SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

West District, Santa Monica Courthouse, Department N

20SMCV00365 March 17, 2021
MARTHA E. HIERRO, M.D. vs PROVIDENCE SAINT JOHNS MEDICAL FOUNDATION DBA SAINT JOHNS PHYSICIAN PARTNERS FKA SAINT JOHNS HEALTH CLINIC, A CORPORATION, et 8:30 AM

Judge: Honorable Craig D. Karlan
Judicial Assistant: S. Hwang
Courtroom Assistant: S. Mixon

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Kevin Cauley (Telephonic)

For Defendant(s): Camilo Echavarria (Telephonic); Lawrence Segal (Telephonic); Todd Picker (Telephonic)

NATURE OF PROCEEDINGS: Hearing on Motion - Other to Compel ; Hearing on Motion for Stay of Proceedings; Hearing on Motion to Compel Arbitration

The matters are called for hearing.

The Court has read and considered all documents filed hereto. Having heard the arguments, the Court now rules as follows:

*** RULING ***

Defendants Digestive Health Associates of Southern California, West Los Angeles Anesthesia Services, LLC, West Los Angeles Anesthesia Services, Rudolph Bedford, M.D., Richard Corlin, M.D., Marc Harwitt, M.S., Lenna Martyak, M.D., and Rahul Dixit, M.D.'s Motion to Compel Arbitration and to Stay Proceedings is GRANTED, as modified below.

First, "except that punitive damages shall not be awarded" is STRICKEN from "ARTICLE XXII. [¶] ARBITRATION" in the Physician Employment Agreement.

Second, as to the FEHA causes of action, attorneys' fees shall only be awarded by the Arbitrator if the Arbitrator deems any/all of these causes of action to be unreasonable, frivolous, meritless or vexatious. As to the remaining causes of action, attorneys' fees may be awarded to the prevailing party as per contract or statute.

The proceedings are STAYED pending the outcome of arbitration. A Status Conference re:

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CSR: None
ERM: None
Deputy Sheriff: None

Arbitration is set for August 13, 2021, at 9:00 AM.

Defendants Digestive Health Associates of Southern California, West Los Angeles Anesthesia Services, LLC, West Los Angeles Anesthesia Services, Rudolph Bedford, M.D., Richard Corlin, M.D., Marc Harwitt, M.S., Lenna Martyak, M.D., and Rahul Dixit, M.D. to give notice.

REASONING

Request for Judicial Notice
Defendants Digestive Health Associates of Southern California, West Los Angeles Anesthesia Services, LLC, West Los Angeles Anesthesia Services, Rudolph Bedford, M.D., Richard Corlin, M.D., Marc Harwitt, M.S., Lenna Martyak, M.D., and Rahul Dixit, M.D. ("Defendants") request judicial notice of (1) the Decision and Order of the Medical Board of California and the documents attached thereto, (2) the Medical Board of California's Disciplinary Alerts, and (3) the fact that Plaintiff Martha E. Hierro, M.D. ("Plaintiff") was disciplined by the Medical Board of California and an accusation was filed against her on October 23, 2018, all of which can be found as exhibits to the declaration of Rudolph Bedford, M.D. Defendants' request is GRANTED, pursuant to Evidence Code section 452, subdivision (h).

Motion to Compel Arbitration
"The right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract." (Eng'rs & Architects Ass'n v. Cmty. Dev. Dep't (1994) 30 Cal.App.4th 644, 653.) General principles of contract law determine whether the parties have entered a binding agreement to arbitrate. (Chan v. Drexel Burnham Lambert, Inc. (1986) 178 Cal.App.3d 632, 640-641 ["The existence of a valid agreement to arbitrate involves general contract principles"].)

"[I]n considering a . . . petition to compel arbitration, a trial court must make the preliminary determinations whether there is an agreement to arbitrate and whether the petitioner is a party to that agreement (or can otherwise enforce the agreement)." (M & M Foods, Inc. v. Pac. Am. Fish Co. (2011) 196 Cal.App.4th 554, 559; see also Giuliano v. Inland Empire Personnel, Inc. (2007) 149 Cal.App.4th 1276, 1284 (Giuliano) ["petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence"].) In deciding a petition to compel arbitration, trial courts must first decide whether an enforceable arbitration agreement exists between the parties, and then determine whether plaintiff's claims are covered by the

agreement. (Omar v. Ralphs Grocery Co. (2004) 118 Cal.App.4th 955, 961.)

Code of Civil Procedure section 1281 states, "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." Code of Civil Procedure section 1281.2 provides, in relevant part:

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.

