STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO. 2013-CP-10-0504
JARED L. SLOVAN, DMD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**ORDER DENYING PLAINTIFF'S MOTION TO COMPEL ARBITRATION**
JAMES H. SEXTON, JR., DMD,	)	
	)	
Defendant.	)	

This matter is before the Court on Plaintiff's Motion to Compel Arbitration which was filed on June 28, 2013. Plaintiff attached as Exhibit A to the motion, pages numbered 1, 2, and 19 of the Asset Purchase Agreement ("APA") between the parties dated February 17, 2007. No affidavits were filed contemporaneously with Plaintiff's Motion to Compel Arbitration on June 28, 2013. On October 31, 2013, Plaintiff filed the Affidavit of Jared L. Slovan, DMD in opposition to Defendant's Motion for Partial Summary Judgment and in reply to Defendant's opposition to Plaintiff's Motion to Compel Arbitration. Plaintiff also filed the Affidavit of Ollie Stukes on November 1, 2013. Plaintiff's Memorandum in support of his Motion to Compel Arbitration, dated November 19, 2013, was sent to the Court via e-mail on November 19, 2013, and was mailed to the Clerk of Court for filing on that date. Plaintiff's Memorandum included an e-mail exchange between the Plaintiff and Ollie Stukes dated August 22, 2013, which was attached as Exhibit A.

On October 22, 2013, Defendant filed the Affidavit of James H. Sexton, Jr., DMD in opposition to Plaintiff's Motion to Compel Arbitration with Exhibit 1, which was represented to be a complete copy of the APA dated February 17, 2013, with Exhibits A, A-1, B, C, D, E, F and

G. The first page of Exhibit 1 to Sexton's affidavit contains only the words "ASSET PURCHASE AGREEMENT." Prior to the hearing on November 21, 2013, Defendant Sexton filed the Affidavit of H. Brewton Hagood dated November 20, 2013, attached to which were three exhibits. Exhibit 1 to Mr. Hagood's affidavit is a certified copy of the Summons and Complaint and the Affidavit of Jared L. Slovan dated January 15, 2013 with Exhibits, which were filed on January 28, 2013, when the case was commenced. The complete copy of the APA filed on January 28, 2013 with Dr. Slovan's affidavit included the first page with only the words "ASSET PURCHASE AGREEMENT," which appears to be identical to the first page which was attached as Exhibit 1 to Affidavit of James H. Sexton, Jr., DMD, in opposition to Plaintiff's Motion to Compel Arbitration filed on October 22, 2013. Defendant also filed a Memorandum of Law in Opposition to Plaintiff's Motion to Compel Arbitration prior to the hearing on November 21, 2013.

A hearing was held on Plaintiff's Motion to Compel Arbitration on November 21, 2013. William A. Scott, Esquire and M. Dawes Cooke, Jr., Esquire appeared on behalf of the Plaintiff. The Defendant was represented by Richard S. Rosen and H. Brewton Hagood. The Court heard arguments of counsel and took the motion under advisement.

CASE HISTORY PRIOR TO FILING MOTION TO COMPEL ARBITRATION

The Plaintiff, Jared L. Slovan, DMD commenced this action by the filing of Summons and Complaint on January 28, 2013. The Complaint alleged two cause of action. The first cause of action sought declaratory relief stating in Paragraph 19 of the Complaint that: "Plaintiff requests the Court to inquire into the facts and circumstances of this case and determine whether Defendant has violated the terms of the Restrictive Covenant Agreement and, if so, enjoin Defendant from practicing within the Restrictive Area". The second cause of action sought a

permanent and temporary restraining order and stating in paragraph 24 of the Complaint that: "The Plaintiff requests the Court to issue a temporary restraining order enjoining the Defendant from practicing within the Restrictive Area until such time as the Defendant complies with the Restrictive Covenant Agreement." Slovan also filed a two page Affidavit with his Complaint on January 28, 2013, attached to which was a copy of Exhibit "C," the Restrictive Covenant Agreement, and a complete copy of the APA entered into between Slovan and Sexton dated February 17, 2007. As noted above, a certified copy of the Summons and Complaint and attachments filed with the Charleston County Clerk of Court was attached as Exhibit 1 to the Affidavit of H. Brewton Hagood dated November 20, 2013. Slovan also filed a Motion for Temporary Restraining Order with the Summons and Complaint.

