FILED 1/29/2004 3:28:32 PM, USDC, Southern District of Iowa

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

GABRIELLE F. MORRIS, M.D.,	)	
	)	Civil No. 4:03-cv-30439
Plaintiff,	)	
	)	
vs.	)	RULING ON DEFENDANTS'
	)	MOTION TO STRIKE REQUEST
MCFARLAND CLINIC P.C. and	)	FOR JURY TRIAL AND
TERRY MCGEENEY, M.D.,	)	ORDER SETTING RULE 16(b)
	)	CONFERENCE TO SET TRIAL DATE
Defendants.	)	

The above-resisted motion is before the Court following hearing (#2).

In the fall of 2002 defendant McFarland Clinic recruited and interviewed plaintiff Morris, a California neurosurgeon, for a position as Director of Neurological Surgery. After a successful interview, McFarland sent Dr. Morris a draft written "Physician Employment Agreement." Morris reviewed the draft agreement and asked for a few changes, specifically that McFarland increase the relocation reimbursement amount and pay for Morris' malpractice insurance tail coverage. McFarland agreed to the changes. Morris handwrote the necessary change in the agreement, initialed every page, signed it on October 1, 2002 and returned it to McFarland.

The agreement contained a provision entitled: "<u>Consent to Jurisdiction; Waiver of Jury Trial</u>." In addition to stipulating to jurisdiction and venue in this Court (and the Iowa District Court in Story County, Iowa), the provision concluded in capitalized letters: "EACH OF THE PARTIES HERETO IRREVOCABLY WAIVES ALL RIGHT

TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT."

Morris' effective start date with McFarland was to be December 17, 2002. One of the provisions of the contract required Morris to obtain a license to practice medicine in the state of Iowa. For reasons at issue between the parties, Morris was unable to do so, and this lawsuit followed.

Plaintiff's complaint raises state law claims of fraudulent misrepresentation, fraudulent nondisclosure, breach of contract, and negligence. Essentially, Dr. Morris claims that McFarland's medical director, Dr. McGeeney, misrepresented that he had influence with the Iowa Board of Medical Examiners which would enable Dr. Morris to obtain an Iowa medical license within a few weeks' time. She alleges that in reliance on McGeeney's representations she closed her practice.

Dr. Morris has demanded a jury trial. Defendants contend that by reason of the above-quoted contract language plaintiff has contractually waived her right to trial by jury. Dr. Morris advances a number of reasons why this is not so.

"[T]he right to a jury trial in federal court is a question of federal law, even when the federal court is enforcing state-created rights and obligations. . . ." Gipson v. KAS Snacktime Co., 83 F.3d 225, 230 (8th Cir. 1996); see Kampa v. White Consol. Indus., Inc., 115 F.3d 585, 587 (8th Cir. 1997). The

Seventh Amendment right to a trial by jury in a civil lawsuit may be waived by contract. Cooperative Financial Ass'n, Inc. v. Garst, 871 F. Supp. 1168, 1171 (N.D. Iowa 1995). But a party's waiver must be knowing and voluntary. Id. Because the right to trial by jury is fundamental, the presumption is against waiver. Id.; see Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); RDO Financial Serv. Co. v. Powell, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002). In light of the presumption the Court agrees with Judge Bennett's suggestion in Cooperative Financial that the burden of demonstrating a voluntary and knowing waiver is on the proponent of the waiver. 871 F. Supp. at 1172 n.2; cf. Medical Air Technology Corp. v. Marwan Inv., Inc., 303 F.3d 11, 18 n.3 (1st Cir. 2002); cert. denied, 537 U.S. 1111 (2003).

The opinion in Cooperative Financial surveyed the case law and summarized a number of factors courts have considered in determining a contractual jury waiver issue: whether the waiver is in a standardized form or newly drafted contract; whether attention is drawn to the provision by its placement or configuration in the contract; whether the contract was tendered on a take-it-or-leave-it basis or was negotiated; the length of the agreement; whether the parties were represented by counsel and the sophistication of the parties; whether the resisting party had an opportunity to review the agreement and in fact reviewed it; and whether there was manifest inequality between the parties in bargaining power. 871 F.

Supp. at 1172 (citing cases); see Evans v. Union Bank of Switzerland, 2003 WL 21277125, *2 (E.D. La. 2003); RDO Financial, 191 F. Supp. 2d at 813; Morgan Guaranty Trust Co. v. Crane, 36 F. Supp. 2d 602, 604 (S.D.N.Y. 1999).

