Carver v Dewitt Rehabilitation & Nursing Ctr., Inc.
2020 NY Slip Op 33786(U)
November 12, 2020
Supreme Court, New York County
Docket Number: 805169/19
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11
-- X
BRENDA HOUSTON CARVER, as Administrator of The Estate of LUCILLE HOUSTON, Deceased,
Plaintiffs,

Index No. 805169/19

-against-

DEWITT REHABILITATION AND NURSING CENTER, INC., THE MOUNT SINAI HOSPITAL and LENOX HILL HOSPITAL,

Defendants,
-- X
JOAN A. MADDEN, J.:

In this action asserting claims for medical malpractice, negligence and the violation of the New York State Public Health Law, defendant Dewitt Rehabilitation and Nursing Center, Inc. ("Dewitt") moves pursuant to CPLR 7503(a) and the Federal Arbitration Act (FAA), 9 USC § 3, for an order compelling arbitration and staying this action pending the resolution of the arbitration, and striking plaintiff's claim for punitive damages under Public Health Law ("PHL") § 2801-d (2). Plaintiff Brenda Houston Carver ("plaintiff") opposes the motion.

Background

In this action, plaintiff alleges, *inter alia*, that her mother, Lucille Houston ("Ms. Houston" or "decedent"), who died on September 13, 2017, suffered personal injuries during her admission at Dewitt's facility as a result of the failure of Dewitt's staff to maintain decedent's skin integrity, to provide proper hydration and nutrition, and to provide necessary treatment to prevent progression of pressure ulcers. Ms. Houston was admitted to Dewitt on December 26, 2016, and on that date, plaintiff signed an Admission Agreement (hereinafter "Agreement").

The Agreement contains an arbitration clause which provides:

> **(a) Option For Binding Arbitration**: The Parties may agree that it is in their mutual interest to provide for a faster, less costly, and more confidential solution to disputes that may arise between them and hereby elect to execute the Binding Arbitration Agreement set forth in the attached Exhibit 1 hereby exercising their option for any and all disputes or controversies between them exceeding the jurisdictional threshold for small claims court to be resolved by final and binding arbitration. It is acknowledged that agreeing to binding arbitration is optional for each party and is not a condition for the Resident's admission to the Facility.
>
> **By opting to participate in binding arbitration as indicated above, the Undersigned acknowledge that he/she/they are waiving the right to a trial by jury or a judge in a court of law, except for small claims court matters or as otherwise set forth above.**

(emphasis in original).

Exhibit 1 to the Agreement, entitled Binding Arbitration Agreement, provides, in pertinent part, that:

> The Parties believe that it is in their mutual interest to provide for a faster, less costly, and more confidential solution to disputes that may arise between them. Accordingly, the Parties agree as follows: All disputes and disagreements between the Facility and the Patient/Resident and between the Facility and the Responsible Party (as those Parties are indicated below) (or their respective successors, assigns or representatives) arising out of or relating to the Admission Agreement or its enforcement or interpretation or to the services provided by Facility to the Patient/Resident, including, without limitation, allegations by Resident of neglect, abuse or negligence, or allegations by the Facility for monies owed, shall be submitted to binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect. The arbitration shall take place in New York County, New York. The arbitrator shall have the authority to issue any appropriate relief, including interlocutory and final injunctive relief, including interlocutory and final injunctive relief. The arbitrator's award shall be binding on the Parties and conclusive and may be entered as a judgment in a court of competent jurisdiction.

The Agreement is signed by plaintiff and was witnessed by a representative of the nursing home. An X is indicated by Ms. Houston's name, and beneath it is states

that "[i]f resident is unable to sign due to physical limitations, resident should affix an 'X' in the presence of a witness."

Dewitt argues that its motion to compel arbitration should be granted as the above provision requires plaintiff to arbitrate her claims against it under New York's arbitration law and the FAA, which Dewitt argues preempts the Public Health Law's prohibition against arbitration of claims against nursing home facilities, citing Friedman v. Hebrew Home for the Aged at Riverdale, 131 AD3d 421 (1st Dept 2015), lv dismissed 28 N.Y.3d 1050 (2016) (holding that arbitration clause was not invalidated by Public Health Law as it is preempted by the FAA).

In opposition, plaintiff asserts that the arbitration provision in the Agreement is unenforceable as her mother did not knowingly entered into the Agreement, and she was not authorized to sign the Agreement on her mother's behalf. Plaintiff also argues that that Dewitt has failed to meet its burden of demonstrating a valid agreement to arbitrate as the motion to compel is not supported by an affidavit of a person with knowledge. In support of her opposition, plaintiff submits her affidavit in which she explains the circumstances surrounding her signing the Agreement. Specifically, plaintiff states that she and her mother "arrived at the facility by ambulance," and her mother was left outside on a stretcher while plaintiff was "escorted into the admissions office with all of my mother's belongings." Before her mother was allowed upstairs to her room, plaintiff was "presented with numerous papers and forms and told by a representative in the office that [plaintiff] had to sign and initial the paperwork in order for them to accept [her mother] as a resident." Plaintiff further states that "at no time did anyone from Dewitt explain all of the contents of the paperwork that [she] was signing, nor did they specify or explain the legal effect of any of the language in the forms." Specifically, no one explained to her that "by signing the forms [she] was agreeing to give up ... [her] mother's rights to

commence a lawsuit." She also states that her mother "was not present while [plaintiff] was signing any of this paperwork nor did [her mother] expressly consent to any of the language in the forms."

Additionally, plaintiff asserts that she did not have authority to agree on behalf of her mother to arbitrate any claims against Dewitt as she was not her mother's power of attorney at the time the Agreement was signed, and in support of this assertion, she submits a copy of a Power of Attorney executed in her favor by her mother on May 3, 2017, approximately five months after her mother's admission to Dewitt.

With regard to Dewitt's motion to dismiss plaintiff's claim for punitive damages under the PHL § 2801-d, plaintiff argues that this provision, which applies only to nursing home facilities like Dewitt, provides for a different standard than that governing punitive damages under the common law, and is adequately pleaded to survive dismissal.

Discussion

CPLR § 7503(a) provides, in relevant part, as follows:

> 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... .

The Court of Appeals has "repeatedly recognized New York's long and strong public policy favoring arbitration." Stark v. Molod Spitz DeSantis & Stark, PC, 9 N.Y.2d 59, 66 (2007) (internal citation and quotation omitted). Thus, it has been held that New York courts should "interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration." Matter of Smith Barney Shearson v. Sacharow, 91 N.Y.2d 39, 49 (1997) (internal citations and quotations omitted); see also Adams v. Kent Sec. of N.Y., Inc., 156 A.D.3d 588, 589 (1st Dept. 2017), lv dismissed 31 N.Y.3d 1059 (2018).

To the extent Dewitt argues that it is engaged in interstate commerce and therefore this matter is governed by the FAA, it should be noted that "[t]he FAA's purpose is to ensure that private agreements to arbitrate are enforced according to their terms." Volt Info. Sciences, Inc. v Board of Trustees of Leland Stanford Jr. Univ.,489 U.S. 468, 469 (1989). The FAA "establishes an emphatic national policy favoring arbitration which is binding on all courts, State and Federal." Singer v. Jeffries, 78 N.Y.2d 76, 81 (1991) (internal citations and quotations omitted).

At the same time, however, as an agreement to arbitrate entails the surrender of the right to utilize the courts in resolving a dispute, under New York's arbitration law and the FAA, "a party will not be compelled to arbitrate…absent evidence which affirmatively establishes that the parties expressly agreed to arbitration their disputes…[t]he agreement must be clear, explicit, and unequivocal …[and] must not be dependent upon implication or subtlety." Matter of Waldron v. Goddess, 61 NY2d 181, 183 (1984) (internal citations and quotations omitted); Gerling v. Global Reinsurance Corp, 302 A.D.2d 188, 123 (1st Dept 2002) lv denied 99 N.Y.3d 511 (2003) (in matter governed by FAA, noting that the party seeking to arbitration must demonstrate a "clear and unequivocal" agreement to arbitrate). Likewise, "as [a]rbitration is a matter of contract…grounded in the agreement of the parties …nonsignatories are generally not subject to arbitration agreements." Matter of Belzberg v. Verus Invs. Holdings Inc., 21 N.Y.3d 626, 630 (2013) (internal citations and quotations omitted); Minogue v. Malhan, 178 A.D.3d 447 (1st Dept 2019).

Here, the threshold issue is whether the parties made a valid agreement to arbitrate such that the arbitration provision in the Agreement is enforceable. Applying the above standards, the court finds that Dewitt has not met its burden of establishing that decedent agreed to arbitrate disputes arising out of her admission to Dewitt. First, while there is an "X" next to decedent's

