IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PHARMACY CORPORATION OF AMERICA, INC., d/b/a PHARMERICA, and INSTA-CARE PHARMACY SERVICES CORPORATION, d/b/a PHARMERICA, Plaintiffs, v. HEALTH CARE AT COLLEGE PARK, LLC, d/b/a COLLEGE PARKHEALTH CARE CENTER, *et al.*, Defendants.	:	CIVIL ACTION NO. 1:16-CV-04790-LMM

ORDER

This case comes before the Court on Defendants' Motion to Compel Arbitration [14] and Plaintiffs' Motion to Dismiss, or, in the alternative, Motion for a More Definitive Statement [18]. After due consideration, the Court enters the following Order:

I. BACKGROUND

This action arises from and alleged breach of contract. Plaintiffs[1] have sued 18 Defendants; 16 of which it has labeled the "Facility Defendants" and two of which it has labeled the "Management Defendants." Dkt. No. [1] at 5. Plaintiffs allege that the Facility Defendants failed to pay Plaintiffs for pharmacy-related goods and services pursuant to their Pharmacy Service Agreements ("PSAs") and improperly terminated the PSAs. Id. ¶ 1. Plaintiffs further allege that the Facility Defendants are operated, managed, and owned directly or indirectly by the Management Defendants. Id. Plaintiffs allege that the Management Defendants are responsible for the Facility Defendants' alleged breach by preventing the Facility Defendants from paying Plaintiffs for their goods and services. Id.

According to the Complaint, Plaintiffs entered into 16 PSAs with the Facility Defendants between September 23, 2013, and October 7, 2015, to provide pharmacy related goods and services to the Facility Defendants in exchange for compensation. Id. ¶¶ 25-40. Pursuant to Section 6(D)(1) of the PSAs, the Facility Defendants were to pay Plaintiffs' invoices within 90 days of the date of the invoice. Id. ¶ 41. Pursuant to Section 6(D)(2), interest accrued on any past due amounts at the rate of 18% per annum and the Facility Defendants were responsible for reimbursing Plaintiffs for any and all costs and expenses incurred

[1] The Complaint indicates that both Plaintiff Pharmacy Corporation of American and Plaintiff Insta-Care do business as Pharmerica.

in collecting past due payments, including reasonable attorney's fees. Id. ¶¶ 41-42.

According to the Complaint, Plaintiffs performed all obligations required of it under the PSAs. Id. ¶ 43. However, Plaintiffs allege that the Facility Defendants failed to pay Plaintiffs invoices as they became due. Id. ¶ 44.

Each PSA has a termination clause that varies from PSA to PSA. However, each PSA indicates that "no notice of termination is valid if there are past due amounts outstanding." Id. ¶ 55. The PSAs further provide that if a Facility Defendant is past due as of the date of the termination, the termination is void. Id. Additionally, the PSAs indicate that if a Facility Defendant provides a valid notice of termination, it must remit payment for any outstanding invoices within 30 days of the date of the invoice rather than 90 days. Id. ¶ 56.

Plaintiffs allege that, by letter dated November 23, 2016, the Facility Defendants purported to terminate eleven of the PSAs, effective December 15, 2016. Id. ¶ 57. On or before December 15, 2016, the Facility Defendants stopped ordering pharmacy related goods and services from Plaintiffs. Id. ¶ 58. Plaintiffs allege that these eleven terminations were invalid because they did not conform with their respective termination clauses and the Facility Defendants were not current in their payments to Plaintiffs. Id. ¶¶ 59-64.

Plaintiffs allege that they repeatedly demanded from the Facility Defendants sums due, but to no avail. Id. ¶ 65. According to the Complaint, the

Facility Defendants owe Plaintiffs a total of $2,300,667.96 in past due invoices.[2] Id. ¶¶ 66-81. Plaintiffs further allege that the Facility Defendants have been reimbursed by Medicare for all or a significant portion of the goods and services provided by Plaintiffs and have benefited from such reimbursement to Plaintiffs' detriment. Id. ¶ 82.

