Rel: January 15, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190179

The Health Care Authority for Baptist Health, an affiliate of UAB Health System, and The Health Care Authority for Baptist Health, an affiliate of UAB Health System d/b/a Prattville Baptist Hospital

v.

Leonidas P. Dickson II

Appeal from Autauga Circuit Court
(CV-18-31)

STEWART, Justice.

The Health Care Authority for Baptist Health, an affiliate of UAB Health System ("HCA"), and The Health Care Authority for Baptist

Health, an affiliate of UAB Health System d/b/a Prattville Baptist Hospital (hereinafter referred to collectively as "the HCA entities"),[1] appeal from an order of the Autauga Circuit Court denying their motion to compel arbitration in an action brought by Leonidas P. Dickson II. We conclude that the HCA entities waived their right to arbitration, and we affirm the order.

Facts and Procedural History

On February 26, 2015, Dickson sustained injuries as a result of an automobile accident. Following the accident, Dickson was taken to Prattville Baptist Hospital ("PBH"), where he was treated and discharged. Dickson was partially covered by a health-insurance policy issued by Blue Cross and Blue Shield of Alabama, Inc. ("BCBS"). PBH was a party to a

[1] It appears to this Court that the HCA entities might, in fact, be a single entity; however, in their answer, as well as in numerous other filings in the proceedings below, the HCA entities identified themselves as "The Health Care Authority for Baptist Health, an affiliate of UAB Health System (inappropriately identified in the Complaint as Baptist Health, Inc.)," and "The Health Care Authority of Baptist Health, an affiliate of UAB Health System d/b/a Prattville Baptist Hospital (inappropriately identified in the Complaint as Prattville Baptist Medical Center.)"

"Preferred Outpatient Facility Contract" ("the provider agreement") with BCBS, under which the medical care rendered to Dickson in the emergency department at PBH was reimbursable.[2]

On May 19, 2017, Dickson filed a complaint in the Montgomery Circuit Court, challenging a reimbursement that PBH had received in exchange for Dickson's medical treatment. Dickson's complaint also sought to certify a class of people who were insured by BCBS and who had received care at any hospital operated by HCA's predecessor, Baptist Health, Inc. ("BHI").[3] The complaint set forth several causes of action,

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[2] In their brief to the Court, the HCA entities note that "HCA owns and operates three hospitals (i.e., Baptist Medical Center South, Baptist Medical Center East, and Prattville Baptist Hospital), and each hospital has its own Provider Agreement with Blue Cross."

[3] The HCA entities asserted below that Dickson had improperly identified HCA as BHI in the complaint. See note 1, supra. BHI filed a motion to dismiss the complaint against it, arguing that it was not a proper party; that, in 2005, HCA was formed to own and operate certain hospitals in the Montgomery area, including PBH, after BHI began to face financial difficulties; and that "at no time has [it] engaged in any acts or omissions relevant to the ... complaint." That motion was denied. In their appellate brief, the HCA entities state that HCA became the owner of BHI in 2005 and, further, that HCA assumed all duties, obligations, liabilities, and benefits of the provider agreement. Dickson contends that there was never an assignment of the provider agreement to HCA, and that BHI

including breach of contract, conversion, breach of implied contract, breach of fiduciary duty, and conspiracy to commit the aforementioned causes of action.

On June 22, 2017, the HCA entities filed a motion seeking dismissal of the action on the grounds that Dickson had failed to state a claim upon which relief could be granted, that Dickson had failed to join BCBS as an indispensable party, and that venue was improper in Montgomery County pursuant to § 6-3-7, Ala. Code 1975, and, alternatively, requesting the transfer of the case to the Autauga Circuit Court under the doctrine of forum non conveniens, pursuant to § 6-3-21.1, Ala. Code 1975. Over the course of the following year, the parties actively engaged in the discovery process.

On June 15, 2018, the Montgomery Circuit Court entered an order transferring the case to the Autauga Circuit Court ("the trial court"). On October 11, 2018, the trial court conducted a status conference in which

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remains a party to the provider agreement. The HCA entities do not raise that issue on appeal, and resolution of that dispute is irrelevant to our resolution of this appeal.

it ruled on various pending discovery motions and denied the HCA entities' motion to dismiss. Subsequently, the HCA entities filed an answer, but that answer did not raise arbitration as a defense.

On January 14, 2019, the HCA entities filed a motion in the trial court renewing a motion they had filed in the Montgomery Circuit Court seeking to stay discovery, for a protective order, to quash subpoenas, and for the entry of a discovery schedule pending the outcome of the request for class certification. On February 14, 2019, the trial court conducted a hearing on all pending motions and directed the parties to prepare a scheduling order for class-related discovery and a hearing on class certification. On February 28, 2019, the parties filed a joint motion for the entry of a class discovery/certification scheduling order, which was granted by the trial court. Thereafter, the parties participated in class-related discovery, including giving notices of intent to serve and issuing of several nonparty subpoenas and responding to interrogatories and requests for production.

On June 20, 2019, the HCA entities filed a motion to compel arbitration on the grounds that Dickson's health-insurance policy with BCBS requires all claims related to the policy to be arbitrated and that the provider agreement also provides for arbitration, contingent upon the arbitration requirements of the BCBS policy. On October 22, 2019, the trial court entered an order denying the HCA entities' motion to compel arbitration, without providing reasoning for the denial. The HCA entities filed a motion to reconsider the order, which the trial court denied, and the HCA entities appealed. See Rule 4(d), Ala. R. App. P.

Standard of Review

This Court's standard of review of a denial of a motion to compel arbitration is well settled:

> " ' "This Court reviews de novo the denial of a motion to compel arbitration. Parkway Dodge, Inc. v. Yarbrough, 779 So. 2d 1205 (Ala. 2000). A motion to compel arbitration is analogous to a motion for a summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce. Id. '[A]fter a motion to compel arbitration has been made and supported, the burden is on the non-movant to

> present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.' Jim Burke Automotive, Inc. v. Beavers, 674 So. 2d 1260, 1265 n.1 (Ala. 1995)(opinion on application for rehearing)."' "

Hoover Gen. Contractors-Homewood, Inc. v. Key, 201 So. 3d 550, 552 (Ala. 2016) (quoting Elizabeth Homes, L.L.C. v. Gantt, 882 So. 2d 313, 315 (Ala. 2003), quoting in turn Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000)).

Discussion

The HCA entities raise several arguments on appeal in support of their contention that the trial court erred in denying their motion to compel arbitration, including that Dickson's claims are subject to the arbitration provisions of the BCBS policy and the provider agreement, that the arbitrability of Dickson's claims must be determined by an arbitrator, and that Dickson is equitably estopped from disavowing that arbitration of his claims is appropriate. The HCA entities also argue that they did not waive the right to compel arbitration by failing to raise it as an affirmative defense or by participating in litigation and engaging in

class-related discovery. Because our resolution as to the issue of waiver is determinative of the appeal, we address that issue first.

Dickson argues that arbitration is an affirmative defense and that the HCA entities waived that affirmative defense by failing to assert it in their answer. Dickson also argues that the HCA entities waived their right to compel arbitration by substantially invoking the litigation process. Waiver is a defense to arbitration. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 (1983). The HCA entities contend that they did not waive arbitration by failing to raise it as an affirmative defense in their answer. As a general rule, a party waives an affirmative defense when it fails to raise that affirmative defense in a responsive pleading. Greiser v. Advanced Disposal Serv. Ala., LLC, 252 So. 3d 664, 672 (Ala. Civ. App. 2017). However, it has been held that a defendant does not waive its right to enforce an arbitration clause solely because it did not assert arbitration as an affirmative defense in its initial pleading. Hoover General, 201 So. 3d at 553; see Ex parte Hood, 712 So. 2d 341, 346 (Ala. 1998) ("[W]e would also affirm that simply failing to plead in one's

answer that a plaintiff's claims are subject to arbitration will not in itself constitute a waiver."). The HCA entities filed an answer on October 19, 2018. The answer did not assert arbitration as an affirmative defense. The HCA entities never amended their answer to include the defense of arbitration. Nonetheless, the HCA entities' failure to include the defense of arbitration in their answer, alone, does not compel the conclusion that they have waived their right to compel arbitration. See Ex parte Hood, 712 So. 2d at 346.

The appropriate test for determining whether a party has waived its right to arbitration has two prongs: "[(1)] whether the party's actions as a whole have substantially invoked the litigation process and [(2)] whether the party opposing arbitration would be prejudiced if forced to submit its claims to arbitration subsequent to the other party's actions invoking the litigation process." Hoover General, 201 So. 3d at 553. Waiver must be determined " 'based on the particular facts of each case.' " Voyager Life Ins. Co. v. Hughes, 841 So. 2d 1216, 1219 (Ala. 2001) (quoting Companion Life Ins. Co. v. Whitesell Mfg., Inc., 670 So. 2d 897,

899 (Ala. 1995)). Thus, "the trial judge's determinations [as to waiver] should be given substantial weight upon review." Id. Nevertheless, Alabama law also makes it clear that, because there is such a strong federal policy favoring arbitration, " 'a waiver of the right to compel arbitration will not be lightly inferred, and, therefore, that one seeking to prove waiver has a heavy burden.' " Id. (quoting Mutual Assurance, Inc. v. Wilson, 716 So. 2d 1160, 1164 (Ala. 1998)).

Dickson commenced the lawsuit in May 2017 -- more than two years before the HCA entities filed their motion to compel arbitration in June 2019. Subsequent to the filing of the complaint, the HCA entities filed a motion to dismiss; supported the attempt by BHI to be dismissed from the action (see note 3, supra); filed motions to stay discovery; opposed Dickson's nonparty subpoenas; submitted briefs to and participated in hearings in the Montgomery Circuit Court; successfully had the case transferred to the trial court; participated in motion practice and hearings in the trial court; answered Dickson's complaint on the merits, and, as noted, did not invoke arbitration; conducted and participated in class-

related discovery, including noticing Dickson's deposition; and joined with Dickson's counsel to prepare a class discovery/certification schedule. Indeed, the HCA entities' actions during the more than two-year period between the filing of the complaint and the filing of their motion to compel arbitration were "inconsistent with any desire that [they] may have had to resolve the case by arbitration." Companion Life, 670 So. 2d at 899.

The HCA entities, however, assert that they did not waive their right to arbitration because, they say, they immediately sought to compel arbitration once they learned that the right to arbitrate existed in Dickson's BCBS policy. The HCA entities emphasize that the applicability of the arbitration provision in the provider agreement between BCBS and PBH is contingent upon whether the insured patient has agreed in his or her BCBS policy to arbitrate his or her claims. The provider agreement reads, in pertinent part:

> "Any controversy, dispute, or claim by any Member arising out of the rendering of hospital, medical and other health care services by the undersigned Preferred Outpatient Facility shall be submitted to binding arbitration ... provided that the Member is required to submit such claims to binding

> arbitration under the applicable Benefit Agreement at the time the services in question are rendered."

(Emphasis added.) Thus, the HCA entities assert, they could not have properly sought arbitration until they obtained a copy of Dickson's BCBS policy.

According to the HCA entities, they did not obtain a copy of Dickson's BCBS policy until April 29, 2019, after they requested it in their first consolidated discovery requests on March 12, 2019. The HCA entities filed their motion to compel arbitration 52 days later, on June 20, 2019. In support of this argument, the HCA entities cite Georgia Power Co. v. Partin, 727 So. 2d 2 (Ala. 1988), which, they contend, holds that a party is under no obligation to seek arbitration until the party knows that the right to arbitration exists. In Georgia Power, the plaintiffs originally alleged only tort claims but later amended their complaint to include breach-of-contract claims based upon an operations agreement that included an arbitration clause. The defendants moved to compel arbitration 12 days after the plaintiffs amended their complaint to add the breach-of-contract claims. The trial court found that the defendants' delay

amounted to a waiver of their right to arbitration. On appeal, the defendants argued that they could not have moved to compel arbitration pursuant to the operations agreement until the plaintiffs amended the complaint to add the breach-of-contract claims based on the operations agreement. This Court agreed, holding that "[t]he law does not require the futile gesture of asking for arbitration before a claim becomes arbitrable; any delay in seeking arbitration should be measured from the time the claim becomes arbitrable." Georgia Power Co., 727 So. 2d at 7. Thus, this Court held that, despite "the substantial litigation that had preceded the filing of the amended complaint," because the defendants promptly filed a motion to compel arbitration after the plaintiffs amended their complaint to make their claims arbitrable, the defendants had not waived their right to arbitration. Id.

