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

STEVEN LUDMERER and GAIL LUDMERER	:	NOVEMBER TERM, 2010
VS.	:	
DAVID NAZARIAN, M.D., 3B ORTHOPAEDICS, et. al.	:	NO. 01591 CONTROL #11020089
MICHAEL IANACONE and JANE IANACONE	:	JANUARY TERM, 2011
VS.	:	
DAVID NAZARIAN, M.D., et. al.	:	NO. 00524 CONTROL #11031782
MARY SOENS	:	APRIL TERM, 2011
VS.	:	
ARTHUR BARTOLOZZI, MD., et. al.	:	NO. 02409 CONTROL # 11051708

MEMORANDUM AND ORDER

KEOGH, A.J. SEPTEMBER 12, 2011

In the above-captioned medical malpractice actions, the Defendant-doctors filed Petitions to Compel Arbitration. This Memorandum and Order adjudicates the Petitions in favor of the Plaintiffs.

I. PROCEDURAL HISTORY

Plaintiff, Steven Ludmerer, alleges negligence regarding hip replacement surgery performed in November of 2008. A consortium claim is included in the suit. Plaintiff, Michael Ianacone, alleges that he suffered complications following a total left knee replacement performed in January of 2009, which resulted in the need for surgery to remove a bowel obstruction due to negligent post-operative care. A consortium claim was also raised. Plaintiff, Mary Soens, underwent a partial right knee replacement in April of 2009 and asserts that she suffered nerve damage to her left leg following the negligent performance of the surgery. David Nazarian, MD performed the surgeries on Mr. Ludmerer and Mr. Ianacone and was named as a Defendant in the first two actions. The surgery for Ms. Soens was performed by Arthur Bartolozzi, MD, who was named as a defendant in the third case. Dr. Nazarian and Dr. Bartolozzi are partners in a medical group, 3B Orthopaedics.1

The Plaintiffs in each of the cases signed a document entitled "Arbitration Agreement" as part of their pre-treatment paperwork. The Agreements in the first two actions are identical. The Agreement from the Soens matter was revised in January of 2009. The difference in the Agreements is only slight and is not material to the resolution of the Petitions.

In the Ludmerer and Ianacone actions, a Petition to Compel Arbitration was filed within a month of each other. In response, this Court issued an Order on April 13, 2011 scheduling a hearing *"for the purpose of exploring the validity, viability and enforceability of the medical malpractice Arbitration Agreements signed prior to treatment in each of these cases."* The hearing was

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1 In each of the cases there are other named Defendants, including the hospital where the surgeries were performed. Plaintiffs have alleged that since these Defendants were not parties to the Arbitration Agreement at issue, arbitration cannot be compelled as to those entities. The Court's disposition of the Petitions does not require resolution of this issue.

conducted on May 11, 2011, at which time the parties were permitted to present testimony or submit documentary evidence relevant to the issue at hand. The initial briefing schedule was extended at the request of the parties, resulting in all supplemental filings to be submitted no later than July 6, 2011.

Subsequent to the hearing, a Petition to Compel Arbitration was filed in the Soens matter. On June 23, 2011, the Court entered an Order staying the matter pending the resolution of the demand for arbitration, noting that the identical issue was under consideration in the Ludmerer and Ianacone actions and that the decision in the latter cases would inform the outcome in Soens.

II. DISCUSSION

Generally, the law regarding arbitration agreements provides that the party seeking to enforce an agreement to arbitrate must establish that there was an agreement to arbitrate entered into and that the issue in dispute falls within the scope of the arbitration agreement. If that is established, the party challenging the contract must establish that the contact is both procedurally and substantively unconscionable; one of the parties lacks a meaningful choice about whether to accept the provision in question and the challenged provision unreasonably favors the other party to the contract. In this instance, the Court finds that an essential term of the Agreements has failed, and thus the Agreements cannot be enforced. Accordingly, the Court does not address whether the Agreements are unconscionable.

Pertinent to the Court's resolution of the demands for arbitration is the following language from the Arbitration Agreements:

> *I understand and agree that any arbitration will be conducted in accordance with the Health Care Claims Arbitration Rules of the American Arbitration Association (AAA), which are incorporated by reference into this agreement and available at the 3B Orthopaedics, P.C. office, and that the arbitration shall be administered by the AAA.*

Prior to the May 11th hearing, defense counsel was asked to provide a copy of the "Health Care Claims Arbitration Rules" referenced in the Agreements. The document provided was not so entitled, rather it read "Commercial Arbitration Rules and Mediation Procedures".2

In considering the enforceability of the Agreements at issue, the Court viewed the AAA website. There is no reference to a set of "Health Care Claims Arbitration Rules". AAA does have rules for "Healthcare Case Services", to arbitrate "reimbursement disputes between payors and providers in the healthcare industry".

Additionally, AAA issued a Healthcare Policy Statement in 2003 stating:

> As a result of a review of its caseload in the health care area, the American Arbitration Association has announced that it will no longer accept the administration of cases involving individual patients without a **post dispute agreement to arbitrate.** In order to provide sufficient notice to provide for an orderly transition, this change will become effective on January 1, 2003.
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> AAA, has also determined that there will be no change in the administration of cases in the health care area where businesses, providers, health care companies, or other entities are involved on both sides of the dispute.
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> Distinguishing a patient undergoing health care treatment from other situations involving an individual, AAA, has determined that they will continue to administer pre-dispute agreements to arbitrate in all areas outside of the health care field, as long as there are appropriate due process safeguards as defined by the courts. (Emphasis added)

This Court is guided by the Superior Court's decision in Stewart v. GGNSC-Canonsburg, L.P., et. al. 2010 PA Super 199; 2010 Pa.Super. LEXIS 3810, which affirmed the trial court's denial of the defendant's preliminary objections to the complaint, asserting that since an arbitration agreement existed, the judicial proceedings should be stayed pending resolution of the dispute via arbitration. The case involved a claim against a nursing home facility for the

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2 Interestingly, the introduction to these Rules states that "each year many millions of business transactions take place. Occasionally disagreements develop over these business transactions".

negligent care of the plaintiff. The agreement at issue had provided for binding arbitration to be conducted in accordance with the National Arbitration Forum (NAF) Code of Procedure. Since NAF was no longer accepting arbitration cases pursuant to a consent decree it entered with the Attorney General of Minnesota, the trial court concluded that an essential term of the agreement had failed and thus the agreement could not be enforced. Additionally, the trial court found that the severability clause of the agreement could not save the agreement since the court would be required to rewrite the arbitration clause to provide for the form and mode of the hearing.

The Superior Court affirmed, holding that the designation of the particular arbitration forum, as well as adherence to that forum's code, were "integral parts" of the agreement to arbitrate. The Stewart concluded that as integral parts of the agreement were unenforceable given NAF's unavailability, the agreement could not be enforced.

In the supplemental filings submitted by the defense in this matter, Clerk v. First Bank of Delaware, 735 F.Supp. 2d 170; 2010 U.S. Dist. LEXIS 27206, is sited for the proposition that the reference to AAA's Health Care Claims Arbitration Rules and AAA were not integral parts to the Agreements, and thus they were enforceable and the disputes should be resolved by arbitration. In Clerk, the claim was initially brought in Pennsylvania state court as a class action suit by a borrower against a high-interest "payday loan" lender for charging usury interest rates. The case was moved to federal court and the lender filed a Motion to Stay and Compel Arbitration pursuant to an arbitration provision in the loan agreement. Pennsylvania law was determined to be controlling.

The pertinent provision of the agreement provided for arbitration of all legal disputes arising from the Loan Agreement pursuant to the American Arbitration Association (AAA), the

National Arbitration Forum (NAF) or any other arbitrator mutually agreed upon by the parties to arbitrate any dispute.

The parties agreed that NAF was no longer available to arbitrate the claims but disagreed as to AAA's availability since the organization had a moratorium on accepting certain types of "consumer debt arbitration filings". The Clerk Court concluded that the:

> The provision in this case fails to designate an exclusive arbitrator. Instead the provision offers the parties a choice between two listed arbitration associations and any other organization or individual that the parties agreed upon. In leaving open a range of potential arbitrators, the provision differs substantially from those provisions which courts have invalidated due to a chosen arbitrator's unavailability. Since the selection of a specific arbitrator was not an integral part of the agreement between the parties, the Court will not deem the arbitration provision unenforceable based on the alleged unavailability of AAA and NAF.

This Court finds that the Clerk decision is distinguishable and that Stewart is controlling. Contrary to the flexibility of the arbitration agreement in the Clerk matter, the Arbitration Agreements at issue here are similar to the agreement in the Stewart decision. The Agreements state that arbitration will be conducted in accordance with AAA's "Health Care Claims Arbitration Rules" and that the hearing will be administrated by AAA; as such, these terms are integral to the Agreement. Thus, since such Rules do not exist for the arbitration of medical malpractice claims and, more importantly, the fact that AAA actually has a policy of only accepting such claims where there has been a **post-dispute** agreement, the Agreements are unenforceable.3

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3 The Defendants' position is somewhat disingenuous given the fact that the Agreements state that a copy of the AAA "Health Care Claims Arbitration Rules" are available at the offices of 3B Orthopadeics, P.C, which as was revealed at the hearing such Rules do not exist. Moreover, AAA's policy to not accept the arbitration of medical malpractice cases unless there was a post-dispute agreement was issued in 2003, well before the Agreements in the cases before the Court were signed.

Therefore, the following order is given:

ORDER

AND NOW, this twelfth day of September, 2011, it is hereby ORDERED AND DECREED that the Petitions to Compel Arbitration filed in the above-captioned matters are DENIED. Additionally, in the Soens matter, the Stay imposed by the Court's June 23, 2011 Order is lifted and the judicial proceedings may resume.

BY THE COURT:

D. WEBSTER KEOGH
ADMINISTRATIVE JUDGE,
TRIAL DIVISION