IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

MACKIN MEDICAL, INC., Plaintiff,	:	February Term 2018
v.	:	No. 4
LINDQUIST & VENNUM LLP, ET. AL., Defendants.	:	Commerce Program
	:	Control Number 18040945
	:	1817 EDA 2018

Djerassi, J. **December 26, 2018**

OPINION

This opinion addresses defendant Lindquist & Vennum LLP's appeal of an Order overruling preliminary objections to compel arbitration. For the reasons discussed below, this court's order should be affirmed.

Plaintiff Mackin Medical, Inc. ("Mackin Medical") rents specialized equipment including Green Light™ Lasers to hospitals, doctors and trained medical professionals. In this case the Green Light™ Lasers were obtained by license.

Defendants are Lindquist & Vennum LLP ("Lindquist & Vennum"), a Minnesota law firm, its attorneys Mark A. Jacobson, Karla Vehrs, Mark Privratsky and Christopher Smith and Ballard Spahr, LLP, which merged with Lindquist & Vennum.

Mackin Medical retained Lindquist & Vennum as legal counsel to renegotiate a licensing agreement so the company could use certain fiber units and software cards with its Green Light ™ Lasers.

On December 11, 2013, Lindquist & Vennum sent a letter to Mackin Medical setting the scope and terms of its engagement of the law firm in pertinent part as follows:

> **Scope of Our Engagement.** You have retained the Firm to represent Mackin Medical in connection with antitrust and competition issues. While the Firm is available to work with you on a wide range of other matters, this will confirm that our engagement at this point is limited to the performance of services solely in the matter described above.

Lindquist & Vennum attached and incorporated to its retainer letter a document titled "Engagement Terms and Policies." This includes the following dispute resolution provision:

> ...In the event of a dispute, controversy, or claim arising out of or relating to our fees, costs, billing practices or this engagement, we mutually agree that any such dispute, controversy or claim will be submitted to mandatory binding arbitration before a single arbitrator in Minneapolis, Minnesota, in an arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules. The decision of the arbitrator will be final and binding on the parties. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction hereof. Arbitration has the advantage of generally being faster, less expensive and more informal than traditional litigation and any decision is final and binding. It does not provide, however, for the assurance of as much pre-hearing discovery, public trial by jury, or appeal. Arbitration filing fees are typically more expensive, and the parties are responsible for paying the arbitrator. Your signature on the accompanying engagement letter acknowledges your informed consent to use of arbitration to resolve disputes with us.[1]

Lindquist & Vennum did not did not advise its client that Pennsylvania lawyers fail to meet professional responsibility if prospective liability for malpractice is limited without a client's having a chance to review the agreement with independent counsel.[2] Nor did Lindquist & Vennum use the words "malpractice" or "legal negligence" in its retainer letter and incorporated engagement terms.

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[1] Engagement Terms and Policies attached to the December 11, 2013 letter attached to the preliminary objections to the complaint as Exhibit "B".

[2] Pa. Rule of Professional Conduct 1.8(h)(1)

On December 12, 2013, Mackin Medical executed the retainer letter with its incorporated engagement terms without independent counsel review.

Lindquist & Vennum represented Mackin Medical in efforts to renegotiate its client's licensing agreement but was unsuccessful and Mackin Medical's license for Green Light™ Lasers was terminated instead.

In its Complaint, Mackin Medical avers that Lindquist & Vennum advised them it was still free to rent out Green Light Laser technology to others provided that Green Light™ trademarks were not used or referenced. Mackin Medical states this was Lindquist & Vennum's counsel even after Mackin Medical's license to use Green Light™ Lasers had been terminated. Relying on this advice, Mackin Medical continued to rent out Green Light lasers from 2014 to 2016 despite demands by the licensor to stop. On September 11, 2016, the licensor filed suit against Mackin Medical alleging that its continued use of the lasers was patent infringement. Shortly thereafter, Lindquist & Vennum told Mackin Medical that the law firm would no longer represent them due to a conflict of interest. This withdrawal occurred three years after the retainer agreement with its incorporated dispute resolution provision.

In February 2018, Mackin Medical filed this lawsuit against its former attorneys alleging legal malpractice. Lindquist & Vennum filed preliminary objections seeking to compel arbitration pursuant to Pa. R. Civ. P. 1028 (a) (6). Preliminary objection was overruled and Lindquist & Vennum has appealed.

DISCUSSION

Arbitration is a matter of contract and, as such, it is for the court to determine as a question of law whether an express agreement to arbitrate exists between the parties. [3] The threshold question whether a party has agreed to arbitrate a dispute is a jurisdictional issue. [4] Law supported by policy strongly favors the disposition or settlement of disputes by way of arbitration. [5] When one party seeks to compel another to binding arbitration, courts are limited to determining (1) if a valid agreement to arbitrate exists between the parties and, if so, (2) whether the dispute involved is within the scope of the arbitration provision. [6] If a valid arbitration agreement exists between the parties and [plaintiff's] claim is within the scope of the agreement, the controversy must be submitted to arbitration.[7] . These points are well settled.[8]/[9]

The issue in this appeal is whether the FAA savings clause exempts arbitration enforcement when attorneys engage in prohibited conduct in a retainer agreement.[10] More specifically, the question is how traditional contract defenses such as fraud, duress, or

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[3] *Smith v. Cumberland Group Ltd.*, 687 A.2d 1167, 1171 (Pa. Super. 1997).

[4] *Patton v. Hanover Insurance Co.*, 612 A.2d 517, 520 (Pa. Super. 1992).

[5] *Smith,* supra. at 1171.

[6] *Hazleton Area School District v. Bosak,* 671 A.2d 277, 282 (Pa. Commw. 1996).

[7] *Smith,* supra. at 1171 (quoting *Kindred Nursing Centers Ltd. P'ship v. Clark,* ___U.S.___, 137 S. Ct. 1421 (2017); *Taylor v. Extendicare Health Facilities, Inc.* 147 A.3d 490 (Pa. 2016). *Messa v. State Farm Insurance Co.*, 641 A.2d 1167, 1170 (Pa. Super. 1994).

[8] Federal Arbitration Act ("FAA") 9 U.S.C.A. §1 et seq.

[9] *Kindred Nursing Centers Ltd. P'ship v. Clark,* supra., and Tay*lor v. Extendicare Health Facilities* ,supra.

[10] The savings clause of Sec. 2 of the FAA is the italicized portion of the following mandatory FAA language: Section 2 requires "a written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter resulting out of such contract or trans action...shall be valid, irrevocable, and enforceable, *save upon grounds as exist at law or in equity for the revocation of any contract.*

unconscionability are evaluated in the context of enforcing binding arbitration. In *Kindred Nursing Centers Ltd,* Justice Kagan states the applicable rules of law as follows:

"The FAA makes arbitration agreements 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2. That statutory provision establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses like fraud or unconscionability', but not on legal rules that 'apply only to arbitration or that delve their meaning from the fact that an agreement to arbitrate is at issue.' *A T & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The FAA thus preempts any state rule discriminating on its face against arbitration---for example, a 'law prohibit[ing] outright the arbitration of a particular type of claim. Id. at 341. And not only that: The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements".

In short, the Court favor binding arbitration and are wary of disguised end runs favoring lawsuits. For the following reasons, this court is not engaging in an end run.

Pa. Rule of Professional Conduct 1.8 (h) (1) provides that "a lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." This rule is not directed to an arbitration agreement *per se* but to any retainer---with or without a binding arbitration term.[11] Rule 1.8(h) (1) is about controlling lawyer conduct, not evaluation of binding arbitration agreements.

[11] Rule of Professional Conduct 1.8 (h) Explanatory Comment 14: ..."This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement."

In this context, it is understood that Lindquist & Vennum's retainer letter does not violate professional conduct relating to requiring binding arbitration. Our scrutiny in this case relates to something else that makes enforcement unconscionable.

Objective reading of Lindquist & Vennum's retainer letter and its incorporated engagement terms compels a finding that the law firm failed to reasonably disclose the prospective limitations the firm was placing on its own liability for malpractice. This is because the retainer and its incorporated terms violate both Pa. Rule of Prof. Responsibility 1.8(h) (1) and Rule 1.8(a) (1), the latter providing: "A lawyer shall not enter into a business transaction with a client...unless...the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner that can reasonably be understood by the client."

To date, Pennsylvania courts have not addressed the validity of retainer agreements prospectively limiting malpractice liability. Courts in Pennsylvania and elsewhere have reviewed malpractice waiver in the context of binding arbitration but focus on whether the retainer letter itself contains adequate information to allow a malpractice claim by arbitration.[12] The cases are not on point with the question whether a retainer agreement that violates a state court's professional rules is unconscionable and therefore not subject to arbitration.

In summary, we find Macklin Medical was not given sufficient objective information required by Pennsylvania courts to understand that its former attorneys were prospectively limiting their own liability for malpractice without telling Mackin Medical that it had a right to

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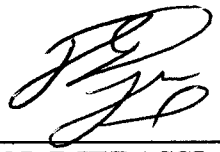
[12] *See, Hodges v. Reasonover*, 103 So. 3d 1069 (La. 2012)(setting forth minimum guidelines that an attorney should disclose to a client in a retainer agreement which mandates binding arbitration); *Sanford v. Bracewell & Guiliani*, 6 F. Supp.3d 568, (E.D. Pa. 2014), reversed and remanded on other grounds (applying *Hodges*. guidelines); See *Batoff v. Widin*, 2015 WL 9461542 (Phila Common Pl., Younge, J., December 18, 2015).

consult independent counsel first. [13] This failure to disclose is unconscionable in substance and the retainer agreement cannot be enforced as an express agreement to limit law firm liability for malpractice in any way. [14]

CONCLUSION

For these reasons, the order overruling preliminary objection in the nature of a petition to compel arbitration should respectfully be affirmed.

BY THE COURT



RAMY I. DJERASSI, J.

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[13]This court understands that Lindquist & Vennum may argue that nothing in the retainer agreement substantively limits its former client's prospective liability for malpractice, and therefore no review by independent counsel needed mention.

Because procedural differences exist between courts and the American Association of Arbitrators, this would not be persuasive. Potential clients need to know whether it makes sense to waive court jurisdiction on the issue of attorney malpractice. A third party lawyer advisor, for example, might explain the discovery ramifications of an arbitration which, in the vague words of the retainer agreement "does not provide...for the assurance of *as much pre-hearing discovery."* (Italics added).

Nor are consequences of waiving a right to appeal adequately explained in Lindquist & Vennum's retainer letter. When a "final and binding" decision by an arbitrator is erroneous but cannot be appealed, a law firm has successfully limited its liability for malpractice.

[14]*Salley v. Option One Mort. Corp.*, 925 A.2d 115, 119 (Pa. 2007)("A contract is unconscionable, and is therefore avoidable, where there was a lack of meaningful choice in the acceptance of the challenged provision and the provision unreasonably favors the party asserting it"). The retainer agreement here is an example of a contract that is substantively unconscionable. This is because facial review of the retainer letter/engagement terms finds no mention whatsoever of Micklin Medical's right to have a third party counsel review Lindquist & Vennum's prospective limitation of its own malpractice liability.

In finding substantive unconscionability, we have examined the retainer agreement's Scope of Engagement and incorporated Engagement Terms and Policies as a whole. We find the integrated document is a deliberate attempt to impose an arbitration scheme affected by fundamental unfairness because it seeks to limit malpractice liability without informed consent. See *Burkett v. St. Francis Country House*, 2018 WL 3730621 (Phila Com. Pl., Rau, J., August 1, 2018) citing *Salley*, supra., and *Hall v Treasure Bay Virgin Islands Co.*, 371 Fed. Appx. 311, 314 (3d Cir. 2010).