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ARBITRATION? NOT SO FAST
By Ted Babbitt

When a valid arbitration agreement exists, Courts favor its implementation, however, there are many reasons why an arbitration agreement may not be enforceable. In Curcio v. Sovereign Healthcare of Boynton Beach, LLC, 34 Fla. L. Weekly D719 (Fla. 4th DCA, April 8, 2009), a nursing home arbitration agreement that had been signed by the resident at the time of her admission was in issue. A motion to compel arbitration was made and plaintiff took the position that the arbitration agreement was unconscionable because the resident, who subsequently died, had no choice but to sign the arbitration agreement in order to obtain necessary medical care and that she was not competent to understand the agreement or the rights she was waiving by signing the agreement.

Fla. Stat. 682.03(1) provides that a court may compel arbitration only if the Court is satisfied that “no substantial issue exists as to the making of the agreement or provision.” The Courts of Florida have interpreted this statute to require an expedited evidentiary hearing if any substantial disputed issue exists concerning the making of the agreement. Linden v. Auto Trend, Inc., 923 So. 2d 1281, 1282 (Fla. 4th DCA 2006) (citing Merrill Lynch Pierce Fenner & Smith, Inc. v. Melamed, 425 So. 2d 127, 129 (Fla. 4th DCA 1982), Tandem Health Care of St. Petersburg, Inc. v. Whitney, 897 So. 2d 531, 532 (Fla. 2d DCA 2005).

The trial judge in the Curcio case refused to hear evidence concerning the agreement despite the existence of these cases. The Fourth District panel unanimously reversed holding at 719 that

“Here, plaintiff demonstrated through her written response in opposition to the motion to compel and her arguments at the non-evidentiary hearing on the motion that she disputed the ‘making of’ the arbitration agreement. The trial court implicitly acknowledged that there were issues in dispute regarding the making of the Agreement and ‘retain[ed] jurisdiction to reconsider the dismissal of th[e] case pending the development of sufficient grounds during the arbitration process.’ The court, however, was required by statute to conduct an evidentiary hearing to resolve the disputed issues before sending the case to arbitration. We therefore reverse the trial court’s order compelling arbitration and remand for an evidentiary hearing. On remand, if, after holding an evidentiary hearing, the court decides to grant the defendant’s motion to compel arbitration, it should stay rather than dismiss the plaintiff’s case.” (citing cases).

Disputes about the making of an arbitration agreement are not the only reason why it may not be enforceable. The right to have an arbitration agreement enforced can be waived. If a defendant participates in the lawsuit before making a motion to compel arbitration, that defendant may well waive the right to compel arbitration. Raymond James Fin. Servs., Inc., v Saldukas, 896 SO. 2d 707, 711 (Fla. 2005); Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999), Marine Envtl. Partners, Inc. v. Johnson, 863 So. 2d 423, 426-27 (Fla. 4th DCA 2003). Filing and losing a motion to dismiss alone results in a waiver of arbitration. R.W. Roberts Constr. Co. v. Masters & Co., 403 So. 2d 1114, 1115

(Fla. 5th DCA 1981). As does actively conducting discovery. Mora v. Abraham Chevrolet-Tampa, Inc., 913 So. 2d 32, 34 (Fla. 2d DCA 2005).

Seifert v. U.S. Home Corp., supra, is the most significant case relative to the issue of compelling arbitration. That case makes it clear that the issues in the civil lawsuit must be the same issues that the parties had contractually agreed to arbitrate in order to grant a motion to compel arbitration. See also King Motor Co. of Ft. Lauderdale v. Jones, 910 So. 2d 1017, 1019-20 (Fla. 4th DCA 2005).

If some of the issues in the lawsuit were the subject of an arbitration agreement and some were not, the issues that are not subject to arbitration can proceed in litigation. See Gail Group, Inc. v. Westinghouse Electric Co., 638 So. 2d 661, 663 (Fla. 5th DCA 1996), Ronback Const. Co. v. Savannah Club Corp., 592 So. 2d 344 (Fla. 4th DCA 1992).

While an arbitration agreement may, indeed, be an obstacle to continuation of a lawsuit there are obviously numerous issues which may need to be determined before arbitration can be compelled.

Note: Many of these citations were taken from the excellent brief of Rebecca Mercier-Vargas in Citigroup v. Abad, 925 So. 2d 327 (Fla. 4th DCA 2006).

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