SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

DANIELLE BERNSTEIN and JOHNATHAN ROSEN,

Plaintiffs,

-against-

AMY SPIZUOCO, D.O., and TRUE DERMATOLOGY, PLLC,

Defendants.

Index No.: 505324/2022

DECISION/ORDER

Hon. Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: dismiss defendant's first affirmative defense, pursuant to CPLR §3211(b), on the grounds that the arbitration agreement between the parties is invalid.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed.....	1-2; 3-4
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits.....	5
Replying Affidavits.....	6
Exhibits.....	
Other: ..... (memo).....	

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

Plaintiffs, Danielle Bernstein ("Ms. Bernstein") and Johnathan Rosen ("Mr. Rosen"), by their attorneys, have moved (seq. 1), pursuant to CPLR §3211(b) to strike defendant's first affirmative defense on the grounds that the arbitration agreement signed by Ms. Bernstein is invalid, as it lacks consideration, it is a contract of adhesion, and it is unconscionable.

Defendants, Amy Spizuoco, D.O. ("Dr. Spizuoco") and True Dermatology, PLLC ("True Dermatology"), by their attorneys, have cross-moved (seq. 2), pursuant to CPLR §7503(a) and §2201 to compel arbitration based on the terms of the arbitration agreement Ms. Bernstein signed in the defendants' office on June 1, 2021, prior to the procedure.

Background:

The within action sounding in medical malpractice was commenced by the filing of a summons and complaint with the Clerk of this Court, on or about February 2, 2022. Issue was joined by the defendants by the service and filing of an answers on or about March 31, 2022. In their answers, both defendants asserted a first affirmative defense claiming "This lawsuit is barred by CPLR 3211(a)(5) and CPLR 7501 et. seq. and CPLR 3211(a)(8) in that there is an Arbitration Agreement between the parties signed on June 1, 2021 by plaintiff Danielle Bernstein."

In response to defendants' assertion of the affirmative defense of arbitration, plaintiff served the instant motion to strike the affirmative defense of arbitration, and defendants have made the instant cross-motion to compel arbitration.

This case arises out of the alleged malpractice and negligence of Dr. Spizuoco with respect to the treatment rendered to Ms. Bernstein beginning on June 3, 2021, specifically the removal of hair from the superior cutaneous lip portion of her face with a Diolaze laser hair removing device, which allegedly resulted in scarring.

Facts:

Ms. Bernstein first presented to Dr. Spizuoco on February 4, 2020 to have a benign lesion removed, prior to which she signed an arbitration agreement as well as other forms. On February 18, 2020, Ms. Bernstein returned to Dr. Spizuoco to have the sutures removed from the February 4th procedure.

On June 1, 2021, Ms. Bernstein returned to Dr. Spizuoco to inquire about laser hair removal of excessive facial hair, which is a cosmetic procedure. At the time of the office visit, Ms. Bernstein was given a tablet with digital documents to review and sign in the waiting room. Allegedly Ms. Bernstein finished signing the documents in the examining room prior to Dr. Spizuoco seeing her. The record reflects that Ms. Bernstein signed 9 different forms on June 1, 2021: Arbitration, Consent Photo, Financial Policy, Consent Minor Procedure, No Show Policy, Credit Card on File, Self-Pay Consent Form, Insurance Signa on File, and HIPPA Authorization.

After the consultation, Ms. Bernstein returned to True Dermatology on June 3, 2021 to undergo her first laser hair removal procedure with Dr. Spizuoco.

Parties' Contentions:

Here, the Court is presented with the issue as to whether the arbitration agreement that Ms. Bernstein signed on June 1, 2021 is valid, and whether the alleged malpractice is within the scope of that agreement.

In support of the motion by plaintiffs, counsel argues that the arbitration agreement is invalid because it lacks consideration, as the defendant has given nothing in return for Ms. Bernstein's promise to waive a court action. In addition, counsel claims it

is a contract of adhesion because Ms. Bernstein had limited time to review the documents, was not notified about the arbitration agreement, and was in an inferior bargaining position with respect to the defendants. Further, counsel asserts it is unconscionable because Ms. Bernstein was allegedly rushed to sign the documents before seeing Dr. Spizuoco.

In support of their cross-motion and opposition to plaintiff's motion, counsel for defendants argues the arbitration agreement was signed by Ms. Bernstein, was clearly written in plain English and was signed and dated contemporaneously (see Sanchez v Simmons, 121 Misc.2d 249, 252 [Bronx Co. 1983]). In addition, counsel asserts that the terms of the arbitration agreement were valid and enforceable, as they explained: the scope of arbitration; that by agreeing to arbitration the plaintiff waived her right to a jury or judge trial; and that arbitration was binding. Further, counsel maintains that arbitration provisions are enforceable in medical malpractice actions and have been upheld by the courts with respect to arbitration clauses in nursing home admission agreements, which counsel claims is analogous to the issue at bar.

Discussion:

In addressing the validity of the arbitration agreement, CPLR §7501 states that "a written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy." On a motion to compel arbitration, the court must determine whether the parties made a valid agreement to arbitrate, and if so, whether the agreement has been

complied with. Dazco Heating & A.C. Corp. v C.B.C. Indus., 225 AD2d 578 [2d Dept 1996]. A party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties' 'clear, explicit and unequivocal' agreement to arbitrate." Fiveco, Inc. v Haber, 11 NY3d 140 [2008]. Notwithstanding the presence of a party's signature on a contract, an arbitration agreement may be unenforceable if the agreement lacked mutuality of consideration, is a contract of adhesion, or is unconscionable. Wolfman v Herbstritt, 114 AD2d 955 [2d Dept 1986]; Ball v SFX Broadcast, Inc., 236 AD2d 158 [3d Dept 1997]; Sablosky v Gordon Co., 73 NY2d 133, 138 [1989].

This Court finds that plaintiff has failed to present evidence that the arbitration agreement Ms. Bernstein signed on June 1, 2021 is unenforceable.

With respect to the allegation that the agreement lacked mutuality of consideration, the arbitration agreement states in Article 1 that "both parties to this contract, by entering into it, are giving up their constitutional rights to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration." (See Arbitration Agreement, annexed to Plaintiff's motion as "Exhibit 3"). Although plaintiff has argued that the arbitration agreement applies only to medical malpractice claims, such assertion is contradicted by the text of the arbitration agreement, which specifically references medical malpractice actions in Article 1, and generally addresses all claims in Article 2: "All claims must be arbitrated: It is the intention of the parties that this agreement bind all parties whose claims may arise out of or relate to the treatment or service provided by the physician including spouse, or heirs of the patient

and any children, whether born or unborn, at the time of the occurrence giving rise to any claim." As both parties have given up their right to a jury trial for all claims arising out of the treatment provided by Dr. Spizuoco, there is mutuality of consideration.[1]

In addition, there is nothing in the record that suggests this is a contract of adhesion. Adhesion relates to "whether the party seeking to enforce the contract used high pressure tactics or deceptive language in the contract and where there is inequality of bargaining power." Ball v SFX Broadcast, Inc., 236 AD2d 158 [3d Dept 1997]. This Court does not consider the requirement that the plaintiff finish signing the forms (including the arbitration agreement) before being seen by Dr. Spizuoco to be a "high pressure tactic", and there is no deceptive language in the agreement. Defendants' counsel also notes that this was not an emergency procedure and Ms. Bernstein could have sought treatment from a different dermatologist if she did not want to sign the arbitration agreement. This Court has also considered that Ms. Bernstein had already undergone a procedure at True Dermatology by Dr. Spizuoco over a year prior to the laser hair removal, and she had signed an arbitration agreement for that procedure as well, and as such, Ms. Bernstein was aware that the arbitration agreement was part of the forms she would have to sign in order to receive treatment by Dr. Spizuoco.

Further, there is no evidence to suggest this arbitration agreement is unconscionable. A contract is unconscionable if it is so grossly unreasonable as to be

[1] In Wolfman, the Court held that the arbitration agreements lacked mutuality of consideration because defendant's only conceivable action against plaintiff (for fees) was specifically exempted from resolution by arbitration. Wolfman v Herbstritt, 114 AD2d 955 [2d Dept 1986]. However, the instant action is distinguishable as there are no exemptions, and all causes of action pertaining to the treatment rendered by Dr. Spizuoco are subject to arbitration.

unenforceable because of an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party. Sablosky v Gordon Co., 73 NY2d 133, 138 [1989]. Such a contract "is so grossly unreasonable...in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms." Sablosky v Gordon Co., 73 NY2d 133, 138 [1989]. Arbitration clauses have been found to be invalid for failure to apprise the patient that he or she was giving up her right to a trial by jury. Stewart v Contemporary Dental Implant Centre, Inc., 2013 N.Y. Slip Op 30430(U) [Sup. Ct. N.Y. Co. 2013], *citing* Roberts v Gillen, 2001 N.Y. Slip Op 30072(U) [Sup. Ct. N.Y. Co. 2001]. Here, as stated above, Ms. Bernstein did have the option to not seek treatment with this dermatologist, as she was aware the arbitration agreement was part of the set of forms requiring her signature in order to receive treatment. In addition, the arbitration agreement clearly states in Article 1, as well as at the bottom in all capital letters, that "BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL." Further, courts have upheld the validity of arbitration agreements in medical malpractice cases involving hospitals and nursing homes. Ahearn v Arvan, 2 AD3d 469 [2d Dept 2003]; Neesemann v Mt. Sinai West, 198 AD3d 484 [1st Dept 2021]; Friedman v Hebrew Home for the Aged at Riverdale, 131 AD3d 421 [1st Dept 2015].

With respect to the issue regarding whether the alleged malpractice is within the scope of the arbitration agreement, this Court finds that, as the arbitration agreement

specifically references medical malpractice actions relating to the subject treatment (laser hair removal), and the instant action is sounding in medical malpractice, it is clear there is "a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract." Dazco Heating & A.C. Corp. v C.B.C. Indus., 225 AD2d 578, 579 [2d Dept 1996]; Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co., 37 NY2d 91, 96 [1975].

There is a strong public policy in favor of arbitration, and "a party to a dispute governed by an arbitration agreement may not unilaterally evade the stipulated forum and litigate the controversy." Olympia & York OLP Co. v Merrill Lynch, Pierce, Fenner & Smith, 214 AD2d 509, 511-12 [1st Dept 1995].

Accordingly, plaintiff's motion, pursuant to CPLR §3211(b) to strike defendant's first affirmative defense is denied.

Defendants' cross-motion, pursuant to CPLR §7503(a) and §2201, to compel arbitration is granted.

This shall constitute the decision and order of this Court.

Dated: August 17, 2022
Brooklyn, NY

ENTER

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

HON. BERNARD J. GRAHAM