

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2009-CP-27-331

Phillip Flexon, M.D.,

Plaintiff,

v.

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,

Defendants.

ORDER

This matter came before me for hearing in Beaufort on September 9, 2013, on Defendant Lifepoint Hospitals, Inc.'s (Lifepoint) Renewed Motion to Compel Arbitration and Defendant PHC-Jasper, Inc., d/b/a/ Coastal Carolina Medical Center's (CCMC) Motion for Relief Pursuant to Rule 60(b). Lifepoint was represented by Trudy Robertson, Esquire and Joseph Belton, Esquire. CCMC was represented by James Myrick, Esquire. Plaintiff was represented by William Harvey, Esquire. For the reasons set forth below, I find that the law of the case doctrine relative to the decision of the South Carolina Court of Appeals applies to these motions, and therefore these motions are denied.

A procedural history of this case is necessary for full consideration of these motions. This case was commenced with the filing of the Summons and Complaint on May 26, 2009. As alleged in the Complaint, this matter arises from an Employment Agreement (the Agreement) between the Plaintiff and Coastal Carolina Medical Center (CCMC) dated December 18, 2006. At the time the Agreement was negotiated and executed, CCMC was

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owned by Lifepoint. The Agreement contains a provision prohibiting assignment without mutual consent. It is alleged by the Plaintiff that, at the time the Agreement was being negotiated, Lifepoint was in active discussions with Defendant Tenet for the sale of the hospital, which Lifepoint failed to disclose to the Plaintiff. That sale occurred in June, 2007, at the very time that Plaintiff began his employment. Plaintiff alleges he would not have considered any employment relationship with Tenet, as Tenet had a very negative reputation to the Plaintiff as a hospital owner. After the sale of the hospital by Lifepoint to Tenet was completed, in July, 2007, CCMC (then owned by Tenet) presented Plaintiff with an Amendment to and Assignment of Physician Employment Agreement (the Assignment) which purported to assign the Employment Agreement to Tenet. Plaintiff refused to sign the Assignment, and in August 2008, delivered a formal notice of termination for cause, pursuant to the Agreement. This action followed.

In response to the Complaint, Defendant Tenet Healthsystems, Inc. filed a Motion to Dismiss alleging that the Complaint failed to state a cause of action. After a hearing on November 30, 2009, the Court denied this Motion to Dismiss.

On October 6, 2009, CCMC served Interrogatories and Requests for Production on the Plaintiff. Similarly Defendant Lifepoint served Interrogatories and Requests for Production upon the Plaintiff on April 16, 2010. Nowhere in any of these discovery requests, or in any correspondence or email communication before the court was there any mention that these discovery requests were in any way limited because of the affirmative defenses alleged by all defendants that this action was subject to mandatory arbitration. Plaintiff responded to the discovery requests of CCMC on April 19, 2010. Defendant Lifepoint



responded to Plaintiff's initial discovery requests on October 30, 2009, and on November 13, 2009, without any reservation or limitation.

On October 21, 2009, CCMC filed a Motion to Compel Arbitration pursuant to the terms of the Agreement. In support of this Motion, CCMC submitted a Memorandum in Support. Nowhere in this memorandum was there any mention of the desire or attempt to take the deposition of the Plaintiff, generally or with reservation of any rights. Prior to the hearing on this Motion to Compel Arbitration, neither counsel made any attempt to take the deposition of the Plaintiff.

A hearing was held on June 9, 2010 before Judge Perry Buckner. The parties submitted the transcript of this earlier hearing in connection with the present motions. It is noteworthy that, in the argument before Judge Buckner, counsel for CCMC made no mention that he needed, or wanted, to take the deposition of the Plaintiff, or that he had made any attempt to take the Plaintiff's deposition prior to the hearing.

At the time of the June 9, 2010 hearing, Defendant Lifepoint had not filed a motion to compel arbitration. However, counsel for Lifepoint acknowledged before Judge Buckner that any such motion would be identical to that of CCMC:

MS. ROBERTSON: Judge, if I may; I'm not presenting argument. This is not our motion today, but we pled this as an affirmative defense as well, that this matter should be submitted to arbitration. I think it goes to arbitration and it should. We support this motion. It goes as to all parties. If I have to separately move, I can do that, but...

THE COURT: I think you ought to do that, because obviously the plaintiff isn't on notice of that. I understand that's your position, but all I can deal with is this motion today. But I understand that. I think you need to file your own motion. And I realize you pled it. But he wasn't prepared to argue, except as against this motion today. It might be an identical argument, but....

MS. ROBERTSON: I think that likely it is. So I will make it.



One week later, on June 16, 2010, and two weeks before the ruling by Judge Buckner on the identical motion by CCMC, Lifepoint filed its Motion to Compel Arbitration. Significantly, Lifepoint's Motion states as follows:

This Motion will be based on the entire record in the within matter and any additional memorandum which may be filed hereafter. Defendant Lifepoint further, pursuant to Rule 10, South Carolina Rules of Civil Procedure, adopts by reference as if fully set forth herein, the Motion to Stay and for Order Compelling Arbitration and accompanying memorandum in support filed on October 23, 2009, by co-Defendant Coastal Carolina Medical Center, Inc....All of these causes of action, without doubt, arise out of or are related to Plaintiff's employment agreement. As such, this entire action should be subject to arbitration.

As with the motion by CCMC, and the arguments by both counsel at the hearing before Judge Buckner, the motion and supporting memorandum by Lifepoint did not mention the need or attempt to depose the Plaintiff as a condition to a ruling thereon.

By Order dated June 30, 2010, Judge Buckner denied the motion by Defendant CCMC to compel arbitration, stating in part as follows:

There is no language in the physician employment agreement at issue which mentions, conditions, requires, affects or involves interstate commerce. It is this critical fact which distinguishes this case from *Thornton* [*Thornton v. Trident Medical Center*, 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2004)]. Further, unlike *Thornton*, the parties to this employment agreement specifically agreed to litigate any dispute arising from, under or pursuant to this agreement in the courts of South Carolina. The employment agreement at issue is between a Hardeeville resident and a Hardeeville medical center to provide specialized care to patients of Lowcountry South Carolina.

On July 29, 2010, Defendant CCMC filed its Notice of Appeal to the South Carolina Court of Appeals. By reported decision dated March 7, 2012, the Court of Appeals affirmed the lower court's Order, stating in part as follows:



We agree with the trial court that the facts of this case are more akin to those in *Tahiri*. [*Arkansas Diagnostic Center, P.A. v. Tahiri*, 257 S.w.3d 884 (Ark. 2007)]. Under the facts surrounding this agreement, Flexon was a South Carolina resident, and Coastal hired him to provide medical services “at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina...and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time....” **We agree with the trial court’s finding that the Agreement and surrounding facts did not implicate interstate commerce. Therefore, the FAA did not apply to the Agreement.** See *Thornton*, 357 S.C. at 96, 592 S.E.2d at 52 (“Our courts consistently look to the essential character of the contract when applying the FAA.”). *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C. 83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012). (emphasis supplied)

On March 19, 2012, CCMC filed its Petition for Rehearing and Suggestion of Rehearing En Banc with the Court of Appeals. Significantly, in this Petition for Rehearing, CCMC argued as follows:

In his Complaint, Flexon alleges that, “In order to sign Exhibit 1 [the employment agreement],” he had to “discontinue, close and leave an established practice in Savannah, Georgia, where he had privileges at surgical hospitals.” (R. at 9.) The Complaint itself, therefore alleges substantial interstate activity as a consequence of the Agreement. Flexon alleges he lost referrals from Savannah doctors several months after he joined CCMC; if this is true, Flexon was receiving referrals across state lines in support of his practice at CCMC. (R. at 81) (“[A]fter the sale of the hospital to Tenet was announced in June...many Savannah doctors stopped referring patients” to Flexon.) During his employment with CCMC, Flexon alleged he took his more complicated surgical cases across state lines to Memorial Hospital in Savannah, Georgia (R. at 83) (“The availability of equipment became so unreliable that Plaintiff started taking him [sic] complicated cases to Memorial.”). Both performing surgery in Georgia and accepting referrals from Georgia physicians in furtherance of Flexon’s employment in South Carolina implicate interstate commerce. These facts contradict the Court’s understanding that Flexon’s employment was purely local in nature.

There is no mention that the Defendants’ motions, or the court’s consideration, was in any way hampered or impacted by the failure or inability to take the deposition of the Plaintiff.



By Order filed July 23, 2012, the Court of Appeals ruled "the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing."

