

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

FOR SENIOR HELP, LLC a/k/a)
 PrimeCare Transport Services,)
)
 Plaintiff/Counter Defendant,)
)
 vs.)
)
 MEDEX PATIENT TRANSPORT, LLC,)
)
 Defendant/Counter Plaintiff and)
 Third Party Plaintiff,)
)
 vs.)
)
 MICHAEL T. "TY" JONES,)
)
 Third Party Defendant.)

FO9 TT
No. 16-0553-BC

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MEMORANDUM AND ORDER GRANTING: (1) DEFENDANT'S APPLICATION FOR STAY OF PROCEEDINGS PURSUANT TO FEDERAL ARBITRATION ACT AND (2) MOTION TO COMPEL ARBITRATION

In issue in this case is the enforceability of a Franchise Agreement. The lawsuit was filed by the franchisee against the franchisor asserting that the Plaintiff was fraudulently induced by the Defendant to enter into the Franchise Agreement in issue. In the 11 counts of its June 6, 2016 *Amended Complaint*, the Plaintiff seeks rescission of the Franchise Agreement in addition to asserting claims and recovery for negligent misrepresentation; breach of contract; breach of the covenant of good faith and fair dealing; violation of the Tennessee Consumer Protection Act; injunctive relief;

declaratory relief; punitive damages; and attorney's fees. The Defendant denies these allegations, claims and relief sought.¹

Despite having been filed in June of 2016, the lawsuit, 6 months later, is still in its initial phase. Part of the reason for that is that the parties' Franchise Agreement contains an Arbitration provision, and the parties' dispute the scope of the claims subject to arbitration and those to be litigated in court. The parties agree all claims should be arbitrated except for the Plaintiff's claim of fraudulent inducement. The Plaintiff asserts that the claim is not subject to arbitration. The Defendant asserts the fraudulent inducement claim is subject to arbitration. That dispute, in turn, results in a dispute on whether this lawsuit should proceed or be stayed while the arbitration proceeds. It is the Plaintiff's position that if fraudulent inducement is not subject to arbitration and proceeds in this Court, the litigation should proceed forthwith because the Plaintiff prevailing on fraudulent inducement would rescind the Franchise Agreement, thereby narrowing or eliminating other claims.

Resolution of the dispute on the arbitrability of the fraudulent inducement claim depends upon textual construction of the section 23.7 Arbitration and section 23.1 Choice of Law provisions in the parties' Franchise Agreement, in conjunction with applying the law.

¹ A counterclaim and third-party complaint filed by Defendants were voluntarily dismissed without prejudice on August 15, 2016.

After performing this analysis, the Court concludes that the scope of the Arbitration provision contained in paragraph 23.7 of the parties' Franchise Agreement includes Plaintiff's claim of fraudulent inducement.

It is therefore ORDERED that the Defendant's *Application For Stay Of Proceedings Pursuant To Federal Arbitration Act And Motion To Compel Arbitration* is granted.

It is additionally ORDERED that the above lawsuit is stayed during the pendency of the arbitration, and the case is administratively closed due to the stay for arbitration unless an order reopening the case is granted.

It is further ORDERED that court costs are assessed to the Plaintiff. As assessment of court costs is required to administratively close a file, that assessment is not indicative of a dismissal of the case. All rights, claims and defenses, including appeal rights, existing at the time of this administrative closure, are preserved, and all statutes of limitation, existing at the time of this administrative closure, are tolled.

The textual analysis of the Franchise Agreement and application of the law are provided below.

The pertinent provisions of the parties' Franchise Agreement are the section 23.7 Arbitration provision and the section 23.1 Choice of Law provision.

Beginning with the text of the section 23.7 Arbitration provision, except for a few carve outs not applicable to this case, section 23.7 provides that the Federal Arbitration Act (the "FAA") shall apply to all disputes "arising out of or relating to this Agreement."

The Plaintiff's fraudulent inducement claim clearly fits this criteria. For example, at paragraph 66 of the *Amended Complaint*, the Plaintiff avers that it relied upon the inducements "in determining...to enter into the Franchise Agreement." Further, rescission of the Franchise Agreement, sought in the *Amended Complaint*, is a dispute which arises out of and is related to the Franchise Agreement. It is, therefore, clear that the fraudulent inducement claim constitutes a dispute "arising out of or relating to" the Franchise Agreement. Thus, under the text of the section 23.7 Arbitration provision, the fraudulent inducement claim is subject to arbitration under the Federal Arbitration Act. The text of the Arbitration provision of the parties' Franchise Agreement is quoted as follows:

23.7 Arbitration

This Agreement evidences a transaction involving commerce and, therefore, the Federal Arbitration Act, Title 9 of the United States Code is applicable to the subject matter contained herein. Except for controversies or claims relating to intellectual property rights, including, but not limited to, Franchisor's Marks, copyrights or the unauthorized use or disclosure of Franchisor's Confidential Information, covenants against competition and other claims for injunctive relief, all disputes arising out of or relating to this Agreement or to any other agreements between the parties, shall be settled by binding arbitration conducted in Davidson County, Tennessee, in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect. The proceedings will be held by a single arbitrator agreed upon by the parties or otherwise appointed by the Circuit Court for the State of Tennessee and located in Davidson County, Tennessee. The decision of the arbitrator will be final and binding upon the parties. Judgment upon the award rendered by the arbitrator may be entered in any court having personal and subject matter jurisdiction.

Franchisee acknowledges that it has read the terms of this binding arbitration provision and affirms that this provision is entered into willingly and voluntarily and without any fraud, duress or undue influence on the part of Franchisor or any of Franchisor's agents or employees.

Also to be considered is the section 23.1 Choice of Law provision of the Franchise Agreement. It must be considered, along with the section 23.7 Arbitration provision, because the section 23.1 Choice of Law provision also contains text regarding application of the Federal Arbitration Act to the Franchise Agreement. Section 23.1 provides as follows:

23.1 Choice of Law

Except to the extent this Agreement or any particular dispute is governed by the U.S. Trademark Act of 1946 or other federal law, this Agreement shall be governed by and construed in accordance with the laws of the State of Tennessee (without reference to its conflict of laws principles). The Federal Arbitration Act shall govern all matters subject to arbitration. References to any law refer also to any successor laws and to any published regulations for such law as in effect at the relevant time. References to a governmental agency also refer to any regulatory body that succeeds the function of such agency.

The Court's construction of the above text of section 23.1 is that Tennessee law governs and shall be used to construe the Franchise Agreement, and that matters subject to arbitration are governed by the Federal Arbitration Act. The issue these provisions present is that Tennessee law and the Federal Arbitration Act differ on whether fraudulent inducement is arbitrable, and there is a different outcome in this case depending upon which law applies. Under Tennessee law, fraudulent inducement is considered a contract formation issue to be decided by the court not the arbitrator. Under the Federal Arbitration Act, fraudulent inducement is a contract validity issue to be arbitrated.

It is the Plaintiff's position that because the section 23.1 Choice of Law provision states that Tennessee law governs, that law must be applied with the result that the fraudulent inducement claim is not arbitrated.

When the contract is governed by Tennessee law, a claim of fraudulent inducement should be resolved by the court and not an arbitrator. This is true even when the arbitration provision is broad and the agreement is governed by the FAA. *Taylor v. Butler*, 142 S.W.3d 277, 282 (Tenn. 2004). Because the franchise agreement does not state that the parties have agreed to arbitrate a claim for fraudulent inducement or required a dispute regarding arbitrability to be determined by an arbitrator, the fraud claims should be heard by this court. See *Whisenant v. Bill Heard Chevrolet, Inc.*, No. W2004-01745-COA-R3CV, 2005 WL 1629991, at *6, 2005 Tenn. App. LEXIS 418 (Tenn. Ct. App. July 12, 2005) ("Tennessee law reflects the 'minority view' that even in the face of a broadly worded arbitration agreement, a party is entitled to a judicial resolution of a claim of fraudulent inducement since such a claim calls into question the very existence of the contract of which the arbitration agreement is part.").

Tennessee law requires that claims of fraudulent inducement be resolved by the courts and not by an arbitrator when the contract is governed by Tennessee law. *Taylor*, 142 S.W.3d at 282, citing *Frizzell*, 9 S.W.3d at 84; see also *Webb*, 2013 WL 3941782, at *16-17.

Plaintiff's Response And Opposition To Defendants' Application And Motion For Stay Of Proceedings Pursuant To Federal Arbitration Act And Motion To Compel Arbitration (For Senior Help), pp. 2; 5 (Nov. 14, 2016). The Court, however, comes to a different conclusion based upon the law that in the area of arbitration federal common law preempts state law.

"The entire body of the common law of contracts (including partnership, agency, equity, remedies, and more) governs the making, enforcement, and revocation of arbitration agreements, except to the extent the FAA preempts such law. Preempting state

contract law, however, is the body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, sometimes referred to as the *federal common law* of arbitration.” 1 Commercial Arbitration § 5:3 (West 2016) “[W]here a point is governed by federal common law, federal common law applies even in a diversity suit or in a state court action.” 32 AM. JUR. 2D *Federal Courts* § 375 (West 2016) (footnotes omitted).

Accordingly, because federal law is preemptive on arbitrability issues and section 23.7 of the Franchise Agreement says the Federal Arbitration Act is to be applied, this Court must look to the federal common law of arbitration in determining whether the Plaintiff’s fraudulent inducement claim is subject to arbitration. That law has recently been analyzed and explained by the Tennessee Court of Appeals.

In *Clayton v. Davidson Contractors, LLC*, No. E201302296COAR3CV, 2015 WL 1880973 (Tenn. Ct. App. Apr. 24, 2015), the Tennessee Court of Appeals analyzed U.S. Supreme Court cases and from that distilled the following law: (1) the arbitrator decides a party's challenge to the *validity* of the contract as a whole and (2) fraudulent inducement is a contract validity issue:

When read together, *Prima Paint, Buckeye, Rent-A-Center*, and *Granite Rock* stand for the proposition that the court resolves two types of issues relating to an agreement to arbitrate: (1) a challenge to the validity of the specific arbitration clause sought to be enforced; and (2) a challenge to the *formation* of a contract, which may include an agreement to arbitrate. *See In re Morgan Stanley & Co.*, 293 S.W.3d 182, 187 (Tex. 2009). Where there is a delegation provision, an arbitrator decides a party's challenge to the *validity* of the contract as a whole. *Id.* Therefore, when a party claims it never concluded an agreement at all, it is for the court, not the arbitrator, to determine whether the parties agreed to the arbitration provision upon which the party seeking arbitration relies. *Granite Rock*, 561 U.S. at 299–

300. Although there is a federal policy favoring arbitration, that policy does not override the principle of consent. *Id.* at 302.

Fortunately, the Court provided some guidance in *Buckeye* as to which contractual defenses are formation issues to be considered by the courts. *See Buckeye*, 546 U.S. 444, n.1 (suggesting that the following defenses were formation issues: lack of signature on a contract; signor's lack of authority to bind principal; and mental capacity to assent). We can also conclude from *Prima Paint*, *Buckeye*, and *Rent-A-Center* that fraudulent inducement, illegality, and unconscionability are contract validity issues.

Id. at *7. Accordingly, under *Clayton*, fraudulent inducement is a contract validity issue under the federal common law, and, under that same law, contract validity issues are determined by the arbitrator.

One additional part of the analysis which must be addressed is that the applicability of *Clayton* to this case, at first read, might appear to hinge on whether there is a “delegation” provision in the Franchise Agreement being construed in this case. In particular, in the above quotation from *Clayton*, it states, “[w]here there is a delegation provision, an arbitrator decides a party's challenge to the *validity* of the contract as a whole.” *Clayton v. Davidson Contractors, LLC*, No. E201302296COAR3CV, 2015 WL 1880973, at *7 (Tenn. Ct. App. Apr. 24, 2015) (emphasis in original). That distinction is not a hurdle to applying *Clayton* to this case.

As quoted above, the section 23.7 Arbitration states that “all disputes arising out of or relating to this Agreement... shall be settled by binding arbitration.” In analyzing whether the court or arbitrator decides a parties’ claim, the Court in *Clayton* examined the United States Supreme Court’s decision in *Prima Paint Corp. v. Flood & Conklin*

Mfg. Co., 388 U.S. 395, 398, 87 S. Ct. 1801, 1803, 18 L. Ed. 2d 1270 (1967) which “included a broad arbitration clause delegating to an arbitrator ‘any controversy or claim arising out of or relating to’ the contract.” *Clayton*, at *5. Comparing the delegation provision in *Prima Paint Corp.* to the arbitration provision in this case reveals that the wording is virtually identical. Based on the similarity in text of the arbitration provision in *Prima Paint Corp.* with the arbitration provision in this case, the Court concludes that, to the extent *Clayton’s* analysis hinges upon the existence of a delegation provision, the reasoning and holding of *Clayton* are applicable to this case as well.

It is clear, then, that the Plaintiff’s fraudulent inducement claim is subject to arbitration, and therefore, under the text of the section 23.1 Arbitration provision, “The Federal Act shall govern all matters subject to arbitration.” Thus, the fraudulent inducement claim must be arbitrated.

There is one final matter. In addition to its textual construction argument, the Defendant also argues, in support of its application for stay and motion to compel arbitration, that the Plaintiff agreed to arbitrate the fraudulent inducement claim based on admissions in its verified *Amended Complaint* at pages 21-22: “Wherefore, FSH [the Plaintiff] prays for judgment in its favor of against Defendant...On Count One (Intentional Misrepresentation/Fraud/Fraud in the Inducement) of its Complaint in an amount to be proven at arbitration.” Based on this Prayer for Relief, the Defendant argues that:

The Plaintiff has clearly agreed to arbitrate the claim of fraudulent inducement, as proven both by the language of the Franchise Agreement and by Plaintiff's own verified First Amended Complaint. In the Plaintiff's First Amended Complaint, which has been sworn to be true by the Plaintiff, Plaintiff states that Count One for Intentional Misrepresentation/Fraud in the Inducement is to be decided in arbitration (see the First Amended Complaint's Prayer for Relief). In so doing, it cannot reasonably be disputed that the Plaintiff again reaffirmed when it filed its First Amended Complaint that its intent and understanding at the time of signing the Franchise Agreement was that a claim of fraudulent inducement would be subject to arbitration. In fact, based on the number of times the Plaintiff discusses arbitration in the verified First Amended Complaint, it is clear that it has affirmed and conceded that the agreement to arbitrate itself is valid and enforceable. Thus, while the dispute surrounding fraudulent inducement goes to the contract as a whole, Plaintiff has expressly reaffirmed and agreed that the arbitration agreement specifically is enforceable.

Reply To Plaintiff's Response And Opposition To Defendants' Application And Motion For Stay Of Proceedings Pursuant To Federal Arbitration Act And Motion To Compel Arbitration(For Senior Help), pp. 1-2 (Nov. 17, 2016).

Because *Clayton* is clear that the fraudulent inducement claim in this case must be arbitrated, it is unnecessary to analyze and decide whether the Plaintiff's statement in its verified *Amended Complaint* in the Prayer for Relief, that Count One fraudulent inducement was subject to arbitration, is an affirmation and concession.



ELLEN HOBBS LYTLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: Gregory H. Oakley
Matthew J. Kreutzer
Jennifer R. Lloyd
Carson W. King
Samuel L. Jackson
Emily H. Mack
Karl M. Braun
Brian S. Faughnan

RULE 58 CERTIFICATION

A Copy of this order has been served by U. S. Mail
upon all parties or their counsel named above.



Deputy Clerk and Master
Chancery Court

1-5-17
Date