Plaintiffs allege that the Management Defendants knew about the PSAs. Id. ¶ 83. According to Plaintiffs, the Management Defendants used their control over their respective Facility Defendants to prevent them from paying Plaintiffs the invoices owing under the PSAs. Id. ¶ 84.

Plaintiffs now allege seven theories of recovery and one count for attorney's fees. Those theories are: (1) breach of contract against Facility Defendants Attalla, Autumn Breeze, Coosa Valley, College Park, Fairhope, Gold City, Gordon Oaks, LaGrange, Meadow Brooks, Mountain View, and Shadecrest for failure to pay Plaintiff Pharmacy Corporation pursuant to their respective PSAs; (2) breach of contract against Facility Defendants Glenvue, Medical Management, Molena, Porter Field, and Thomasville for failure to pay Plaintiff Insta-Care pursuant to their respective PSAs; (3) breach of contract against Facility Defendants Attalla, Autumn Breeze, Coosa Valley, College Park, Fairhope, Gold City, Gordon Oaks, LaGrange, Mountain View, and Meadow Brooks for improper termination of Plaintiff Pharmacy Corporation's PSAs; (4) breach of contract against Facility

[2] This amount represents all alleged past due payments from each Facility Defendant, not just those Defendants that terminated their PSAs.

Defendants Glenvue, Porter Field, Medical Management, Molena, and Thomasville for improper termination of Plaintiff Insta-Care's PSAs;[3] (5) tortious interference with contractual relationships against the Management Defendants; (6) unjust enrichment/constructive trust against all Defendants; and (7) promissory estoppels against all Defendants.

Defendants filed one counterclaim against Plaintiffs for breach of contract. Dkt. No. [13] ¶ 2. Specifically, Defendants contend that, pursuant to the PSAs, Plaintiffs had a contractual duty to, among other things: (1) provide a pharmacy consultant to meet with facility staff to discuss cost containment; (2) promptly fill orders; (3) promptly deliver orders; (4) timely and properly account and invoice for goods and services provided; and (5) perform their contractual obligations in good faith and fair dealing. Id. ¶ 1. Defendants summarily allege that Plaintiffs breached those duties and now Defendants have sustained money damages and "other damages" for which they are entitled recovery. Id. ¶ 3.

Additionally, Defendants contend that, pursuant to the PSAs, Plaintiffs agreed to arbitrate this matter. As such, Defendants ask the Court to compel arbitration and Plaintiffs ask the Court to dismiss Defendants' counterclaim, or,

[3] There appears to be some contradiction concerning which Facility Defendants actually terminated their PSAs. In the body of the Complaint, Plaintiffs allege that only eleven of the 16 Facility Defendants terminated improperly. However, in their enumerated counts, Plaintiffs allege that 15 of the Facility Defendants terminated improperly; essentially all Facility Defendants except Shadecrest. However, as this does not change the outcome of this Order, the Court will not attempt to determine which allegation is correct.

in the alternative, order a more definitive statement. The Court will discuss the Motion to Compel first.

II. LEGAL STANDARD

"The [Federal Arbitration Act "(FAA")] reflects the fundamental principle that arbitration is a matter of contract." Rent-A-Car, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010). The "primary substantive provision" of the FAA provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, an enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

"The FAA thereby places arbitration agreements on an equal footing with other contracts [] and requires courts to enforce them according to their terms." Rent-A-Car, 561 U.S. at 67 (internal citations omitted). In addition, "[i]n enacting the FAA, Congress demonstrated a liberal federal policy favoring arbitration agreements." MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999) (internal citations and quotations omitted). "Therefore, questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitrations." Id. However, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Id. Nonetheless, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

Determining whether a matter must be submitted to arbitration is a two-step inquiry. First, the Court must determine whether a valid agreement to arbitrate exists; and second, whether the specific dispute falls within the substantive scope of that agreement. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626-28 (1985).

III. DISCUSSION

Defendants contend that each PSA referred to in Plaintiffs' Complaint contained an arbitration clause which requires this Court to send the matter to arbitration. Specifically, Defendants refer to Section 15 of the PSAs that dictate:

> Any disputes, controversies or claims arising under or relating to this Agreement, except for injunctive relief due to breach or threatened breach of confidentiality provisions of this Agreement or for payment of money due to Pharmacy, must be settled exclusively by binding arbitration.

Dkt. No. [14-2] at 7.

While Defendants acknowledge that claims for payment of money due are carved out of the arbitration clause, Defendants contend that Plaintiffs' Complaint includes claims for relief other than payment of money due. Specifically, Defendants contend, without explanation, that Plaintiffs' claims for breach of contract for alleged improper termination, tortious interference, unjust enrichment, and promissory estoppel are *not* for payment of money due. Additionally, Defendants contend that the case must be arbitrated because they have asserted a counterclaim for breach of contract.

Plaintiffs argue that each of the claims against Defendants is for money allegedly due. The Court agrees. Plaintiffs allege that they provided certain pharmacy related goods and services and that the Facility Defendants, and the Management Defendants' command, failed to remit compensation. The breach of contract claims, the promissory estoppel claims, the tortious interference claims, and the unjust enrichment claims are specifically brought to collect the money owed to Plaintiffs by Defendants for this failure to compensate. Additionally, Plaintiffs have alleged that the Facility Defendants impermissibly terminated the PSAs such that Plaintiffs lost profits. These lost profits are money allegedly due to Plaintiffs under the PSAs because, as Plaintiffs allege, they are profits Plaintiffs would have received if Defendants had not impermissibly terminated. Because Plaintiffs did not agree to arbitrate claims for money due to them, the Court will not compel them to arbitrate those claims. Cat Charter, LLC v. Schurtenberger, 646 F.3d 836, 843 (11th Cir. 2011) ("Parties must agree to arbitrate in the first instance.").

Next, the Court turns to Defendants' counterclaim. As discussed above, Defendants contend that, because the counterclaim is arbitrable, the entire case must go to arbitration. Plaintiffs do not deny that Defendants' counterclaim is arbitrable. The Court agrees. Specifically, the counterclaim for breach of contract does not fit into one of the arbitration clause exceptions: It does not involve injunctive relief due to breach or threatened breach of confidentiality provisions of the PSAs or for payment of money due to Plaintiffs. Instead, the counterclaim

concerns money allegedly due to Defendants. The arbitration clause does not exclude such claims. As such, the counterclaim is arbitrable.

However, Defendants fail to argue why the arbitrability of their counterclaim means the Court must compel arbitration for Plaintiffs' claims, which are excluded from the arbitration clause. In the Eleventh Circuit, only those claims within the scope of an arbitration agreement are subject to arbitration. See Brandon, Jones, Sandall, Kohn, Chalal & Musso, P.A. v. Medpartners, Inc., 312 F.3d 1349, 1357 (11th Cir. 2002) ("[W]e will compel no arbitration of issues that are outside an agreement to arbitrate."). Because Plaintiffs have not agreed to arbitrate their claims, the Court cannot compel them to do so. Id.

For that reason, Defendants' Motion to Compel is **DENIED** as to Plaintiffs' claims. However, it appears that Defendants' counterclaim is arbitrable, but it is unclear as to whether either party is seeking to arbitrate the counterclaim alone. Accordingly, any party requesting Defendants' counterclaim be sent to arbitration as a stand-alone claim should file a renewed Motion to Compel Arbitration only as to Defendants' counterclaim within 14 days within the entry of this Order. The Court will defer ruling on Plaintiffs' Motion to Dismiss until that time.

IV. CONCLUSION

In accordance with the foregoing, the Court **DENIES** Defendants' Motion to Compel Arbitration [14]. The parties have 14 days from the date of this Order to file a renewed Motion to Compel as to Defendants' counterclaim if they are requesting arbitration of that counterclaim. The Court will defer ruling on Plaintiffs' Motion to Dismiss Defendants' counterclaim until that time. The Clerk is **DIRECTED** to resubmit Plaintiffs' Motion to Dismiss [18] in 14 days from the entry of this Order.

IT IS SO ORDERED this 14th day of April, 2017

LEIGH MARTIN MAY
UNITED STATES DISTRICT JUDGE