

Raj v Lopez

2020 NY Slip Op 33247(U)

October 2, 2020

Supreme Court, New York County

Docket Number: 652145/2019

Judge: Carol R. Edmead

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD **PART** **IAS MOTION 35EFM**

Justice

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INDEX NO. 652145/2019

MURUGA RAJ, BROADWAY MANHATTAN MEDICAL
OFFICE PC,AKA/DBA BROADWAY MANHATTAN MEDIC,

MOTION DATE 9/24/2020

Plaintiff,

MOTION SEQ. NO. 004

- v -

JUAN LOPEZ, MARIA VIVENES, MILIVOJE MILOSEVIC,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 41, 42, 43, 44, 45, 46

were read on this motion to/for COMPEL ARBITRATION.

Upon the foregoing documents, it is

ORDERED that the motion by defendant Milivoje Milosevic, M.D. (motion seq. 004) to compel arbitration against plaintiffs Muruga Raj, M.D. and Broadway Manhattan Medical Office, P.C., d/b/a Broadway Manhattan Medic is granted to the extent of directing those parties to mediate, and if necessary, arbitrate in accordance with the alternate dispute resolution clause contained in the Agreement; and it is further

ORDERED that all proceedings in this action as against defendant Milosevic are hereby stayed, except for an application to vacate or modify the stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify the stay upon determination of the mediation or arbitration, and it is further

ORDERED that the first cause of action as well as the third through seventh causes of action as against defendant Milosevic are severed and dismissed; and it further

ORDERED that defendant Milosevic is directed to serve a copy of this decision and order with notice of entry within twenty (20) days on all parties and on the County Clerk's office, which is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action is severed and shall continue.

Memorandum Decision

Defendant Milivoje Milosevic, M.D. (Milosevic) moves, pursuant to CPLR article 75 for an order compelling arbitration of a dispute between plaintiffs Muruga Raj, M.D. and Broadway Manhattan Medical Office, P.C., d/b/a Broadway Manhattan Medic (Broadway) as allegedly set forth in a contract between the parties requiring that all disputes under the contract be submitted to arbitration, and staying all proceedings of plaintiffs' against Milosevic (motion seq. 004).

The motion was filed on February 19, 2020. According to the affidavit of service, Milosevic served, thru his attorneys, a true copy of the notice of motion and supporting documents by mail to plaintiffs' counsel, Choudry & Franzoni, PLLC, 385 West John Street, Suite 201, Hicksville, NY 11801. Plaintiffs have not filed an opposition.

Background

On or about late 2011, plaintiff, Muruga Raj, M.D. (Raj), purchased the assets of a medical practice known as Manhattan Medical Office PC, located at 4915 Broadway, Suite #1K, New York, NY 10034 (Manhattan Medical) pursuant to an oral asset purchase agreement (complaint, ¶ 11). As part of the asset purchase agreement, Raj purchased the patient charts and two phone numbers of Manhattan Medical, namely (212) 543-2500 and (212) 543-2503 (*id.*).

Thereafter, Raj formed a new practice, Broadway Manhattan Medical Office PC doing business as Broadway Manhattan Medic (BMM). Raj is the sole proprietor of BMM (*id.*, 13). In May 2012, after paying the full purchase price of the asset, the Manhattan Medical lease was transferred and assigned to BMM (*id.*, ¶ 14).

On May 26, 2016, pursuant to a "Physician Services Agreement with Independent Contractor" (service agreement), Milosevic joined BMM as a provider (*id.*, ¶ 17, 5/26/16 service

agreement, defendant exhibit C).¹ Under the terms of the service agreement, Milosevic was required to pay BMM 50% of all of his gross earnings derived from BMM, minus costs and expenses (*id.*, ¶ 4; complaint, ¶ 17). The service agreement was signed by plaintiff Muruga Raj, MD as majority shareholder of Broadway Manhattan Medical Office P.C. (5/26/16 service agreement at p. 3).

Under the terms of the service agreement's "Disputes" provision, the parties agreed that

"If a dispute arises, the parties will try in good faith to settle it through mediation conducted by a mediator to be mutually selected. The parties will share the costs of the mediator equally. Each party will cooperate fully with the mediator and will attempt to reach a mutually satisfactory compromise to the dispute. If the dispute is not resolved within 30 days after it is referred to the mediator, it will be arbitrated by an arbitrator to be mutually selected. "Judgment on the arbitration award may be entered in any court that has jurisdiction over the matter. Costs of arbitration, including lawyers' fees, will be allocated by the arbitrator"

(5/26/16 service agreement, ¶ 13, defendant exhibit C). Further, the service agreement provides that it "is the entire agreement between the parties . . . [and] replaces and supersedes any and all oral agreements between the parties, as well as any prior writings" (*id.*, ¶ 14).

From 2015 to on or about late March 2019, Raj traveled extensively to India in pursuit of developing a medical device. During that time, Raj rarely visited BMM, and only for administrative work such as writing checks and completing payroll. While away, Raj maintained contact with on Maria Vivenes (Vivenes), his office manager since 2011 (complaint, ¶¶ 15, 19, 23). On February 8, 2019, Vivenes called Raj and informed him that Lopez had an MRI that revealed a brain tumor. Vivenes told Raj that Lopez refused surgery and was going to the Dominican Republic (*id.*, ¶ 22).

¹ The complaint states that Raj practiced at BMM alongside defendant Juan Sebastian Lopez, MD (Lopez) and Milosevic until 2015, at which point he stopped practicing medicine in order to focus on developing a medical device. It is unclear whether Milosevic was working at BMM prior to entering into the employment agreement.

On February 12, 2019, Raj left for a preplanned trip to India, remaining in contact with Vivenes. On March 5, 2019, Vivenes told Raj that Milosevic was leaving the practice, and, further, that she had not been able to reach Lopez or his wife to find out when he was returning to the practice. On March 7, 2019, Raj returned from India and called Vivenes to get an update, and told her he was coming to the office. Vivenes told him to come to the office on Monday, as she was just about to leave for the day (*id.*, ¶¶ 23, 24, 26).

When Raj returned to the office that Monday, March 11, 2019, he discovered that a company had entered his office and removed BMM's patient charts, equipment and office supplies. Vivenes and the two women at the front desk claimed they did not know who the company was and who removed the patient charts from the office (*id.*, ¶ 22).

Raj was distressed, and upon Vivenes' recommendation, told her to pay for the phone lines and forward the office phone to her cell phone until he until he figured out what to do next. He learned that Vivenes had not revalidated him with Medicaid insurance providers. Growing suspicious, on March 18, 2019, Raj went to BMM and removed Vivenes's cell phone from call forwarding. When he went to the office on March 20th, he discovered that the phone was disconnected. He went to the phone provider's office, Spectrum to see what the issue was and was told that the phone numbers had been transferred to another location by the authorized user, Vivenes. He then learned that the patients were being diverted to this new location. There were very few documents left in his cabinet, which left him unable to calculate what was owed to him by Lopez and Milosevic. As a result, Raj suffered tremendous financial loss (*id.*, ¶¶ 27-366).

Discussion

“A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration” (CPLR 7503 [a]). “In deciding an application to compel arbitration

pursuant to CPLR 7503[a], the court is required to ‘first make a determination whether the parties have entered into a valid arbitration agreement and, if so, whether the issue sought to be submitted to arbitration falls within the scope of that agreement’” (*Koob v IDS Fin. Servs.*, 213 AD2d 26, 30 [1st Dept 1995] [internal citations omitted], quoting *Schenkers Intl. Forwarders v Meyer*, 164 AD2d 541, 543 [1st Dept 1991]).

The Court of Appeals has held that “‘an arbitration clause in a written agreement is enforceable . . . when it is evident that the parties intended to be bound by the contract’” (*Matter of Fiveco, Inc. v Haber*, 11 NY3d 140, 144 [2008], quoting *God’s Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 373 [2006]). There must be a “clear, explicit and unequivocal agreement to arbitrate” (*Matter of Fiveco*, 11 NY3d at 144 [internal quotation marks and citation omitted]; *Empire Entertainment Group v Wanderlust Pictures*, 307 AD2d 811, 811 [1st Dept 2003]). Milosevic argues that given that plaintiffs refer to the service agreement in the first cause of action for breach of contract, it is clear the parties have agreed to submit to arbitration. Here, as the motion is unopposed, and based on a review of the service agreement reflecting that both plaintiffs and Milosevic were signatories to the contract, the court finds there is a valid arbitration agreement.

The court next must determine “whether the issue sought to be submitted to arbitration falls within the scope of that agreement” (*Schenkers Intl. Forwarders*, 164 AD2d at 543). Moreover, “incidental tort claims which are integrally linked to an arbitrable dispute [are to] be submitted for resolution in arbitration” (*Szabados v Pepsi-Cola Bottling Co. of N.Y.*, 174 AD2d 342, 343 [1st Dept 1991]; *New York Mar. & Gen. Ins. Co. v Jorgenson & Co.*, 151 AD3d 637, 637-638 [1st Dept 2017] [claims plaintiff “alleging fraud and intentionally dishonest conduct, are

subject to arbitration pursuant to the broad arbitration clause in the parties . . . [a]greement” [internal quotation marks and citation omitted]).

Here, plaintiffs allege that defendant breached the service agreement, in addition, plaintiffs allege fraud, conversion, conspiracy to commit fraud, unjust enrichment, and seek an accounting. The complaint, however, “does not allege fraud in the inducement of the arbitration clause or fraud permeating the entire agreement” (*New York Mar. & Gen. Ins. Co.*, 151 AD3d at 638). As the “record is devoid of any facts supporting the allegation that the contract was permeated by fraud. In the absence of such evidence, the question of fraudulent inducement of the contract is one for the arbitrators, not for the court” (*Avalon Intl. Trading Corp. v GST Receivables Mgt. Corp.*, 220 AD2d 248, 249 [1st Dept 1995]; *New York Mar. & Gen. Ins. Co.*, 151 AD3d at 638; *Gondal Asset Mgt. v New York Stock Exch.*, 22 Misc 3d 1108[A], 2004 NY Slip Op 51954(U) [Sup Ct, NY County 2004], *affd* 27 AD3d 271 [1st Dept 2006]).

Therefore, as there is no motion in opposition, and in light of the discussion above, the court grants the motion by Milosevic to compel arbitration and stay the proceedings with respect to those causes of action as raised against him. However, consistent with the procedure specified by the language of the service agreement’s alternative dispute resolution clause, the court will direct mediation as a precursor to arbitration (*see, e.g., WM Meadow, LLC v Sierra Pacific Industries*, 2020 WL 3961995, *3 [Sup Ct, NY Co 2020]; *Rosenberg v Tribeca Holdings Inc.*, 2020 WL 203829, *1–2 [Sup Ct, NY Co 2020]; *Berdon LLP v Stenger*, 2018 WL 3838323, *2 [Sup Ct, NY Co 2020]).

Conclusion

Accordingly, it is hereby

ORDERED that the motion by defendant Milivoje Milosevic, M.D. (motion seq. 004) to compel arbitration against plaintiffs Muruga Raj, M.D. and Broadway Manhattan Medical

Office, P.C., d/b/a Broadway Manhattan Medic is granted to the extent of directing those parties to mediate, and if necessary, arbitrate in accordance with the alternate dispute resolution clause contained in the Agreement; and it is further

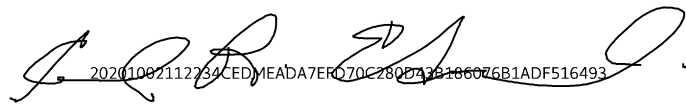
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ORDERED that either party may make an application by order to show cause to vacate or modify the stay upon determination of the mediation or arbitration, and it is further

ORDERED that the first cause of action as well as the third through seventh causes of action as against defendant Milosevic are severed and dismissed; and it further

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ORDERED that the remainder of the action is severed and shall continue.


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10/2/2020
DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE