

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

SHARON OSTROFF, Individually and as	:	CIVIL ACTION
Power of Attorney for Lillian Restine	:	
Plaintiff,	:	
	:	
v.	:	NO. 05-6187
	:	
ALTERRA HEALTHCARE	:	
CORPORATION	:	
Defendant.	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 25th day of July, 2006, upon consideration of Defendant Alterra Healthcare Corporation's Motion for Reconsideration and to Vacate June 7, 2006 Court Order (Document No. 21, filed June 21, 2006) and plaintiff Ostroff's Opposition to Defendant's Motion for Reconsideration (Document No. 25, filed June 30, 2006), for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that Defendant Alterra Healthcare Corporation's Motion for Reconsideration and to Vacate June 7, 2006 Court Order is **DENIED**.

MEMORANDUM

Sharon Ostroff, individually and as power of attorney for Lillian Restine, her mother, filed suit against Alterra Healthcare Corporation ("Alterra") for personal injuries suffered by Restine while she was a resident at an assisted living facility operated by Alterra. Defendant moved to compel arbitration pursuant to a Residency Agreement signed by plaintiff Ostroff. In an Order & Memorandum dated June 7, 2006, the Court denied defendant's motion to compel arbitration. Ostroff v. Alterra Healthcare Corp., ___ F. Supp.2d ___, 2006 WL 1544390 (E.D. Pa. June 7, 2006). In that Order & Memorandum, the Court held that the Residency Agreement

was a contract of adhesion and thus procedurally unconscionable. Id. at *5. The Court also ruled that the Agreement was substantively unconscionable, because it severely restricted discovery available to plaintiff¹ and reserved access to the courts for defendant while requiring plaintiff to arbitrate all disputes. Id. at *8. Because the arbitration clause was procedurally and substantively unconscionable, the Court refused to enforce it. Id. Defendant has now filed a Motion for Reconsideration and to Vacate that Order of June 7, 2006. For the reasons below, defendant's motion is denied.

There are three situations which justify granting a motion for reconsideration: (1) an intervening change in the controlling law; (2) the availability of new evidence not available when the court granted the prior motion; or, (3) the need to correct a clear error of law or fact or prevent "manifest injustice." Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999); Dimensional Music Pub., LLC v. Kersey, 2006 WL 1983189, at *1 (July 12, 2006). In a motion for reconsideration, the burden is on the the party seeking reconsideration. Max's Seafood Café, 176 F.3d at 677; In re Loewen Group Inc. Sec. Litig., 2006 WL 27286, at *1 (E.D. Pa. Jan. 5, 2006). "Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly." Cont'I Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995); see also Porter v. NationsCredit Consumer Discount Co., 2006 WL 1737544, *2 (E.D. Pa. June 22, 2006).

Defendant asserts that reconsideration is needed in order to correct "manifest errors of

¹ Specifically, while plaintiff was allowed "permissible discovery per the Pennsylvania Rules of Civil Procedure," plaintiff was only allowed to depose defendant's expert witnesses. Ostroff v. Alterra Healthcare Corp., ___ F. Supp.2d ___, 2006 WL 1544390, at *6 (E.D. Pa. June 7, 2006).

law.” Def. Memo. at 3. Defendant also submits several documents in support of its motion, thus implicitly arguing that there is “newly discovered evidence” in this case. Because defendant relies on these documents to argue that the Court made clear errors of law, the Court will first address the “newly discovered evidence.”

All of the documents and evidence which defendant seeks to present were either available or should have been available to defendant before the Court decided the motion to compel arbitration. This evidence includes:

- A statement dated November 15, 2005, from the son of Ms. Restine’s roommate, who was in the room at the time Ms. Restine was injured. Def. Ex. B. Clearly this statement was available to defendant long before it filed its motion to compel arbitration on February 17, 2006.
- An affidavit from Patti Jo Robinson, the Alterra employee who obtained plaintiff’s signature on the Residency Agreement. Def. Ex. D. Ms. Robinson states that she first learned of plaintiff’s allegations regarding the contract – that it was the result of procedural unconscionability – on approximately May 16, 2006. Id. ¶ 6. Defendant knew that plaintiff was arguing the Residency Agreement was procedurally unconscionable no later than March 3, 2006, when plaintiff submitted her memorandum opposing defendant’s motion to compel arbitration. Defendant therefore had several months before the Court issued its opinion on June 7, 2006 to contact Ms. Robinson.²
- Handwritten notes of defendants’ employee regarding Ms. Restine’s accident. Def. Ex. C. Defendant states that it located these notes on June 14, 2006. However, these notes are dated October 9, 2005, the date of the accident in question. Defendant provides no reason as to why it was unable to obtain these notes written by one of its employees prior to June 14, 2006.

Defendant also states that prior to the Court’s ruling, it “agreed” that depositions of non-experts could be taken by both sides. Memo at 2. In support of this assertion, defendant

² A few weeks before May 16, 2006, Ms. Robinson received a phone call and a letter from someone identifying himself as an attorney for defendant, but Ms. Robinson did not respond. Def. Ex. D ¶¶ 7, 9.

provides a letter dated May 23, 2006, in which defense counsel offered to allow each side to depose up to two non-expert witnesses. Def. Ex. A. However, it does not appear from this letter that defendant and plaintiff actually reached an agreement regarding deposing non-expert witnesses, and counsel confirmed after the motion for reconsideration was filed that no such agreement was reached. Moreover, this letter was written by defendant's counsel two weeks before the Court issued its opinion; it was not called to the Court's attention until after the Order & Memorandum was issued.

“[C]ourts will amend a prior judgment for newly discovered evidence only where the evidence submitted was not available when the court decided the motion.” Porter, 2006 WL 1737544, at *2 (quoting Max's Seafood Café, 176 F.3d at 677). Because the evidence defendant seeks to submit was available (or should have been available) to defendant before the Court decided its motion to compel arbitration, this evidence does not warrant reconsideration. Moreover, assuming arguendo that the Court decided to consider this evidence, it does not alter the principal basis for the Court's June 7, 2006 Order & Memorandum – the fact that, under the arbitration provision, plaintiff was not permitted to take depositions of defendant's employees or any other non-expert witnesses.

The arguments defendant presents in support of its assertion that the Court made “manifest errors of law” are little more than restatements of the arguments previously made in its motion to compel arbitration. “A motion for reconsideration is not properly grounded on a request that a court consider repetitive arguments that have been fully examined by the court.” Blue Mountain Mushroom Co. v. Monterey Mushroom, Inc., 246 F. Supp.2d 394, 398 (E.D. Pa. 2002). For example, defendant argues that the Court erred by judging the unconscionability of

the Residency Agreement in light of the circumstances of the litigation instead of the circumstances at the time the Agreement was signed. Def. Memo. at 3-4. In support of this argument, defendant cites two cases, Parilla v. IAP Worldwide Services, 368 F.3d 269 (3d Cir. 2004) and Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), which the Court fully considered in its June 7, 2006 Order & Memorandum. See Ostroff, 2006 WL 1544390, at *4 (discussing Parilla), *6-8 (discussing Gilmer). “A motion for reconsideration will not be granted where it asks the Court to rethink what it had already thought through – rightly or wrongly.” Jurinko v. Med. Protective Co., 2006 WL 1791341, at *2 (E.D. Pa. June 23, 2006) (quoting Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993)). All of defendant’s arguments for reconsideration similarly re-hash and re-interpret arguments previously made in its motion to compel arbitration. These recycled arguments are not a basis for reconsidering the Court’s Memorandum & Order of June 6, 2006. Accordingly, defendant’s motion for reconsideration is denied.

BY THE COURT:

/s/ Honorable Jan E. DuBois
JAN E. DUBOIS, J.