STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO. 2014-CP-07-2779
MARY BETH MARZULLI,	)	
Plaintiff,	)	ORDER
vs.	)	
TENET SOUTH CAROLINA, INC., HILTON HEAD HEALTH SYSTEM, LP d/b/a HILTON HEAD REGIONAL MEDICAL CENTER, and TENET PHYSICIAN SERVICES–HILTON HEAD, INC.,	)	
Defendants.	)	

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This matter was before the Court on the Defendants' Motion to Compel Arbitration pursuant to the Federal Arbitration Act.[1] The Court received memoranda and supplemental memoranda, numerous affidavits and exhibits, and held two hearings. The matter was given considerable deliberation, and for the reasons detailed below, the Court denies Defendants' motion.

Factual Background

Plaintiff Marzulli is a physical therapist with over forty (40) years of professional experience. She specializes in pediatric physical therapy and treats children with special needs and disabilities. Marzulli obtained a Bachelor of Science Degree from the University of Alabama in Birmingham and studied at the graduate level. She was issued a South Carolina license to perform her work on September 14, 2011, and has been licensed in other states. She has held several positions, including the Chief Physical Therapist at Ashton Hall Nursing Home in

[1] The Defendants' Motion asserts arbitration only on federal grounds. Defendants also moved pursuant to SCRCP 12 (b)(1) and (6) but effectively abandoned that motion. Therefore, that motion is denied.

Philadelphia, at Imperial Point Hospital in Fort Lauderdale, Fla., and at Carraway Methodist Medical Center in Birmingham, Alabama. Marzulli also worked, among many other positions, with Mercy Catholic Medical Center Foundation and the Shiners Hospital for Children. She has held teaching positions and clinical teaching appointments as well. She has served on the Board of Directors of the American Hippotherapy Association and Quest Therapeutic Services. Marzulli has been a member of the American Physical Therapy Association, and has been published. The Plaintiff is a care-giver to young people afflicted with significant physical afflictions, including neurological maladies.

Hilton Head Regional Medical Center (a/k/a Hilton Head Hospital) is a local hospital which markets itself as a regional medical center serving and a part of the local Hilton Head Island community.

According to the Second Affidavit of Darlene Nester, the Chief Human Resources Officer for Hilton Head Hospital, Mary Beth Marzulli's first date of employment was September 19, 2011. Marzulli was hired as a pediatric physical therapist. She had purchased a home in South Carolina in 2008, and that home has become her permanent residence. The Plaintiff began leasing a second home in Hilton Head establishing two residences in South Carolina on September 5, 2011. She obtained her South Carolina physical therapist license on September 14, 2011. Marzulli got a South Carolina driver's license on September 16, 2011.

Well after her start date, in October 2011, the Plaintiff was required to sign several administrative documents at a required orientation. One of the documents was titled an "*Acknowledgement.*"[2] Upon receiving the *Acknowledgement* the Plaintiff was told by the Defendants' human resource representative that the document simply acknowledged that she had

[2] The Court notes that the document at issue titled, "*Acknowledgement*" contained an incorrect spelling of the word "Acknowledgment" in its title.

received the employee handbook. However, the Plaintiff did not receive the employee handbook contemporaneously with the *Acknowledgement.* Buried nondescriptly within the fourth of five paragraphs in this single spaced, small font document is the disputed language attempting to impose arbitration. The document was signed October 10, 2011.

Mrs. Marzulli's employment as a physical therapist consisted of her treating local patients at a local hospital by providing them with one on one physical therapy services.

The Plaintiff's theory in this defamation action is that Defendants committed a false accusation that a 40-year physical therapist veteran, married professional, sexually and physically abused a minor of the same sex, a patient who had special needs.

Standard of Review

Both federal and state policy favors arbitrating disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 471 S.E.2d 135 (1995) ("The policy of the United States and this State is to favor arbitration of disputes.") Despite this expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration. *Volt Inf. Scis. Inc. v. Board of Trs.*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d. 488 (1989). Stated simply, every purported arbitration agreement is not enforceable.

