MEMORANDUM DECISION

DR. DONNA L. D'ELIA and DR. JONEL M. DERSHEM, *Plaintiffs,* v. DR. WENDY MARTINEZ, *Defendant.*	: SUPERIOR COURT OF NEW JERSEY : LAW DIVISION | CAMDEN COUNTY : : : : Docket No. CAM-L-2500-21 : : (CBLP) : : Civil Action : :

Decided: September 27, 2024

STEVEN J. POLANSKY, P.J.Cv.

Defendant Dr. Wendy Martinez moves to dismiss the complaint with prejudice based upon an asserted arbitration provision in the contract between the parties.

Plaintiffs Dr. Donna D'Elia and Dr. Jonel Dershem began practicing medicine with defendant Dr. Wendy Martinez in the 1990's. On September 1, 1997, D'Elia and Dershem entered into an employment agreement with The Woman's Group for Obstetrics and Gynecology, P.A. All three parties in this case further on the same date entered into a shareholder agreement.

Dr. Dershem testified that while defendant Martinez had an attorney who prepared the original agreements, she did not have legal counsel and did not understand the legal language. No evidence is presented that Dr. D'Elia had legal counsel advising her during the initial hiring by Dr. Martinez.

Paragraph 15 of each of the employment agreements contain the following arbitration provision:

> Any dispute, disagreement or controversy arising out of or relating to this Agreement, the policies of the Board of Directors, or the disability of the EMPLOYEE, shall be determined by arbitration in Camden County, New Jersey. Each party to the dispute shall appoint an arbitration within ten (10) days after written demand therefor is made by any other party, which demand shall set forth a statement of the issue or issues

to be arbitrated. The arbitrators so appointed within fifteen (15) days thereafter shall elect another arbitrator. The Board of Arbitrators shall convene within ten (10) days after the date of their appointment, accept evidence with respect to the dispute, and file a written award within thirty (30) days after the close of the taking of evidence. Such an award signed by a majority of the arbitrators shall be final and conclusive upon all of the parties, and may be entered as common law award in any court of competent jurisdiction. If any party fails to appoint an arbitrator, or if the arbitrators so appointed cannot agree upon the designation of another arbitrator or if the arbitrators cannot reach a majority decision, any party may request the American Arbitration Association to fill the vacancy or vacancies and conduct the arbitration in accordance with its Rules and Regulations.

The shareholder agreement also contained an arbitration provision in paragraph 19 which reads as follows:

> Any dispute, disagreement or controversy arising out of or relating to this Agreement, or the management of the affairs of the CORPORATION, the policies of the Board of Directors, or the conduct of the officers of CORPORATION, shall be determined by arbitration in Camden County, New Jersey. Each party to the dispute shall appoint an arbitrator within ten (10) days after written demand therefor is made by any other party, which demand shall set forth a statement of the issue or issues to be arbitrated. The arbitrators so appointed within fifteen (15) days thereafter shall elect another arbitrator. The Board of Arbitrators shall convene within ten (10) days after the date of their appointment, accept evidence with respect to the dispute, and file a written award within thirty (30) days after the close of the taking of evidence. Such an award signed by a majority of the arbitrators shall be final and conclusive upon all of the parties, and may be entered as common law award in any court of competent jurisdiction. If any party fails to appoint an arbitrator, or if the arbitrators so appointed cannot agree upon the designation of another arbitrator or if the arbitrators cannot reach a majority decision, any party may request the American

> Arbitration Association to fill the vacancy or vacancies and conduct the arbitration in accordance with its Rules and Regulations.

In 2012, the doctors elected to become part of Advocare, LLC. A standard physician employment agreement was signed with Advocare by all three parties in this case. The Advocare physician agreement did not contain an arbitration provision. The court is also provided with a Care Center Founder's Agreement from July 1, 2012 which is unsigned. That Founder's Agreement does not contain an arbitration provision.

Defendant asserts that the parties entered into a separate Founder's Agreement in 2012 which is attached as Exhibit J to the moving papers. The document attached is an unsigned agreement. Defendant has never been able to produce a signed copy of the agreement. Both plaintiffs have denied ever signing or for that matter seeing the agreement.

Arbitration is a matter of contract. NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div. 2011), appeal dismissed, 213 N.J. 47 (2013). Not every arbitration clause is enforceable. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 441 (2014)) "An agreement to arbitrate 'must be the product of mutual assent, as determined under customary principles of contract law.'" Barr, 442 N.J. Super. at 605 (quoting Atalese, 219 N.J. at 442).

"Mutual assent requires that the parties understand the terms of their agreement[,]" and where the "agreement includes a waiver of a party's right to pursue a case in a judicial forum, 'clarity is required.'" Id. at 606 (quoting Moore v. Woman to Woman Obstetrics & Gynecology, LLC, 416 N.J. Super. 30, 37 (App. Div. 2010)).

To determine "whether a valid agreement to arbitrate exists," a "court must first apply 'state contract-law principles.'" Martindale v. Sandvik, Inc., 173 N.J. 76, 83 (2002).. (quoting Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006)). In that regard, "[a]n agreement to arbitrate 'must be the product of mutual assent, as determined under customary principles of contract law.'" Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 442 (2014)); Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 605-06 (App. Div. 2015) "Mutual assent requires that the parties understand the terms of their agreement." Id. at 606.

Essentially, "[t]he key . . . is clarity; the parties must know at the time of formation that 'there is a distinction between resolving a dispute in arbitration and in a judicial

forum.'" Atalese, 219 N.J. at 445). "[T]he waiver 'must be clearly and unmistakably established,' and 'should clearly state its purpose,' . . . [a]nd the parties must have full knowledge of the legal rights they intend to surrender." Ibid. (citations omitted). An arbitration agreement should clearly state if it "depriv[es] a citizen of access to the courts." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132 (2001) (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)).

"An arbitration agreement that fails to 'clearly and unambiguously signal' to parties that they are surrendering their right to pursue a judicial remedy renders such an agreement unenforceable." Atalese, 219 N.J. at 444.

Moving defendant relies upon the decision in County of Passaic v. Horizon Healthcare Services, Inc., 474 N.J. Super. 498 (App. Div. 2023), decided February 8, 2023, for the assertion that the arbitration provision need not satisfy the requirements under Atalese. Defendant argues that the Atalese decision should be limited to the context of employment and consumer contracts.

Defendant cites to Ogunyemi v. Garden State Medical Center, 478 N.J. Super. 310 (App. Div. 2024) as both contrary to the decision in the County of Passaic case as well as for the holding that in the employment setting, an express waiver under Atalese is required.

The court finds that the decision in County of Passaic v. Horizon Healthcare Services' decision is limited to cases where both parties are sophisticated and possess equal bargaining power. Unlike the County of Passaic case, all parties here were not represented by counsel at all relevant stages of negotiation and during the formation of relevant contract documents. For these reasons, the court does not find the County of Passaic decision applicable to the circumstances presented here.

The court concludes that the arbitration agreements in the various documents fail to clearly and unambiguously advise the parties they are surrendering their right to a judicial remedy and a jury trial. Pursuant to the New Jersey Supreme Court's decision in Atalese, this renders the arbitration provisions unenforceable despite New Jersey's strong preference to enforce arbitration agreements. See Hirsch v. Amper Financial Services, LLC, 215 N.J. 174, 186 (2013). The arbitration provisions describe how the arbitration shall proceed and where it shall proceed. Conspicuously absent from any of the arbitration provisions is any language that would place the party entering into the agreement on notice that they are waiving their right to a judicial remedy and they are waiving their right to have their dispute

determined by a jury. These deficiencies are fatal to enforcement of the arbitration provision.

The second issue presented here is whether defendant's conduct in conducting discovery and continuing to litigate this case for almost three years constitutes a waiver of defendant's right to compel arbitration based upon the New Jersey Supreme Court decision in Cole v. Jersey City Medical Center, 215 N.J. 265 (2013).

The Court instructed in Cole that when analyzing whether a party has waived its right to arbitration, a court "must focus on the totality of the circumstances." *Id.* at 280. Courts should consider, among other things, the following seven enumerated factors:

> (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any.

[*Id.* at 280-81.]

The complaint in this matter was filed over three years ago on August 17, 2021. Moving defendant Martinez filed her answer on October 29, 2021 and included as the first affirmative defense that the claims were subject to mandatory arbitration under the employment agreement.

In this case, all parties including defendant have conducted extensive discovery over a period of almost three years. This case is approaching the discovery end date of November 15, 2024, at which point it will have had 1,113 days of discovery. The matter has a scheduled trial date of April 7, 2025. The parties have not only engaged in extensive discovery, but have also engaged in extensive motion practice during the period of almost three years. Defendant further waited more than 16 months following issuance of the decision in the County of Passaic case and continued to engage in extensive discovery and motion practice before filing the present motion.

A litigant should not be permitted to reap the benefits of discovery in the adjudicative process before first seeking to compel arbitration. Examining the Cole factors, the

delay in seeking to compel arbitration is substantial.[1] Defendant delayed close to three years before filing this motion to compel arbitration. The case at this point in time has had close to 1,000 days of discovery, far beyond the presumptive period of 450 days.

Examining the second factor, this case has had substantial motion practice both as to the merits as well as to numerous discovery issues. This matter has a discovery end date in less than two months, and a pending trial date. The court also notes that the original trial date in this case was August 21, 2023, almost a year before the present motion was filed. The speed, efficiency and cost savings of arbitration have been lost.

Defendant did file a motion to compel arbitration in early 2022. That motion was denied by the court on March 18, 2022, and the reasons placed on the record for denying the motion to compel arbitration at that time are incorporated herein as part of this decision. The current motion fails to address the reasons why the court originally denied the motion to compel arbitration, and nothing is presented to the court which would change the conclusion that the arbitration provisions in the agreement fail to satisfy the requirements under the Atalese decision.

Since the court has concluded that there are two separate and independent reasons why arbitration should not be compelled, the court need not reach the issue whether the 1997 employment agreements remain in effect. For all of these reasons, the motion to compel arbitration is denied.

[1] The court notes that a prior motion to compel arbitration was denied on March 18, 2022. This is essentially a reconsideration motion filed two years later.

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DR. DONNA L. D'ELIA and DR. JONEL M. DERSHEM, Plaintiffs, v. DR. WENDY MARTINEZ Defendant.	: : : : : : : : :	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – CAMDEN COUNTY Docket No. CAM-L-002500-21 (EBLP) CIVIL ACTION [redacted] **ORDER**

THIS MATTER having been brought before the Court on the Motion of Defendant, Dr. Wendy Martinez's to Compel Arbitration and Plaintiff, Dr. Donna L. D'Elia's Opposition thereto, by and through her attorney George J. Lavin III Esquire, and the Court having considered the submission of the parties, and good cause having been shown:

IT IS on this 27th day of September, 2024, **ORDERED** that:

1. Defendant, Dr. Wendy Martinez's Motion to Compel Arbitration **HEREBY DENIED.**

BY THE COURT:

Honorable Steven J. Polansky, P.J.Ch.

This Motion was:

_____ Unopposed
__X__ Opposed

Reasons set forth in attached memorandum decision.