(c) A party to the arbitration is also a party to a pending court action or special proceeding with a third party . . . .

Here, Defendants move to compel arbitration of Plaintiff Martha E. Hierro, M.D.'s claims against them; Defendants Providence Saint John's Medical Foundation, Providence Saint John's Health Center, and Endoscopy Center of Southern California filed joinders to Defendants' motion.

The existence of a Binding Arbitration Agreement
Plaintiff first argues there is no agreement to arbitrate between her and Defendants because the arbitration provision was placed in a twenty-one-page employment agreement, she was never counseled regarding the arbitration provision, she was not told to study the agreement, she was under the impression the only term open for discussion or negotiation was the issue of compensation, and she relied upon the advice of Defendants' attorney, who did not advise her to obtain independent counsel.

Upon reference to the Physician Employment Agreement, the Court notes it was entered into between Plaintiff and Digestive Health Associates, signed by Plaintiff, Rudolph Bedford, M.D., and Richard Corlin, M.D., on behalf of Digestive Health Associates. Within the agreement,

which is lengthy, the arbitration provision is conspicuous on page 19, with a bold, capitalized, and underlined offset heading, "ARTICLE XXII. [¶] ARBITRATION," and the first sentence of the provision states that "[a]ny controversy, dispute or claim arising out of, in connection with, or related to the interpretation, performance or breach of this Agreement shall be resolved by final and binding arbitration." (Mot., Rudolph Decl. ¶ 7, Ex. C, p. 19.)

Article XII of the agreement also states, "Providence Medical Foundation shall be an express and intended third party beneficiary of this Agreement," and the recitals on page 1 state that "Providence Medical Foundation" consists of Providence Saint John's Health Center d/b/a Saint John's Health Clinic, and that the agreement would be assigned to Defendant Providence Saint John's Medical Foundation. (Mot., Rudolph Decl. ¶ 7, Ex. C, p. 1.) Defendants argue all Defendants in this action may invoke the arbitration agreement in that Plaintiff alleges all individual Defendants were agents of DHA. (Compl ¶¶ 19, 76.) Plaintiff does not dispute this to be true, and indeed nonsignatories may invoke an arbitration agreement under an agency theory. (Westra v. Marcus & Millichap Real Estate Investment Brokerage Co. (2005) 129 Cal.App.4th 759, 766 [allegations in pleading constitute judicial admission that party was acting as agent of signatory party].)

As such, the Court finds there to be a valid agreement to arbitrate which may be invoked by Defendants. The Court next analyzes Plaintiff's other contentions in the context of unconscionability.

Unconscionability
"[A] party opposing the petition [to compel arbitration] bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [] In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination." (Giuliano, supra, 149 Cal.App.4th at p. 1284.) "Courts analyze the unconscionability standard in Civil Code section 1670.5 as invoking elements of procedural and substantive unconscionability." (McManus v. CIBC World Markets Corp. (2003) 109 Cal.App.4th 76, 87 (McManus).) "The procedural element of unconscionability focuses on whether the contract is one of adhesion" and "whether there is oppression arising from an inequality of bargaining power or surprise arising from buried terms in a complex printed form." (Ibid., quotation marks omitted.) "The substantive element addresses the existence of overly harsh or one-sided terms." (Ibid.) "An agreement to arbitrate is unenforceable only if both the

procedural and substantive elements are satisfied." (Ibid.)

"Procedural unconscionability pertains to the making of the agreement; it focuses on the oppression that arises from unequal bargaining power and the surprise to the weaker party that results from hidden terms or the lack of informed choice." (Ajamian v. CantorCO2e, L.P. (2012) 203 Cal.App.4th 771, 795.)

An arbitration provision is substantively unconscionable where the provision "does not fall within the reasonable expectations of the weaker or 'adhering' party," is "unduly oppressive," or has "overly harsh or one-sided" terms. (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 113-114 (Armendariz); McManus, supra, 109 Cal.App.4th at p. 87.) "An arbitration agreement is lawful if it (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require [the assenting party] to pay either unreasonable costs or any arbitrators fees or expenses as a condition of access to the arbitration forum." (Armendariz, supra, 24 Cal.4th at p. 102, quotation marks omitted.)

Plaintiff argues the agreement is substantively unconscionable in that it was presented to her in a "take it or leave it" fashion, the agreement was prepared by the attorney who represented the other physicians in the agreement, the attorney did not discuss the agreement with Plaintiff, and Plaintiff was not advised to obtain independent counsel. Notably, Defendants provide the declaration of Rudolph Bedford, M.D., who states Plaintiff was given the contract to review and study before signing, no one exerted pressure on her to sign it, and the agreement used by DHA was originally drafted by a team which included Plaintiff. (Mot., Rudolph Decl. ¶¶ 7-10.) There is no legal requirement to advise a party to consult with counsel before signing an arbitration agreement, and the Court is not inclined to invalidate an arbitration agreement as being presented in a "take it or leave it" fashion when the party so asserting assisted in drafting the agreement.

Plaintiff also argues the arbitration provision should not be enforced as Defendants failed to attach the arbitration forum rules. The arbitration provision, though, specifically states that "[t]he Arbitration shall be initiated and administered by and in accordance with the then existing Rules of Practice and Procedures of the Judicial Arbitration and Mediation Services, Inc. ('JAMS') or, if JAMS is not located or actively conducting arbitrations in Los Angeles County, with the Commercial Rules of the American Arbitration Association ('AAA')." (Mot., Rudolph Decl. ¶ 7, Ex. C, p. 19.) While the failure to provide a copy of the rules could be a relevant factor in

concluding the agreement is unconscionable (Lane v. Francis Capital Management LLC (2014) 224 Cal.App.4th 676, 690), it does not, standing alone, provide grounds for a finding of procedural unconscionability (Peng v. First Republic Bank (2013) 219 Cal.App.4th 1462, 1472). Insofar as Plaintiff contends the agreement requires her to bear the costs of arbitration, this is belied by the agreement, which states the prevailing party "shall be awarded reasonable attorneys' fees, expert and nonexpert witness costs and expenses incurred directly or indirectly with said Arbitration, including without limitation the fees and expenses of the arbitrator(s) and any other expenses of the Arbitration." (Mot., Rudolph Decl. ¶ 7, Ex. C, p. 20.) This provision does not make the payment of fees and costs a condition of access to the arbitration forum; indeed, Plaintiff is only required to pay such fees and costs if she does not prevail, and if she does, Defendants will pay her fees and costs. Nevertheless, as to the FEHA causes of action, the Court finds that attorneys' fees shall only be awarded by the Arbitrator if the Arbitrator deems any/all of these causes of action to be unreasonable, frivolous, meritless or vexatious; as to the remaining causes of action, attorneys' fees may be awarded to the prevailing party as per contract or statute.

Plaintiff further contends the agreement improperly prohibits recovery of punitive damages, which are allowable under her third, fourth, fifth, sixth, eighth and ninth causes of action. Indeed, the agreement states "[t]he arbitrator(s) shall have the power to grant all legal and equitable remedies provided by California law and award compensatory damages provided by California law, except that punitive damages shall not be awarded." (Mot., Rudolph Decl. ¶ 7, Ex. C, p. 20.) It is axiomatic that "an arbitration agreement may not limit statutorily imposed remedies such as punitive damages." (Armendariz, supra, 24 Cal.4th at p. 103.) In fact, our Supreme Court has stated that "an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA.," which includes punitive damages. (Id. at p. 101.) Thus, this provision of the arbitration agreement is unenforceable.

Nonetheless, this offending provision limiting Plaintiff's ability to collect punitive damages can be severed from the agreement, as the Court finds that the agreement is not otherwise unconscionable. For these reasons, Defendants Digestive Health Associates of Southern California, West Los Angeles Anesthesia Services, LLC, West Los Angeles Anesthesia Services, Rudolph Bedford, M.D., Richard Corlin, M.D., Marc Harwitt, M.S., Lenna Martyak, M.D., and Rahul Dixit, M.D.'s Motion to Compel Arbitration and to Stay Proceedings is GRANTED. However, the restriction on awarding punitive damages is ordered stricken from "ARTICLE XXII. [¶] ARBITRATION" in the Physician Employment Agreement.

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Judge: Honorable Craig D. Karlan
Judicial Assistant: S. Hwang
Courtroom Assistant: S. Mixon
CSR: None
ERM: None
Deputy Sheriff: None

The proceedings are STAYED pending the outcome of arbitration.

*** END OF RULING ***

The Motion to Compel Arbitration filed by Digestive Health Associates of Southern California, a California professional medical corporation, West Los Angeles Anesthesia Services, LLC, a California limited liability company, Richard Corlin, M.D., Rudolph Bedford, M.D., Marc Harwitt, M.D., Lenna Martyak, M.D., Rahul Dixit, M.D. on 08/19/2020 is Granted.

The Court hereby stays the proceedings pending the outcome of arbitration.

Status Conference Re: Arbitration is scheduled for 08/13/2021 at 09:00 AM in Department N at Santa Monica Courthouse.

Clerk is to give notice to moving party who shall give notice to all other relevant counsel.

Certificate of Mailing is attached.