The HCA entities, however, ignore a key distinction between this case and Georgia Power, specifically that, in Georgia Power, this Court relied heavily on the length of time between when the claims became arbitrable and when the defendants filed their motion to compel

arbitration. In this case, the claims were arbitrable the moment the complaint was filed. There were no triggering events during the more than two-year period between the filing of the complaint and the filing of their motion to compel arbitration that altered the status of the claims. The breach-of-contract claim, conversion claim, breach-of-implied-contract claim, and breach-of-fiduciary-duty claim all derived from the BCBS policy and the provider agreement. This distinction also applies to the two cases that the HCA entities cite in their appellate brief, namely Dunn Construction Co. v. Sugar Beach Condo. Ass'n, 760 F. Supp. 1479, 1486 (S.D. Ala. 1991) and Vitolo v. Bloomingdale's, Inc., No. CV 09-7728, DSF (PJWx) March 22, 2011 (C.D. Cal.)(not reported in F. Supp.). As they did with Georgia Power, the HCA entities mistakenly liken these cases, which focus on the time when the claims became arbitrable, to the present case, which, instead, involves the length of time between Dickson's assertion of arbitrable claims and the HCA entities' assertion of their right to compel arbitration.

The record reflects that HCA acquired BHI, including PBH, in 2005. See note 3, supra. Therefore, we can conclude that the HCA entities had knowledge of the arbitration provision in the provider agreement since 2005. Broadway v. Household Fin. Corp. of Huntsville, 351 So. 2d 1373, 1376 (Ala. Civ. App. 1977) ("In civil contractual matters, the law has always been that one is presumed to know and intend what he places his signature to."). Although the provider agreement does not state definitively that arbitration is required, it states that arbitration is required if an insured is required to submit his or her claims to arbitration under his or her health-insurance policy. It is undisputed that the HCA entities had notice of that provision in the provider agreement from at least the onset of the action. With knowledge of this contingency-based arbitration provision in the provider agreement, it would be logical to expect one to assert the defense of arbitration immediately upon receipt of a complaint that is based largely upon claims involving the provider agreement. The HCA entities might not have obtained a copy of Dickson's BCBS policy until April 29, 2019, but they had from May 19, 2017, the day

Dickson filed his complaint asserting claims based on the provider agreement, to subpoena BCBS for the policy, to contact Dickson's counsel, or to take any other action necessary to discern whether they could assert the applicability of the arbitration provision in the provider agreement. Instead, the HCA entities waited over two years, after the action had been transferred, after their motion to dismiss had been denied, and after class-related discovery had begun, to inquire into whether Dickson's BCBS policy contained an arbitration provision.

Prior caselaw supports the determination that the HCA entities substantially invoked the litigation process. In Hales v. ProEquities, Inc., 885 So. 2d 100, 103 (Ala. 2003), this Court held that a waiver of the right to arbitration was present when there was a delay of more than two years between the commencement of the action and the assertion of the right to arbitration, the defendant had participated in discovery, a delay of two-months after the defendant had "learned for the first time" that the claim was subject to an arbitration clause, and a failure to move to compel arbitration until one month before trial. Additionally, it is noteworthy that

the HCA entities delayed filing their motion to compel arbitration until after they received an adverse ruling on their motion to dismiss. See Morrison Rests., Inc. v. Homestead Vill. of Fairhope, Ltd., 710 So. 2d 905, 907 (Ala. 1998) (holding that waiver was present when party seeking arbitration waited "until after it had suffered an adverse ruling, in the form of the summary judgment as to liability," eight months had passed from the filing of the complaint before the motion to compel was filed, and the party seeking arbitration had failed to assert arbitration in its answer). Accordingly, based on their actions and our prior precedents, this Court holds that the HCA entities substantially invoked the litigation process before seeking to compel arbitration.

Having determined that the HCA entities substantially invoked the litigation process, we must next address the issue of prejudice. See Ex parte Merrill Lynch, Pierce, Fenner & Smith, Inc., 494 So. 2d 1, 2-3 (Ala. 1986) (holding that both substantial invocation of the litigation process and prejudice must be present to establish waiver).

The HCA entities argue that there is no evidence in the record indicating that Dickson has been prejudiced because there has been no discovery on the merits and the only discovery exchanged was pursuant to the class discovery/certification scheduling order, which, they say, consisted of discovery that was permitted by the arbitration provision in the BCBS policy. Dickson argues that he has already suffered unnecessary expense and wasted time that he could have otherwise avoided if the case had been initially sent to arbitration, because, he states, his BCBS policy requires BCBS to "bear the costs of arbitration" and the policy states that "the arbitration hearing shall ordinarily commence within four months of the selection of the arbitrator unless the parties agree otherwise." Dickson asserts that his attorneys have spent countless hours and resources responding to the numerous letters, objections, motions, and other documents that the HCA entities have sent or filed in the trial court. Dickson thus emphasizes that he has already expended years litigating a case that would have been resolved in months if arbitration had been compelled sooner.

This Court has long recognized that " ' "[p]rejudice has been found in situations where the party seeking arbitration allows the opposing party to undergo the types of litigation expenses that arbitration was designed to alleviate." ' " Paw Paw's Camper City, Inc., v. Hayman, 973 So. 2d 344, 349-50 (Ala. 2007) (quoting Hales, 885 So. 2d at 105-06, quoting in turn Morewitz v. West of England Ship Owners Mut. Prot. & Indem. Ass'n, 62 F. 3d 1356, 1366 (11th Cir. 1995)) . Prejudice may be found if, for example, " ' "the party seeking the stay [for arbitration] took advantage of judicial discovery procedures not available in arbitration." ' " Kennamer v. Ford Motor Credit Co., 153 So. 3d 752, 761 (Ala. 2014) (quoting Hales, 885 So. 2d at 106, quoting in turn Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 n. 7 (2d Cir. 1968)). In this case, Dickson incurred substantial time and expense in opposing the HCA entities' motion to dismiss or, alternatively, for a change of venue and in responding to their opposition to serving subpoenas on several nonparty witnesses, expenses that Dickson would have been spared had the HCA entities sought to invoke their right to arbitration earlier. Dickson also incurred the expense

associated with conducting class-related discovery, an expense not necessarily associated with arbitration. The HCA entities' acts of agreeing to the class discovery/certification scheduling order and pursuing class-related discovery evinced a desire to resolve the dispute in the trial court through litigation rather than arbitration. See Kennamer, 153 So. 3d at 761. Indeed,

> "[t]he judicial system was not designed to accommodate a defendant who elects to [forgo] arbitration when it believes that the outcome in litigation will be favorable to it, proceeds with extensive discovery and court proceedings, and then suddenly changes course and pursues arbitration when its prospects of victory in litigation dim. Allowing such conduct would ignore the very purpose of alternative dispute resolution: saving the parties' time and money."

Gutierrez v. Wells Fargo Bank, NA, 889 F.3d 1230, 1236 (11th Cir. 2018). The Supreme Court of the United States has proclaimed that in arbitration "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010). In this case, Dickson

has already had to undergo the types of litigation expenses that arbitration was designed to alleviate and, thus, has suffered prejudice.

Conclusion

For the above-stated reasons, we hold that the HCA entities have substantially invoked the litigation process, to the prejudice of Dickson, and that they have, therefore, waived any right to compel arbitration. Accordingly, the trial court correctly denied the HCA entities' motion to compel arbitration. Based on our holding, we pretermit discussion of the HCA entities' other arguments. We affirm the trial court's order denying the HCA entities' motion to compel arbitration.

AFFIRMED.

Parker, C.J., and Wise, J., concur.

Bolin and Sellers, JJ., concur in the result.