UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Dartmouth Hitchcock Medical Center

v. Civil No. 09-cv-160-JD
Opinion No. 2010 DNH 126

Cross Country Travcorps, Inc., d/b/a Cross Country Staffing (and their affiliates), and CHG Medical Staffing, Inc., d/b/a RN Network

O R D E R

Dartmouth Hitchcock Medical Center ("DHMC") brought an action against Cross Country Travcorps, Inc., doing business as Cross Country Staffing, and their affiliates (referred to collectively as "Cross Country"), and CHG Medical Staffing, Inc., doing business as RN Network ("CHG"). CHG moved for summary judgment, seeking an order that all three claims against CHG be submitted for binding arbitration. In an order dated June 10, 2010, the court granted the motion with respect to DHMC's claims against CHG for indemnification and breach of contract, and denied the motion with respect to DHMC's claim for contribution. DHMC now seeks reconsideration of the portion of the order requiring that the indemnification and breach of contract claims be submitted to arbitration. CHG objects.

Standard of Review

"A motion to reconsider an interlocutory order of the court, meaning a motion other than one governed by Fed. R. Civ. P. 59 or 60, shall demonstrate that the order was based on a manifest error of fact or law."[1] Local Rule 7.2(e). "The granting of a motion for reconsideration is 'an extraordinary remedy which should be used sparingly.'" Palmer v. Champion Mortgage, 465 F.3d 24, 30 (1st Cir. 2006) (quoting 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2810.1 (2d ed. 1995)). "Unless the court has misapprehended some material fact or point of law, such a motion is normally not a promising vehicle for revisiting a party's case and rearguing theories previously advanced and rejected." Palmer, 465 F.3d at 30.[2]

---

[1]DHMC did not specify under what rule it seeks reconsideration. In its objection, CHG applied Local Rule 7.2(e), and DHMC did not file a reply or otherwise object. It appears that neither Rule 59 nor Rule 60 is applicable, so the court proceeds under the Local Rule.

[2]Although the motion to reconsider in Palmer was brought under Rule 59(e), there is only a subtle difference between the Palmer standard and Local Rule 7.2(e). See Northwest Bypass Group v. U.S. Army Corps of Engineers, 552 F. Supp. 2d 137, 145 n.5 (D.N.H. 2008). To the extent there is any difference between the two standards, the court looks to Palmer for guidance but makes its determination pursuant to the Local Rule.

Discussion[3]

DHMC argues that the June 10 order was incorrect because the arbitration clause, by its terms, is limited to the "parties" to the contract. DHMC contends that the clause does not apply to it, because it is not a "party" as that term was defined by the Subcontract, but rather merely a third-party beneficiary. In particular, DHMC argues that the court misapplied Sitarik v. JFK Med. Ctr. Ltd., 7 So.3d 576, 578 (Fla. Dist. Ct. App. 2009) and Terminix Int'l Co. v. Ponzio, 693 So.2d 104 (Fla. Dist. Ct. App. 1997); overlooked portions of the Subcontract; and misunderstood the holding of Hirshenson v. Spaccio, 800 So.2d 670, 673 (Fla. Dist. Ct. App. 2001). CHG argues that the court committed no manifest error of fact or law.

A. Sitarik and the Subcontract

DHMC argues that the court erred because it failed to follow Florida law as dictated in Sitarik. According to DHMC, Sitarik is applicable to this case and instructs the court to look to other provisions of the Subcontract to determine whether DHMC is bound by the arbitration clause. CHG contends that the court correctly applied Florida law.

---

[3]The pertinent background is provided in the June 10 order.

In Sitarik, John Sitarik brought breach of contract and related claims against his former employer and others. The defendants sought to compel arbitration of the claims under the terms of an arbitration clause in a "Professional Services Agreement" ("PSA"), which Sitarik did not sign. 7 So.3d at 577. They argued that Sitarik was bound by the arbitration clause because he had signed an addendum to the contract providing that the PSA was binding on Sitarik "to the extent applicable." Id.

The court determined that the arbitration clause, by its terms, applied only to the "parties" to the PSA, and that the term "parties" was not defined explicitly in the contract. Id. at 578. To determine the meaning of the word "parties," the court looked at the remainder of the PSA. In holding that Sitarik was not bound by the arbitration clause, the court relied primarily on the PSA's third-party beneficiary clause, which stated that the PSA and the parties' course of dealing should not "'be construed as conferring any third-party beneficiary status on any person not a party to this Agreement, including without limitation any Contractor's Representative.'" Id. (quoting the PSA). Because another portion of the PSA stated that Sitarik was a Contractor's Representative, the court concluded that Sitarik was not a "party" to the PSA. Id.

Sitarik is distinguishable from the present case because in that case, the contract clearly provided that Sitarik was a Contractor's Representative and thus was not a third-party beneficiary. In the present case, DHMC concedes that it is a third-party beneficiary of the Subcontract and there is no provision in the Subcontract that states otherwise. Therefore, Sitarik, which dealt with whether a non-signatory, non-third party beneficiary could be bound to an arbitration clause, is not applicable to the situation here. The court correctly applied Florida law.[4]

---

[4]To the extent DHMC is arguing that a third-party beneficiary is not bound to an arbitration clause that refers explicitly to the parties to the agreement, Florida law indicates otherwise. In Extendicare Health Services, Inc. v. Estate of Patterson, 898 So.2d 989, 990 (Fla. Dist. Ct. App. 2005), the arbitration clause at issue referred to "a dispute aris[ing] out of this Agreement which the parties cannot resolve by negotiation." Despite the fact that Patterson was not a party to the agreement, the court stated in dicta that, "[a]s a third party beneficiary, Patterson could be bound by the agreement, including the arbitration provision." Id. As discussed below, Terminix explicitly states the same principle.

Sitarik is also distinguishable because the arbitration clause in that case clearly stated that it only bound the parties to the PSA. The Subcontract in this case, on the other hand, states that "[a]ll disputes arising from or relating to this Agreement and not settled between the parties will be decided before a neutral third party." Subcontract, ¶ X.G. In context, especially given the lack of an explicit definition of the term "parties" in the Subcontract, it is not clear that the reference is to parties to the Subcontract rather than parties to the "dispute[] arising from or relating to" the Subcontract. Even if

B. Terminix

DHMC also argues that the court misapplied Terminix because that case addressed the scope of a valid arbitration clause rather than whether a third-party beneficiary can be bound to an arbitration clause.[5] Again, CHG contends that there was no error.

In Terminix, Anthony Ponzio entered an agreement with Terminix to control pests at his home. The agreement included an arbitration clause providing that, "[Ponzio] and Terminix agree that any controversy or claim between them arising out of or relating to this agreement shall be settled exclusively by arbitration." 693 So.2d at 105. When the pests were not

---

the clause was meant to refer to the parties to the Subcontract, however, DHMC would still be bound to it, as explained in Extendicare and Terminix.

[5]DHMC also argues that, even if Terminix is applicable, it cannot trump Sitarik because Terminix was decided by the Fifth District Court of Appeal of Florida, whereas Sitarik was decided by the Fourth District, where the offices of CHG and Cross Country are located. Because the court finds that Sitarik is not applicable and that Terminix was applied appropriately, the two cases do not present a conflict and there is no need to decide their relative strength. Moreover, DHMC cites no precedent for its proposition. See also System Components Corp. v. Fla. Dept. of Transp., 14 So.3d 967, 973 n.4 (Fla. 2009) ("In the absence of inter-district conflict or contrary precedent from this Court, it is absolutely clear that the decision of a district court of appeal is binding precedent throughout Florida.") (citing Pardo v. State, 596 So.2d 665, 666 (Fla. 1992)) (emphasis in original).

eradicated, Ponzio and his wife, their child, and the mother of another child who apparently resided occasionally at the residence in question sued Terminix, alleging negligence and breach of contract. Terminix moved to dismiss on the ground that the arbitration provision in the pest control agreement applied. The trial court denied the order.

DHMC is correct that much of the Terminix decision centers on whether personal injury claims are within the scope of the arbitration provision. In reversing the trial court and holding that the arbitration agreement applied, however, the appellate court also explained that "the fact that only Anthony Ponzio signed the contract does not limit arbitration to just his claim. The non-signing plaintiffs are in essence asserting third party beneficiary status to the contract." 693 So.2d at 109. The court found that the other plaintiffs were bound to the arbitration clause even though the arbitration clause referred explicitly to controversies or claims arising between Ponzio and Terminix.

Because Terminix held that the arbitration clause bound non-signatory third-party beneficiaries even where the clause itself explicitly bound only the parties to the contract, it is directly

on point. The court did not err in citing or relying on Terminix.[6]

C. Hirshenson

DHMC argues that the court should not have relied upon Hirshenson because that case did not turn on whether arbitration clauses are binding on third-party beneficiaries, but rather on the fact that the third-party beneficiary in question was explicitly bound by the terms of the agreement. CHG does not directly address this argument.

The June 10 order relied on Hirshenson only for the general proposition that "Florida courts have generally held that arbitration clauses in contracts . . . are binding on third party beneficiaries." 800 So.2d at 673. The facts in Hirshenson are quite different from the facts in the present case.[7] The June 10

[6]DHMC suggests that, although the Terminix court stated that the non-signatory plaintiffs were bound because they were third-party beneficiaries, the court could have – but did not - discuss the fact that the non-signatories should be bound under an agency theory. Terminix was not decided on this ground, nor was it even mentioned in the decision. DHMC's speculation regarding the applicability of the agency theory and a potential alternate ground for the Terminix court's holding does not present a manifest error of law.

[7]Indeed, in Hirshenson, a third-party beneficiary sought to bind a signatory to an arbitration clause, whereas this case presents the opposite scenario.

order did not, however, apply Hirshenson or rely on it beyond the very general statement of Florida law, which is repeated in numerous other Florida cases. See, e.g., BallenIsles Country Club, Inc. v. Dexter Realty, 24 So.3d 649, 652 n.2 (Fla. Dist. Ct. App. 2009) (because defendant was a third-party beneficiary of agreements, it was bound to arbitration clauses); Alterra Healthcare Corp. v. Estate of Linton, 953 So.2d 574, 579 (Fla. Dist. Ct. App. 2007) ("A nonsignatory third-party beneficiary is bound by the terms of a contract containing an arbitration clause."); Extendicare Health Servs., 898 So.2d at 990; Germann v. Age Inst. of Fla., Inc., 912 So.2d 590, 592 (Fla. Dist. Ct. App. 2005) ("a nonsignatory to an arbitration agreement may be bound to arbitrate . . . if the nonsignatory is specifically the intended third-party beneficiary of the contract"); Int'l Bullion & Metal Brokers, Inc. v. West Pointe Land, LLC, 846 So.2d 1276, 1277 (Fla. Dist. Ct. App. 2003) ("It is well established that arbitration provisions of a contract are binding on the parties to the contract, as well as on intended third party beneficiaries of the contract.").

Because the court relied on Hirshenson only for a general statement of Florida law, and the statement is repeated by many other Florida courts, citing Hirshenson was not a manifest error of law.

Conclusion

For the foregoing reasons, DHMC's motion for reconsideration (doc. no. 56) is denied.

SO ORDERED.

Joseph A. DiClerico, Jr.
United States District Judge

July 27, 2010

cc: Andrew D. Dunn, Esquire
Ronald J. Lajoie, Esquire
Anil Madan, Esquire
Joseph Gardner Mattson, Esquire
Ralph Suozzo, Esquire