On August 29, 2012, the Court of Appeals issued its Remittitur of this case to the Jasper Court of Common Pleas.

There is only one employment agreement in this case. It was negotiated and signed by Defendant Lifepoint. Although the Motion to Compel Arbitration was filed, argued and appealed by CCMC, as acknowledged by counsel for Lifepoint the issues and argument are identical for Lifepoint.

Lifepoint now points to statements made in the Plaintiff's deposition which was taken on April 30, 2013. Specifically, Lifepoint cites to the following testimony:

[t]he practice always existed in both states before and after. It really did. I mean, it was--you know-- it--by--by accident there's a river and a state line, but the practice always involved both states [Plaintiff's Depo. p. 269]. [The Plaintiff stated that he had] "plenty of patients coming from Georgia. [Plaintiff's Depo. p. 373] Lifepoint's Reply Memorandum at 4.

It is alleged in the Complaint that Plaintiff had a medical practice in Savannah, Georgia prior to the execution of the employment agreement. It is also alleged that the Plaintiff performed surgeries at Memorial Hospital in Savannah while employed by the Defendants. As acknowledged by CCMC in its appeal, the parties knew that Plaintiff was receiving referrals and other patients from the Savannah area while he was working at the Defendant's hospital. With these facts before it, the South Carolina Court of Appeals ruled that "We agree with the trial court's finding that the Agreement and the surrounding facts did



not implicate interstate commerce. Therefore, the FAA did not apply to the Agreement.”

Phillip Flexon v. PHC-Jasper, Inc., 399 S.C.83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012).

Under the law of the case doctrine, “a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.” *Judy v. Martin*, 381 S.C. 455, 458–59, 674 S.E.2d 151, 153 (2009) (citing *Bakala v. Bakala*, 352 S.C. 612, 632, 576 S.E.2d 156, 166 (2003)). “The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case.” *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957). *Sloan Const. Co., Inc. v. Southco Grassing, Inc.*, 395 S.C. 164, 169-70, 717 S.E.2d 603, 606 (2011).

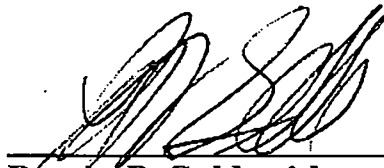
Lifepoint argues that the “law of the case doctrine” does not apply in this case because the facts established by the quoted portions of the Plaintiff’s deposition are substantially different from those that were before and considered by the circuit court and the Court of Appeals with regard to CCMC’s motion to compel arbitration, citing the case of *Nelson v. Charleston & W.C. Ry. Co.*, 231 S.C. 351, 98 S.E.2d 798 (1957)(“Of course, the doctrine of ‘the law of the case’ has no application where the facts relating to the question decided are substantially different....”). Similarly, in its present Motion for Relief pursuant to rule 60(b), CCMC argues that the quoted portions of the Plaintiff’s deposition create a situation where it would be inequitable to bind CCMC by the rulings on its earlier motion.

Having read the written submissions by the parties, and having heard extensive arguments from counsel, I find that the facts and testimony from the Plaintiff’s deposition argued by the Defendants herein are not substantially different than those before the court in

the prior rulings. Further , if the Defendants believe that the Plaintiff's deposition was necessary for a full review of this issue , they could have sought to present that contention to the lower and appellate courts when this issue was before them. Defendants could have taken a limited deposition of Plaintiff prior to the earlier rulings without invoking any issue of waiver or prejudice. That they did not then cannot now be grounds for reargument of issues about which the parties spent two years litigating in the Court of Appeals.

The Court of Appeals has decided that this "employment agreement and surrounding facts did not implicate interstate commerce. Therefore , the FAA did not apply to the Agreement. Phillip Flexon , M.D. v. PHC-Jasper , Inc. , 399 S.C. 83 , 89 , 731 S.C. 1 , 4 (Ct. App. 2012). The " surrounding facts " are not substantially different now than they were before the earlier courts. The decision of the Court of Appeals on the applicability of the FAA to this Agreement is the law of the case. Therefore CCMC's motion for relief from judgment under SCRCP 60 is denied as is Lifepoint's Motion To Compel Arbitration.

AND IT IS SO ORDERED



Brooks P. Goldsmith
Circuit Judge

Lancaster , S.C.

September 24 2013