

Jones v Alliance Health Operations, LLC.
2019 NY Slip Op 31505(U)
May 28, 2019
Supreme Court, Kings County
Docket Number: 509707/2017
Judge: Bernard J. Graham
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36**

Index No. 509707/2017
Motion Calendar No.
Motion Sequence No.

LOIS D. JONES, as Executrix of the Estate of
DOLORIS JONES, deceased,

Plaintiff(s),

-against-

DECISION / ORDER

Present:

Hon. Judge Bernard J. Graham
Supreme Court Justice

ALLIANCE HEALTH OPERATIONS, LLC.,
d/b/a LINDEN CENTER FOR NURSING and
REHABILITATION, MOSTAQUE AHMED, M.D.,
TONIANN M. STONE, D.O. WYCKOFF HEIGHTS
MEDICAL CENTER and MAHALINGAM SIVAKUMAR, M.D.,

Defendant(s).

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: lift the stay of litigation and allow the plaintiff to proceed with this action; compel Alliance Health Operations LLC d/b/a Linden Center for Nursing and Rehabilitation to serve an answer to plaintiff's supplemental summons and amended complaint; to amend the caption to reflect the appointment of Renee Jones as Executor of the Estate of Doloris Jones.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	_____ 1-2 _____
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits & cross-motion.....	_____ 3-4 _____
Replying Affidavits.....	_____ 5,6 _____
Exhibits.....	_____
Other:.....	_____

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

The plaintiff, Lois D. Jones as Executrix of the Estate of Doloris Jones, ("Lois Jones") has moved for an Order to vacate the stay of litigation and allow plaintiff to proceed with the medical malpractice, negligence and Public Health Law claims as against the defendants, Alliance Health Operations, LLC d/b/a Linden Center for Nursing and Rehabilitation ("Linden"), Mostaque Ahmed, M.D., Toniann M. Stone, D.O.,

Wyckoff Heights Medical Center (“Wyckoff Heights”) and Mahalingam Sivakumar, M.D. In addition, the plaintiff seeks an Order to compel Linden to serve an answer to plaintiff’s supplemental summons and amended complaint, as well as to amend the caption to reflect the appointment of Renee Jones as Executor of the Estate of Doloris Jones in place and instead of Lois D. Jones.

Counsel for Linden opposes the relief sought herein by the plaintiff and contends that this matter should proceed to arbitration, as an arbitration was mandated by order of Justice Dabiri dated September 27, 2017, and they have not waived their right to arbitration. Linden has further cross-moved for an order awarding costs for having to oppose the plaintiff’s motion to vacate the stay of litigation which request for relief is alleged to be frivolous.

Background:

Counsel for the plaintiff commenced the within action by the filing of a summons and verified complaint on or about May 16, 2017. The defendant Wyckoff Heights interposed a verified answer on or about June 8, 2017.

On June 22, 2017, defendant Linden filed a Notice of Motion to Compel Arbitration as against that defendant only.

On July 12, 2017, the plaintiff filed an amended complaint. On or about September 13, 2017, answers were served and filed by all of the defendants, with the exception of defendant Linden, as it was agreed by the plaintiff that Linden could wait to file its answer until a determination was made by the Court on the Motion to Compel Arbitration.

On September 27, 2017, Justice Dabiri granted the relief sought in Linden’s Motion to Compel Arbitration, in which it was determined that the arbitration clause was valid and enforceable, and the underlying court proceeding would be stayed pending the completion of the arbitration. On October 13, 2017, the executrix, Lois Jones, passed away. On February 20, 2018, Renee Jones was appointed by the Surrogates Court as Executor of the Estate of Deloris Jones.

On July 2, 2018, the plaintiff e-filed a Demand for Arbitration with the American Arbitration Association (“AAA”). On July 10, 2018, the AAA sent a letter to counsel for both the plaintiff and the defendant acknowledging that the claim had been filed and they were in receipt of the fee paid by the plaintiff. The July 10, 2018 correspondence further requested that both parties execute and submit a Healthcare Due Process Protocol waiver and Linden was reminded that their mandatory fee was still unpaid.

On or about July 10, 2018, the plaintiff executed the waiver and e-mailed the document to both the AAA and defendant Linden.

On or about July 27, 2018, Sue Anne Esterly-Parrish, the Consumer Filing Specialist for AAA, sent further correspondence to both parties advising them that they still had not received either the signed waiver or the \$4,200.00 fee from Linden and extended Linden’s time until August 10, 2018 within which to comply.

