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

PRESENT: Hon. EILEEN A. RAKOWER **PART 6**

Justice

JOHN CLIFTON, as Administrator of the Estate of, PATRICK BURK, and JOHN CLIFTON, Individually,

Plaintiffs,

- against-

PUTNAM NURSING AND REHABILITATION CENTER,

Defendant.

INDEX NO. 805355/2020
MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.

Decision and Order

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..
Answer — Affidavits — Exhibits
Replying Affidavits

Defendant Putnam Nursing and Rehabilitation Center ("Defendant"), moves for an Order pursuant to CPLR § 7503(a) granting Defendant's motion to compel arbitration and dismiss the action, or, in the alternative, stay the proceedings. Plaintiffs John Clifton, as Administrator of the Estate of Patrick Burk ("Decedent"), and John Clifton, Individually, (collectively, "Plaintiffs") oppose the motion.

Factual Background

This is an action for medical malpractice. Plaintiffs filed the Summons and Complaint on November 6, 2020 against Defendant for causes of action sounding in negligence, wrongful death, loss of support, and violations of New York Public Health Law §§ 2801-d and 2803(c).

Plaintiffs assert that the Decedent "was in the inclusive care" of Defendant from October 13, 2018 to April 5, 2019. On October 31, 2018, Decedent signed an Admissions Agreement (the "Agreement"). The Admissions Agreement, paragraph IV(g), states:

> In the event of any claim for damages arising out of: (1) breach or anticipated breach of this Agreement; (2) injuries alleged to have been incurred by Resident; or (3) death of Resident, allegedly due to health care provider negligence or other wrongful act (hereinafter collectively

> a "claim"), but not including intentional torts or any action brought by the Facility to collect payment owed to Facility by Resident under this agreement, the Claim shall be submitted to binding arbitration pursuant to the provisions of this health care arbitration agreement and the rules of the American Arbitration Association. The parties to this Agreement hereby waive any right to commence an action, proceeding or lawsuit in court for damages of any kind against any of the other parties to this Agreement. Binding arbitration shall be the parties' sole remedy for recovery of damages as against each other. This does not prevent a party from going to court for injunctive or other equitable relief. It is agreed that New York law, including statutes of limitations, shall govern this arbitration process.
>
> Within 15 days after a party to this agreement has given written notice of demand for arbitration to all other parties to this agreement of a Claim, the party making the Claim shall contact the American Arbitration Association and in writing request the appointment of an arbitrator chosen by that organization. The arbitration shall proceed under the direction of the assigned arbitrator, in accordance with the procedures of the American Arbitration Association. It is expressly agreed that the arbitration hearing will be conducted not farther than fifty miles from Holmes, New York.

On December 24, 2020, Defendant served a Demand for Arbitration on Plaintiffs, seeking "arbitration of claims" against Defendant pursuant to paragraph IV (g) of the Agreement.

Parties' Contentions

Defendant asserts that "[t]he proper forum for this dispute is before the American Arbitration Association." Defendant further asserts that "[a]s a review of the Complaint establishes, this dispute is clearly within the parameters of the arbitration clause, to which each of the parties agreed in writing."

In opposition, Plaintiffs argue that the Decedent "was incapable of making legal decision (sic.) for herself at the time she signed the arbitration agreement."

Plaintiffs assert that "the arbitration clause is so favorable to [Defendant] that they are (sic.) unconscionable." Plaintiffs argue that when the Decedent was admitted to Defendant nursing home, "[s]he was very hard of hearing, using hearing aides and a white board for communication. Her vision was impaired and used glasses for bot (sic.) near and far vision." Plaintiffs further argue that:

> Oddly enough, the admission agreement that the Defendant reference as binding the patient to arbitration was not signed until October 31, 2018. This was more than 24 hours after the patient arrived at the facility and begun treatment/rehabilitation. What is glaring about this agreement is that [the Decedent] does not "sign" any particular line. Instead we see the initials "P.B." noted throughout the document, even specifically where the agreement requests a signature.

Plaintiffs argue that "[c]onsidering [the Decedent's] condition upon arrival, her diagnoses, and her inability to hear or see very well it should have been apparent that [the Decedent] had signed an agreement that she couldn't understand, nor was she in any position to decline or contest." Plaintiffs further assert that Defendant did not have the Decedent sign the Agreement when her family was present on October 30, 2018. Plaintiffs argue that Decedent's family could have "a) assist[ed] [the Decedent] in understanding the documents if need be and b) see[n] and hear[d] the terms of that agreement themselves."

Moreover, Plaintiffs argue that they should be allowed to depose a representative from Defendant with regards to the "arbitration agreement, and circumstances surrounding where it was signed, who was present when it was being signed, and the mental state of [the Decedent] when she signed it." Plaintiffs assert that in Defendant's chart "it was indicated that all communications must be made to [the Decedent] via whiteboard." Plaintiffs argue that "it is unclear if [the Decedent] actually visually saw what she was signing due to her vision impairment for both near and far vision!"

In reply, Defendant argues that "plaintiffs fails (sic.) to set forth standard (sic.) by which a contractual provision can be considered unconscionable to the point it nullifies the agreement between two parties." Defendant asserts that the "Decedent's signing of the Agreement was neither procedurally nor substantively unconscionable." Defendant contends that the "arbitration clause was not hidden, but instead conspicuously bolded and underlined." Defendant further contends that the "Agreement also included a warning in all capital letters immediately prior to

the signature lines that 'THE UNDERSIGNED HAVE READ, UNDERSTAND AND AGREE TO BE LEGALLY BOUND BY THE TERMS AND CONDITIONS AS SET FORTH HEREIN…'" Additionally, Defendant argues that the "Agreement is not substantively unconscionable, either." Defendant asserts that an agreement is typically held as "unconscionable when the terms are unfairly one-sided." Defendant argues that here, "both parties are able to invoke the provisions of the agreement or otherwise enforce its terms, and are not barred from commencing an action in court 'for injunctive or other equitable relief.'" Defendant asserts that the "arbitration agreement in this case is equally accessible and available for both parties to claim relief against the other, as evidence by the following provisions: (i) arbitration of any claims under the clause are to be held 'not farther than fifty miles from Holmes, New York', the location of Defendant's facility…; and (ii) the arbitration association is to assign, with the consent of both parties, an arbitrator to oversee the action." Defendant further asserts that "the Agreement clearly identifies which claims are subject to arbitration." Defendant argues that "the arbitration provision entered into by the parties in the instant matter does not favor any party unfairly, nor does it deter either party from seeking relief of its claims via arbitration."

Furthermore, Defendant argues that while "Plaintiff does not expressly argue that the Agreement is unenforceable on grounds of contractual incapacity, there is no evidence upon which an inference can be made to support such a conclusion." Defendant asserts that the annexed portion of Decedent's records "are not certified and there is no affidavit averring to their authenticity or completely." Defendant contends that "[i]n the same admissions note that Plaintiff cites to, decedent is described as 'alert and oriented', with past diagnoses of sepsis, pulmonary aspergillosis, large cell lymphoma, encephalopathy, and dysphagia." Defendant asserts that "[t]he remaining pages are replete with references to decedent's mental acuity: she is 'able to make [her] needs known', alert and oriented, 'cognizant', and able to 'express[] wants/needs nonverbally and verbally.'" Additionally, Defendant contends that "[o]n November 6, 2018, decedent was described by Social Services representative Schadique Escoffery as 'able to make her needs and wants known and is independent in her decision making at this time.'" Defendant further contends that the Decedent "advised staff that she was 'considering herself to be short-term [care] and plan[ned] to return home when able.'" Defendant argues that the records do not "reference to any confusion or disorientation by decedent, nor any advance directives such as a health care proxy or power of attorney evidencing decedent's inability to make her own decisions, and no such document has been produced."

Defendant asserts that Plaintiffs only cite to the Decedent's "past medical diagnoses and conditions on admission to establish contractual incapacity." Defendant argues that "[n]one of the identified conditions, however, indicate

decedent was unable to engage in independent decision-making, including dysphagia, incontinence, a recently-removed feeding tube, sepsis, pulmonary aspergillosis (an allergic reaction to mold), or reliance on assistive devices for both vision and hearing." Defendant further argues that Plaintiffs fail to cite any legal authority that constitutes inadequate vision as a found for disregarding an enforceable contract. Defendant asserts that the records that were produced state that on March 29, 2019, the Decedent had an optometry consultation which "confirm that decedent's ability to see in adequate light was not impaired at all." Defendant argues that "there is only one instance where decedent initialed the Admissions Agreement, above a line whereby decedent was directed to place her "Signature (or Mark)". Defendant argues that the "Decedent acquired direct benefits from the contract, moving into Defendant's facility, living in the facility, and receiving daily care for a period of several months. During this time, decedent, and her family, acted as though the agreement was fully enforceable, and Defendant reasonably relied upon these actions as proof of acquiescence."

Legal Standards

Under CPLR §7503(a), "a party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration." *Koob v. IDS Fin. Servs., Inc.*, 213 AD2d 26, 30 [1st Dept 1995]. The FAA holds that written provisions to arbitrate in contracts "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" 9 USC §2. The effect of the FAA is "to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 US 1, 24 [1983]. "[T]he central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 US 662, 682 [2010][citations omitted]. New York Courts are bound to apply the FAA "as interpreted by Supreme Court decision or, absent such, in accordance with the rule established by lower Federal courts if they are in agreement." *Flanagan v. Prudential-Bache Sec., Inc.*, 67 NY2d 500, 505 [1986].

"Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court." *AT&T Tech., Inc. v. Communications Workers of Am.*, 475 US 643, 649 [1986]. To determine whether a dispute is arbitrable, a court must examine: "(1) whether there exists a valid agreement to arbitrate at all under the contract in question ... and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the

arbitration agreement." *Hartford Acc. & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F3d 219, 226 [2d Cir. 2001].

A party may challenge the enforcement of such an agreement 'on any basis that could provide a defense to or grounds for the revocation of any contract, including fraud, unconscionability, duress, overreaching conduct, violation of public policy, or lack of contractual capacity.' (*Matter of Teleserve Sys. [MCI Telecom. Corp.]*, 230 AD2d 585, 592 [4th Dept 1997])." *Ane v. Caffe Bene, Ltd*., 2017 N.Y. Slip Op. 30407[U], 4 [N.Y. Sup Ct, New York County 2017]. "To raise an a factual issue with respect to [plaintiff's] capacity to contract" proof must be offered "in admissible form that, at the time of entering into the agreement, [plaintiff] was, incapable of comprehending and understanding the nature of the transaction at issue, or ... due to his ... mental illness, was unable to control his ... conduct." *Estate of Ilya Kandov v. Kogan*, 2014 N.Y. Slip Op. 31702[U] [N.Y. Sup Ct, New York County 2014] (citation omitted). Plaintiff " is required to offer more than conclusory assertions to that effect." *Id.*

The Court has held that where the party "had the capacity to enter a contract" that the party "had the capacity to submit to binding arbitration." *Stark v. Rubel*, 2015 N.Y. Slip Op. 31385[U] [N.Y. Sup Ct, Kings County 2015].

"An unconscionable contract has been defined as one which 'is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms. (*See* 1 Corbin on Contracts, § 128, p. 400.)' (*Mandel v. Liebman,* 303 N.Y. 88, 94, 100 N.E.2d 149.) *Gillman v. Chase Manhattan Bank, N.A*., 73 NY2d 1, 10 [1988]. "The doctrine, which is rooted in equitable principles, is a flexible one and the concept of unconscionability is intended to be sensitive to the realities and nuances of the bargaining process." *Id.* (citation omitted). "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.* (citations omitted).

Discussion

Here, the parties have "clearly and unmistakably" delegated the threshold question of arbitrability to the arbitrator. *AT&T Tech*., 475 US at 649. Plaintiffs have failed to show that the Agreement should be revoked based on "fraud, unconscionability, duress, overreaching conduct, violation of public policy,

or lack of contractual capacity." *Ane*, 2017 N.Y. Slip Op. at 4 (citation omitted). Plaintiffs have not provided any evidence that shows that the Decedent lacked contractual capacity. Decedent's records that are attached to the motion do not "reference to any confusion or disorientation by decedent, nor any advance directives such as a health care proxy or power of attorney evidencing decedent's inability to make her own decisions, and no such document has been produced." Additionally, the Decedent was able to communicate with a whiteboard. There is no indication that the Decedent was not able to read the Agreement. Plaintiffs have provided only conclusory evidence. *See Estate of Ilya Kandov*, 2014 N.Y. Slip Op. 31702[U] [N.Y. Sup Ct, New York County 2014].

Furthermore, Plaintiffs fail to demonstrate that the Agreement is procedurally and substantively unconscionable. The arbitration clause was not hidden and stated, "THE UNDERSIGNED HAVE READ, UNDERSTAND AND AGREE TO BE LEGALLY BOUND BY THE TERMS AND CONDITIONS AS SET FORTH HEREIN…'" before the signature line. Moreover, the Agreement was not "unfairly one-sided." The arbitration agreement was accessible and available for both parties. The relevant provisions of the Agreement state: "(i) arbitration of any claims under the clause are to be held 'not farther than fifty miles from Holmes, New York', the location of Defendant's facility…; and (ii) the arbitration association is to assign, with the consent of both parties, an arbitrator to oversee the action." Therefore, Defendant's motion to compel arbitration is granted.

Wherefore, it is hereby

ORDERED that Defendant's motion pursuant to CPLR §7503(a) compelling Plaintiffs John Clifton, as Administrator of the Estate of Patrick Burk, and John Clifton, Individually, to arbitrate their claims against Defendant Putnam Nursing and Rehabilitation Center is granted; and it is further

ORDERED that the action is dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: May 4, 2021

ENTER: _____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION