IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NICHOLAS L. DEPACE, MD.,	:	CIVIL ACTION
	:	
Plaintiff,	:	04-1886
	:	
v.	:	
	:	
JEFFERSON HEALTH SYSTEM, INC., THOMAS JEFFERSON UNIVERSITY HOSPITALS, INC., and METHODIST ASSOCIATES IN HEALTHCARE, INC.,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

JOYNER, J. **December 7, 2004**

Via the motion now pending before this Court, Defendants have moved to dismiss Plaintiff's Amended Complaint, or to direct Plaintiff to proceed to arbitration, or to stay these proceedings pending arbitration. Plaintiff has presented a thorough and detailed response.[1] For the reasons outlined below, the motion

[1] We encourage Plaintiff's counsel, in future submissions to this Court, to be mindful of Local Rule of Civil Procedure 7.1(c), which requires that every contested motion be accompanied by a brief "containing the concise statement of the legal contentions and authorities relied upon in support of the motion." E.D. Pa. Loc. R. Civ. Pro. 7.1(c)(emphasis added). Counsel's willingness to present unedited excerpts of case law in excess of three single-spaced pages suggests both lack of effort in developing its legal analysis, and lack of consideration for this Court and for opposing counsel. See Plaintiff's Response, pp. 27-29 (citing Kimble v. D. J. McDuffy, Inc., 648 F.2d 340, 353-54 (5th Cir. June 1981)), pp. 52-56 (citing Tripp v. Renaissance Advantage Charter Sch., No. 02-9366, 2003 U.S. Dist. LEXIS 19834 at 24-32 (E.D. Pa. 2003)). Counsel's wholesale extraction of nearly ten pages from Plaintiff's Amended Complaint likewise calls to mind the Seventh Circuit's admonition regarding the virtue of clarity in legal briefs: "Judges are not like pigs, hunting for truffles buried in briefs." Feliciano v. City of Philadelphia, No. 96-6149, 1997 U.S. Dist. LEXIS 1394 at 16 (E.D. Pa. 1997) (quoting United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) Roszkowski, J.); See Plaintiff's Response, pp. 5-14. At the other end of the spectrum, endless repetition of a single quotation, no matter how relevant, suggests counsel's lack of confidence in this Court's ability to process information. See Plaintiff's Response, at pages 20, 21, 31, 32, 33, 37, and 44 ("Deterrence or intimidation of a potential witness can be just as harmful

shall be granted. Plaintiff is directed to proceed to arbitration on the issue of whether § 5a-ii of the Employment Agreement was breached when Plaintiff's compensation was reduced in April 2004. This action shall be stayed pending resolution of that issue.

Factual Background

Plaintiff Nicholas L. DePace is a physician whose medical practice was purchased in 1997 by Jefferson Methodist Heart Center (JMHC); the practice is now owned and operated by Defendant Methodist Associates in Healthcare (MAH). Plaintiff's January 31, 1997 Employment Agreement with JMHC established that Plaintiff would be paid approximately $803,000 per year until December 31, 2001. Section § 5a-ii of the Employment Agreement also established that from January 1, 2002 through December 31, 2006, Plaintiff's annual compensation "shall be reduced to no less than $642,285.69 and shall be based on mutually agreed productivity, quality and financial indicators..." Plaintiff agreed to bear responsibility for his own licensure and certification, and the Employment Agreement did not guarantee credentialing or practice benefits to third parties affiliated with Plaintiff's practice. See Employment Agreement, § 2a, § 4g.

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to a litigant as threats to a witness who has begun to testify." Malley-Duff & Associates, Inc. v. Crown Life Ins. Co., 792 F.2d 341, 355 (3rd Cir. 1986), quoting Chalal v. Paine Webber. 725 F.2d 20, 24 (2nd Cir. 1984)). Plaintiff's counsel should be attentive to the above considerations should they again appear before this Court.

The Employment Agreement's arbitration clause required that all controversies, claims, or disputes arising "with regard to the performance or interpretation of Section 5 [Employment], Section 11 [Change of Law], or Section 7c [Non-Competition]" be submitted to arbitration by the National Health Lawyers Association Alternative Dispute Resolution Service. Employment Agreement, § 12.

On March 25, 2004, Plaintiff filed a diversity action ("DePace I") against Defendants and JMHC for breach of contract and various other tort law claims, alleging failure to fund or develop programs to generate additional revenue for Plaintiff's practice. See generally, DePace v. Jefferson Health System, Civ. No. 04-1316 (E.D. Pa. 2004). JMHC and Defendant MAH were ultimately withdrawn from that action, and are currently engaged in arbitration proceedings with Plaintiff to resolve the alleged breaches of contract.

The present civil rights action ("DePace II"), filed on April 30, 2004, sets forth allegations that Defendants conspired to improperly reduce Plaintiff's salary from approximately $803,000 to $642,285.69 shortly after Plaintiff filed his Complaint in DePace I. Plaintiff also alleges that Defendants conspired to improperly limit the medical privileges of Dr. Asif Hussain, a MAH employee and potential witness in this litigation. Plaintiff pleads in Count I of his Amended Complaint that these

actions violated 42 U.S.C. § 1985(2), which prohibits conspiracies to deter or injure parties and witnesses in proceedings before a court.[2] Count II claims that Defendants Jefferson Health System (JHS) and Thomas Jefferson University Hospital (TJUH) conspired to reduce Plaintiff's salary and limit Dr. Hussain's privileges with the intent of tortiously interfering with Plaintiff's contractual relations with MAH.

Discussion

I. Legitimacy of Plaintiff's § 1985(2) Claim

Defendants have moved to dismiss Count I of Plaintiff's Amended Complaint on the grounds that § 1985(2) does not protect against retaliation for the mere filing of a complaint, but rather "only physical attendance or testimony" in court. Dreher v. Vaughn, No. 94-4810, 1995 U.S. Dist. LEXIS 9459 at 6, 1995 WL 407366 (E.D. Pa. 1995); see also Kimble v. D. J. McDuffy, Inc., 648 F.2d 340, 347-48 (5th Cir. June 1981) (examining the legislative history of § 1985(2) to find that it protects only against "direct violations of a party or witness's right to attend or testify in federal court"); Wright v. Brown, No. 94-35486, 1995 U.S. App. LEXIS 27867 at 10, 1995 WL 566951 (9th Cir. 1995); but see Wright v. No Skiter, Inc., 774 F.2d 422, 425-26

[2] 42 U.S.C. § 1985(2) provides that a party may recover damages if "two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified..."

(10th Cir. 1985) (holding that, for the purposes of § 1985(2), an individual is deemed to have "attended" a court from the moment he files a complaint).

The Third Circuit has held that § 1985(2) protects against retaliation for testifying, but not retaliation for "the filing of complaints." Malley-Duff & Associates, Inc. v. Crown Life Ins. Co., 792 F.2d 341, 355 (3rd Cir. 1986). However, the Court in Malley-Duff interpreted the § 1985(2) protection of parties testifying in or "attending" court to encompass any person asked to provide discovery in a case, regardless of where or in what form. Malley-Duff, 792 F.2d at 355. See also Heffernan v. Hunter, 189 F.3d 405, 407 (3rd Cir. 1999) (finding that § 1985(2) protects an individual even though he does not appear as a witness and is not subpoenaed); Chahal v. Paine Webber, Inc., 725 F.2d 20, 24 (2nd Cir. 1984) (finding that deterrence or intimidation of a potential witness can be just as harmful to a litigant as threats to a witness who has begun to testify).

Plaintiff has properly brought a § 1985(2) claim because he has alleged more than mere retaliation for the filing of his complaint in DePace I. Plaintiff has pled that Defendants have conspired to "deter by force, intimidation and/or threat Dr. DePace and others from proceeding in court with DePace I." Amended Complaint, ¶ 17. Although neither Plaintiff nor Dr. Hussain have yet been called to testify as witnesses in court,

Plaintiff will certainly be asked to provide discovery as DePace I progresses, and Dr. Hussain has been named as a potential witness. Because it is possible that Defendants' actions were intended to deter Plaintiff and Dr. Hussain from testifying or proceeding in DePace I, Count I cannot be dismissed.

II. Arbitration of Claims Alleging Improper Salary Reduction

In making out his claims under both Counts I and II, Plaintiff alleges that his April 2004 salary reduction violated Section 5a-ii of the Employment Agreement. Plaintiff contends that any reduction should have been based on "mutually" agreed-upon factors, and that his employer had no authority to unilaterally reduce Plaintiff's pay.

It is impossible for this Court to determine whether Plaintiff's Amended Complaint sets forth valid claims without first knowing whether Plaintiff's salary decrease was permitted under the Employment Agreement. For example, if the Employment Agreement permitted or required the allegedly unilateral April 2004 reduction, there would be no § 1985(2) or tort law violation. Where a party acts in accordance with a contractual agreement with the plaintiff, there can be no impropriety or injury to the plaintiff sufficient to ground liability. See generally, Haddle v. Garrison, 525 U.S. 121, 125 (1998) (discussing interference with contractual relations as the kind of injury contemplated by § 1985(2)); Geofreeze Corp. v. C.

Hannah Construction Co., 588 F. Supp. 1341, 1345 (E.D. Pa. 1984) (finding no tortious interference where the defendant acted according to pertinent contractual provisions).

The propriety of changes to Plaintiff's compensation is a matter explicitly reserved for arbitration under Section 12 of the Employment Agreement. Pending resolution of that issue, the proceedings before this Court must be stayed, in accordance with § 3 of the Federal Arbitration Act.[3] We find no merit to Plaintiff's objections on grounds of preemption or waiver.

A. Congressional Preemption of Arbitration

Individuals may not contract away their access to the courts where Congress has demonstrated a clear intent to preserve judicial remedies for the enforcement of statutory rights. Tripp v. Renaissance Advantage Charter Sch., No. 02-9366, 2003 U.S. Dist. LEXIS 19834 at 21, 2003 WL 22519433 (E.D. Pa. 2003). Plaintiff, who contends that Congress never intended § 1985(2) actions to be arbitrable, opposes arbitration of this matter on these grounds.

It is unnecessary for this Court to determine whether

[3] "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3

Congress intended to preempt arbitration of § 1985(2) claims generally. The issue for arbitration in this matter is limited to whether Plaintiff's decrease in pay from $803,000 to $642,285.69 in April 2004 was permissible under the Employment Agreement.[4] Only after this extremely narrow contractual issue has been resolved can this Court then proceed to analyze the pay decrease within the framework of a potential § 1985(2) violation. The doctrine of Congressional preemption of arbitration is simply inapplicable in this case.

B. Defendants' Alleged Waiver of Arbitration

Plaintiff further claims that Defendants waived any right to proceed in arbitration by "previously arguing, successfully, that all claims against them must be brought in Court." In DePace I, Defendants JHS and TJUH objected to their inclusion in arbitration proceedings between Plaintiff and MAH/JMHC regarding violations of the Employment Agreement, to which JHS and TJUH were non-signatories.

This Court remains unconvinced by Plaintiff's attempts to highlight alleged "inconsistencies" in Defendants' position. Defendants' refusal to submit to arbitration in DePace I does not preclude them from seeking to compel arbitration between

[4] We note that the issue of Dr. Hussain's practicing privileges is not subject to mandatory arbitration under the terms of the Employment Agreement. However, the parties may wish to take advantage of the arbitration proceedings already in progress to determine whether the restriction of Dr. Hussain's operating privileges violated any contractual terms.

Plaintiff and MAH/JMHC on a limited contractual issue closely tied to the claims against them in this action. Even as non-signatories to the arbitration clause in the Employment Agreement, Defendants have standing to compel arbitration because Plaintiff cannot make out his claims against them without reference to the contract. See generally, Bannett v. Hankin, 331 F. Supp. 2d 354, 359-60 (E.D. Pa. 2004) (compelling arbitration by estoppel where the signatory's claims against a non-signatory "make reference to or presume the existence of" the written agreement, or "arise out of and relate directly to" the agreement).

III. Stay of the Proceedings Before this Court

Although only the issue of Plaintiff's salary reduction is subject to mandatory arbitration, we find that Plaintiff's claims of impropriety in the detrmination of Dr. Hussain's operating privileges must likewise be stayed.

The Federal Arbitration Act's requirement that a court stay "the trial of the action" suggests that these proceedings must be stayed in their entirety, even though Plaintiff's Amended Complaint encompasses both arbitrable and non-arbitrable claims. See Feinberg v. Ass'n of Trial Lawyers Assur., No. 01-6966, 2002 U.S. Dist. LEXIS 21518 at 7-8, 2002 WL 31478866 (E.D. Pa. 2002) (court elected to stay entire proceedings pending arbitration even though only some of plaintiff's claims were covered by the

arbitration agreement); Davies v. Ecogen Inc., No. 98-299, 1998 U.S. Dist. LEXIS 5363 at 3, 1998 WL 229780 (E.D. Pa. 1998); see also Landis v. North American Co., 299 U.S. 248, 254 (1936) (finding that a court's power to stay proceedings is incidental to the power to control its docket "with economy of time and effort for itself, for counsel, and for litigants").

Both Counts I and II of Plaintiff's Amended Complaint cite Plaintiff's salary reduction and Dr. Hussain's limited privileges as grounds for relief. Because Plaintiff has incorporated these allegations into both causes of action, we elect to stay the entirety of the proceedings pending arbitration of the compensation issue.

An appropriate Order follows.

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	:	
Defendants.	:	

ORDER

AND NOW, this 7th day of December, 2004, upon consideration of the Defendants' Motion to Dismiss Plaintiff's Amended Complaint And/Or To Direct Plaintiff to Proceed, If At All, To Arbitration, Or To Stay Pending Arbitration (Doc. No. 20) and all responses thereto (Docs. No. 23, 26, 28), it is hereby ORDERED that the Motion is GRANTED.

Plaintiff is hereby DIRECTED to proceed to arbitration with Defendant Methodist Associates in Healthcare to determine whether Section 5a-ii of the Employment Agreement was breached when Plaintiff's compensation was reduced in April 2004. This action shall be STAYED pending further Order.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.