

Epps v Anthony

2019 NY Slip Op 31327(U)

April 22, 2019

Supreme Court, New York County

Docket Number: 805061/2018

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10

-----X
DEBRA EPPS, as Administrator of the
Estate of DAVID RICHARDSON, deceased

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Plaintiff

-against-

HOWARD ANTHONY ARABELO, M.D., MUSTAFA
KAGALWALLA MBBS, JANICE BARNHART, M.D.,
MELISSA MARTIN, M.D., MOUNT SINAI ST.
LUKE'S, THE NEW JEWISH HOME, AND JEWISH
HOME LIFE CARE

Defendants

-----X

The following papers numbered 1 to 3 were read on this motion for (Seq. No. 001)
for COMPEL ARBITRATION (see CPLR §2219 [a]):

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1
Answering Affidavit and Exhibits	No(s). 2
Replying Affidavit and Exhibits	No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with
the annexed decision and order of the court.

Dated: _____

Hon. _____
GEORGE J. SILVER J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER

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Defendants

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HON. GEORGE J. SILVER:

In this medical malpractice action, defendants JANICE BARNHART, M.D. (“Dr. Barnart”), MELISSA MARTIN, M.D. (“Dr. Martin”), THE NEW JEWISH HOME, AND JEWISH HOME LIFE CARE (“Jewish Home”) (collectively, “defendants”) move for an order compelling arbitration pursuant to CPLR §§7503(a) and 2201 based on the terms of a February 18, 2016 admission agreement and arbitration agreement executed by TAMEESHA SMALLWOOD (“Smallwood”) as a responsible party on behalf of her father DAVID RICHARDSON (“decedent”) with Jewish Home. In addition, defendants move for an order dismissing the action as against Dr. Barnart and Dr. Martin so that the matter can be arbitrated pursuant to the arbitration agreement. In the alternative, defendants move, pursuant to CPLR §§501, 510(1), 511(b) directing a change of venue from New York County to Westchester County, pursuant to the change of venue selection clause in the February 18, 2016 admission agreement. Co-defendants HOWARD ANTHONY ARABELO, M.D. (“Dr. Arabelo”) MUSTAFA KAGALWALLA MBBS (“Kagalwalla”), and MOUNT SINAI ST. LUKE’S (“Mt. Sinai”)(collectively “co-defendants”) take no position with respect to the instant application. Plaintiff, however, opposes the requested relief.

BACKGROUND

In this action, plaintiff DEBRA EPPS (“plaintiff”) alleges, on behalf of decedent, that co-defendants caused and permitted a sacral pressure ulcer to develop on decedent, and thereafter defendants failed to adequately treat the ulcer, allowing it to become infected and develop into sepsis. Plaintiff alleges that these actions led to plaintiff’s decedent’s wrongful death on March 3, 2016.

In support of the instant motion, defendants’ highlight that Paragraph 11 of the admission agreement entitled “OPTION FOR BINDING ARBITRATION,” states that the parties had the

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option to execute the binding arbitration agreement attached to the admission agreement. This section of the admission agreement, defendants contend, explicitly states that “It is acknowledged that agreeing to binding arbitration is optional for each party and is not a condition for the Patient’s admission into the facility.” Additionally, defendants aver that the binding arbitration agreement attached to the admission agreement, entitled BINDING ARBITRATION AGREEMENT, memorializes the parties’ agreement that “All disputes and disagreements between the Facility and the Patient and between the Facility and the Responsible Party...arising out of or relating to the Admission Agreement or its enforcement or interpretation or to the services provided by Facility to the Patient...shall be submitted to binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect.” Defendants submit that this language appears in plain English and is devoid of any legalese. Thus, as plaintiff’s decedent, through Smallwood, agreed to arbitrate “all disputes and disagreements,” and as the agreement binds decedent, defendants contend that decedent’s estate must arbitrate the instant matter to give the contract the full force and effect of its terms. Therefore, defendant contends that this matter must be dismissed as against Dr. Barnart and Dr. Martin so that the matter can be arbitrated pursuant to the arbitration agreement.

