Mark Fromer MD P.C. v Ragusa
2019 NY Slip Op 30266(U)
January 31, 2019
Supreme Court, New York County
Docket Number: 161955/2018
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 32**

Justice

----------X

INDEX NO. 161955/2018

MARK FROMER MD P.C. d/b/a FROMER EYE CENTERS

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

NIKOLA RAGUSA, M.D.,

Defendant.

DECISION AND ORDER

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for DISMISSAL

The motion by defendant to dismiss or stay this action and compel arbitration is denied.

Background

Defendant used to work for plaintiff as an ophthalmologist from May 17, 2012, to July 8, 2014. In January 2014, defendant entered into an employment agreement with plaintiff where plaintiff agreed to acquire professional liability insurance on defendant's behalf. Plaintiff claims that during defendant's employment, plaintiff paid about $56,950 in premiums to insure defendant.

In 2018, the insurance company providing the liability insurance, Medical Liability Mutual Insurance Company ("MLMIC"), sought approval from the New York State Department of Financial Services to convert MLMIC from a mutual insurance company to a stock insurance

company. Part of the conversion required MLMIC to make cash payments based on premiums paid for policies in effect from July 15, 2013 through July 14, 2016.

This case is about the distribution of that cash payment, which purportedly amounts to $45,683.67. Plaintiff claims that it is entitled to the money because it paid the premiums and is the owner of the policy. Defendant claims that he should get the cash payment because the policy was for his benefit.

Defendant moves to compel arbitration on the ground that the employment agreement requires disputes to be handled in arbitration. In opposition, plaintiff argues that the employment agreement expired when defendant stopped working for plaintiff in July 2014. Plaintiff also argues that the circumstances necessitating this dispute occurred years after defendant left his job with plaintiff.

Discussion

"It is settled that a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. The agreement must be clear, explicit and unequivocal and must not depend upon implication or subtlety" (*Waldron v Goddess*, 61 NY2d 181, 183-84, 473 NYS2d 136 [1984]).

Here, the employment agreement contains an arbitration provision which provides that:

> "In the event of any dispute under the provisions of this Agreement other than a dispute in which the primary relief sought is an equitable remedy such as an injunction, the parties shall be required to have the dispute, controversy or claim, controversy or claim settled by arbitration. The parties agree to select an Arbitrator and to conduct such arbitration in accordance with the Voluntary Labor Arbitration Rules of the American Arbitration Association ("AAA"). To implement this agreement, the parties agree to use the "Submission to Dispute" Form utilized by

> the AAA. Any decision by the Arbitrator shall be final and binding upon the parties." (NYSCEF Doc. No. 6 ¶ 14[a]).
>
> The agreement also contains an expiration clause, which provides that
>
> "The term of this Agreement shall commence on July 9, 2013 and shall be effective for a one year period ending on July 8, 2014 unless terminated pursuant to any of the provisions of Section 8 herein. This Agreement shall be automatically renewed for continuous one year periods unless either party provides sixty (60) days written notice of their intention not to renew in which case the Agreement will automatically terminate at end of the one year term" (*id.* ¶ 1[b]).

This Court finds that the parties' instant dispute does not arise out of the employment agreement and, therefore, it is not subject to arbitration. There is no question that plaintiff complied with its obligation under the agreement to procure professional liability insurance for defendant and to pay the premiums. The disagreement here does not involve the parties' obligations under the agreement. Instead, the parties seek the cash payment from MLMIC due to actions taken by MLMIC *after* defendant left his employment for plaintiff.

Simply put, the dispute in this case was not contemplated in the arbitration provision of the employment agreement, which requires arbitration for disputes arising out of that agreement. Obviously, the parties had no idea when they entered into the employment agreement that MLMIC would make these payments and therefore could not have agreed to arbitrate the issue years after the employment ended.

Because the Court is unable to find that the arbitration provision clearly and unequivocally compels arbitration over this issue, the Court must deny defendant's motion.

Accordingly, it is hereby

ORDERED that the motion to dismiss is denied, defendant is directed to answer pursuant to the CPLR, and the parties shall appear for a preliminary conference on May 14, 2019 at 2:15 p.m.

The parties are encouraged to commence the discovery process before the preliminary conference.

1.31.19
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

APPLICATION: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER

CHECK IF APPROPRIATE: ☐ INCLUDES TRANSFER/REASSIGN ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE