2012 WL 12092427 (Pa.Com.Pl.) (Trial Motion, Memorandum and Affidavit)
Court of Common Pleas of Pennsylvania.
Philadelphia County

Patrick J. MACPHERSON, Executor of the Estate of Richard Macpherson, Deceased, Plaintiff,
v.
THE MAGEE MEMORIAL HOSPITAL FOR CONVALESCE d/b/a Magee Rehabilitation Hospital; Jefferson Health System, Inc.; Tjuh System; Manor Care of Yeadon PA, LLC, d/b/a, Manorcare Health Services-Yeadon; HCR Manorcare, Inc.; Manorcare, Inc.; HCR Healthcare, LLC; HCR II Healthcare, LLC; and HCR III Healthcare, LLC, Defendants.

No. 111000191.
October 11, 2012.

October Term, 2011

Plaintiff's Supplemental Memorandum of Law in Opposition to Defendants' Arbitration-Related Preliminary Objections to Plaintiff's Amended Complaint

Wilkes & McHugh, P.A., Ruben J. Krisztal, Esquire, Attorney Identification No. 202716, 1601 Cherry Street, Suite 1300, Philadelphia, PA 19102, Tel No. (215) 972-0811, Email: rkrisztal@wilkesmchugh.com, for plaintiff, Patrick J. Macpherson, Executor of the Estate of Richard Macpherson, Deceased.

I. MATTER BEFORE THE COURT

Plaintiff, Patrick J. MacPherson, Executor of the Estate of Richard MacPherson, deceased, through his counsel, Wilkes & McHugh, P.A., files this Supplemental Memorandum of Law in Opposition to Defendants', Manor Care of Yeadon PA, LLC, d/b/a ManorCare Health Services - Yeadon, HCR ManorCare, Inc., Manor Care, Inc., HCR II Healthcare, LLC, HCR III Healthcare, LLC, and HCR Healthcare, LLC (collectively “ManorCare Defendants”), Arbitration-Related Preliminary Objections to Plaintiff's Amended Complaint, as follows.

II. FACTS AND PROCEDURAL HISTORY

This is a nursing home **abuse** and neglect case arising out of the severe injuries sustained by Richard MacPherson while residing under the Defendants care at Magee Rehabilitation Hospital, a hospital, from August 20, 2009, through September 15, 2009, and ManorCare Health Services - Yeadon, a nursing home facility, from September 15, 2009, through February 1, 2010. Mr. MacPherson died on February 1, 2010. Plaintiff, Patrick J. MacPherson, Executor of the Estate of Richard MacPherson, deceased, commenced this action by writ of summons on October 3, 2011. Plaintiff filed a Complaint in Civil Action on January 27, 2012, and an Amended Complaint on March 19, 2012, alleging that Defendants **abused** and neglected Mr. MacPherson at their respective facilities. [1]

On or about March 30, 2012, ManorCare Defendants filed Preliminary Objections seeking to enforce an alleged Arbitration Agreement and, alternatively, to dismiss various counts and claims from Plaintiff's Complaint. On April 20, 2012, Plaintiff filed a Memorandum of Law responding to those objections, and fully incorporates that Memorandum of Law herein by reference. [2] By Court Order, Plaintiff now submits this Supplemental Memorandum of Law in Opposition to Defendants Preliminary Objection to compel arbitration.

III. STATEMENT OF QUESTION PRESENTED

Should this Honorable Court refuse to compel arbitration in this matter?

Suggested Answer: YES.

IV. ARGUMENT

Standard for Enforcing Arbitration Agreements

In a proceeding to compel arbitration, the question of whether the parties agreed to arbitrate, commonly referred to as substantive arbitrability, is generally one for the courts and not for the arbitrators.[3] In Huegel v. Mifflin Const. Co., Inc.,[4] the Court recognized that arbitration is a matter of contract and, as such, it is for the court to determine whether an express agreement between the parties to arbitrate exists. This holding is in line with other holdings in the Commonwealth of Pennsylvania that the court, not the arbitrator, must resolve the very existence of the agreement.[5] Thus, the threshold issue for the Court is whether the parties have entered into a valid agreement to arbitrate. Lastly, arbitration agreements are contracts and should be interpreted using contract principles.[6]

THIS HONORABLE COURT HAS JURISDICTION OVER PLAINTIFF'S CLAIMS, AS THE ALLEGED ARBITRATION AGREEMENT IS INVALID ON SEVERAL GROUNDS

As explained in Plaintiff's Memorandum of Law,[7] the alleged Arbitration Agreement proffered by Defendants is unenforceable, void, unconscionable, and/or a contract of adhesion. The alleged Arbitration Agreement is also void as being against public policy, void for lack of consideration, void for impracticability of performance, void for frustration of purpose, void because it creates a perpetual term, void based on the fact that it was procured by fraud, void because Plaintiff signed it under duress, void as it limits damages guaranteed to Plaintiff by law, void as violating the Pennsylvania and United States Constitutions, and void as improperly limiting discovery that may be exchanged and the depositions that may be taken.[8]

In summary, the Defendants have a contemptible admission policy (or rather lack of policy) that deprives residents of their rights. For instance, a new resident is admitted from a hospital after some major illness or surgery, and in this fragile state, is rushed through an unconscionable admission process whereby the resident or his or her family member is induced into signing documents that they have not read or understood, and which they believe are required for admission to the facility.[9] In the instant case, Defendants have offered no evidence that the legal implications of the Arbitration Agreement were fully explained to Richard MacPherson during the admission process, or that he fully comprehended the rights he was relinquishing. Furthermore, Defense counsel has informed Plaintiff that upon information and belief, the admissions representative from ManorCare Health Services - Yeadon has no recollection of Mr. MacPherson, and if deposed, will be unable to testify as to the details of his admission or residency at the Facility. For the reasons in Plaintiff's incorporated Memorandum of Law and the supplemental arguments below, Defendants' proffered Arbitration Agreement should be struck down.

A. THE RECENT U.S. SUPREME COURT DECISION IN MARMET HEALTH CARE CTR., INC., ET AL. V. BROWN SUPPORTS PLAINTIFF'S ARGUMENT THAT THE ARBITRATION AGREEMENT MUST BE STRUCK DOWN BASED UPON PENNSYLVANIA CONTRACT DEFENSES

In his incorporated Memorandum of Law, Plaintiff asserts that the Arbitration Agreement must be struck down according to Pennsylvania contract law defenses.[10] In Pennsylvania, generally applicable contract defenses, such as fraud, duress,

unconscionability, impracticability of performance, frustration of purpose, etc., may be applied to invalidate arbitration agreements and provisions. [11] Examining whether these contract law defenses are valid as against the proffered Arbitration Agreement comports with the United States Supreme Court's recent decision in Marmet Health Care Ctr., Inc., et al. v. Brown, 132 S.Ct. 1201 (2012). In Marmet, the Supreme Court overturned the West Virginia Supreme Court's categorical prohibition of pre-dispute nursing home arbitration agreements, and directed the lower courts to examine whether the agreements were unenforceable pursuant to state common law principles (i.e., grounds existing at law to attack any contract) on a case-by-case basis. Marnet at 1204. This Court should do the same, and find that Defendants' Arbitration Agreement is unenforceable, based upon any or all of the contract defenses Plaintiff has raised in this case. To be clear, Plaintiff is not seeking a broad-brush invalidation of all nursing home arbitration agreements, which the Marmet case clearly proscribed. Rather, Plaintiff avers that this particular agreement cannot be enforced based upon the "state common law principles" (unconscionability, lack of consideration, etc.) that the Marmet decision instructed the lower courts to examine.

For the many reasons set forth in Plaintiff's Memorandum of Law in Opposition to ManorCare Defendants' Preliminary Objections, [12] this Arbitration Agreement must be struck down according to Pennsylvania contract law defenses. It is respectfully submitted that this Court should overrule Defendants' Preliminary Objection that seeks to compel arbitration in this case.

B. The Healthcare Facility Setting Is Unique

1. This Pre-dispute Alternative Resolution Agreement is not appropriate in this case

Plaintiff recognizes that the Marmet decision prevents a state from categorically prohibiting arbitration of certain types of claims. 132 S.Ct. at 1204. Plaintiff is not advocating the outright prohibition of all pre-dispute arbitration agreements in healthcare facility settings, but rather, that in this particular case, the pre-dispute agreement is void as a matter of law and equity, in accordance with Marmet Health Care Ctr., Inc., et al. See id.

Unlike cases dealing with arbitration agreements that occur in commercial settings, in this case, there was no negotiation between the parties on the terms of this Arbitration Agreement as required by First Union Nat'l Bank v. U.S., 164 F.Supp.2d at 663 (E.D. Pa. 2001) (stating a waiver of rights must be knowing, voluntary, and intelligent, which includes, inter alia, the opportunity to negotiate contract terms). Second, it was not foreseeable to Plaintiff that a dispute would arise due to injuries that Mr. MacPherson sustained at the Facility. At the time of Mr. MacPherson's admission to the Facility, he certainly did not have a reasonable expectation that he would suffer the injuries enumerated in Plaintiff's Amended Complaint. It was certainly not reasonable to expect that the Defendants would fail to provide Mr. MacPherson care during his admission at the Facility such that he would suffer horrific and preventable injuries. This case must rest against this backdrop.

Sensitive to public policy concerns of protecting nursing home residents, courts do not enforce these types of agreements unless they contain basic safeguards designed to prevent overreaching. Recognizing the unique vulnerability of healthcare facility residents, Pennsylvania courts have observed that "arbitration clauses in... [healthcare facility] cases must be closely examined." Robb v. Mountainview Specialty Care Ctr., Inc., 2007 Pa. Lexis 122 (C.P. Westmoreland Apr. 9, 2007), aff'd, 938 A.2d 1129 (Pa. Super. 2007) (quoting Small v. HCF of Perrysburg, 823 N.E.2d 19, 24 (Ohio Ct. App. 2004)). The Robb court aptly noted that, given the time pressure and emotional stress involved with securing needed care, healthcare facility residents lack the ability to "shop" for a healthcare facility. Id. at *13. Thus, healthcare facility residents do not enjoy the same options available to sophisticated business persons or consumers generally.

Accordingly, the Robb court found that the arbitration agreement at issue in that case violated public policy because it "deprive[d] the resident of the benefit of remedial legislation enacted by Congress and [the Pennsylvania] General Assembly to protect nursing home residents." Id. at *13. Further, the court identified particular concerns with applying arbitration agreements to negligence actions, where the "reasonableness" of a defendant's action is "best left to a jury acting as a fact finder." Id. (citation omitted). Here, the Defendants' Arbitration Agreement bars any court action arising out of State or Federal law, including

breach of "Patient's Rights." [13] As such, the Arbitration Agreement violates public policy by both stripping Mr. MacPherson of the rights explicitly granted to him (and others in a similarly vulnerable position) by this State's legislature and by failing to provide proper procedural safeguards. Id.

b. Pre-dispute alternative resolution agreements are not appropriate in cases of neglect and abuse

Pre-dispute alternative resolution agreements are never appropriate in cases of neglect and **abuse** of an **elderly** person. Such agreements are inconsistent with this State's policy to protect a particularly vulnerable portion of the population (the **elderly** and disabled) from gross mistreatment in the form of **abuse** and custodial neglect. In Pennsylvania, the Older Adults Protective Services Act ("OAPSA") sets forth civil penalties and other consequences for **abuse** of a care-dependent person. See 35 P.S. §10225.101, et seq. OAPSA expresses the policy of this Commonwealth in that:

> ...older adults who lack the capacity to protect themselves and are at imminent risk of **abuse**, neglect, exploitation or abandonment shall have access to and be provided with services necessary to protect their health, safety and welfare. It is not the purpose of this act to place restrictions upon the personal liberty of incapacitated older adults, but this act should be liberally construed to assure the availability of protective services to all older adults in need of them. Such services shall safeguard the rights of incapacitated older adults while protecting them from **abuse**, neglect, exploitation and abandonment. It is the intent of the General Assembly to provide for the detection and reduction, correction or elimination of **abuse**, neglect, exploitation and abandonment, and to establish a program of protective services for older adults in need of them.

35 P.S. §10225.102. Plaintiff has made a claim for negligence per se according to this statute.

No doubt, this statute was designed to protect a particularly vulnerable portion of the population from gross mistreatment in the form of **abuse** and custodial neglect, and to ensure that there are consequences for this type of mistreatment. The perpetrator of these wrongs should not be allowed to use a pre-dispute arbitration agreement to deprive a victim of his or her day in court. Clearly, these types of agreements are against public policy when the underlying allegations are based on neglect and/or **abuse**. See e.g., Fitzhugh v. Granada Healthcare and Rehabilitation Center, LLC, 58 Cal Rptr. 3d 585, 590 (Cal. App. 1 Dist. 2007) ("we conclude that upholding the [order denying arbitration] is consistent with public policy expressed in the statutes enacted by the Legislature 'to protect a particularly vulnerable portion of the population from gross mistreatment in the form of **abuse** and custodial neglect,' and to ensure appropriate relief for such mistreatment."). For the forgoing reasons, this Honorable Court should overrule Defendants' Preliminary Objection attempting to compel arbitration.

V. CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Honorable Court OVERRULE Defendants' Preliminary Objections and further order Defendants to file an Answer to Plaintiff's Amended Complaint within twenty (20) days of the date of the Order.

Respectfully Submitted,

WILKES & McHUGH, P.A.

By:

Ruben J. Krisztal, Esquire

Attorney for Plaintiff

Date: 10/11/2012

Footnotes

1 See Amended Complaint attached as Exhibit “A.”

2 Attached hereto as Exhibit “B.”

3 Ross Development Co. v. Advanced Bldg. Development, Inc., 2002 PA Super 219 Pa.Super., 2002.

4 796 A.2d 350 (Pa.Super. 2002).

5 McNulty v. H&R Block, Inc., 843 A.2d 1267 (Pa.Super 2004); D&H Distributing Col, Inc. v. National Union Fire Ins. Co., 2003 PA Super 62 (Pa.Super. 2003).

6 See Bucks Orthopedic Surgery Associates, P.C. v. Ruth, 925 A.2d 868 (Pa. Super. 2007).

7 See Exhibit “B.”

8 See Exhibit “B.” at 5-23.

9 See e.g., King v. Mercy/Manor Partnership, d/b/a ManorCare Health Services at Mercy Fitzgerald, et al., No. 10-010228 (C.C.P. Delaware), 9/17/12 Order, and Plaintiffs Supplemental Memorandum of Law, collectively Exhibit C, and Kolar v. Manor Care of Yardley, PA LLC, et al., No. 2010- 06542 (C.C.P. Bucks 2010), 6/6/10 Order and Supplemental Memorandum of Law, collectively Exhibit D, overruling defendants' preliminary objection to compel arbitration, wherein plaintiff argued that the same corporate defendant as in this instance case employ the practice of providing a quick, biased and inaccurate explanation of arbitration, particularly leaving out the consequences.

10 See Exhibit “B.” at 5-23.

11 See Bucks Orthopaedic Surgery Assocs., P.C. v. Ruth, 925 A.2d 868, 872 (Pa. Super. 2007); Lytle v. CitiFin. Servs. Inc., 810 A.2d 643, 657 (Pa. Super. 2002); Hopkins v. New Day Financial, 643 F. Supp. 2d 704 (E.D. Pa. 2009). Pennsylvania case law neither favors nor disfavors the enforcement of these agreements. Alternative dispute resolution agreements are contracts “as enforceable as other contracts, but not more so.” Prima Paint Corp. v. Flood Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) (emphasis added). The Pennsylvania Supreme Court recently noted that Congress' purpose in enacting the Federal Arbitration Act (“FAA”) was to establish “a substantive rule of federal law placing [arbitration] agreements upon the same footing as other contracts.” Salley v. Option One Mortgage Corp., 592 Pa. 323, 330, 925 A.2d 115, 118-19 (2007) (emphasis added). Just like any other contract, generally applicable state-law contract defenses, such as impracticability of performance and unconscionability, may be applied to invalidate arbitration agreements. Id. at 330, 925 A.2d at 119.

12 See Exhibit “B.”

13 See Arbitration Agreement, section B, attached hereto as Exhibit “E.”