In opposition, plaintiff argues that the subject arbitration clause in defendants’ admission agreement is unenforceable since the agreement was not signed by either decedent or a representative of decedent. To be sure, plaintiff contends that Smallwood, a signatory to the contract, did not have the power to bind decedent to Jewish Home’s admission agreement because Smallwood had no legal authority to sign the document. Plaintiff also submits that decedent had the capacity to sign the agreement on his own rather than having a family member sign the agreement on his behalf. Plaintiff further contends that a change in venue is unwarranted, and in contravention of applicable law.

In reply, defendants refute plaintiff’s assertion that decedent’s mental faculties are relevant to the court’s inquiry, and reiterate the position that defendants are entitled to enforcement of the arbitration agreement, or at the very least a change in venue.

As previously mentioned, co-defendants take no position with respect to the merits of the instant application.

DISCUSSION

CPLR § 7503(a) provides as follows:

Application to compel arbitration; stay of action. 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

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shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

New York public policy clearly supports arbitral resolution where the parties have agreed to submit their disputes to arbitration. The New York Court of Appeals has “repeatedly recognized New York’s ‘long and strong public policy favoring arbitration’ ” (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007], quoting *Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 49 [1997]; *People v. Coventry First LLC*, 13 NY3d 108, 113 [2009]). New York courts should interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration (see *Matter of Smith, Barney, supra* at 49-50).

An agreement to arbitrate is an agreement to surrender the right to utilize the courts in resolving a dispute and thus, must be clear, explicit and unequivocal (see *God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006]; *Matter of Waldron [Goddess]*, 61 NY2d 181, 183 [1984]). “Consent occurs in the most straightforward manner when a party signs a formal agreement to arbitrate,” (*People v. Coventry First LLC, supra* at 113).

Under the statute, once the court has determined the threshold issues of the existence of a valid agreement to arbitrate, that the party seeking arbitration has complied with the agreement, and that the claim sought to be arbitrated would not be time-barred were it asserted in state court, the remaining issues are for the arbitrator (see CPLR § 7503(a) *supra*, *Matter of Smith Barney, Harris Upham & Co. v Luckie*, 85 N.Y.2d 193, 201; *Shah v. Monpat Constr., Inc.*, 65 A.D.3d 541, 543 (2009)

As evidenced by the foregoing, New York Courts are frequently called upon to enforce arbitration clauses in admission agreements. On the other hand, it is axiomatic that a party cannot be compelled to arbitrate a dispute unless there is evidence which affirmatively establishes that the parties clearly, explicitly, and unequivocally agreed to arbitrate the dispute (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Associates, LLP*, 10 AD3d 671 [2d Dept 2004]). The agreement must be clear, explicit and unequivocal and not dependent upon implication or subtlety (*Matter of Waldron v. Goddess*, 61 NY2d 181, 183-184 [1984]).

Here, the court’s inquiry is directed to the threshold issue of whether the parties made a valid agreement to arbitrate. Applying that analysis to the facts presented, the court finds that relevant parties to be bound to the arbitration agreement did not unequivocally agree to its terms. Although Smallwood was decedent’s daughter, there is insufficient evidence to conclude that Smallwood had the power to bind decedent Jewish Home’s admission agreement, including the arbitration clause therein. Within the subject admission agreement, which the court has reviewed at length, there is reference to a “designated representative” signing the agreement on the patient’s behalf. Notably, however, Smallwood is not defined as a “designated representative,” and the term by itself is not demarcated as applying to her by virtue of her kinship to decedent. One can imagine the perils of simply assuming that a family member, by virtue of that title alone, can sign documents on behalf of another family member. Imagine, for instance, an acrimonious familial dispute. One cannot assume there that spouses, let alone brothers and sisters, are always united in interest such that one can sign paperwork on behalf of another. Admissions to facilities like Jewish Home carry a similar danger. One can envision, for instance, children wanting to be alleviated from the burdens or caring for their

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ailing parents by placing those parents in a nursing home even where those parents do not agree with such placement. As such, this court will not assume, absent credible evidence, that Smallwood, simply by virtue of her role as decedent's daughter, was able to sign paperwork on his behalf. Moreover, Smallwood was never appointed guardian, power of attorney, or conservator (even for this proceeding for that matter), nor is there an indication that such an appointment was necessary. In fact, the affidavit of Joanna Reyes, an admissions assistant at Jewish Home, indicates that she usually speaks to the patient to determine if they are oriented, and also to determine if they can sign their own paperwork. Such practice recognizes the importance of the actual patient acquiescing to the terms of a contract, rather than having that determination made by a family member. In this case, decedent was oriented enough to sign a patient notification record of his admission to Mount Sinai on February 11, 2016. There is no mention as to why, a few days later, he was unable to sign the admission agreement at Jewish Home on February 18, 2016. Although New York public policy favors enforcing agreements to arbitrate disputes, the general presumption in favor of arbitration does not apply when the parties dispute whether such an agreement to arbitrate exists. Indeed, unless the parties have subscribed to the arbitration agreement, the court will not infer a waiver of the safeguards and benefits of the court "on the basis of anything less than a clear indication of intent" (*TNS Holdings, Inc. v. MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]).

In addition, from a reading the arbitration clauses in context with "other requirements and obligations of the parties' agreements" (*Primavera Laboratories, Inc.*, 297 AD2d 506, 506 (1st Dept 2002)), it is clear that while other provisions of the contract are bolded and in underlined typeface, the arbitration clause appears at the end of the admission agreement, and only as an exhibit rather than as a component of the body of mandates under the contract. As such, the evidence presently in the record is insufficient to meet defendants' burden of demonstrating the existence of a "clear, unequivocal and extant agreement to arbitrate" and that the "dispute falls clearly within that class of claims which the parties agreed to refer to arbitration" (*id.* at 505-506). As such, the court finds that the arbitration clause contained in the admission agreement is unenforceable as a matter of law.

Similarly, the court finds that defendants' have not made a necessary showing to support a change of venue. "A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court" (*Puleo v. Shore View Center for Rehabilitation and Health Care*, 132 AD2d 651, 652 [2d Dept 2015]).

Courts have generally enforced forum selection clauses in admission agreements to nursing homes (*see e.g. Medina v. Gold Crest Care Center*, 117 AD3d 633 [1st Dept 2014][reversing trial court and finding forum selection clause in admission agreement between nursing home and patient was enforceable when signed by plaintiff as attorney-in-fact for her grandmother]; *Puleo v. Shore View Center for Rehabilitation and Health Care*, 132 AD2d at 652, *supra* [estate failed to show forum selection clause in nursing home admissions agreement signed by the patient's daughter was the product of fraud or overreaching]; *Public Administrator Bronx County v. Montefiore Medical Center*, 93 AD3d 620, 621 [1st Dept 2012][forum selection clause in nursing home contract was enforceable absent a showing that its enforcement would violate public policy or that a trial in the forum "would be so impracticable and inconvenient that [plaintiff] would be deprived of his day in court"]).

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However, a court may elect to forestall enforcement of a forum selection clause where such enforcement would be unreasonable, unjust, or in contravention of public policy (*see Casale v. Sheepshead Nursing & Rehabilitation Ctr.*, 131 AD3d 436 [2015]).

Here, the admission agreement at issue contains a choice of forum provision that requires that all actions arising out of or related to the admission agreement be brought in Westchester County. Moreover, the admission agreement states, "the [a]greement shall be binding on the heirs, executors, administrators, distributees, successors, and assignees of the parties." However, it is evident from a reading of the admission agreement in its totality that the agreement was not clear, conspicuous, or reasonably communicated. To be sure, as previously mentioned, the admission agreement at issue was never signed by decedent, and defendants have furnished insufficient proof to support the position that his daughter administrator, Smallwood, was an authorized agent of decedent at the time that the admission agreement was executed.

The admission agreement totals sixteen (16) pages, with the forum selection clause contained on the fifteen (15) page (ninth numbered page) of the agreement in a section titled "Consent to Jurisdiction and Governing Law." Within that section, the designation of Westchester County as a choice forum is in small typeface, *un-bolded*, and *un-capitalized*. Notably, the section is as inconspicuous as preceding sections addressing the facility's internal "Smoking Policy." Nothing about the admission agreement's section on forum selection, on its face, signifies either its import or its relevance. Contrast that with one of the seminal cases on forum selection, *Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7 (2d Cir.1995), wherein a choice of forum within an agreement was found to be reasonable on account of the fact that "the ticket at issue is comparable to a typical airline ticket. It consists of three double-sided leaves, each approximately 4" x 8 1/2" (*Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7, 8 [2d Cir.1995]). In addition, the warning "IMPORTANT NOTICE --READ BEFORE ACCEPTING" is conspicuously found in bold, capitalized, medium-sized lettering on the fact of the ticket. Immediately before that warning, the ticket's purchaser's attention is directed specifically to the contract clause that limits the choice of the forum (*id.*).

The admission agreement at issue here contains no such warning or notice so as to direct residents to the location or existence of any forum selection provision. The inconspicuous nature of the forum selection clause at issue here is compounded by the fact that the decedent never executed the admission agreement, thus making this matter distinguishable from *Public Adm'r Bronx County v. Montefiore Medical Center*, 93 AD3d 620 (1st Dept 2012) and its progeny. In *Public Adm'r Bronx County v. Montefiore Medical Center*, 93 AD3d 620 (1st Dept 2012), *Puleo v. Shore View Center for Rehabilitation and Health Care*, 132 AD2d 651, 652 (2d Dept 2015), and *Medina v. Gold Crest Care Center*, 117 AD3d 633 (1st Dept 2014), the enforcement of the forum selection clauses at issue was premised, in large part, upon the fact that the forum selection clauses had been unequivocally signed by a patient or a person proven to have been an authorized representative of the patient. Neither fact is applicable in this case, as decedent did not sign the admission agreement at issue, and defendants have not shown Smallwood was decedent's authorized representative at the time that the admission agreement was entered into.

Beyond these considerations, the admission agreement at issue also contravenes public policy in light of the fact that the designated forum, Westchester County, is not where the subject Jewish

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Home facility is located (*see* CPLR §503). To be sure, the admission agreement was signed in New York County, and the Jewish Home facility at issue is similarly located in New York County. Notably, defendants did not make an application to change venue upon service of their answer, thus rendering the instant application untimely under CPLR 511(a), which specifies that such a motion “shall be served with the answer or before the answer is served.” As such, the reasonable expectation of decedent would have been for a lawsuit to be initiated in New York County. Based on the foregoing, plaintiff has sufficiently set forth reasons why a change of venue to Westchester County would effectively deprive decedent of his posthumous day in court. Moreover, co-defendants were not parties to the admission agreement. As such, binding co-defendants to Westchester County, even though they were not parties to the contract, would be improper (*see* CPLR §503).

Accordingly, based on the foregoing, it is hereby


ORDERED that defendants’ motion is denied in its entirety; and it is further

ORDERED that plaintiff is directed to serve a copy of this decision, with notice of entry, on all appearing parties within 20 days of its issuance; and it is further

ORDERED that the parties are directed to appear for a conference on May 28, 2019 at 2:15 PM at the courthouse located at 111 Centre Street, Room 1227.

This constitutes the decision and order of the court.

Dated: April 22, 2019



GEORGE J. SILVER
J.S.C.

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