

Jones v Alliance Health Operations, LLC
2019 NY Slip Op 33389(U)
October 31, 2019
Supreme Court, Kings County
Docket Number: 509707/2017
Judge: Bernard J. Graham
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36**

Index No.: 509707/2017
Motion Calendar No.

RENEE JONES as Executrix of the Estate of
DOLORIS JONES, deceased,

Plaintiff(s),

-against-

DECISION / ORDER

Present:
Hon. Judge Bernard J. Graham
Supreme Court Justice

ALLIANCE HEALTH OPERATIONS, LLC
d/b/a LINDEN CENTER FOR NURSING AND
REHABILITATION, MOSTAQUE AHMED, M.D.,
TONIANN M. STONE, D.O., WYCKOFF HEIGHTS
MEDICAL CENTER and MAHALINGAM SIVAKUMAR, M.D.,
Defendant(s).

**Recitation, as required by CPLR 2219(a), of the papers considered on the review of
this motion to: renew and reargue a prior Decision/Order of this Court**

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	___ 1-2 ___
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits.....	___ 3 ___
Replying Affidavits.....	_____
Exhibits.....	_____
Other:.....	_____

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

The defendant, Alliance Health Operations, LLC d/b/a Linden Center for Nursing and Rehabilitation (“Linden”) has moved, pursuant to CPLR §2221, for leave to reargue a prior decision/order of this Court dated May 28, 2019, wherein this Court granted

plaintiff's¹ motion to vacate the stay of litigation and allowed plaintiff to proceed with the medical malpractice, negligence and Public Health Law claims as against the defendants. In addition, defendant Linden was directed to serve an answer to plaintiff's supplemental summons and amended complaint within thirty days. In moving for relief herein, Linden seeks to lift the stay imposed for arbitration and to compel the plaintiff to proceed with arbitration.

The plaintiff opposes the relief sought by the defendant and argues that the defendant by failing to adhere to the rules of the American Arbitration Association has waived its right to arbitration and that the plaintiff may proceed with their claim in the Supreme Court.

Background:

On September 27, 2017, Justice Dabiri granted the relief sought in defendant Linden's Motion to Compel Arbitration, having determined that the arbitration clause contained in the admission agreement to Linden's facility, as valid and enforceable, and the underlying court proceeding would be stayed pending the completion of the arbitration.²

On July 2, 2018, the plaintiff e-filed a Demand for Arbitration with the American Arbitration Association ("AAA"). On July 10, 2018, the AAA sent a letter to counsel for both the plaintiff and the defendant acknowledging that the claim had been filed and they were in receipt of the fee paid by the plaintiff. The July 10, 2018 correspondence from the AAA further requested that both parties execute and submit a Healthcare Due Process

¹ This Court in its Order/Decision dated May 28, 2019 also granted the plaintiff's motion to amend the caption of this matter to reflect that Renee Jones had been substituted for Lois D. Jones (who had died on October 13, 2017) as the Executrix of the Estate of Doloris Jones.

² The underlying matter was originally assigned to the Hon. Justice Gloria Dabiri of this Court, and upon her retirement the case was reassigned to Justice Graham.

Protocol waiver and defendant Linden was reminded that their mandatory fee was still unpaid.

On or about July 10, 2018, the plaintiff executed the waiver and e-mailed the document to both the AAA and defendant Linden.

On or about July 27, 2018, Sue Anne Esterly-Parrish, the Consumer Filing Specialist for AAA, sent further correspondence to both parties advising them that they still had not received either the signed waiver or the \$4,200.00 fee from Linden and extended Linden's time until August 10, 2018 within which to comply.

On August 16, 2018, the AAA sent a letter to both parties advising them that AAA had declined to administer the case since they had not received the signed waiver or the fee from Linden. In addition, as a result of the failure of Linden to adhere to the AAA policies, the AAA advised Linden that they may decline to administer future consumer arbitrations involving Linden and requested that Linden remove AAA's name from their consumer arbitration clause.

The plaintiff then moved to vacate any stays and to permit this matter to proceed in this Court, pursuant to the AAA Consumer Arbitration Rules (R-1(d)), due to the alleged failure of defendant Linden to comply with the requests of the AAA, and the AAA's determination to decline to administer the case. The plaintiff maintained that the AAA Consumer Arbitration Rules (R-1(d)) provides that either party may choose to submit their dispute to the appropriate court for resolution, if the AAA declines to administer an arbitration. In opposition to the motion, the defendant argued that the AAA was ready, willing and able to reopen the file and conduct the arbitration process provided they had the consent of both parties. The plaintiff has refused to consent to the request of defendant Linden. Additionally, the defendant asserted that their failure to adhere to the AAA requirements and to submit a timely payment was not willful but rather due to law office failure and the changing of third-party administrators.

Defendant's contention:

In support of their motion for leave to reargue the Order of this Court, the defendant maintains that their failure to timely pay the fee to the American Arbitration Association should not result in a waiver of their right to arbitrate this matter. The defendant argues that the plaintiff had not been prejudiced by their delay in making the payment to the AAA and additionally there has not been an unreasonable delay in this matter proceeding towards arbitration as only thirty days had elapsed between the commencement of litigation and Linden's request for arbitration. The defendant asserts that there is a strong policy preference in favor of arbitration. "Whether or not there has been a waiver is decided in the context of the case, with a healthy regard for the policy of promoting arbitration" (Kramer v. Hammond, 943 F2d 176, 179 [2nd Cir. 1991]).

Plaintiff's contention:

The plaintiff, in opposing the relief sought by the defendant, maintains that there is no basis to grant reargument to the defendant as the Court did not overlook or misapprehend any fact or law. The plaintiff contends that the defendant has made the same arguments in this motion that were previously made in opposition to the underlying motion.

The plaintiff asserts that the defendant is seeking to minimize the fact that while it was afforded the right to arbitrate this matter, they failed to abide by the terms of the American Arbitration Association. Since the mandatory arbitration provision in their admission contract requires the case to proceed pursuant to the rules of the AAA, the failure to abide by their rules should not be considered a minor gaffe. The suggestion by the defendant that the Court could permit the defendant to proceed with arbitration before a different arbitration tribunal is neither a fair or justifiable alternative to circumvent their failure to adhere to the AAA rules.

Finally, the plaintiff maintains that the defendants did not act promptly to pay the arbitration fee late as they have inferred, but rather that attempt to comply did not occur until after the plaintiff filed the underlying motion to vacate the court stay and to permit the matter to proceed in the Supreme Court, rather than before an arbitrator.

Discussion:

This Court has reviewed and considered the arguments of the attorney for the defendant Linden which seeks reargument of the Decision/Order of this Court dated May 28, 2019, and the opposition to said motion by counsel for the plaintiff.

A motion to re-argue should be premised upon the argument that there were matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion. It is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented (see Ahmed v. Pannone, 116 AD3d 802, 984 NYS2d 104 [2nd Dept. 2014]; Amato v. Lord & Taylor, Inc., 10 AD3d 374, 781 NYS2d 125 [2nd Dept. 2004]). Its purpose is not to serve as a vehicle for an unsuccessful party to argue once again the very questions previously decided (see Pro Brokerage, Inc. v. Home Ins. Co., 99 AD2d 971, 472 NYS2d 661 [1st Dept. 1984]).

Here, the defendant has in essence presented the same argument that this Court considered when determining the initial motion. This Court is of the opinion that in the Decision/Order dated May 28, 2019, it carefully reviewed and addressed the arguments of the attorneys with respect to the issue as to whether Linden breached the terms of its Sub-Acute Admission Agreement by not timely abiding by the procedural rules of the American Arbitration Association, and if so, did it result in the defendant waiving its right to arbitration.

This Court in reaching its determination considered that the plaintiff abided by the preliminary rules of the AAA by timely making the required payment and executing a

waiver. The Court further considered the correspondence issued by the AAA in which they notified the defendant as to their noncompliance and had extended the time for Linden to comply with their regulations. Despite the extension of time, Linden failed to abide by the procedural rules, and they did not request additional time within which to comply. Thus, when the AAA issued a letter to the parties that due to Linden's failure to comply with their regulations, they had declined to administer this case, the plaintiff was within its rights, pursuant to Article 1(d) of the Consumer Rules of the AAA, to submit the dispute to the appropriate court for resolution.

While this Court further considered the argument that the courts in this State encourage arbitration as a means of conserving their time and resources as well as those of the contracting parties, this Court found the defendant's failure to adhere to the arbitration rules, while the plaintiff who had opposed arbitration had fully complied with the AAA's procedural rules, as sufficient grounds to find that the defendant had waived its right to arbitration. "Like contract rights generally, a right to arbitration may be modified, waived or abandoned" (see Cusimano v. Schnurr, 26 NY3d 391, 23 NY2d 137 92015]). As such, this Court finds no merit to the arguments presented in defendant's Motion to Reargue.

2019 NOV 13 AM 9:10
KINGS COUNTY CLERK
FILED

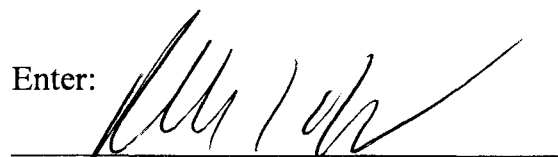
Conclusion:

The motion by defendant for leave to reargue the Decision/Order of this Court dated May 28, 2019 is denied.

This constitutes the decision and order of the Court.

Dated: October 31, 2019
Brooklyn, New York

Enter:



Hon. Bernard J. Graham, Justice
Supreme Court, Kings County