"[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.*, at 478, 109 S.Ct. at 1255. While the federal policy favoring arbitration as expressed in the Federal Arbitration Act is now binding in state courts and supersedes inconsistent state law, the act nonetheless requires *a contract evidencing a transaction involving commerce* to settle a controversy by arbitration.

Zabinsksi v. Bright Acres Associates, 346 S.C. 580, 553 S.E. 2d 110 (2001), citing *Allied-Bruce Terminix Co. V. Dobson,* 513 U.S. 265, 115 S.CT. 834, 130 L.Ed.2d 753 (1995).

Analysis

A. Ms. Marzulli's work did not require her to perform actions related to interstate commerce.

Mrs. Marzulli was a South Carolina resident and her employment as a physical therapist consisted of her treating local patients at a local hospital by providing them with one on one physical therapy services. The Defendants ask the court to rule that all employment in the health care field involves interstate commerce. However, Defendants' position is without any support of the jurisprudence of South Carolina. Further, it is in direct contradiction with *Flexon v. PHC ("Flexon I")*[3]

In determining whether a transaction is inside or outside of the scope of the FAA, the court determines "whether *the contract* require[s] [a party] to administer anything related to interstate commerce." *Thornton v. Trident Medical Center, LLC*, 357 S.C. 91, 96, 592 S.E.2d 50 (S.C. App. 2003) (quoting *Mathews v. Fluor Corp.*, 312 S.C. 404, 407, 440 SE2d 880, 882 (2001))(emphasis added). Pursuant to the Federal Arbitration Act, "A written provision in any *contract* evidencing a transaction involving commerce to settle by arbitration *a controversy thereafter arising out of such [ ]contract* . . . shall be valid, irrevocable and enforceable, save

[3] Defendants further argue that, because the Plaintiff at times used "props" or devices that are shipped from across state lines while providing physical therapy to patients, her work involved in interstate commerce. This argument is without merit. Under this same theory, a South Carolina History teacher, teaching South Carolina students in a South Carolina classroom would be engaging in interstate commerce when he used chalk that was manufactured in another State to write on a chalkboard that was manufactured outside of South Carolina. If the Court were to accept the Defendant's argument, it would be hard to imagine any work which could exist that would not involve interstate commerce. Likewise, Defendant's argue that, because some of the Plaintiff's patients' bills were at times paid by out-of-state insurers or Medicare or Medicaid, that her work involved interstate commerce. This argument is unpersuasive. Even if the Court assumes *per arguendo* that the act of paying a bill across State lines involves interstate commerce, the Plaintiff did not personally submit bills to insurance providers for payment. That job would be a task assigned to other employees of the Defendant. The Plaintiff's job was to provide a medical service, physical therapy, to local patients.

upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. 2 (2009) (emphasis added). Courts must "focus upon what the terms of *the contract* specifically require for performance in determining whether interstate commerce is involved. Our courts consistently look to the essential character of *the contract* when applying the FAA." *Thornton v. Trident Medical Center, LLC*, 357 S.C. 91, 96, 592 S.E.2d 50 (S.C. App. 2003) (emphasis added). "General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

Compare the *Acknowledgement* signed by Ms. Marzulli to the recruiting agreement and employment contract signed by the Plaintiff in *Thornton*. In *Thornton* the Court looked to what the contract between the parties required the parties to *perform*. The Court noted in *Thornton* that the entire contract that was subject to the arbitration provision "was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines." *Thornton*, 357 S.C. at 98. Indeed, in *Thornton* "[t]he express purpose of the recruiting agreement was to provide a monetary incentive, consisting of multiple related promises, to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina." *Id.* Again, the entire agreement in Thornton, the recruiting agreement and contract for employment which was part and parcel to it, was the *contract* that the court interpreted.

Here, the only purported contract for the Court to consider is the "*Acknowledgement*." The terms of the *Acknowledgement* have nothing to do with Mrs. Marzulli's move to South Carolina.[4] She signed the *Acknowledgement* as a South Carolina resident.

[4] Paragraph four of the *Acknowledgement*, beginning on the final word of line two of the paragraph states, in small, single spaced nondescript font, "I hereby voluntarily agree to use the Company's Fair Treatment Process and to submit to final and binding arbitration of any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet."