On August 16, 2018, the AAA sent a letter to both parties advising them that AAA had declined to administer the case since they had not received the signed waiver or the fee from Linden. In addition, as a result of the failure of Linden to adhere to the AAA policies, the AAA advised Linden that they may decline to administer future consumer arbitrations involving Linden and requested that Linden remove AAA’s name from their consumer arbitration clause.

Due to the alleged failure of defendant Linden to comply with the requests of the AAA, and the AAA’s determination to decline to administer the case, the plaintiff has submitted the underlying motion which seeks to vacate any stays and to permit this matter to proceed in this Court, pursuant to the AAA Consumer Arbitration Rules (R-1(d)). Plaintiff asserts that this rule provides that either party may choose to submit their dispute to the appropriate court for resolution, if the AAA declines to administer an arbitration.

Plaintiff’s contention:

In support of their motion to vacate the stay and permit this matter to proceed in this Court, the plaintiff maintains that since Linden violated the terms of AAA by failing

to adhere to their rules, they have waived their right to arbitration. The plaintiff asserts that Linden had ample time within which to comply with the requests of the AAA. Defendant failed to timely respond to the July 10, 2008 correspondence requiring defendant to pay the arbitration fee and failed to respond to the July 27, 2008 AAA correspondence requesting the signed waiver and arbitration from Linden. In fact, the AAA rules provided that if for any reason the respondent was unable to comply with the request by the response date, an email could be sent requesting an extension prior to the deadline. Plaintiff maintains that Linden did not timely comply with their right to file for an extension and instead on August 22, 2018, (two weeks after the deadline), their counsel (Mr. Beauzile) contacted plaintiff's counsel's seeking their consent to reinstate the case. Plaintiff's counsel, who has been opposed to the arbitration process, declined to consent to reinstatement of this case before the AAA. Thereafter, defendant's counsel contacted Ms. Easterly Parrish with the request that AAA change their position with respect to rejecting this matter, and allegedly Ms. Parrish, on behalf of AAA, was not receptive to defendant's request to reinstate this matter and responded that the AAA file would remain closed.

Plaintiff maintains that the standard of review with respect to the failure of the defendant to adhere to the rules of the AAA should not be whether Linden's actions were willful or negligent, but that they violated their own contractual provision (paragraph XIV) in their admission agreement. Plaintiff contends that Linden has demonstrated an ongoing pattern of violating rules, procedures and deadlines, and as a result, the determination should be made that they waived their right to arbitration.

Defendant contentions (Linden):

In opposing the motion of the plaintiff, Linden asserts that the Court should direct that this matter be returned to arbitration since the Decision/Order of Judge Dabiri was clear that the party's agreement to arbitrate was valid and irrevocable and they have not waived their right to arbitrate.

Linden asserts that their failure to adhere to the AAA requirements and to submit a timely payment was not willful or deliberate, but due to law office failure and the changing of third-party administrators. Counsel states that the required payments were delayed since processing the funds was the responsibility of an insurance claim administrator and at the time that the payments were due there was a transition between companies.

Linden maintains that the AAA was never designated as the forum for arbitration and there was no requirement that AAA be utilized, but rather the arbitration agreement only adopted the AAA's procedural rules as to how to conduct an arbitration. While the Court could direct that this matter proceed before another arbitration tribunal if the AAA had not been inclined to administer this arbitration, counsel for Linden contends that AAA has advised them that they are ready, willing and able to reopen the file and conduct the arbitration process. In addition, the defendant asserts that since the decision of Judge Dabiri did not place a time limitation as to when the arbitration should be conducted, that a slight delay in proceeding to arbitration should not be considered a waiver.

Discussion:

At issue is whether the defendant Linden breached the terms of the Sub-Acute Admission Agreement, (Paragraph XIV-Arbitration) by not timely abiding by the procedural rules of the American Arbitration Association, and if so, did it result in the defendant waiving its right to arbitration?

It is undisputed that the plaintiff abided by the preliminary rules of the AAA by timely making the required payment on July 2, 2018 and executing a waiver (Healthcare Due Process Protocol Waiver) on July 10, 2018. It is further undisputed that Linden failed either to make the required payment or to execute said waiver. This is evidenced by correspondence between the AAA and the parties on July 27, 2018, in which Ms. Parrish of the AAA notified Linden as to their noncompliance and that their time to comply was extended until August 10, 2018. On August 16, 2018, the AAA notified the

parties that due to Linden's failure to comply with their regulations they had declined to administer the case.

