SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1580-15T1

KONSTANTINE H. ZOGRAFOS, individually and as a shareholder in SOZA CLINIC, LLC,

Plaintiff-Appellant,

v.

DR. ANTHONY WEHBE, individually and as a shareholder in SOZA CLINIC, LLC,

Defendant-Respondent.

Submitted September 11, 2017 – Decided September 18, 2017

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1362-14.

Gilmore & Monahan, attorneys for appellant (Angela M. Koutsouris, on the briefs).

Subranni Zauber, LLC, attorneys for respondent (William P. Rubley, on the brief).

PER CURIAM

Plaintiff in this business dispute appeals the Law Division's October 30, 2015 order. The order denied plaintiff's motion to

reopen this civil action, which the court had dismissed a year earlier pursuant to a contractual binding arbitration provision. The order also denied plaintiff's request for leave to file an amended complaint, to compel defendant to produce additional documents, and for counsel fees. For the reasons that follow, we affirm.

We recite only the most pertinent background.

Defendant Anthony Wehbe is a physician. Through various related business entities, defendant and other individuals established several weight loss clinics in New Jersey and Pennsylvania. The weight loss establishments were known and marketed as the "Soza" clinics. Among these business enterprises were two limited liability companies: Soza Northeast, LLC, formed in Pennsylvania in 2012, and Soza Clinic, LLC, formed in Delaware in 2013. Dr. Wehbe directly or indirectly held ownership interests in these enterprises. Plaintiff Konstantine Zografos, a friend of Dr. Wehbe and who attended college with him, began working for Soza Northeast, LLC in 2012.

Initially, Dr. Wehbe paid for many of the clinics' expenses through charges on his personal American Express credit card. According to plaintiff, in the spring of 2013, American Express reduced the monetary limit on Dr. Wehbe's credit card. In order to maintain the operations, Dr. Wehbe asked plaintiff to place

business charges on plaintiff's own credit card. Plaintiff willingly did so for several months, until such time as Dr. Wehbe's credit improved and he began using his own credit card again. Dr. Wehbe reimbursed plaintiff for a portion of the amounts that had been charged on plaintiff's card. Plaintiff characterizes the sums charged on his card as a "loan," although the arrangement was not memorialized in a written loan agreement.

The weight loss business entities were reorganized in 2013, when Soza Clinic, LLC was formed under Delaware law. As part of the reorganization, plaintiff was assigned a fourteen percent interest in that LLC. The reorganization documents included an Operating Agreement and a Reorganization Plan.[1] A separate Investment Agreement, to which plaintiff was not a party, reflected the new capital contribution of a third party.

Plaintiff did not make a contemporaneous capital contribution in exchange for his equity interest in Soza Clinic, LLC. Instead, defendant asserts that the unreimbursed portion of plaintiff's prior credit card debts were deemed by agreement to be the consideration for plaintiff's equity share. Plaintiff, however,

[1] The copies of these documents supplied in the Joint Appendix are unsigned. However, plaintiff admits in his proposed amended verified complaint that he "reluctantly signed" the agreements, but claims that he was not supplied with a "fully signed copy" of them. For purposes of this opinion, we shall presume, as the trial court did, that the agreements were mutually executed.

disputes that characterization. He instead contends that his equity share was granted in exchange for the uncompensated or undercompensated services he provided to the business as an employee. He maintains that the unreimbursed charges on his credit card continued to be a loan, which defendant was obligated to repay in full.

After the clinics sustained financial problems, plaintiff filed a verified complaint and order to show cause in the Law Division in October 2014 against Dr. Wehbe. The complaint sought various forms of relief for plaintiff, in both his individual capacity and as a shareholder of Soza Clinic, LLC. Judge Anne McDonnell immediately ordered certain temporary measures, including placing restraints on the distribution of company assets.

Defendant thereafter moved to dissolve the restraints and to dismiss the lawsuit for lack of jurisdiction, citing a mandatory arbitration provision within the Operating Agreement. That provision, set forth in Section 12.8, prescribes as follows:

> 12.8 Arbitration: Dispute Resolution. Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity hereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be resolved through final and binding arbitration in Philadelphia, Pennsylvania. The arbitration

> shall be administered by either JAMS pursuant to its Comprehensive Arbitration Rules and Procedures or by the American Arbitration Association in accordance with the applicable rules of the American Arbitration Association then in effect. Judgment on the arbitration award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction. Before either party may proceed to arbitration, he or it shall first provide each other party with 30 days prior written notice explaining the nature of the dispute and an opportunity to cure said alleged breach.
>
> [(Emphasis added).]

Before ruling on the jurisdictional motion, Judge McDonnell dissolved the temporary restraints. However, on October 9, 2014 she ordered defendant to undertake certain actions, including to perform an accounting of the income and expenditures of Soza Clinic, LLC, and to make the business's books and records available for review. The judge directed defendant to pay eighty-six percent of the costs of the accounting, and for plaintiff to bear the remaining fourteen percent.

After hearing oral argument, Judge McDonnell granted defendant's motion for dismissal, in anticipation that the parties' dispute would be resolved through binding arbitration. In her bench opinion on October 29, 2014, the judge made the following key observations:

> [Section] 12.8 of the Operating Agreement does include what I would describe as a broad arbitration clause. I think it does permit the plaintiff to seek Court relief, as they have done in this matter. But, I found no reason to continue the restraints. I'm satisfied that I've set up a process whereby there will be an accounting, and the accountant will be paid. And, that there is no need for me to continue to keep this matter open.
>
> The Court is always open in the event that something emergent arises. But, I am satisfied that, based on the Operating Agreement, and the broad arbitration language, and the fact that it's construed consistent with Delaware law, which like New Jersey law, strongly favors the enforcement of the arbitration provision.
>
> I am satisfied that it is appropriate to grant the Cross-Motion for Dismissal at this time.
>
> [(Emphasis added).]

Judge McDonnell accordingly entered a conforming order on November 6, 2014 dismissing the complaint.

Nearly a year later, in September 2015, plaintiff, represented by new counsel, filed a motion to reinstate the civil action, to amend the complaint to include additional parties and legal theories, and to compel defendant to produce more documents needed for the accounting. With respect to the discovery issues, plaintiff asserted in his supporting certification that defendant "left large amounts of disorganized documents, office equipment,

garbage and various items" when he left one of the clinic locations. Plaintiff asserted that he was unable to find the missing accounting information when he sorted through those abandoned documents.

Defendant countered, through his own certification, that he had made himself available to the reviewing accountants as required, that they had never requested further materials or information from him, and that he had produced every record for the business in his possession. Defendant argued that there was no need for the dismissed civil action to be revived or expanded, and that the additional matters that plaintiff sought to litigate should be handled in the arbitration.

Following oral argument, Judge Jean B. McMaster denied plaintiff's motions. Among other things, Judge McMaster noted that "plaintiff's claims . . . relate to the same facts and circumstances of the original matter that was dismissed earlier. Nothing has changed in that regard." Judge McMaster expressed agreement with Judge McDonnell's earlier finding about the broadness of the arbitration provision in the Operating Agreement. She also noted that the "public policy favors resolution by arbitration."

Having been advised of the court's oral decision to not reopen the case, plaintiff requested Judge McMaster to compel defendant

to provide the additional documents needed to complete the accounting, invoking the order entered previously by Judge McDonnell. Judge McMaster denied that request as well, accepting Dr. Wehbe's representation that he had already supplied all documents in his possession, and discerning no reason to continue the court's involvement.

In his present appeal, plaintiff does not contest Judge McDonnell's decision in October 2014 to dismiss his original complaint and to refer those particular pleaded claims to arbitration. In fact, plaintiff explicitly agrees with Judge McDonnell's finding that Section 12.8 of the Operating Agreement contains a "broad" arbitration clause, and that the claims encompassed in his original complaint are indeed subject to that arbitration mandate. However, plaintiff contends that his proposed amended complaint would add parties and causes of action that are outside of the scope of the Operating Agreement and are thus non-arbitrable. Among other things, plaintiff contends that the unwritten "loan agreement" with Dr. Wehbe is not covered by the Operating Agreement. Plaintiff further asserts that the trial court at least should have reopened this matter to compel defendant to provide additional "meaningful" discovery. We disagree.

As a threshold matter, we note that both the Operating Agreement and the Reorganization Plan include provisions

designating the laws of Delaware as the governing law. "Ordinarily, when parties to a contract have agreed to be governed by the laws of a particular state, New Jersey courts will uphold the contractual choice if it does not violate New Jersey's public policy." N. Bergen Rex Transp. v. Trailer Leasing Co., 158 N.J. 561, 568 (1999) (quoting Instructional Sys., Inc. v. Comput. Curriculum Corp., 130 N.J. 324, 341 (1992)). We discern no such public policy impediment here, and therefore apply Delaware law to the parties' dispute.

Consistent with federal law principles, Delaware law generally recognizes that courts, not arbitrators, have the primary authority to decide whether an arbitration agreement is valid and applicable, a concept known as "substantive arbitrability." See, e.g., First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985, 993 (1995); James & Jackson, LLC v. Willie Gary, LLC ("Willie Gary"), 906 A.2d 76, 79 (Del. 2006). More specifically, Delaware enforces the federal rule that "courts should not presume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable evidence that they did so.'" Willie Gary, supra, 906 A.2d at 79 (quoting First Options, supra, 514 U.S. at 944, 115 S. Ct. at 1924, 131 L. Ed. 2d at 994).

Here, Section 12.8 of the Operating Agreement refers to mandatory arbitration to be conducted by either the American Arbitration Association ("AAA") or, alternatively, the JAMS dispute resolution agency. The Delaware Supreme Court has "adopt[ed] the majority federal view that [a contract's] reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator." Id. at 80. This principle "applies in those cases where the arbitration clause generally provides for arbitration of all disputes and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability." Ibid.; see also GTSI Corp. v. Eyak Tech., LLC, 10 A.3d 1116, 1120 (Del. Ch. 2010) (applying this approach). The narrow exception to this rule is that "a court need not defer to an arbitrator if the assertion that the underlying dispute would be arbitrable is 'wholly groundless.'" GTSI Corp., supra, 10 A.3d at 1120-21. Such a determination requires "a clear showing that the party desiring arbitration has essentially no non-frivolous argument about substantive arbitrability to make before the arbitrator." Id. at 1121 (quoting McLaughlin v. McCann, 942 A.2d 616, 626-27 (Del. Ch. 2008)).

Here, plaintiff's proposed amended complaint centers around two central disputes: (1) whether his alleged "loan" was repaid or partially repaid with equity in Soza Clinic, LLC under the

Reorganization Plan, and (2) whether any of the defendants in the proposed amended complaint breached fiduciary duties prescribed in the Operating Agreement. These disputes manifestly fall within the broad arbitration provisions of the agreements, both of which extend to "[a]ny dispute, claim or controversy arising out of or relating to" their respective agreements. (Emphasis added). Defendant's invocation of these arbitration provisions is not frivolous or "wholly groundless." The disputes appear to concern the relationships between the parties with respect to their business dealings within the overall Soza Clinic enterprise, and appear to logically "relate to" the Operating Agreement.

Moreover, both arbitration provisions explicitly apply to "the determination of the scope of applicability of [the] agreement to arbitrate." They specifically require that either the AAA rules or JAMS rules shall apply to any arbitration brought under them. Given the Delaware Supreme Court's holding in Willie Gary, supra, 906 A.2d at 80, the arbitration provisions require an arbitrator, not the court, to decide in the first instance the issue of arbitrability for all claims in the proposed amended complaint against all of proposed defendants who executed these agreements. We yield to have an arbitrator make that determination.

Plaintiff further argues the arbitration provisions cannot be enforced against any of the proposed defendants who did not sign either the Operating Agreement or the Reorganization Plan. He asserts that "[t]he proposed additional defendants are not bound to the parent company's operating agreement or arbitration clause." That argument is unavailing.

The Federal Arbitration Act, 9 U.S.C.A. §§ 1-16, requires courts to enforce an arbitration agreement "notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20, 103 S. Ct. 927, 939, 74 L. Ed. 2d 765, 782 (1983). The United States Supreme Court has held that "[b]ecause 'traditional' principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third party beneficiary theories, waiver and estoppel,'" nonparties to a contract may be bound by, or be able to enforce, arbitration provisions featured therein. Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631, 129 S. Ct. 1896, 1902, 173 L. Ed. 2d 832, 840 (2009).

Indeed, a Delaware court has applied the doctrine of equitable estoppel to compel signatories to an arbitration agreement to arbitrate disputes with non-signatories in certain contexts.

Douzinas v. Am. Bureau of Shipping, Inc., 888 A.2d 1146, 1153 (Del. Ch. 2006). "One circumstance that frequently warrants such estoppel is 'when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract.'" Ibid. (citation omitted). Refusal to compel arbitration in such a setting "would render the arbitration between the signatories meaningless and thwart the state and federal policy in favor of arbitration." Ibid. This approach is consistent with the strong public policy in Delaware to "minimize claim splitting," and to bind parties "for fairness and efficiency's sake to litigate in one place, and not force the defendants to unnecessarily expend resources on what would essentially be the same defense in multiple venues." Ashall Homes Ltd. v. ROK Entm't Group, Inc., 992 A.2d 1239, 1251 (Del. Ch. 2010) (citing McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281 (Del. 1970)).[2]

Such estoppel principles equitably and sensibly apply here. In each count of the proposed amended complaint, plaintiff alleges

[2] Notably, similar principles enabling non-signatories to be included at times within contractual arbitrations are followed under New Jersey law, subject to certain limitations. See, e.g., Hirsch v. Amper Fin. Serv., LLC, 215 N.J. 174, 192 (2013); Alfano v. BDO Seidman, LLP, 393 N.J. Super. 560, 569 (App. Div. 2007).

that both signatories and non-signatories to the agreements are liable for fundamentally the same wrongful conduct. Given the apparent interdependency and overlap of his proposed claims, and the signatories' likely reliance on the arbitration clause, plaintiff should not be permitted to circumvent the mandatory arbitration provisions of the Operating Agreement and the Reorganization Plan by the device of adding non-signatories to his pleadings. That is especially a fair and just conclusion, after nearly a year had passed since the time the court dismissed this complaint.

Although it is not essential to our analysis, we further note that the integration clause in the Operating Agreement set forth in Section 12.3, specifies that it comprises the parties' "entire agreement . . . with respect to the subject matter," and that it "supersedes any prior agreement or understanding among the parties." This provision undercuts plaintiff's contention that the alleged oral loan agreement that preceded the Operating Agreement is unaffected by the latter's arbitration mandate.[3]

[3] In any event, we note that plaintiff's counsel advised this court in a March 22, 2017 letter that plaintiff and Dr. Wehbe individually settled the debt claim in bankruptcy proceedings, leaving only the additional claims set forth in the proposed amended verified complaint.

Lastly, we see no reason to overturn Judge McMaster's denial of plaintiff's post-dismissal motion to compel additional discovery from defendant. We recognize that Judge McDonnell did state in October 2014 that the trial court would remain "open in the event that something emergent arises." Even so, there is a mechanism within the arbitration process itself for plaintiff to seek additional discovery under the rules of the AAA or, alternatively, from JAMS, depending upon which of the two of those arbitration forums is selected.[4] We offer no advisory opinion on whether such discovery should or should not be granted by an arbitrator.

Affirmed.

[4] See Am. Arbitration Ass'n, Commercial Arbitration Rules & Mediation Procedures (amended & eff. Oct. 1, 2013), available at https://www.adr.org/sites/default/files/Commercial%20Rules.pdf. See also JAMS, Comprehensive Arbitration Rules & Procedures (eff. July 1, 2014), available at https://www.jamsadr.com/rules-comprehensive-arbitration; JAMS, Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases (eff. Jan. 6, 2010), available at https://www.jamsadr.com/arbitration-discovery-protocols.