Dr. Morris first argues she is not bound by the contractual waiver because the contract is void for having been procured by fraud. A general allegation of fraud in the inducement with respect to a contract does not avoid the waiver provision. For two reasons I agree with the court in Telum Inc. v. E. F. Hutton Credit Corp., 859 F.2d 835, 837-38 (10th Cir. 1988), cert. denied, 490 U.S. 1021 (1989), that the allegations and evidence of fraud must relate specifically to the waiver provision.[1] See Evans, 2003 WL 21277125, *2 n.1 (following Tellum); Ameritrust Co. Nat'l Assoc. v. Dew, 1992 WL 84479, *6 (S.D.N.Y. 1992)(same); Gurfein v. Sovereign Group, 826 F. Supp. 890, 921 (E.D. Pa. 1993)(same). First, agreements to waive jury trials, as well as those fixing venue, making a choice of law, and the like would be practically

[1] In so holding the Tenth Circuit analogized to the Federal Arbitration Act, 9 U.S.C. §§ 1-14, and case law under it concerning the enforceability of arbitration agreements, an analogy the court felt was appropriate "because submission of a case to arbitration involves a greater compromise of procedural protections than does the waiver of the right to trial by jury." 859 F.2d at 838. In Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-06 (1967), the Supreme Court interpreted the FAA to require courts to focus on the making of the agreement to arbitrate, adding that "the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally." Id. at 404.

unenforceable if they could be avoided simply by an allegation of fraud in the inducement. Second, Tellum appropriately focuses the analysis on whether the waiver of the right to trial by jury is itself knowing and voluntary. See Gurfein, 826 F. Supp. at 921 (a "general allegation of fraud in no way suggests that plaintiff's agreement to waive the right to a jury trial was involuntary or not knowing"). Plaintiff does not claim she was fraudulently induced to waive her right to trial by jury. The claim of fraud in the inducement relates solely to the alleged representations by McGeeney that he and McFarland had the influence to speedily procure an Iowa medical license for Dr. Morris.

Dr. Morris points out she did not draft the terms of the agreement, which she characterizes as a standardized form employment contract. Defendants no doubt used a form of contract they had previously employed, but it does not have the appearance of a standardized, take-it-or-leave-it contract which could not be negotiated. In fact, the record is undisputed that Dr. Morris did negotiate changes in provisions of interest to her, the increase in the amount of relocation expenses and payment for malpractice tail insurance coverage. Evidence of negotiation and change in some terms of an agreement is evidence that other terms could have been negotiated. See Wechsler v. Hunt Health Systems, Ltd., 2003 WL 21878815, *3 (S.D.N.Y. Aug. 8, 2003); see also Westside-Marrero Jeep Eagle v. Chrysler Corp., 56 F. Supp. 2d 694, 707 (E.D. La.

1999); Morgan Guaranty, 36 F. Supp. 2d at 604. The fact the parties did not engage in negotiations concerning the jury waiver provision is not evidence that the term was non-negotiable. Wechsler, 2003 WL 21878815, *3; Evans, 2003 WL 21277125, *2; Morgan Guaranty, 36 F. Supp. 2d at 604.

The correspondence between the parties prior to execution of the contract indicates that other than the items she successfully negotiated changes on, Dr. Morris was quite happy with the contract. She e-mailed a McFarland representative, Jane Eagan, on September 30, 2002, that she had received the proposed contract "and it looks great!" She said she wanted to discuss some things with McGeeney. (Ex. C at 2). She did so and evidently resolved the questions she had to her satisfaction. Dr. Morris signed the contract on October 1, 2002 and sent it back to McFarland. She e-mailed Eagan: "Yes, it's perfect and so . . . yes, i [sic] signed it . . . ." (Id. at 3).

That Dr. Morris obtained the changes she requested is also against any finding of unequal bargaining power. In this regard the standard is not inequality, but inequality that is manifestly or grossly in favor of the proponent of the waiver. See Cooperative Financial, 871 F. Supp. at 1172; Evans, 2003 WL 21277125, *2. Dr. Morris alleges in her complaint that McFarland solicited her to join the clinic. At hearing counsel explained that neurosurgery is a highly competitive field of practice and

McFarland's haste resulted from the fact it did not have a neurosurgeon on staff and needed one.[2] Dr. Morris' specialized qualifications and McFarland's needs thus suggest relative parity in bargaining positions.

Dr. Morris contends that the jury trial waiver was not conspicuous. The Court disagrees. The contract is a six-page document with two pages of attachments. The waiver provision is on the fifth page. It is in a separately numbered paragraph titled with underlined words indicating its subject is in part "Waiver of Jury Trial." The specific waiver language is at the end of the paragraph and, unlike the rest of the contract, is in all upper case letters. The waiver language is not "buried" in a "lengthy" document as characterized by Dr. Morris, but is presented in a way that draws the attention of the reader. See Morgan Guaranty, 36 F. Supp. 2d at 604. In any event, Dr. Morris does not say she was unaware of the provision. Absent some showing to this effect, whether the provision was conspicuous makes little difference. See Efficient Solutions, Inc. v. Meiners' Country Mart, Inc., 56 F. Supp. 2d 982, 983 (W.D. Tenn. 1999).

Dr. Morris' profession and credentials (Ex. D) evince that she is a highly intelligent, well-educated, sophisticated

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[2] In her affidavit Dr. Morris states Dr. McGeeney assured her that a medical license would be forthcoming quickly in part because of McFarland's "documented need for your specialty." (Morris Aff. at 2).

individual. She was no stranger to contract negotiations. At the time McFarland was soliciting her she was the administrative oversight and contract negotiations manager at the clinic in which she practiced. Dr. Morris was about to end her practice in California and move to a new employment situation in Iowa to be governed by the employment agreement she was reviewing, a major change in her professional life. It is not likely she failed to notice the waiver provision, and is likely that had she had an objection to it she would have raised it with McFarland.[3]

In her affidavit Dr. Morris complains that McFarland wanted her to start her employment within a few months. She says Dr. McGeeney said she should sign and return the agreement as soon as possible. Under this time pressure, Dr. Morris states she did not, because of her on-call schedule, have a chance to talk to her lawyer about the agreement. There is a dispute in the record as to which side was more anxious to have Dr. Morris join McFarland's staff at the earliest. However, Dr. McGeeney's statements in his supplemental affidavit that Dr. Morris was given a draft agreement with the jury waiver clause when she interviewed on September 24 and 25, 2002, and was sent an executable copy of the employment

[3] At argument plaintiff's counsel stated his client is not alleging she failed to read the waiver provision, only that she did not understand its significance. Dr. Morris did not so indicate in her affidavit. The waiver provision is straightforward. The Court doubts one of Dr. Morris' education and experience would fail to understand the meaning of the waiver.

agreement on September 27 with a request that Morris respond to McFarland's offer within ten days are not contradicted. There is no evidence that Dr. Morris requested additional time to review the contract, or have a lawyer review it.[4] Her prompt and enthusiastic e-mail to McFarland after she had signed the contract does not hint at a need for more time to review its terms. As noted previously, Dr. Morris was the contract negotiation manager for the California clinic she was about to leave. In the face of these facts, Dr. Morris' affidavit that she did not have time to have her lawyer take a look at the proposed agreement does not create an issue about her opportunity for adequate review.

Finally, Dr. Morris argues that defendant McGeeney was not a party to the contract and the waiver provision does not apply to the claims against him. The waiver provision extends to "any action . . . arising out of or relating to this agreement." The complaint alleges that in the course of his employment for McFarland, Dr. McGeeney made false representations to Dr. Morris which induced her to enter into the agreement. Clearly, the claims

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[4] At argument plaintiff's counsel stated Dr. McGeeney discouraged Dr. Morris from retaining an attorney as that would involve additional delay. Dr. Morris does not say in her affidavit that Dr. McGeeney discouraged or dissuaded her from having the contract reviewed by an attorney. Rather, she says Dr. McGeeney told her that she needed to make the December employment date and in order to do that she had to sign the agreement as soon as possible. She said she was unable to have her attorney review the agreement because her on-call schedule did not permit enough time. (Morris Aff. at 2).

against Dr. McGeeney arise out of and relate to the agreement as they concern the very circumstances of its formation. The Court finds the waiver provision unambiguously applies to the claims made against Dr. McGeeney.

For the reasons discussed above, the factors identified in Cooperative Financial as they pertain to the circumstances here[5] support a finding that defendants have demonstrated Dr. Morris voluntarily and knowingly agreed to waive her right to trial by jury with respect to the claims in this case.

The resolution of civil disputes by trial by jury is of historic and fundamental importance. That is why the framers guaranteed the right of trial by jury "[i]n suits at common law" in the Seventh Amendment, part of the Bill of Rights. I cannot improve on the words of Alexander Hamilton:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

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[5] Plaintiff requested an evidentiary hearing on the motion to strike. In the Court's judgment an evidentiary hearing has not been necessary. There is no claim or evidence that the jury waiver provision was tainted by fraud. The motion papers, principally the affidavits of Drs. Morris and McGeeney, indicate that the material facts are not disputed as they bear on the various factors which govern the inquiry into whether Dr. Morris voluntarily and knowingly agreed to waive her right to trial by jury.

Federalist 83. Given the importance of the jury in the history and fabric of our society, the diminishing number of civil jury trials in recent years in our district and in the state courts of Iowa is a trend this Court is not at all anxious to encourage. However, the right to jury trial clearly may be waived and there are many legitimate reasons why parties may wish to do so. Parties are free to enter into agreements as to how they will resolve disputes that may arise in a business or professional relationship. When they have voluntarily and knowingly elected to give up the right to trial by jury it is incumbent on a court to enforce the agreement just as it would be to enforce the right to trial by jury in the absence of such an agreement.

The motion to strike request for jury trial (#2) is **granted.** This case will come before the Court as a bench trial.

The parties have consented to trial before the undersigned. This matter shall come on for conference to discuss trial dates **by telephone conference call on Friday, February 13, 2004 at 9:00 a.m., said call to be placed by plaintiff's counsel**, unless before said date counsel contact the undersigned's chambers to obtain an agreed trial date. The Court's judicial assistant, Nancy Ryan, may be reached at (515) 284-6217.

IT IS SO ORDERED.

Dated this 29th day of January, 2004.

ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE