Mitchell v Dewitt Rehabilitation & Nursing Ctr., Inc.
2020 NY Slip Op 30747(U)
March 9, 2020
Supreme Court, New York County
Docket Number: 805208/2019
Judge: Martin Shulman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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BERNADETTE MITCHELL and DENISE MITCHELL AS EXECUTORS OF THE ESTATE OF DENNIS MITCHELL, DECEASED,

Plaintiffs,

-against- Index No. 805208/2019

DEWITT REHABILITATION AND NURSING CENTER, INC., d/b/a UPPER EAST SIDE REHABILITATION AND NURSING CENTER, CASSENA CARE LLC d/b/a UPPER EAST SIDE REHABILITATION AND NURSING CENTER, CASSENA CARE MANAGEMENT SERVICES, LLC d/b/a UPPER EAST SIDE REHABILITATION AND NURSING CENTER, CASSENA CARE IPA LLC d/b/a UPPER EAST SIDE REHABILITATION AND NURSING CENTER, DANIEL KLEIN, M.D., MARY MOLLOY, R.N., NELLEYE DANKOV, R.N., MARIA DIAZ, M.D. and THE MOUNT SINAI HOSPITAL,

Mot. Seq. Nos. 001, 002, 003

Defendants.

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HON. MARTIN SHULMAN, J.S.C.:

This is a medical malpractice and wrongful death action arising from the medical and nursing care and treatment defendants provided to plaintiffs' decedent, Dennis Mitchell (decedent).

Motion Sequence 001

Defendants Dewitt Rehabilitation and Nursing Center, Inc., d/b/a Upper East Side Rehabilitation and Nursing Center, Cassena Care LLC d/b/a Upper East Side Rehabilitation and Nursing Center, Cassena Care Management Services, LLC d/b/a Upper East Side Rehabilitation and Nursing Center, Cassena Care IPA LLC d/b/a

Upper East Side Rehabilitation and Nursing Center (Nursing Home) move: (1) pursuant to CPLR §7503 (a) and the Federal Arbitration Act (9 USC § 3 [FAA]), to compel arbitration and stay this litigation pending resolution of arbitration; and (2) to dismiss and strike plaintiffs' claim for punitive damages under Public Health Law (PHL) § 2801-d for failure to state a cause of action. By separate cross-motions, defendants Daniel Klein, M.D. (Dr. Klein), Mary Molloy, R.N. (Nurse Molloy) and The Mount Sinai Hospital (MSH) also seek to strike plaintiffs' cause of action seeking punitive damages, and in the event arbitration is granted, they seek to participate in it.

Motion Sequence 002

Defendant Maria Diaz, M.D. (Dr. Diaz) moves to dismiss and strike plaintiff's claim for punitive damages.

Motion Sequence 003

Defendant Nelleye Dankov, R.N. (Nurse Dankov) moves, pursuant to CPLR 3211 (a) (7), to dismiss and strike plaintiffs' claim for punitive damages. In the event that the court compels arbitration, Nurse Dankov also moves to stay the action pending tits outcome. Although not requested in her notice of motion, Nurse Dankov's supporting affirmation asks that she be included in arbitration should the court compel same. Nurse Molloy and MSH again cross-move for dismissal of the punitive damages claim and again seek to participate in arbitration.

FACTUAL BACKGROUND

From March 15, 2017 to March 28, 2017 and from April 25, 2017 to June 29, 2017, decedent was a resident at Upper East Side Rehabilitation and Nursing Center

(the facility). In between that time, from March 28, 2017 to April 25, 2017, decedent was a patient at MSH.

On June 30, 2017, Eileen Mitchell signed an admission agreement at the facility, as the decedent's designated representative (NYSCEF Doc No. 30). The admission agreement was effective as of March 15, 2017 (*id.*).

During the decedent's stay at the facility and MSH, it is alleged, among other things, that defendants allowed decedent to become malnourished and overly sedated and failed to prevent and treat decubitus ulcers. According to the complaint, Dr. Klein, Nurse Molloy and Nurse Dankov treated decedent at the Nursing Home, while Dr. Diaz treated decedent at MSH. The decedent passed away on August 24, 2017. On February 24, 2018, plaintiffs, Bernadette Mitchell and Denise Mitchell, were appointed executors of the decedent's estate.

DISCUSSION

Arbitration

Nursing Home moves to compel arbitration pursuant to the admission agreement (NYSCEF Doc No. 30). It argues that the admission agreement contains an arbitration clause whereby the parties agreed to resolve all disputes by way of binding arbitration. The admission agreement states that it is "binding on the parties, their heirs, administrators, distributees, successors and assignees (*id.* at XII [c]).

Plaintiffs argue that since the admission agreement was signed by non-party Eileen Mitchell as decedent's representative it is not binding upon them. Alternatively, plaintiffs argue that the arbitration agreement is invalid pursuant to 42 CFR § 483.70 (n) (1) because the facility requires a resident or resident's representative to enter into an

arbitration agreement as a condition precedent to admission. Finally, plaintiffs contend that this court should adopt the analysis of the Kentucky Court of Appeals in *Preferred Care Partners Mgt. Group, L.P. v Alexander* (530 SW3d 919, 921 [Ky App 2017]), which held that wrongful death beneficiaries were not bound by a nursing home's arbitration clause signed by a nursing home resident.

In reply, Nursing Home points to the admission agreement's opt-out clause, which states: "[t]he Resident and the Responsible Party have the right to opt out of this agreement to arbitrate by providing written notice of his or her intention to do so to the Facility within thirty (30) days..." (*id.* at Ex. 1 and XII [a]). It also argues that the holding in *Preferred Care Partners* (530 SW3d at 921) should not apply to this case because it is not the controlling law in New York. Further, it argues that under the FAA, the arbitration clause is valid and enforceable.

The arbitration agreement at issue here is governed by the FAA because defendant Nursing Home is engaged in interstate commerce (*see Singer v Jefferies & Co.*, 78 NY2d 76, 81 [1991]; *Friedman v Hebrew Home for the Aged at Riverdale*, 131 AD3d 421, 421 [1st Dept 2015], *lv dismissed* 28 NY3d 1050 [2016]). The FAA's purpose is to ensure that private agreements to arbitrate are enforced according to their terms (*Volt Info. Sciences, Inc. v Board of Trustees of Leland Stanford Jr. Univ.*, 489 US 468, 469 [1989]). "[I]t establishes an 'emphatic' national policy favoring arbitration which is binding on all courts, State and Federal" (*Singer*, 78 NY2d at 81).

"[W]hether a controversy is properly subject to arbitration is initially one for the courts to determine" (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007]). In a motion to compel arbitration under the

FAA, a court must determine whether a valid agreement to arbitrate exists and, if so, whether the dispute falls within the scope of that agreement (*Hartford Acc. & Indem. Co. v Swiss Reins. Am. Corp.*, 246 F3d 219, 226 [2d Cir 2001] [internal quotation marks and citation omitted]). The burden falls on the proponent of arbitration to demonstrate that the parties agreed to arbitrate (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C.,* 44 AD3d at 583).

The court must rely on basic principles of contract interpretation to determine the threshold matter of whether the parties here agreed to arbitrate (*Katz v Feinberg,* 167 F Supp 2d 556, 566 [SD NY 2001], *affd* 290 F3d 95 [2d Cir 2002]). In doing so, the court is "required to discern the intent of the parties, to the extent that [the parties] evidenced what they intended by what they wrote" (*Slatt v Slatt*, 64 NY2d 966, 967 [1985], *rearg denied* 65 NY2d 785 [1985] [internal quotations and citations omitted]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). Therefore, a written agreement that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms (*150 Broadway N.Y. Assoc., L.P. v Bodner,* 14 AD3d 1, 6 [1st Dept 2004]).

Here, the arbitration clause is clear and unambiguous on its face and must be enforced according to the plain meaning of its terms (*see R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32 [2002], *rearg denied* 98 NY2d 693 [2002]). That the admission agreement and arbitration clause are "binding on the parties, their heirs, administrators, distributees, successors and assignees" is also clear on its face and must likewise be enforced.

Moreover, according to the admission agreement, Eileen Mitchell executed the agreement as attorney-in-fact, making her "essentially an alter ego of the principal and ... authorized to act with respect to any and all matters on behalf of the principal..." (*Zaubler v Picone*, 100 AD2d 620, 621 [2d Dept 1984]). Plaintiffs' contention that the executors of decedent's estate were not parties to the agreement and therefore cannot be compelled to arbitrate is unavailing (*see Casale v Sheepshead Nursing & Rehabilitation Ctr.*, 131 AD3d 436, 437 [2d Dept 2015] [administrator of decedent's estate was bound by nursing home admission agreement that was binding "on the parties, their heirs, administrators, distributees, successors and assignees"]; *Puleo v Shore View Ctr. for Rehabilitation & Health Care,* 132 AD3d 651, 653 [2d Dept 2015]).

The United States Supreme Court found nursing home arbitration agreements enforceable pursuant to the FAA in *Kindred Nursing Ctrs. Ltd. Partnership v Clark* (137 S Ct 1421, 1427 [2017]) and *Marmet Health Care Ctr., Inc. v Brown* (565 US 530, 530 [2012]). Furthermore, this court is "bound by the doctrine of stare decisis to apply precedent established by the Appellate Division in its own Department or by the Court of Appeals" (*D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]). Thus, plaintiffs' conclusory argument that the court should adopt the analysis in *Preferred Care Partners* (530 SW3d at 921) is unavailing (*see Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 49 [1997] [New York has a "long and strong public policy favoring arbitration"]).

Plaintiffs' argument that 42 CFR § 483.70 (n) (1) invalidates the agreement by making binding arbitration a condition precedent to admission is unavailing, since the resident or their representative has an option to opt-out. This option is listed in bold

within the General Provisions portion of the admission agreement and again in the arbitration clause. Decedent's designated representative signed both the admission agreement and arbitration agreement. Moreover, every page of the admission agreement, including the arbitration clause, is initialed by the decedent's representative.

Having determined that Nursing Home and plaintiffs entered into a valid arbitration agreement, the court turns to whether the dispute falls within the scope of the arbitration clause. The arbitration clause states in part:

> **All disputes and disagreements** between the Facility and the Patient/Resident and between the Facility and the Responsible Party (as those Parties are indicated below) (or their respective successors, assigns or representatives) **arising out of or relating to** . . . the services provided by Facility to the Patient/Resident, including, without limitation, allegations by Resident of **neglect, abuse or negligence** . . . shall be submitted to binding arbitration . . .

(emphasis added). This wording is "'inclusive, categorical, unconditional and unlimited'" (*Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 46 [1997], quoting *PaineWebber Inc. v Bybyk,* 81 F3d 1193, 1199 [2d Cir 1996]). Therefore, the court finds that plaintiffs' claims, including the punitive damages claim, are within the scope of the arbitration agreement and must be referred to an arbitrator (*see e.g. Mastrobuono v Shearson Lehman Hutton*, 514 US 52, 60 [1995] [FAA preempts state law requiring judicial resolution of claims involving punitive damages]).

As to the cross-motions by Dr. Klein and Nurse Molloy (seq. 001), and Nurse Dankov's motion (seq. 003), requesting to participate in arbitration, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (*AT&T Tech. v Communications Workers of Am.*, 475 US 643, 648 [1986] [internal quotation marks and citation omitted]). "Only persons

who expressly agree to arbitrate can be compelled to do so" (*Matter of Brookfield Clothes v Tandler Textiles*, 78 AD2d 841, 842 [1st Dept 1980]). However, courts have afforded employees the benefit of arbitration agreements entered into by their employers to the extent that the alleged misconduct falls within the scope of the arbitration agreement (*see Roby v Corporation of Lloyd's*, 996 F2d 1353, 1360 [2d Cir 1993] ["employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement"]). Here, the allegations against Dr. Klein, Nurse Molloy and Nurse Dankov all relate to their performance as employees of Nursing Home and fall within the scope of the arbitration clause (*see Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.,* 152 AD3d 567, 570 [2d Dept 2017] [where corporation and plaintiff signed arbitration clause, nonsignatory individual defendant employees could compel plaintiff to arbitrate when the alleged misconduct was related to their behavior as employees]).

The FAA provides that courts must stay any suit or proceeding until arbitration is completed if it concerns "any issue referable to arbitration under any agreement in writing for such arbitration . . ." (9 USC § 3). CPLR §7503 (a) also mandates that an order compelling arbitration "shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration." Accordingly, plaintiffs' claims against Nursing Home, Dr. Klein, Nurse Molloy and Nurse Dankov are referred to arbitration and this action is stayed as to them pending completion thereof.

