FILED: BRONX COUNTY CLERK 07/31/2019 10:39 AM INDEX NO. 22467/2019E
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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ERICA RODRIGUEZ, as Administrator of the Estate of EDELMIRO RODRIGUEZ

Index №.: 22467/2019E

-against-

Hon. GEORGE J. SILVER

Justice Supreme Court

MONTEFIORE MEDICAL CENTER, JOPAL BRONX, LLC d/b/a WORKMEN'S CIRCLE MULTICARE CENTER and ARCHCARE SENIOR LIFE,

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HON. GEORGE J. SILVER:

The following papers numbered 1 to 3 were read on this motion for (Seq. No. 001)

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

Motion is Respectfully Referred to Justice: _____
Dated: _____

This is a medical malpractice action to recover damages allegedly sustained by decedent EDELMIRO RODRIGUEZ ("decedent") during his admission at defendants' facilities, including Workmen's Circle Multicare Center ("Workmen's Circle"). Indeed, with the instant motion, Workmen's Circle seeks an order compelling arbitration pursuant to the terms of an admission agreement whereby the parties purportedly agreed to resolve all disputes by way of binding arbitration. In the alternative, Workmen's Circle cites to the same admission agreement as a basis to change venue of this action from Bronx County to Westchester County. Plaintiff ERICA RODRIGUEZ ("plaintiff"), decedent's administrator, opposes both applications.

On September 30, 2016, decedent was admitted to Workmen's Circle pursuant to the terms of an admission agreement. The admission agreement contained an arbitration clause whereby the parties purportedly agreed to resolve all disputes by way of binding arbitration. The admission agreement also contained a venue provision whereby the parties purportedly agreed to have disputes resolved in Westchester County. The admission agreement was signed by Louis Rodriguez. Notably, neither decedent nor plaintiff, decedent's administrator, signed the admission agreement. Nevertheless, Workmen's Circle cites to that admission agreement in its present request for an order compelling arbitration or, in the alternative, transferring venue of this action to Westchester County.

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 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, supra*; *Shah v. Monpat Constr., Inc.*, 65 AD3d 541, 543 [2d Dept 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 Louis Rodriguez is a family member of decedent, there is insufficient evidence to conclude that Louis Rodriguez had the power to bind decedent to Workmen's Circle'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 "respective successors, assigns, or representatives." There is also reference to "heirs, administrators, distributees, successors, and assignees" being bound to the admission agreement. Notably, however, Louis Rodriguez is not conspicuously identified as a successor, and the referenced terms by themselves are not demarcated as applying to him by virtue of his kinship to decedent. One can imagine the perils of simply assuming that a family member, by virtue

of that title alone, can sign and be bound by documents executed 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 Workmen's Circle carry a similar danger. One can envision, for instance, children wanting to be alleviated from the burdens or caring for their 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 Louis Rodriguez, simply be virtue of his role as a member of decedent's family, was able to sign paperwork on his behalf. Moreover, Louis Rodriguez 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 addition, Workmen's Circle proffers no affidavit supported by anyone with personal knowledge of the facts surrounding decedent's admission to the facility. Instead, the purported admission agreement is submitted by Workmen's Circle's attorney, who has no personal knowledge of the facts at issue herein. It is unclear, for instance, whether decedent was oriented and capable of signing his own paperwork, such that Louis Rodriguez's involvement was unnecessary. Indeed, typically when applications like this are made, a facility submits an affidavit that recognizes the importance of an actual patient acquiescing to the terms of a contract, rather than having that determination made by a family member. Usually, the facility proffers evidence that the patient was unable to sign, thus necessitating the involvement of a family member. No such evidence can be proffered here, and this court refuses to presume that such evidence exists. Certainly, one would assume that if such evidence exists, it would have been offered. 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, on its face the arbitration clause at issue is in small print, and appears at the end of a voluminous document. As such, the evidence presently in the record is insufficient to meet Workmen's Circle's 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" (*Primavera Laboratories, Inc.*, 297 AD2d 505, 506 [1st Dept 2002]). 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 Workman's Circle has 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]).

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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*, 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"]).

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 that it shall be binging on "heirs, administrators, distributees, successors, and assignees." 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 Workmen's Circle has furnished insufficient proof to support the position that Louis Rodriguez, a family member, was an authorized agent of decedent at the time that the admission agreement was executed.

The admission agreement totals thirty (30) pages, with the forum selection clause inconspicuously appearing on the eleventh and twelfth (11-12) pages of the agreement. 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 unobtrusive 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.*).

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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 singed by a patient or a person proven to have been an authorized representative of the patient. Nether fact is applicable in this case, as decedent did not sign the admission agreement at issue, and Workmen's Circle has not shown Louis Rodriguez 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 facility is located (*see* CPLR §503). To be sure, the admission agreement was signed in Bronx County, and the Workmen's Circle facility at issue is similarly located in Bronx County. Notably, Workmen's Circle 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 Bronx 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 Workmen's Circle's 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 September 25, 2019 at 9:30 AM at the courthouse located at 851 Grand Concourse, Room 600 (Part 19A).

This constitutes the decision and order of the court.

Dated: July 26, 2019 **Hon.** George J. Silver

GEORGE J. SILVER, J.S.C.

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