STATE OF VERMONT

SUPERIOR COURT
Franklin Unit

CIVIL DIVISION
Docket No. 212-8-20 Frcv

ADELLE REBEOR,
Plaintiff,

v.

GENESIS HEALTHCARE, INC. AND ITS SUBSIDIARY, 300 PEARL STREET OPERATIONS, LLC, (d/b/a BURLINGTON HEALTH & HEHAB) (a/k/a GENESIS CENTERS),
Defendants.

RULING ON DEFENDANTS' AMENDED MOTION TO COMPEL ARBITRATION

Introduction

In this civil suit, Plaintiff Adelle Rebeor seeks to recover damages from her former employers, Defendant Genesis Healthcare, Inc. and its subsidiary Defendant 300 Pearl Street Operations, LLC d/b/a Burlington Health & Rehab, for their alleged constructive termination of her employment in violation of state law (First Amended Complaint and Jury Demand). Presently before the court is Defendants' Amended Motion to Compel Arbitration. Plaintiff opposes the motion.

Defendants contend that the Plaintiff agreed in writing to arbitrate any dispute she may have with the Defendants arising out of or related to her employment or its termination, including the claims that she seeks to assert in this case. Defendants further assert that the Plaintiff has nevertheless refused to submit her claims to arbitration and is instead wrongfully attempting to sue the Defendants in this court. Defendants therefore ask this court to dismiss this suit and order the Plaintiff to proceed to arbitration pursuant to the Federal Arbitration Act (9 U.S.C. §§ 1, *et seq.).*

The Plaintiff does not deny that the arbitration agreement that she allegedly signed is broad enough to encompass all the claims that she seeks to assert in this suit. Plaintiff also does not deny that she has refused the Defendants' demand that she submit her claims to arbitration. Plaintiff's sole contention is that she cannot

be compelled to arbitrate her claims because she never signed any written arbitration agreement with the Defendants.

The Federal Arbitration Act

The Federal Arbitration Act, and Vermont's counterpart, the Vermont Arbitration Act, establish a strong national and state public policy supporting settlement of disputes by arbitration.

Under Section 4 of the Federal Arbitration Act, "upon being satisfied that the making of the agreement for arbitration ... is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." However, "[i]f the making of the arbitration agreement ... be in issue, the court shall proceed summarily to the trial thereof...." (Id.). If after trial the court determines that no written arbitration agreement was entered into, "the proceeding shall be dismissed," but if such an agreement is found to have been entered into, then "the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof." (Id.).

Thus, "a party seeking to invoke FAA § 4 must make a prima facie initial showing that an agreement to arbitrate existed...." Hines v. Overstock.com, Inc., 380 Fed.Appx. 22, **1 (2d Cir. 2010) (unpub. mem.) (citations omitted). If the party seeking arbitration makes such a showing, the burden then shifts to the party opposing arbitration "to put the making of that agreement 'in issue.'" If the opposing party comes forward with evidence putting the existence of the alleged arbitration agreement genuinely in dispute, then the court must hold an evidentiary hearing to resolve the dispute. At the hearing, the party seeking to compel arbitration bears the burden of proving the existence of the agreement by a preponderance of the evidence. Rosenthal v. Great Western Financial Securities Corp., 926 P.2d 1061, 1072 (Cal. 1996) ("Because the existence of the agreement [to arbitrate] is a statutory prerequisite to granting the petition [to compel arbitration], the petitioner bears the burden of proving its existence by a preponderance of the evidence.").

"[I]n deciding whether parties agreed to arbitrate a certain matter, a court should generally apply state-law principles to the issue of contract formation." Specht v. Netscape Comms. Corp., 306 F.3d 17, 27 (2d Cir. 2002); *see also* State v. Philip Morris USA Inc., 183 Vt. 176, 183 (2008) ("In deciding whether parties agreed to arbitrate a matter, we apply the ordinary rules of contract interpretation."). Under Vermont law, "[t]o be an enforceable contract, the agreement must manifest the parties' intention to be bound and its terms must be sufficiently definite." J&K Tile Co. v. Wright & Morrissey, Inc., 2019 VT 78, ¶12, 211 Vt. -- .

Background Facts and Allegations

Defendants operate a number of nursing homes in the State of Vermont. Plaintiff became a full-time employee of the Defendants in January of 2016, and in July of 2019, Plaintiff was promoted to Senior Admissions Director. That same year, Defendant Genesis Healthcare, Inc. acquired Defendant 300 Pearl Street Operations, LLC d/b/a Burlington Health & Rehab ("BH&H").

In March of 2020, the State of Vermont adopted various public safety regulations and restrictions in response to the outbreak of COVID-19, including regulations applicable to nursing homes like the ones being operated by the Defendants. Plaintiff alleges that the Defendants failed to comply with applicable pandemic-related regulations, making the facility where she worked unsafe (First Amended Complaint, ¶ 12-22). Plaintiff requested permission to work remotely from home and provided the Defendants with a doctor's order stating that Plaintiff was high-risk for COVID infection because she had an active asthma condition (Id. ¶ 23, 25). The Defendants at first granted the request but on May 14, 2020, Plaintiff claims that the Defendants "ordered her to return to the center – even though the center was not COVID-19-free and sanitation measures were not in force" (First Amended Complaint, ¶ 24, 26-35). "Plaintiff's fear of exposure to herself and others and defendants' action of threatening plaintiff with dismissal if she failed to work from the center, forced plaintiff to reluctantly and involuntarily resign" (Id. ¶ 39).

Defendants contend that on May 31, 2019, Plaintiff signed their "Mutual Arbitration Agreement." Defendants acknowledge that they do not have a copy of any such agreement bearing the Plaintiff's signature by hand. Defendants contend that the agreement is valid nonetheless because Plaintiff signed it electronically.

In support of their contention, Defendants rely upon the affidavit of their Vice President for Corporate Human Resources, Gwen Eagen. Eagen's affidavit describes in detail the process by which Defendants' employees obtain and use a unique and secure password for electronically signing documents, the security protocols related to employees' electronic signatures, and the process for employees to consent to electronic signatures by reviewing and signing an Electronic Signature and Document Delivery Consent Agreement (the "E-Signature Agreement").

According to the Eagen affidavit, the Defendants use an electronic database called "the On-Track System" to keep track of information provided to and collected from their employees (Id. ¶ 4). According to Eagen, "Defendant has used the On-Track System since at least the time period when Plaintiff was hired by Defendant in early 2016" (Id. ¶ 5). Eagen further states:

> I have reviewed the documents that Plaintiff electronically signed, including her electronic signature agreement, her signatures on various handbooks, policies, and acknowledgments. Each of these documents bears the signature and the electronic signature agreement and acknowledgement forms also reflect a time stamp. The date and time stamp information is recorded by the On-Track software. The on-Track software is reliable for this purpose.

(Id. ¶ 11).

Attached to the Eagan affidavit is a copy of the E-Signature Agreement putatively bearing the Plaintiff's electronic signature as of 1:46 p.m. on January 19, 2016. This agreement states: "I understand that attaching my e-signature is the legal equivalent of submitting a document signed by hand, and that clicking on the 'I Agree' option manifests my desire and intent to receive future documents electronically and to sign future documents using an electronic signature where required" (Eagan Affidavit, Attachment 1). Attachment 2 to the Eagen affidavit is a copy of the "Mutual Arbitration Agreement," putatively bearing Plaintiff's electronic signature as of 1:50 p.m. on May 31, 2019.

The Plaintiff, in her opposition affidavit, denies ever agreeing to arbitrate any legal claims she might have against her employer (Affidavit of Adelle Rebeor, ¶ 15). Plaintiff states that, when Defendant BH&H initially employed her in January 2016, she "did not sign any documents electronically," that "[a]t the time, all hiring and related documents were paper," and that "defendant did not have an electronic onboarding system" (Id. ¶ 4). When Genesis Healthcare, Inc. acquired BH&H in 2019, Plaintiff "noted" that BH&H continued "using its former owner's documents and processes despite the defendant's assumption of ownership" (Id. ¶ 6). Plaintiff further asserts that she "paid close attention to the defendant's documentation processes" and "there was never an occasion when the defendant's employees used the 'On-Track' software to memorialize ... employment records" (Id. ¶¶ 9-10).

Plaintiff states in her affidavit: "I methodically stored and preserved copies of all the personnel records I signed throughout my tenure as defendant's employee" and "[t]here never was nor is there now an arbitration agreement among the documents I preserved" (Id. ¶¶ 7-8). Plaintiff the adds, "If I had acknowledged or agreed to the arbitration process to resolve any employment disputes, I would remember it and would have preserved any such documentation because I paid close attention to such matters" (Id. ¶ 12). Plaintiff also notes that "there is no facsimile" of her signature on the documents that Defendants claim she electronically signed (Id. ¶ 14).

Plaintiff further attests that "[t]he 2019 employee handbook contained no reference to an arbitration process it planned to impose on its employees" (Id. ¶ 32).

In addition, Plaintiff states that she and Defendants' human resources on-site director, Katya Babyuk, "were friends," yet "at no time did Ms. Babyuk discuss the alleged arbitration agreement with [the Plaintiff]" (Id. ¶ 35). Indeed, Plaintiff assets that, during her time as an employee of the Defendants, none of her supervisors, administrators or colleagues at the facility ever discuss the alleged arbitration agreement with her (Id. ¶¶ 36-38).

Lastly, Plaintiff states in her affidavit that she was "familiar with arbitration agreements" because the Defendants "always urged/pressed Admissions Directors to have patients sign for arbitration," so, as one of defendant's Admissions Directors, it was her responsibility "to explain the arbitration agreement to patients and their families" (Id. ¶¶ 39-40). This, Plaintiff avers, "is the reason I can attest to the fact that defendant did not present the alleged arbitration agreement to me – despite the defendant's claims to the contrary" (Id. ¶ 40).[1]

Discussion and Analysis

The Eagan affidavit is sufficient to meet the Defendants' initial burden of making a prima facie showing that a written arbitration agreement exists between the parties. Vermont's Uniform Electronic Transactions Act, 9 V.S.A. § 270, *et seq.*, states that "[a] record or signature may not be denied legal effect or enforceability solely because it is in electronic form," and "[a] contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation." Id. § 276. The Act further provides:

> An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

Id. § 278(a). In addition, "the effect" of such a signature "is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law." Id. § 278(b).

For two reasons, however, the court also concludes that the Plaintiff has come forward with sufficient evidence to put the existence of the purported arbitration agreement genuinely in dispute. First, a number of Gwen Eagen's key sworn statements are directly contradicted by the Plaintiff's sworn statements. For example, Eagen swears that "Defendant has used the On-Track system since at least the time period when Plaintiff was hired by Defendant in early 2016," and that

[1] The Plaintiff makes a number of other assertions in her affidavit, but the court does not find them to be relevant to the issue before it, namely, whether the Plaintiff signed the Defendants' "Mutual Arbitration Agreement."

Defendant's On-Track system records the Plaintiff's electronic signature not only on "her electronic signature agreement" but also on "various handbooks, policies and acknowledgments." The Plaintiff, however, swears that she "did not sign any documents electronically" when BH&H hired her in 2016, that "all hiring and related documents were paper" at the time, that BH&H continued using its former owner's documents and processes even after Genesis Healthcare, Inc. acquired it, and "[t]here was never an occasion when the defendant's employees used the 'One-Track software to memorialize ... employee records." These factual assertions in the two affidavits before the court directly contradict each other.

Second, the Plaintiff has also come forward with evidence of context and surrounding circumstances calling into doubt whether an arbitration agreement was ever requested or signed. For example: Defendants' 2019 employee handbook makes no mention of any arbitration process that employees were expected or required to pursue; none of Plaintiff's supervisors, administrators or colleagues at the facility where she worked ever discussed any such arbitration agreement while Plaintiff was employed by the Defendants; Plaintiff "methodically" stored and preserved all the personnel records that she signed during her employment with the Defendants but they do not include any arbitration agreement; and Plaintiff was very familiar with arbitration agreements, since she was expected to explain them to prospective patients as part of her job, which is why she is certain that she was never asked to sign one herself.

Because the issue of the existence of a signed arbitration agreement between the parties is genuinely in dispute, the court must hold an evidentiary hearing to resolve the dispute.

Conclusion and Order

The clerk will set this matter for a four-hour evidentiary hearing to be held during the second half of July. Each party will be allocated two hours of hearing time. Defendants will bear the burden of proving that the Plaintiff electronically signed their Mutual Arbitration Agreement by a preponderance of the evidence. The hearing will be held remotely by Webex or some similar platform. The parties shall file their exhibits with the court, and exchange their exhibits with each other, not less than five (5) days before the hearing.

In the meantime, the parties may engage in limited discovery focused on the question whether the Plaintiff electronically signed the Defendants' Mutual Arbitration Agreement.

Requests for the production of documents shall be responded to within fifteen (15) days. All documents obtained thereby shall be treated as confidential at the request of the producing party, shall be shared only with the parties, their

attorneys/law offices, experts and the court, and shall be used solely for purposes of this litigation.

Interrogatories shall be limited to no more than ten (10) question, including subparts, and shall be responded to within 21 days. In addition, each party may take up to two depositions of not more than two hours' duration each. The depositions shall be taken remotely.

SO ORDERED this 4th day of May, 2021.

Vermont Superior Court

MAY 4 2021

FILED: Franklin Civil

Robert A. Mello
Superior Judge