As to Dr. Diaz and MSH, neither is covered by an arbitration agreement. Although MSH asks to be included should arbitration be compelled, Dr. Diaz is silent on the point and cannot be compelled to arbitrate. Plaintiffs allege that Dr. Diaz treated

decedent at MSH during a separate and distinct period of time than did the Nursing Home defendants. Consequently, plaintiffs' claims against MSH and Dr. Diaz are not "so intertwined" with their claims against Nursing Home as to warrant a stay pending arbitration (*see Minogue v Malhan*, 178 AD3d 447, 448 [1st Dept 2019]). Accordingly, the claims against Dr. Diaz and MSH will be litigated in this action.

Punitive Damages

In considering a motion to dismiss pursuant to CPLR 3211 (a) (7),[1] the court must "accept the facts as alleged in the complaint as true, accord [the] plaintiff [] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Defendants argue that plaintiffs have failed to state a cause of action for punitive damages. They claim that it is insufficient for a claimant to simply state that he or she has been deprived of a right. Rather, the claimant must show the deprivation was committed with reckless disregard. Defendants further contend that plaintiffs have failed to allege conduct that transcends normal negligence, and therefore this cause of action should be dismissed.

In opposition, plaintiffs argue that dismissal would be premature. Further, they contend that the standard to recover punitive damages is "less stringent" under PHL § 2801-d (2) than that governing mere malpractice or negligence matters.

"[P]unitive damages in medical malpractice actions are not recoverable unless the conduct is wantonly dishonest, grossly indifferent to patient care, or malicious and/or

[1] Although certain defendants do not move pursuant to a specific CPLR provision, because they move to dismiss for failure to state a cause of action, CPLR 3211 (a) (7) is applicable.

reckless" (*Schiffer v Speaker*, 36 AD3d 520, 521 [1st Dept 2007]). "It is not necessary that the conduct complained of be intentionally harmful" (*Rey v Park View Nursing Home*, 262 AD2d 624, 627 [2d Dept 1999]). However, "more than mere negligence" or carelessness is required to permit a claim for punitive damages (*Zabas v Kard*, 194 AD2d 784, 784 [2d Dept 1993]). When a complaint "lacks the requisite allegations of egregious conduct or moral turpitude necessary to support punitive damages," it should be stricken (*Denenberg v Rosen*, 71 AD3d 187, 196 [1st Dept 2010], *lv dismissed* 14 NY3d 910 [2010]).

Since Nursing Home, Dr. Klein, Nurse Molloy and Nurse Dankov's respective motions to dismiss plaintiffs' punitive damages claims have been referred to arbitration, the court turns to MSH and Dr. Diaz's motions. Plaintiffs' allegations that Dr. Diaz and MSH failed to prevent and treat decedent's decubitis ulcers fall short of conduct that "evidences a high degree of moral culpability" or that "constitutes willful or wanton negligence or recklessness" (*Buckholz v Maple Garden Apts., LLC*, 38 AD3d 584, 585 [2d Dept 2007] [Supreme Court erred in granting motion to amend to add a demand for punitive damages where the allegations were grounded in mere speculation]; *Morton v Brookhaven Mem. Hosp.*, 32 AD3d 381, 381 [2d Dept 2006] [in a medical malpractice action, proposed amendment to include claim for punitive damages was improper where allegation was "devoid of any willful or wanton negligence"]; *National Broadcasting Co. v Fire Craft Servs.*, 287 AD2d 408, 408-409 [1st Dept 2001] ["an award of punitive damages must be premised on conduct particularly egregious in nature directed both at the plaintiff and the general public"]).

Lastly, plaintiffs' argument regarding PHL § 2801-d (1) is inapplicable against Dr. Diaz and MSH since PHL § 2801–d only applies to nursing homes (*see Novick v South Nassau Communities Hosp.*, 136 AD3d 999, 1001 [2d Dept 2016]). Accordingly, Dr. Diaz and MSH's motions to dismiss and strike the cause of action seeking punitive damages is granted.

CONCLUSION

Based upon the foregoing, it is

ORDERED that defendants Dewitt Rehabilitation and Nursing Center, Inc., d/b/a Upper East Side Rehabilitation and Nursing Center, Cassena Care LLC d/b/a Upper East Side Rehabilitation and Nursing Center, Cassena Care Management Services, LLC d/b/a Upper East Side Rehabilitation and Nursing Center, Cassena Care IPA LLC d/b/a Upper East Side Rehabilitation and Nursing Center's motion (motion sequence number 001) is granted to the extent of compelling arbitration and is otherwise denied; and it is further

ORDERED that defendant Daniel Klein, M.D.'s cross motion (001) is granted to the extent that plaintiffs' claims against him, including the punitive damages claim, are referred to arbitration, and the cross motion is otherwise denied; and it is further

ORDERED that defendant Mary Molloy, R.N.'s cross motion (001) is granted to the extent that plaintiffs' claims against her, including the punitive damages claim, are referred to arbitration, and the cross motion is otherwise denied; and it is further

ORDERED that defendant The Mount Sinai Hospital's cross motion (001) is granted to the extent of dismissing and striking plaintiffs' cause of action seeking punitive damages and is otherwise denied; and it is further

ORDERED that defendant Maria Diaz, M.D.'s motion (002) is granted to the extent of dismissing and striking plaintiffs' cause of action seeking punitive damages; and it is further

ORDERED that defendant Nelleye Dankov, R.N.'s motion (003) is granted to the extent that plaintiffs' claims against her, including the punitive damages claim, are referred to arbitration, and the motion is otherwise denied; and it is further

ORDERED that defendant The Mount Sinai Hospital's cross motion (003) is granted to the extent of dismissing and striking plaintiffs' cause of action for punitive damages, and is otherwise denied; and it is further

ORDERED that defendant Mary Molloy, R.N.'s cross motion (003) is granted to the extent that plaintiffs' claims against her, including the punitive damages claim, are referred to arbitration, and the cross motion is otherwise denied; and it is further

ORDERED that plaintiff Bernadette Mitchell and Denise Mitchell as Executors of the Estate Of Dennis Mitchell, deceased, shall arbitrate their claims against defendants Dewitt Rehabilitation and Nursing Center, Inc., d/b/a Upper East Side Rehabilitation and Nursing Center, Cassena Care LLC d/b/a Upper East Side Rehabilitation and Nursing Center, Cassena Care Management Services, LLC d/b/a Upper East Side Rehabilitation and Nursing Center, Cassena Care IPA LLC d/b/a Upper East Side Rehabilitation and Nursing Center, Daniel Klein, M.D., Mary Molloy, R.N. and Nelleye Dankov, R.N. in accordance with the admission agreement; and it is further

ORDERED that all proceedings in this action against defendants Dewitt Rehabilitation and Nursing Center, Inc., d/b/a Upper East Side Rehabilitation and Nursing Center, Cassena Care LLC d/b/a Upper East Side Rehabilitation and Nursing

Center, Cassena Care Management Services, LLC d/b/a Upper East Side Rehabilitation and Nursing Center, Cassena Care IPA LLC d/b/a Upper East Side Rehabilitation and Nursing Center, Daniel Klein, M.D., Mary Molloy, R.N. and Nelleye Dankov, R.N. are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either plaintiffs or defendants Dewitt Rehabilitation and Nursing Center, Inc., d/b/a Upper East Side Rehabilitation and Nursing Center, Cassena Care LLC d/b/a Upper East Side Rehabilitation and Nursing Center, Cassena Care Management Services, LLC d/b/a Upper East Side Rehabilitation and Nursing Center, Cassena Care IPA LLC d/b/a Upper East Side Rehabilitation and Nursing Center, Daniel Klein, M.D., Mary Molloy, R.N. and Nelleye Dankov, R.N. may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration.

Counsel for plaintiffs, Dr. Diaz and MSH shall appear for a preliminary conference at Part 1MMSP, 60 Centre St., Room 325, New York, NY, on March 24, 2020 at 9:30 a.m.

Dated: New York, New York
March 9, 2020

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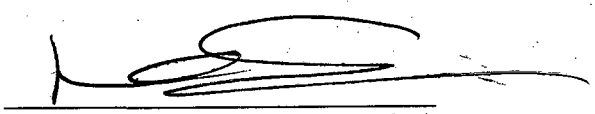

Hon. Martin Shulman, J.S.C.