other regarding such Dispute, the Dispute *shall* be resolved by arbitration in accordance with this section 9. [emphasis added]

In this regard, CPLR 7503(a) provides:

> A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

New York public policy strongly favors arbitration. *See Cooper v Bruckner*, 21 AD3d 758, 758 (1st Dept 2005). When evaluating a motion to compel arbitration, a court must consider three threshold questions: "whether the parties made a valid agreement to arbitrate, whether if such an agreement was made it has been complied with, and whether the claim sought to be arbitrated would be barred by limitation of time had it been asserted in a court of the State." *County of Rockland v Primiano Constr. Co.*, 51 NY2d 1, 6 (1980); *see also JetBlue Airways Corp. v Stephenson*, 88 AD3d 567, 571 (1st Dept 2011).

Here, the plain language of the PPA clearly evinces the parties' intention to arbitrate all disputes that arise out of or relate to their agreement. Neighbors does not specifically point to any language in section 9.1 or any other section of the PPA that would render the agreement to arbitrate ambiguous. Instead Neighbors asserts that its dispute with ICS falls outside the scope of the arbitration clause because it also involves the Plaintiff who is not a party to the PPA. However, ICS is not named as a defendant in Plaintiff's action and the statute of limitations has run against its being so included. The only connection between ICS and Neighbors in this dispute is by way of the PPA which binds the parties to arbitration. While it is true that the third-party action would not exist were it not for Plaintiff's injuries, more important is that Neighbors' entire third-party action against ICS is actually an unresolved "dispute" which "arises out of or relates to" their contractual agreement.[8]

Neighbors' concern that it will be unable to obtain necessary discovery from ICS unless ICS participates in the main action is speculative and inconsistent with New York law. Even if the court were to dismiss the third-party action against ICS in its entirety, Neighbors would be able to subpoena documents from ICS and/or seek to depose an ICS representative to prepare for its case.

[8] Whether ICS properly noticed its demand for arbitration should be determined at arbitration. *Shah v Monpat Constr., Inc.*, 65 AD3d 541, 545 (2d Dept 2009).

ICS' non-party status does not protect it from being subpoenaed to produce relevant information, and ICS could only avoid having to comply with a subpoena issued by Neighbors if it were to demonstrate that the discovery sought was "utterly irrelevant" to the action or that the "futility of the process to uncover anything legitimate is inevitable or obvious." *Matter of Kapon v Koch*, 23 NY3d 32, 34 (2014).

Accordingly, it is hereby

ORDERED that ICS's motion to sever the third-party action from the main action pursuant to CPLR 603 and CPLR 1010 is granted; and it is further

ORDERED that ICS's application to compel arbitration as between it and Neighbors pursuant to CPLR 7503(a) is granted; and it is further

ORDERED that Neighbors' third-party action is hereby severed and stayed pending arbitration and until further order of this court; and it is further

ORDERED that the main action shall continue as against all party defendants, including Neighbors; and it is further

ORDERED that the remainder of ICS's motion is denied; and it is further

ORDERED that counsel in the main action shall appear in Part 30, Room 412, 60 Centre Street, New York, NY, on September 26, 2016 at 9:30AM; and it is further

ORDERED that the Clerk of the Court shall mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: Aug. 18, 2016

SHERRY KLEIN HEITLER, J.S.C.