

<b>Stewart v Contemporary Dental Implant Ctr., Inc.</b>
2013 NY Slip Op 30430(U)
February 28, 2013
Sup Ct, New York County
Docket Number: 113966/11
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: LOBIS  
Justice

PART 6

Index Number : 113966/2011  
STEWART, JAMIE  
vs.  
CONTEMPORARY DENTAL IMPLANT  
SEQUENCE NUMBER : 002  
COMPEL OR STAY ARBITRATION

INDEX NO. \_\_\_\_\_  
MOTION DATE 12-11-12  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 13, were read on this motion to for compel arbitration

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1-7  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 8  
Replying Affidavits \_\_\_\_\_ No(s) 9-13

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION  
+ Order

FILED

MAR 04 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/28/13

JB  
JOAN B. LOBIS, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
JAMIE STEWART,

Plaintiff,

Index No. 113966/11

-against-

**Decision and Order**

CONTEMPORARY DENTAL IMPLANT CENTRE,  
INC., GRAND CENTRAL GROUP LLP, DAVID  
TAVELIN, DDS, and HERTZL HABIB, DDS,

Defendants.  
-----X

JOAN B. LOBIS, J.S.C.:

**FILED**

**MAR 04 2013**

NEW YORK  
COUNTY CLERK'S OFFICE

Defendants Contemporary Dental Implant Centre, Inc., Grand Central Group LLP, David Tavelin, D.D.S., and Hertzl Habib, D.D.S., move pursuant to Article 75 of the Civil Practice Law and Rules for an order compelling Plaintiff to submit to arbitration, and dismissing or staying the action. Plaintiff Jamie Stewart opposes the motion, and asks that the case be referred for a preliminary hearing.

Plaintiff commenced this dental malpractice action on or about December 13, 2011, alleging that Defendants negligently performed surgical implants on teeth 9, 12, and 13. She also has a lack of informed consent cause of action. Defendants answered, interposed a number of affirmative defenses, and served discovery requests, deposition notices, and a demand for a bill of particulars. The parties appeared for a preliminary conference on June 26, 2012. Defendants filed this motion to compel arbitration on October 2, 2012. Since then, the parties have appeared for two compliance conferences.

In support of their motion, Defendants argue that Plaintiff should be compelled to arbitrate as she signed an informed consent form on January 21, 2011, which included arbitration language. Dr. Tavelin submits his own affidavit advancing a similar argument. He states that he performed Plaintiff's implants at teeth 9, 12, and 13 on January 21, 2011, and that, prior to treatment, Plaintiff signed a consent form, which contained an agreement to arbitrate any and all claims arising from any treatment at the facility. Defendants argue that this controversy falls within the province of the arbitration agreement, and that courts favor arbitration as a mechanism for controlling the increasing cost of dental care.

In opposition, Plaintiff argues that Defendants' motion should be denied because Defendants have waived their right to arbitrate by extensively participating in this litigation and by belatedly moving to compel arbitration. Plaintiff points out that Defendants have answered the complaint, interposed affirmative defenses, served notice of deposition, notices for discovery, and demanded a bill of particulars. Plaintiff states that she has responded to all of these notices. Additionally, Plaintiff argue that Defendants appeared at the preliminary conference on June 26, 2012, in which the parties established a comprehensive discovery schedule. Plaintiff also argues that Defendants have commenced an action against her in New York County, "Contemporary Dental Implant Centre, David Tavelin, D.D.S., and Barry Habib, D.M.D. v. Jamie Stewart," under Index No. 101162/12 (the "Second Action"). The Second Action was filed on or about February 2, 2012, and sounds in breach of contract. It contends that Ms. Stewart breached her contract to resolve any claims arising from the care and treatment rendered by the Defendants by arbitration. Plaintiff also disputes the validity of the arbitration clause contained in the consent form, specifically arguing that

it is void and unenforceable. Plaintiff avers that it was procured by deception, and that Defendants concealed the arbitration agreement and failed to explain it to her.

In support of her opposition to the motion, Ms. Stewart submits her own affidavit. Plaintiff states that she went to Defendants' office at 295 Madison Avenue, New York, New York on January 7, 2011, for an initial examination-consultation regarding dental implants for a missing tooth. After examination, the procedure and pricing were explained to her and she agreed on the proposed treatment. She was provided with a packet of forms to sign and was told that the documents were insurance forms, consent forms, and installment payment plan forms, all of which needed to be signed before the dental work could be performed. She states that the individual forms were never explained to her. On January 21, 2011, she was placed in a dentist chair in an examination room, fitted with a bib, and placed in a fully reclined position. Dr. Tavelin came into the room and gave her anesthesia, and said that he would begin the procedure once the anesthesia took effect. It was while Plaintiff was waiting in the chair that one of Dr. Tavelin's assistants appeared and presented Plaintiff with a series of forms and paperwork that required her signature. When she inquired as to the significance of the forms, she was told that they were consent forms.

In reply, Defendants argue that there has been no acceptance of the judicial forum, as there has been minimal degree of participation in this litigation. Defendants argue that answering the complaint does not by itself constitute a waiver of arbitration and that they affirmatively rejected the judicial forum when they asserted in their affirmative defenses that the Court lacked subject matter jurisdiction by virtue of an arbitration clause. Defendants liken this case to Grubin v. The

Gotham Condominium, New York County, Index No. 115404/10, in which the judge held that ordering depositions and appearing at court-ordered preliminary conference were insufficient to waive arbitration. Defendants cite to Denihan v. Denihan, 34 N.Y.2d 307 (1974), to support their argument that commencing a separate law suit alleging a breach of contract does not act as a waiver of arbitration. Defendants further aver that their actions are consistent with an assertion of their right to arbitrate and that the delay in bringing this motion was minimal.

In further support of the motion to compel arbitration, Dr. Tavelin submits a reply affidavit. He disagrees with the circumstances Plaintiff claims to have occurred surrounding her review and signing of the arbitration agreement. He states that the consent form was presented to Plaintiff before any treatment was rendered, and that it is a form that must be signed before any patient can be examined. Patients who have refused to sign the arbitration agreement have not been treated. He further states that the anesthesia administered to Plaintiff was a localized agent specific to the region of the mouth being treated and had no effect on her cognitive functioning, reasoning ability, or judgment capabilities. He disputes Plaintiff's assertion that her agreement to arbitrate was obtained deceptively.

C.P.L.R. §7503(a) permits the court to direct arbitration of a matter where there is no substantial question whether a valid agreement was made or complied with. On motions to stay or to compel arbitration, there are three threshold questions to be resolved by the court: (1) whether the parties made a valid agreement to arbitrate; (2) whether, if such an agreement was made, it has been complied with; and (3) whether the claim sought to be arbitrated would be barred by limitation of

time had it been asserted in court. See C.P.L.R. §7503(a); see also In re Cassone, 63 N.Y.2d 756 (1984). Before considering whether Defendants have waived their right to arbitrate or their level of participation in the litigation, the court must first ascertain whether the arbitration agreement is valid. Arbitration cannot be judicially mandated unless there is clear and unequivocal language indicating the parties' agreement to do so. See Fiveco, Inc. v. Haber, 863 N.Y.3d 140, 144 (2008). While arbitration is favored, as it provides for a less expensive and more expeditious mode of resolving disputes (Mobil Oil Indonesia v. Asamera Oil [Indonesia], 43 N.Y.2d 276 (1977)), the "policy favoring arbitration cannot displace the necessity for proof of a voluntary agreement to arbitrate." Miner v. Walden, 101 Misc.2d 814, 815 (Sup. Ct. Queens Co. 1979). Notwithstanding the presence of a party's signature on a contract, an arbitration agreement may be unenforceable based on various factors, and courts have given guidance as to what may render an arbitration agreement voidable or unenforceable. Some factors may be evaluated by a careful examination of the language contained in the arbitration agreement, while other factors require more extensive fact finding.

We first consider whether the language in the arbitration agreement renders it unenforceable. Courts have set aside agreements to arbitrate disputes due to overriding public policy. See In re Sprinzen v. Nomberg, 46 N.Y.2d 623 (1979). Courts have found agreements that lack mutuality of consideration to be unenforceable. See Wolfman v. Herbstritt, 114 A.D.2d 955 (2d Dep't 1986). Adhesion contracts have been deemed unenforceable. 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

A.D.2d 158 (3d Dep't 1997). Additionally, unconscionable arbitration clauses are also voidable. A contract is unconscionable if it is so grossly unreasonable as to be 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. See Sablosky v. Gordon Co., 73 N.Y.2d 133, 138 (1989). While there is no general test measuring the reasonableness of a transaction, the Court of Appeals ruled that an unconscionable contract is one that "is so grossly unreasonable . . . in light of the mores and business practices of the time and place as to be unenforcible according to its literal terms." Id. (quoting Gillman v. Chase Manhattan Bank, 73 N.Y.2d 1, 10 (1988)). Furthermore, an arbitration clause was found to be invalid for failure to apprise the patient that he or she was giving up her right to a trial by jury. See Roberts v. Gillen, 2001 N.Y.Slip Op 30072U (Sup. Ct. N.Y. Co. 2001).

Here, Defendant's motion to compel arbitration is predicated on the arbitration clause contained in the form signed by Plaintiff on January 21, 2011, entitled "Informed Consent for Dental Implant and Dental Procedures and Treatment." It states that "the patient agrees . . . that any dispute relating to dental or medical care . . . and any dispute arising out of the diagnosis, treatment, or care . . . including the scope of this arbitration clause and the arbitrability of any claim or dispute . . . shall be resolved by binding arbitration by the National Arbitration Forum." It contains language informing Plaintiff that by agreeing to arbitrate, she was waiving her right to a trial by jury. The language is clear and there exists no obvious lack of mutuality of consideration. The agreement is also not grossly unreasonable as to render it substantively unconscionable. It does not appear to be an adhesion contract, as Plaintiff did not undergo an emergency procedure and there is no deceptive language in the agreement. See Sanchez v. Sirmons, 121 Misc.2d 249 (Sup. Ct. Bronx Co. 1983).



Additionally, the court in Sanchez noted that “the resolution of medical malpractice disputes by arbitration cannot be regarded as offensive to public policy since several States have enacted legislation which permit its use[.]” Id. at 252. There is nothing in the language of the arbitration agreement rendering it unenforceable.

There remains, however, ambiguity and issues of fact surrounding the circumstances under which the agreement to arbitrate was obtained. Ms. Stewart states in her affidavit that Defendants secured her signature to agree to arbitrate by deception, concealment, and misrepresentation. She contends that in one instance, she was provided with forms while sitting in the dentist chair, under local anaesthesia, and awaiting the implant procedure to begin. She states that Defendants not inform her about the arbitration agreement contained in the consent form, that no one discussed the arbitration provision with her, and that when she inquired as to the forms’ significance, she was told they were consent forms. Dr. Tavelin, on the other hand, states in his affidavit that Ms. Stewart was not in the examination room when she signed the arbitration agreement, as it is his office’s custom to have patients sign the consent form prior to being examined. And that, in any event, the anesthesia was locally targeted and had no influence on the Plaintiff’s abilities to understand the forms. At a minimum, an evidentiary hearing for further inquiry is required to ascertain the circumstances surrounding the formation of the arbitration agreement. Findings of fact as to Ms. Stewart’s location and mental status are necessary to evaluate the validity of the agreement. Additionally, credibility testimony and documentary evidence is needed to understand whether Plaintiff had the opportunity to understand and inquire about the arbitration provision to be fully apprised of what she was signing. See, e.g., Sanchez v. Sirmons, 121 Misc.2d

[\* 9]  
249 (Sup. Ct. Bronx Co. 1983); Miner v. Walden, 101 Misc.2d 814 (Sup. Ct. Queens Co. 1979).

As there remains a substantial question whether a valid agreement was made, the Court declines to render a decision at this time. See C.P.L.R. § 7503(a). Accordingly, it is

ORDERED that the issue of whether a valid agreement to arbitrate was made between the parties is referred to a Special Referee to hear and report with recommendations, or hear and determine, if the parties so stipulate in writing, pursuant to C.P.L.R. § 4317; it is further

ORDERED that this issue is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to C.P.L.R. Rule 4403, or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for Plaintiff shall, within 15 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Special Referee Information Sheet upon the Special Referee Clerk in the Motion Support Office to arrange a date for the reference to a Special Referee.

Dated: February 28, 2013

ENTER:

**FILED**

**MAR 04 2013**

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JOAN B. LOBIS, J.S.C.