Prior to the January 29, 2013 hearing on Slovan's Motion for Temporary Restraining Order, Sexton filed his personal affidavit, to which a complete copy of the APA was attached as Exhibit 1, and the Affidavit of Elizabeth Strickland. Sexton also filed a Memorandum of Law in Opposition to Plaintiff's Motion for Temporary Restraining Order.

Slovan's Motion for Temporary Restraining Order was heard by Judge Kristi Lea Harrington on January 29, 2013. Judge Harrington issued an Order denying Slovan's Motion for Temporary Restraining Order on January 31, 2013.

Sexton filed an Answer and Counterclaim on March 8, 2013, in which he asserted six defenses and five Counterclaims for: Breach of Contract/Breach of Covenant of Good Faith and Fair Dealing; Breach of Contract Accompanied by a Fraudulent Act; Declaratory Judgment; Intentional Interference with Existing and/or Potential Contractual Relations; and Violation of Unfair Trade Practices Act. Sexton filed a Demand for Jury Trial on March 13, 2013.

Slovan's Answer to Sexton's Counterclaims was filed on April 9, 2013. Slovan's prayer for relief in this pleading included requests for declaratory relief, an injunction and "for judgment against the Defendant for actual, incidental and consequential damages on Dr. Slovan's causes of action, plus costs of this action and attorney's fees." Slovan also requested that Defendant's Counterclaims be dismissed with prejudice. Slovan's Answer to Sexton's Counterclaims makes no mention of the arbitration clause in the APA and no motion to dismiss or stay the case pending arbitration was filed.

A Joint Motion for Assignment to Business Court was submitted to me for consideration. I recommended approval to Chief Justice Jean Toal who signed the Order assigning the case to the Business Court on May 24, 2013. The record indicates that counsel for Slovan took the deposition of Sexton on June 11, 2013, and that counsel for Sexton took the deposition of Joann Anderson, an employee of Slovan's dental practice, on June 13, 2013. An unsuccessful attempt to mediate the case was conducted on June 18, 2013. A status conference was held before me on June 19, 2013. At the status conference counsel for Sexton requested a date certain trial and I informed counsel for the parties that the weeks of September 20, 2013 and November 18, 2013 were available. Counsel for Sexton informed my law clerk via e-mail on June 19, 2013 that either of those weeks would work with the Defendant. On June 24, 2013, my law clerk received an e-mail from counsel for Slovan stating that: "I cannot agree to a trial date in September and cannot agree to the Nov. 18, 2013 date at this time. I will continue to work with Brew to see if we can agree on discovery and a trial date."

The file indicates that a Consent Confidentiality Order was prepared and submitted to me as the presiding Judge of the Business Court and this Order was signed and filed on June 24, 2013.

On June 28, 2013, Slovan filed the Motion to Compel Arbitration of all claims in this litigation. Exhibit A to the Motion to Compel included pages numbered 1, 18 and 19 to the Asset Purchase Agreement but did not include the first page entitled "ASSET PURCHASE AGREEMENT" which has been attached to the Affidavits filed by Sexton in opposition to the motion to compel arbitration.

BASIS FOR PLAINTIFF'S MOTION TO COMPEL ARBITRATION

Plaintiff's argument in support of its Motion to Compel Arbitration as set forth in Plaintiff's Memorandum of Law In Support of Motion to Compel Arbitration and as argued at the hearing can be summarized as follows:

1. The matter sought to be arbitrated arises out of the Agreement between the parties;
2. The Court should compel the Defendant to uphold the Agreement and follow the arbitration provision;
3. The arbitration provision in the Agreement complies with the notice requirements of the South Carolina Uniform Arbitration Act;
4. The Court should follow South Carolina's longstanding philosophy of liberally favoring arbitration;
5. The Federal Arbitration Act preempts state law because the Agreement, in fact, involves and affects interstate commerce in that:
    a. Defendant advertised the sale of his dental practice outside of South Carolina;
    b. Plaintiff first saw Defendant's advertisement for the sale of the Defendant's Dental Practice while Plaintiff was residing in and physically located in Florida;
    c. Plaintiff traveled from Florida to South Carolina to visit Defendant's dental practice;
    d. Plaintiff resided in and was physically located in Florida when he entered into the Agreement; and
    e. Plaintiff moved from Florida to South Carolina for the sole purpose of purchasing Defendant's dental practice and performing under the Agreement.