Thereafter, the plaintiff based upon the declination of the AAA, relied upon Article 1(d) of the Consumer Rules of the AAA, which provided that "should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution", in seeking the within relief from this Court.

This Court in its determination of plaintiff's application has considered that the provision which required plaintiff's claims against Linden to be conducted before an arbitrator were included in an agreement that was written by the defendant and the decedent had no ability to negotiate nor bargaining power to change the terms thereof. The plaintiff, who has originally opposed arbitration, complied with the AAA requirements, and when the AAA declined to administer this matter, the plaintiff moved for leave of Court to proceed with their claims in Supreme Court. This Court further considered that Judge Dabiri had issued a decision on September 27, 2017, in which the arbitration clause was determined to be valid and enforceable, yet in August 2018, Linden had not yet complied with its obligation to adhere to the AAA rules which would have enabled the arbitration to proceed in a timely manner.

While New York favors and encourages arbitration as a means of conserving the time and resources of the Courts and the contracting parties (see Matter of Smith Barney Shearson Inc. v. Sacharow, 91 NY2d 39, 49, 666 NYS2d 990 [1997]), an unreasonable delay in serving a proper demand for arbitration was determined to be a waiver of arbitration (see Gross v. Tagger, 46 AD2d 876 [1st Dept, 1974]; Plateis v. Flax, 54 AD2d 813, 388 NYS2d 245 [3rd Dept. 1976]). Whether a delay is or is not reasonable in seeking their right to arbitrate, depends on the facts of each case (see Chapman-Kruege Corp. v. Jaffe, 239 AD795, 263 NYS 737 [2nd Dept. 1933]).

Generally, when addressing waiver of a right to arbitrate, Courts should consider (1) the amount of litigation that has accrued; (2) the length of time between the start of litigation and the arbitration request and (3) whether prejudice has been established (see

Leadertex v. Morganton Dyeing & Finishing Corp., 67 F3d 20, 1995 US App. Lexis 27611 (2nd Cir. 1995); Cusimano v. Schnurr, 26 NY3d 391, 23 NYS3d 137 [2015]).

Here, the Court finds that Linden has waived its right to proceed before an arbitrator by the failure to abide by the terms of an agreement that it prepared and created. Linden could have simply requested additional time within which to comply with the AAA regulations and avoid their rejection of this action which triggered the application of Article 1(d) of the Consumer Rules of the AAA.

The Court further rejects the argument of Linden that they should be afforded the opportunity to proceed before another arbitrator. The AAA only rejected this matter because of the failure of Linden to abide by their preliminary rules and based upon the circumstances of this case there is no reasonable grounds to permit Linden to apply to another arbitration panel. As such, the motion by plaintiff to vacate the stay and to proceed with its causes of action is granted.

The portion of the motion which seeks to amend the caption to reflect the appointment of Renee Jones as Executor of the Estate of Doloris Jones is granted.

Conclusion:

The motion by plaintiff to vacate the stay of litigation and permit plaintiff to proceed with the medical malpractice, negligence and Public Health Law claims as against the defendants, Alliance Health Operations, LLC d/b/a Linden Center for Nursing and Rehabilitation, Mostaque Ahmed, M.D., Toniann M. Stone, D.O., Wyckoff Heights Medical Center and Mahalingam Sivakumar, M.D, is granted. Defendant Linden shall have thirty (30) days to serve an answer to plaintiff's supplemental summons and amended complaint, in the event that said answer has not been previously served and filed with the Court.

In addition, the caption of this matter is amended to reflect the appointment of Renee Jones as Executor of the Estate of Doloris Jones.

The cross-motion by defendant Linden Center for Nursing and Rehabilitation to impose costs to the plaintiff for having to defend plaintiff's motion based upon the

allegation that it is frivolous is denied in that this Court determined that there was merit to the relief sought therein by the plaintiff.

This shall constitute the decision and order of this Court.

Dated: May 28 2019
Brooklyn, New York

ENTER

Bernard J. Graham
Hon. Bernard J. Graham, Justice
Supreme Court, Kings Count

KINGS COUNTY CLERK
FILED
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