signature line, Dewitt submits no evidence to as to the circumstances surrounding decedent's signing the Agreement in this manner, and plaintiff's affidavit does not indicate that her mother read or signed the Agreement. Next, although the Agreement was signed by plaintiff, the record is devoid of evidence that she had the authority to agree to the arbitrate on behalf of her mother. To the contrary, in her affidavit plaintiff states that her mother did not consent to her signing the Agreement, nor did plaintiff possess a Power of Attorney for her mother at the time she signed the Agreement. Moreover, while under certain circumstances, agency can provide a basis for binding a non-signatory to an agreement to arbitrate (see e.g. Kramer Levin Naftalis & Frankel v. Cornell, 148 A.D.3d 430, 431 [1st Dept. 2017]), plaintiff's status as decedent's daughter is insufficient to give rise to agency. See Rodriguez v. Montefiore Med. Ctr., Index No. 22467/2019E (J. Silver) (July 26, 2019) (denying motion to compel arbitration of claims against defendant nursing home in medical malpractice action where admissions agreement containing arbitration provision was signed by a family member of nursing home resident); Wisler v. Manor Care of Lancaster P.A., LLC, 124 A.3d 317 (Pa. Super.), appeal denied, 633 Pa. 788 (2015) (trial court properly denied nursing home's motion to compel arbitration where son who signed the admissions agreement lacked express or apparent authority and was not his mother's agent). Furthermore, while in Friedman v. Hebrew Home for the Aged at Riverdale, 131 A.D.3d 421 the court enforced an arbitration clause in an admission agreement executed by a son on behalf of his mother, the son's authority to do so was not at issue.

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 N.Y.2d 335, 339 (1998).

Plaintiff's signing of the Agreement without decedent's consent falls short of this required intent. Accordingly, the motion to compel is denied.

The remaining issue is whether plaintiff has sufficiently stated a claim for punitive damages under Public Health Law § 2801-d (2). In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court "must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007) (internal citations and quotations omitted).

Plaintiff's fourth cause of action, which seeks punitive damages under PHL § 2801(d)(2), alleges that Dewitt violated decedent's rights as a nursing home resident by, *inter alia*, "failing to move decedent on a regular basis; allowing pressure ulcer to occur on multiple areas of decedent's body," and by violating various regulations and statutes designed to protect nursing home residents, and that these failures were a direct and proximate cause of plaintiff's pain and suffering, mental anguish, and loss of personal dignity.

PHL§ 2801(d)(2) provides that punitive damages are available "where the deprivation of a right or benefit is found to have been willful or in reckless disregard of the lawful rights of a patient." Here, viewing the allegations of the complaint in favor of plaintiff, the court finds that it adequately states claim for punitive damages under PHL§ 2801(d)(2), such that the motion to dismiss the claim must be denied. See Hairston v. Liberty Behavioral Management Corp., 138 A.D.3d 467 (1st Dept 2016)[1] (reversing trial court's denial of motion to amend to add claim

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[1] Following discovery, the Appellate Division First Department dismissed the claim for punitive damages under PHL §2801(d)(2) on the ground that the facility was not governed by the Public Health Law. See Hairston v. Liberty Behavioral Management Corp., 157 A.D.3d 404, 406 (1st Dept 2018), lv dismissed 31 N.Y.3d 1036 (2018).

under PHL§ 2801(d)(2) where patient who suffered from various conditions including alcoholism, schizophrenia and bipolar disorder left alcohol rehabilitation facility unattended); Osborne v. Irvington House-the Nicholas Rango Health Care Facility, 19 Misc.3d 1132(A) (N.Y. Sup. Ct. Apr. 15, 2008) (holding that PHL 2801(2)(d) would appear to [impose] a less stringent standard than that under the law governing medical malpractice); Tanenbaum v. Dewitt Rehabilitation and Nursing Ctr., Inc., 2020 WL 1929805 (S. Ct. N.Y. Co. 2020) (denying motion to dismiss punitive damage claim under PHL 2801[d][2] as premature).[2]

Conclusion

In view of the above, it is

ORDERED that the motion to compel arbitration is denied; and it is further

ORDERED that the motion to dismiss plaintiff's claim for punitive damages under PHL§ 2801(d)(2) is denied.

DATED: November 12 2020

J.S.C.

HON. JOAN A. MADDEN
J.S.C.

[2] While Dewitt cites to various cases where courts have dismissed a demand for punitive damages under PHL 2801(d)(2), these cases are not dispositive here as they involved (i) a dismissal based on an examination of the evidence as opposed to the pleadings (see e.g., Butler v. Shorefront Jewish Geriatric Ctr., 33 Misc.3d 686 [Sup. Ct. Kings 2011]) or (ii) allegations which are factually distinguishable (see Williams v. Ruby Weston Manor, 2006 WL 6901808 [S. Ct. N.Y. Co. 2006] (denying motion to amend to include a claim for punitive damages under PHL 2801(d)(2) based on allegations that plaintiff was left alone in the bathroom and that x-rays were improperly taken).