6. Plaintiff did not waive his right to arbitrate by submitting to the jurisdiction of the Court and to the litigation process.

The factual basis for Plaintiff's claims is set forth in the Affidavits of Slovan and Ollie Stukes and the exhibits attached thereto. The Plaintiff also submitted excerpts of the depositions of Sexton and Joann Anderson and highlighted excerpts of the certain pages of the APA at the hearing.

BASIS FOR DEFENDANT'S OPPOSITION TO MOTION TO COMPEL ARBITRATION

Defendant's argument in opposition to Plaintiff's Motion to Compel Arbitration as set forth in Defendant's Memorandum of Law In Opposition to Compel Arbitration and in counsel's argument before the Court can be summarized as follows:

1. Plaintiff elected to invoke the jurisdiction of this Court when he commenced the case seeking a declaratory judgment and temporary and permanent injunctive relief and in the prayer for relief in his Answer to Defendant's Counterclaims without asserting that the case should be arbitrated so Defendant is entitled to have these issues heard by this Court;

2. The notice required by S.C. Code Sec. 15-48-10(a) does not appear on the first page of the APA;

3. The Federal Arbitration Act does not apply to the APA as this was a sale and/or lease of assets of a dental practice located solely in Mt. Pleasant, South Carolina and the ten mile restrictive covenant Plaintiff is seeking to enforce all related to conduct within Charleston County;

4. Slovan has waived the right to arbitrate by his conduct in the litigation in that:

    a. Slovan filed his Complaint asking the Court to investigate the facts and circumstances related to his request for declaratory and injunctive relief, Slovan did not raise arbitration in his Answer to the Sexton's Counterclaims and Slovan asked the Court to award Slovan damages in his prayer for relief;
    b. Slovan consented to assignment of the case to the Business Court after the issues were joined in the pleadings;
    c. Slovan sought the protection of the Court regarding documents being produced in discovery by entering into the Consent Protectve Order;

d. Slovan issued a Notice of Deposition to take Sexton's deposition pursuant to the South Carolina Rules of Civil Procedure;
e. Slovan participated in mediation pursuant to a mediation agreement under the South Carolina Rules of Civil Procedure;
f. Slovan participated in a status conference following the mediation and did not raise arbitration at the status conference;
g. Slovan issued discovery requests under the South Carolina Rules of Civil Procedure and received the benefit of the responses and production;
h. Slovan waited until Sexton's counsel had taken the deposition of a witness before moving to compel arbitration knowing that the arbitration provision he later sought to enforce only allows one deposition thereby seeking to avoid subjecting the Plaintiff to a deposition;
i. Slovan did not pursue arbitration within the time parameters contemplated in the arbitration provisions of the APA.

The factual basis for Defendant's opposition is set forth in the Affidavits of James H. Sexton, Jr. DMD and H. Brewton Hagood and the exhibits thereto which were filed in opposition to Plaintiff's Motion to Compel Arbitration.

LEGAL ANALYSIS

I. Does the Notice Required by S.C. Code Sec. 15-48-10(a) appear on the first page of the Asset Purchase Agreement?

A complete copy of the APA was attached as Exhibit 1 to the Affidavit of James H. Sexton, Jr., DMD on October 22, 2013. The first page of this document is the title page which only contains the words "ASSET PURCHASE AGREEMENT." The notice required by Section 15-48-10(a), which is to be typed in underlined capital letters or prominently stamped on the first page of the contract, does not appear on this page. It is undisputed that the required language does appear on the page following the title page of the Asset Purchase Agreement. The title page was not included with the excerpts from the Asset Purchase Agreement which Slovan attached as Exhibit A to Plaintiff's Motion to Compel Arbitration, but the title page was included with the excerpts to the Asset Purchase Agreement which counsel for Slovan provided to the Court at the hearing on the Motion.

Slovan's position is that the title page is not the first page of the contract. In support of his argument on this issue, Slovan attached an e-mail exchange between Slovan and Ollie Stukes on August 22, 2013 as Exhibit A to Plaintiff's Memorandum In Support of Plaintiff's Motion To Compel Arbitration. In the e-mail from Slovan to Stukes on August 22, 2013, which appears at the bottom of Exhibit A, Slovan states that: "... It appears that everyone except me feels that it is on the second page, and thus unenforceable. They say the first page says 'ASSET PURCHASE AGREEMENT.'" The reply e-mail from Ollie Stukes states that: "We have never had this problem before!! The "ASSET PURCHASE AGREEMENT' is the title of the 'book' NOT the not the first page of the Agreement".

Thus the issue before the Court is whether the title page can be ignored when construing the notice requirement of Section 15-48-10(a) of the Code of Laws of South Carolina. The South Carolina Court of Appeals considered a very similar argument in Richland Horizontal Prop. Regime Homeowners Ass'n, Inc. v. Sky Green Holding, Inc., 392 S.C. 194, 196-97, 708 S.E. 2d 225, 226-227 (Ct. App. 2011), reh'g denied (April 21, 2011). In that case, the defendant argued that the Master Deed in question contained a cover page and that the second page was actually the first page. See id. The Court of Appeals rejected this argument despite the fact that the page following the title page stated that: "[t]his is the first page of the Master Deed for the Richland Horizontal Property Regime. In the event other pages including but not limited to cover pages, indexes, or tables of contents are placed in front of this page, those pages shall not be deemed the first page. This page and this page only shall be deemed the first page of the Master Deed for all legal purposes." Id. The Court of Appeals rejected this argument and quoting Black's Law Dictionary 635 (6th Ed. 1990), stated that "[t]he term 'first' is defined as preceding all other pages." Id.

I, therefore, find that the language required by Section 15-48-10(a), as interpreted by the South Carolina Court of Appeals, must appear on the cover page or title page of the contract as this page precedes all other pages and the failure to include the required language on the title page to the APA renders the arbitration provision unenforceable under the South Carolina Uniform Arbitration Act.

II. Does the Federal Arbitration Act apply to the Asset Purchase Agreement under the facts in the case before the Court?

Slovan argues that even if the Court determines that that the arbitration clause in the APA is not enforceable under the South Carolina Arbitration Act, the APA involves interstate commerce and that the Federal Arbitration Act ("FAA") preempts the South Carolina Act. In order to determine if a transaction involves or affects interstate commerce thereby making the arbitration provision enforceable under the FAA, I am required to examine the agreement, the complaint and the surrounding facts. The facts pertinent to Slovan's argument on this issue are set forth in the affidavit of Slovan and Ollie Stukes which were filed in support of Plaintiff's Motion to Compel Arbitrations. The facts pertinent to Sexton's argument on this issue are set forth in Sexton's affidavits filed on October 22, 2013 and October 25, 2013.

A complete copy of the Asset Purchase Agreement and Exhibits dated February 17, 2007, is attached as Exhibit 1 to Sexton's Affidavit filed on October 22, 2013 in opposition to Plaintiff's Motion to Compel Arbitration. This document governs: (a) the terms of the sale of Sexton's dental practice, personal goodwill and related personal property and equipment located at 924 Tall Pine Road in Mt. Pleasant to Slovan; (b) the terms of Slovan's employment as a Provider to Sexton as Host for the period of July 1, 2007 until June 30, 2008; (c) the terms of Sexton's employment as a Provider to Slovan as Host for the period July 1, 2008 until June 30,

2013; (d) Slovan's lease of the premises from Sexton following a closing on the sale on June 30, 2008; and (e) the terms of a Restrictive Covenant Agreement.

The transaction was completed in several steps. Pursuant to paragraph 4 of the APA, Plaintiff Slovan paid a $15,000.00 earnest money deposit on the Signature Date of February 17, 2007. A second payment of $60,000.00 was to be paid within 60 days following the date Slovan acquired his license to practice dentistry in South Carolina. Slovan worked as an employee of the dental practice owned by Sexton from July 1, 2007 until June 30, 2008. The parties agreed that a closing on the transaction would take place on or before July 1, 2008 and a June 30, 2008 closing date was eventually established at which time the balance of the $846,400.00 purchase price was paid. The assets purchased by Slovan and the premises leased by Slovan were all located at 924 Tall Pine Road in Mt. Pleasant. (Sexton 10/22/13 Affidavit, para. 5)

Upon the closing on June 30, 2008, Sexton became an employee of the dental practice sold to Slovan pursuant to a Provider Agreement which was attached as Exhibit D to the APA. Under the Provider Agreement, Slovan was the "Host" and Sexton was the "Provider". (Sexton 10/25/13 Affidavit, para. 8) A "Non-Termination Period" of 60 months (5 years) was established under paragraph 10 during which Slovan as "Host" could not unilaterally terminate the Provider Agreement unless certain specific events occurred such as the suspension of Sexton's dental license, failure to maintain insurance or treatment for mental illness. (Sexton 10/25/13 Affidavit, para. 15) Slovan has not alleged that any of the termination for cause events occurred.

Paragraph 3 A. of the Provider Agreement had initially been filled in to only allow Sexton to have access to the Premises for a minimum of 1.5 regularly scheduled, eight hour days per week, or a total of 72 days per year which was not acceptable to Sexton. (Sexton 10/25/13 Affidavit, para. 5) Exhibit "F" to the Asset Purchase Agreement entitled "ADDITIONAL

PROVISIONS AND MODIFICATIONS" is where changes to the agreement were to be made and the prefatory language reads as follows: "Any provisions set forth in the attached Asset Purchase Agreement and/or its exhibits which are inconsistent or contrary to the provisions set forth in this exhibit shall be void and have no effect. All other terms shall remain in full force and effect." Since Sexton was not agreeable to the numbers which had been filled in Paragraph 3 A of the Provider Agreement, Sexton added the following handwritten provision:

> 4. Reference page 27-Provider shall have access to treat patients of the practice for a minimum of 3 5hr days per week or total of 144 days per year. (Sexton 10/22/13 Affidavit, para. 8)

Up until September of 2012, Slovan had honored the provisions of the above paragraph and Sexton's work schedule from January 1, 2012 through October of 2012 had been 8am until noon on Mondays, 8am until 5:30 on Tuesdays and 8am until 1pm on Thursdays. (Sexton 10/25/13 Affidavit, para. 11) Dr. Slovan did not work on Tuesdays so Dr. Sexton was the only dentist at the practice on that day and patients who preferred to see Dr. Sexton had been scheduling their appointments on Tuesdays.

In October 2012, Slovan unilaterally cut Sexton's access to treat patients from 3 five hour days per week as called for in paragraph 4 of Exhibit F to the APA to 2 five hour days and misrepresented Sexton's availability to treat patients on the two days Sexton was there. (Sexton 10/25/13 Affidavit, para. 13). Sexton informed Slovan this was in violation of the Provider Agreement as modified by Exhibit F to the APA. (Sexton 10/25/13 Affidavit, para. 14 and Exhibit 3 thereto) Slovan refused to allow Sexton to work the 3 five hour days provided for in paragraph 4 of Exhibit F to the APA. Slovan states under oath in paragraph 28 of his affidavit that Sexton never requested orally or in writing to work more than two days or more than the hours Slovan asked him to work. In an e-mail exchange between Slovan and his consultant on

October 18, 2012 attached as Exhibit 3 to the Affidavit of H. Brewton Hagood, Slovan reported that Sexton was upset at the closing of the office on Tuesdays and that he asked to work more hours on the days Slovan would allow him to work to make up for the lost time.

Paragraph 10 B. of the Provider Agreement states that: "Should Host, without Cause seek to terminate this Provider Agreement before the end of the Non-Termination Period, then Host shall be considered in default of this Provider Agreement, and in that event the Restrictive Covenant described in 'Exhibit C' shall be considered null and void". Sexton informed Slovan, by a letter from Sexton's attorney on January 3, 2013, that Slovan's material breach of the Provider Agreement constituted a termination of the Agreement and that Sexton would no longer practice dentistry at the practice except to complete work on patients of the practice which had already been scheduled. (Sexton 10/25/13 Affidavit, para. 17).

Slovan's affidavit on the involving or affecting interstate commerce issue focuses upon the facts that the sale of Sexton's dental practice was advertised on the internet, that he was in Florida when he learned of that Sexton's dental practice was being offered for sale, that he traveled from Florida to South Carolina to visit the practice and that he moved from Florida to South Carolina to begin working for Sexton.

The decision by the South Carolina Supreme Court in Bradley v. Brentwood Homes, 398 S.C. 447, 730 S.E.2d 312 (2012) provides guidance to the Court as to how the APA and the surrounding facts should be analyzed to determine if interstate commerce is involved or affected. The dispute in the Bradley case was construction defect claim arising out of the sale of a completed home. Brentwood Homes conceded that the Home Purchase Agreement did not meet the technical requirements of the South Carolina Uniform Arbitration Act. The Court examined the essential character of the contract, the Complaint, and the surrounding facts. Brentwood

argued that the Home Purchase Agreement involved interstate commerce because material to construct the home came from outside of South Carolina, that out of state subcontractors and suppliers were used, that warranty claims were required to be presented to a national warranty company with an office in Georgia and that financing to purchase the home was from a North Carolina lender. The Supreme Court noted that it has adhered to the view that the development of real estate is an inherently intrastate transaction citing its decision in Zabinsky v. Bright Acres Assoc., 343 S.C. 580, 580 at 595, 553 W.E.2d 110 at 117-18. The Court looked to decisions of other jurisdictions and relied on the case of Saneii v. Robards, 289 F.Supp. 2d 855 (W.D.Ky. 2003), holding that "a residential real estate contract does not evidence or involve interstate commerce." Id. at 860. The citizenship of the parties or their movements to or from the state were determined to be incidental to the underlying real estate transaction. Applying the analysis utilized in other jurisdictions, the South Carolina Supreme Court determined that none of the factors relied upon by Brentwood such as out of state financing and a national warranty company were sufficient evidence that the transaction involved interstate commerce. See Brentwood, 398 S.C. 447, 730 S.E.2d 312.

In support of his argument, Slovan relies primarily on the decision of the Court of Appeals in Thornton v. Trident Medical Center, LLC, 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003). In Thornton, the Court of Appeals found the basis for interstate commerce for purposes of the Federal Arbitration Act ("FAA") after interpreting the contractual agreement at issue. Id. at 96, 592 S.E.2d at 52 ("Our courts consistently look to the essential character of the contract when applying the FAA."). While Thornton involved a physician relocating from another state to South Carolina, the agreement at issue in Thornton was in essence a recruitment agreement. The Court noted that "*the subject matter of the contract clearly extends beyond Thornton's*

obligation to provide medical services in South Carolina." Id. (emphasis added). In support of its interpretation of the agreement, the Court observed that:

> The contract recites that Thornton will be compensated for expenses incurred in moving his personal effects and household furnishings to South Carolina. Thornton accepted money to defray the cost of the move and agreed to repay these relocation expenses if he failed to maintain his practice in Charleston for four years. The contract terms provided for Trident's payment of money to induce the relocation and Thornton's promise to repay the money should he fail to perform fully under the contract. By the terms of the recruiting agreement, Thornton was obligated to relocate his practice from Michigan to South Carolina. Trident, in turn, was obligated to reimburse Thornton for expenses incurred in the transfer of his practice across state lines.

Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct. App. 2003). Unlike Thornton, the APA between Slovan and Sexton was not the recruitment of an already licensed physician practicing in one state to another state. Slovan was not licensed in another state when the APA was signed as he was still attending dental school. Sexton did not recruit Slovan to come to South Carolina and did not pay his moving expense to relocate to South Carolina. Rather, the APA contemplates the sale of dental equipment, the lease of the dental office and personal property entirely within the State of South Carolina. The subject matter of the contract does not extend beyond the sale of intrastate business, employment solely within this state, and the lease of in-state premises. The fact Slovan, the ultimate purchaser, was from another state, is an incidental fact which does not change the intrastate nature of the APA under the relevant analysis under the FAA.

The decision of the South Carolina Court of Appeals in Flexon v. PHC-Jasper, Inc., 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012) also provides guidance to this Court as to how the employment aspect of the APA in this case should be analyzed with regard to the affecting or involving interstate commerce test. Flexon was a resident of Hardeeville, SC, licensed to

practice medicine in South Carolina and Georgia. The Physician Employment Agreement under review by the Court in the Flexon case provided that Flexon would practice for five years at the Coastal Carolina Medical Center in Jasper County. Flexon alleged that PHC refused to honor commitments it made to Flexon when he started work in March of 2007 and that the parent company of PHC sold PHC and Coastal Carolina Medical Center to Tenet in June of 2007. In July of 2007, Tenet presented Flexon with an Amendment and Assignment purported to assign the Physician Employment Agreement to Tenet. Flexon refused to sign the Amendment and in August of 2008, Flexon delivered a formal notice of termination of the Agreement for cause. In May of 2009, Flexon received a letter from Tenet claiming that he owed Tenet more than $725,000 and that he must cease his practice of medicine in Savannah, Georgia. Flexon sued Tenet and Coastal filed a motion to compel arbitration. The trial court denied the motion to compel arbitration finding that the Agreement "calls for local medical services to be performed by a Hardeeville resident at a medical facility located in Hardeeville." According to the decision of the Court of Appeals, Judge Buckner rejected the argument by Coastal that the Agreement and its surrounding circumstances involved interstate commerce under the precedent set forth in Thornton v. Trident. The South Carolina Court of Appeals affirmed Judge Buckner's reliance on the analysis of the Arkansas Supreme Court in Arkansas Diagnostic Center, P.A v. Tahiri, 370 Ark. 157, 257 S.W. 3d 884, 892 (2007) in which the Court found that interstate commerce was not involved and the FAA did not apply to the employment contract at issue in the case.

To apply the analysis of the South Carolina Supreme Court in Bradley v. Brentwood Homes, and the analysis of the Court of Appeals in Flexon v. PHC-Jasper, the Court must look to the underlying nature of the APA between Slovan and Sexton. These factors are addressed in paragraphs 5 and 6 of Sexton's 10/22/13 Affidavit. The assets purchased which were described

in paragraphs 1 and 3 of the APA and listed in the Exhibits were identified as equipment, office furniture and fixtures, office and clinical supplies which were all located within the dental office located at 924 Tall Pine Road in Mt. Pleasant. A component of the transaction was a lease with an option to purchase the portion of the building where Sexton operated his dental practice. The personal goodwill included in the sale all relate to the operation of the dental practice at one location in South Carolina. Sexton's employment of Slovan for the first year and Slovan's employment of Sexton for the next five years was all related to the sole location of the dental practice. The non-solicitation of employees or patients only related to the dental practice at this one location. The conduct complained of by both Slovan and Sexton all involves the dental practice at this one location and the Restrictive Covenant which Slovan seeks to enforce is limited to a 10 mile radius of the dental practice.

I find that the sale and lease of assets and the employment contract contained in the Provider Agreement to the Asset Purchase Agreement between Slovan and Sexton was an intrastate transaction and does not involve or affect interstate commerce so as to bring the transaction within the FAA. Therefore, Plaintiff's Motion to Compel Arbitration is denied.

III. <u>Has Slovan waived the right to arbitrate filing his Complaint invoking the jurisdiction of the Court and by his conduct in the litigation?</u>

Sexton contends in his opposition to the Motion to Compel Arbitration that even if Slovan may have had a right to arbitrate, Slovan has acted inconsistently with the alleged right to arbitrate and has waived the right to arbitrate by virtue his conduct during the litigation. Sexton referred the Court to the following fact's in support of the argument on waiver: (a) Slovan did not raise arbitration in his Answer to Sexton's Counterclaims and, in fact, asked the Court to award him damages in his prayer for relief; (b) Slovan consented to the assignment of the case to the Business Court after the issues were joined in the pleadings; (c) Slovan sought the

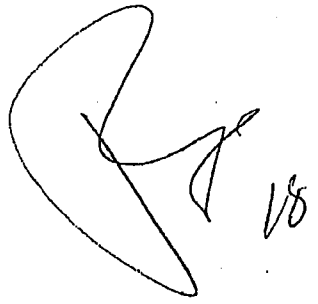
protection of the Court regarding documents being produced in discovery by entering into the Consent Protective Order; (d) Slovan issued a Notice to Take the Deposition of Sexton pursuant to the South Carolina Rules of Civil Procedure; (e) Slovan participated in mediation pursuant to a Mediation Agreement under the South Carolina Rules of Civil Procedure; (f) Slovan issued discovery requests under the South Carolina Rules of Civil Procedure and received the benefit of the responses and production; (g) Slovan participated in a status conference with the Court to discuss scheduling following the unsuccessful mediation and did not raise arbitration at the status conference; (h) Slovan waited until Sexton's counsel had taken the deposition of employee Joann Anderson before Moving to Compel Arbitration knowing that the arbitration provision in the APA limited each party to one deposition; and (i) Slovan did not pursue arbitration within the time parameters contemplated in the arbitration provisions in the APA.

Slovan contends that he has not waived the right to arbitrate the dispute and argued at the hearing on the motion that all factual disputes should be determined by an arbitrator.

The Court considered the following precedent on the issue of waiver of the right to arbitrate: Nicholas v. KBR, Inc., 2009 WL 998974, *2 (5th Cir. 2009) ("Although waiver of arbitration is a disfavored finding, '[w]aiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.' A party generally invokes the judicial process by initially pursuing litigation of claims then reversing course and attempting to arbitrate those claims."); Hooper v. Advance America, 2008 WL 4371360, *4 (W.D. Mo. 2008) (in ruling that defendant waived its right to arbitrate by seeking to compel arbitration after the Court refused to grant its motion to dismiss the entire dispute primarily on the merits, the Court noted that "[p]arties must not be allowed to call upon Court resources to resolve substantive issues then, dissatisfied with the Court's resolution, reopen

the same issues before an arbitrator"); Lewallen v. Green Tree Servicing, L.L.C., 487 F.3d 1085 (8th Cir. 2007) (party who sought to have the court "dispose of [plaintiff's] claim on the merits" by way of a motion to dismiss acted inconsistently with the right to arbitrate); Major Cadillac, Inc. v. General Motors Corp., 280 S.W.3d 717 (Mo. Ct. App. 2009) (defendant waived right to arbitrate when it raised defenses to the claims and filed a motion to dismiss the case with prejudice amounting to a request for adjudication on the merits).

I find that Slovan's engagement in discovery and delay in seeking arbitration has prejudiced Sexton and constitutes a waiver of Slovan's contractual right to now seek arbitration. Slovan's elected to file the suit for declaratory and injunctive relief and to seek a temporary restraining order from this Court and sought affirmative relief in his Answer to Defendant's Counterclaim. This has required Sexton to incur significant costs and expenses which he would not have necessarily incurred in arbitration. On this basis, Slovan's conduct in this case establishes his waiver of arbitration. See Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 551, 575 S.E.2d 74, 77 (Ct. App. 2003) ("we find evidence that Accent's continuation of discovery, rather than seeking arbitration in a timelier manner, prejudiced Evans by forcing her to incur discovery costs"). Similar to Evans, Slovan failed to timely seek protection or stay its civil action and engaged in discovery to his benefit. Accordingly, I find that Slovan has waived the right to arbitrate.



For the above stated reasons, Plaintiff's Motion to Compel Arbitration is hereby DENIED.

AND IT IS ORDERED.

Honorable Roger M. Young

Charleston, South Carolina

2/3/14, 2013