Also compare the nature of Mrs. Marzulli's work to the work of the Plaintiff in *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E. 2d 839 (Ct. App. 1999). In that case, the Plaintiff was required to attend out-of-state conferences, participated in conferences with the Defendant's office in Minnesota, reviewed claims from out-of-state providers and specialty providers located in North Carolina and Georgia, and participated in Sales Presentations in South Carolina and Georgia, and, reviewed proposals from out-of-state medical and ancillary service providers. The court found those activities provided "sufficient evidence to invoke the FAA." Here, Ms. Marzulli's work had no similar requirements. She was a local physical therapist providing physical therapy services to local patients at a local facility.

South Carolina jurisprudence is dispositive to the issue. *Flexon v. PHC-Jasper, Inc.*, a 2012 Court of Appeals decision, dictates that Defendants' motion to compel arbitration be denied. Flexon was a South Carolina resident licensed to practice medicine as a physician. He was to practice at sites in Jasper County. There was an arbitration agreement. The trial court found the employment agreement called for local medical services to be performed at a medical facility in Hardeeville, and as such denied the motion to compel arbitration since it didn't involve interstate commerce. *See Flexon, supra*, 309 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012).

Flexon is analytically analogous to the present case before the Court. Here, the Plaintiff provided physical therapy services exclusively in South Carolina. She did not travel out of state for her work. (By contradistinction, *see Lucey v. Meyer*, 201 S.C.C 122, 736 S.E. 2d 274 (Ct. App. 2012), in which employment *contract* detailed at least one specific matter which required out of state travel, triggering the commerce clause.)

Flexon resurfaced to the Court of Appeals and a different panel ruled again in favor of the physician. *Flexon v. PHC-Jasper, Inc.*, Op. No. 5336, Filed July 29, 2015 ("*Flexon II*"). Thus, this case is binding and controlling jurisprudence.

The Court also looks to the terms of the "*Acknowledgement*" to determine whether *it* requires Mrs. Marzulli to administer anything related to interstate commerce. Here, the "*contract*" that the court must examine is the "*Acknowledgement.*" Thus, the Court must determine whether its terms require Ms. Marzulli to specifically perform anything related to interstate commerce. See *Thornton, supra.* No other contemporaneous or subsequent contract exists. The FAA only requires arbitration of "*a controversy thereafter arising out of such contract,*" not controversies or acts arising before the contract was entered into. 9 U.S.C. 2 (2009).

Ms. Marzulli was a South Carolina resident when she signed the "*Acknowledgement*" for nearly one month. This dispels and relevancy to the fact that she established permanent residency in South Carolina approximately one month before signing the alleged contract at issue. Her act of signing the *Acknowledgement* on October 10, 2011 as a South Carolina resident in no way evidences the involvement of interstate commerce. Further, an agreement to arbitrate—the only purported contract at issue here—standing alone does not involve interstate commerce.

Finally, even if the Court looks beyond the four corners of the *Acknowledgement* to determine what the agreement required her to perform, as detailed above, Marzulli's work did not involve interstate commerce. Marzulli performed all her work in South Carolina, it did not involve interstate commerce and thus, arbitration should not be compelled. Given that

Defendants move only on the basis of the federal act, the South Carolina Act is inapplicable as well.[5]

B. The "Agreement" is Unconscionable

The Plaintiff began leasing a second home in Hilton Head establishing two residences in South Carolina on September 5, 2011. She obtained her South Carolina physical therapist license on September 14, 2011. Marzulli got a South Carolina driver's license on September 16, 2011. According to Tenet's records, the Plaintiff was to begin work on September 19, 2011 and for her first pay period, she received her first direct deposit from Defendants on October 21, 2011. She unquestionably was a South Carolina resident no later than September 16, 2011, and began employment prior to the document at issue was required to be signed by her.

Marzulli began work at Tenet weeks before October 11, 2011, the date she was required to sign the "*Acknowledgement*", requiring Ms. Marzulli to submit "any and all claims and disputes that are related in any way to [her] employment or the termination of [her] employment with Tenet." She had no meaningful choice in the matter; she had no negotiating leverage. There was no bargaining for the clause.

General contract principles of state law demonstrate that the arbitration clause is not enforceable. *See Simpson, supra.* In that Marzulli had already established her residency in South Carolina and had in fact begun work before being required to sign the "*Acknowledgement*" at a subsequent orientation, the purported agreement lacks a component so axiomatic no citation is necessary–consideration. Without consideration, there can be no contract. Without a contract, arbitration cannot be compelled. Even if there were consideration, and there is not, the "agreement" is unconscionable.

[5] Further, the "*Acknowledgement*" signed by the Plaintiff does not meet the notice requirements of the South Carolina Uniform Arbitration Act, and was made a condition of employment, which also violates the SCUAA; Thus, under the SCUAA, the document titled "Acknowledgement" is unenforceable.

In determining unconscionability, the Court considers whether a contract provision is absent of meaningful choice and contains oppressive, one-sided terms.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *See Carlson v. General Motors Corp.*, 883 F. 2d 287 (4th Cr. 1989). In determining whether a contract was "tainted by an absence of meaningful choice," *Id.* at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; inclusion of the challenged clause; and the conspicuousness of the clause. *Id.* at 293.

Here, the alleged defamation is actionable per se, meaning that she suffered presumed damages; the Plaintiff is an individual, not a substantial business concern; she had no bargaining power as she had already begun work and was required to sign the agreement; the Defendants are very sophisticated business and health care companies; and the clause is unquestionably inconspicuous, buried in a document which is single-spaced in small font, which bears a misspelled title (that in no way gives notice of the substantive right that the Defendants argue the Plaintiff relinquished by signing the same). The Agreement was offered on a "take it or leave it" basis. The context of the inclusion of the clause and the circumstances of her being required to sign it disturb the court.

The terms of the agreement are oppressive and one-sided. They strip her right to a jury trial. According to the Defendant's arguments, it requires the Plaintiff to arbitrate a criminal act. The document also requires a "Fair Process" procedure that curiously, the Defendants did not employ in this matter. They seek to invoke one clause, the one concerning arbitration, while

eschewing the procedural mechanism supposedly designed to protect the process rights of the employee.

These factors in sum considered, the Court is convinced that the Plaintiff had no meaningful choice but to sign the document titled *Acknowledgement*. She had already begun her job. Additionally, the Defendants ask the court to enforce an agreement which, according to the Defendants, allows them to report the other bound party to law enforcement without probable cause, thereby filing a criminal "claim" against that party which would be subject to a jury trial, but which bars the Plaintiff from seeking redress by way of jury trial for that very act of unlawful reporting which may itself be a crime. Such terms patently are oppressive and one-sided.

C. The intentional tort of defamation is not contemplated by the "agreement."

Defamation is a false and defamatory statement about the plaintiff published by the defendant to others. It is an intentional tort. The cause of action in this case is not founded on employment or termination grounds; it is not a breach of contract action, discrimination suit or payment of wages claim. The defamation suit is not pendent to employment causes of action, as they often are in "shotgun" approaches to pleading numerous causes of actions. Instead, this intentional tort is not grounded upon employment issues. The alleged publication of the defamation was not made to individuals exclusively within the Plaintiff's employment, but to individuals outside of and unaffiliated with Plaintiff's employment. Consequently, the libel and slander are not "related" to her employment or termination. What is more, in South Carolina, commission of slander or libel is a violation of the criminal code. *See,* S.C. Code Ann. §16-7-150. One cannot consent to a criminal act, nor agree to arbitrate a criminal act. Utilizing contractual principles, it is difficult to see that a defamation claim would be contemplated and negotiated in this case.

There is a slim cache of legal authorities on the issue of whether the tort of defamation is contemplated by an arbitration agreement, but cases exist. The Second Circuit, under different facts, has found that defamation and related claims are not necessarily bound by arbitration provisions. *See, Coudert v. Paine Webber Jackson & Curtis*, 705 F. 2d 78 (1983); *McMahon v. RMS Electronics, Inc.*, 618 F. Supp. 189 (1985).

This court finds, holds and rules that the Defendant's Motion to Compel Arbitration is DENIED, consistent with the findings and conclusions above.

AND IT IS SO ORDERED.

Presiding Judge

October 22, 2015
Beaufort, South Carolina