STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
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COUNTY OF RICHLAND)	Civil Action No. 2017-CP-40-3750
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)	
Capital City OB-GYN Associates, P.A.,)	
)	
Plaintiff,)	
)	
vs.)	
)	
Medorizon, Inc.,)	**ORDER**
)	
Defendant.)	
)	
)	

This matter was before me for argument on January 8, 2018, on Defendant's Motion pursuant to Rule 12(b) SCRCP to dismiss the Plaintiff's Complaint and compel Arbitration. Present at the hearing on this matter were counsel for Plaintiff and for Defendant.

First, I address Defendant's position that a 90-day Notice of Intent to Pursue Arbitration clause bars Plaintiff's claims. The South Carolina Code of Laws prohibits any contract provision which shortens the time to bring suit as prescribed by the applicable statute of limitations. Section 15-3-140 provides that:

> No clause, provision or agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action, but the action may be brought notwithstanding such clause, provision or agreement if brought within the time prescribed by the statute of limitations in reference to like causes of action.

S.C. Code §15-3-140 (1962). South Carolina Courts have repeatedly interpreted this statute as barring *any* contract clause which would shorten the codified statute of limitations period. *See Barringer v. Fid. & Deposit Co. of Maryland*, 161 S.C. 4, 159 S.E. 373 (1931)(holding that a

provision in a contractor's bond, which had the effect of limiting the time for filing claims was in contravention of the statute of limitations, and was therefore ineffective); *see also Lyerly v. Am. Nat. Fire Ins. Co.*, 343 S.C. 401, 540 S.E.2d 469 (Ct. App. 2000)(holding that a suit limitations clause was unenforceable in light of the state statute invalidating suit limitations clauses for periods shorter than the statute of limitations).

In this instance, the Service Agreement's notice of intent to pursue arbitration provision would attempt to limit Plaintiff's ability to bring suite if notice is not given within 90 days following the date of the event giving rise to the dispute. This provision has the effect of shortening the period of time in which to bring suit, to a period shorter than the applicable statute of limitations, and would not even allow for a reasonable discovery period. South Carolina statutory and case law is clear that such a contract provision is unenforceable. As such, I find that the 90-day notice provision is unenforceable pursuant to S.C. Code §15-3-140, and such provision should not prevent Plaintiff from recovering damages caused by the Defendant. Further, that clause is in Paragraph 14 of the Service Agreement which is in direct conflict with Paragraph 21 as discussed below.

I also conclude that the venue selection provision within the arbitration clause of the Service Agreement (Paragraph 14) is unenforceable. South Carolina law applies to any disputes arising under the Service Agreement. Paragraphs 14 and 21 of the Service Agreement are in direct conflict with each other. Paragraph 14 provides that arbitration will be within 15 miles of the Defendant's principal place of business unless otherwise agreed upon by the parties and that Illinois law will apply. Alternatively, Paragraph 21 provides that South Carolina law will govern and jurisdiction will be in South Carolina. Paragraph 14's venue selection of Illinois is in conflict with the jurisdiction selection of South Carolina in Paragraph 21. Similarly, Paragraph

14's choice of Illinois law is incompatible with Paragraph 21's choice of South Carolina law. Additionally, Paragraph 21 is apparently a clause the parties negotiated for, as it stands in sharp contrast to the standard provisions found within Paragraph 14. In light of the conflicting choice of South Carolina law in Paragraph 21, the arbitration provision of Paragraph 14 cannot be compelled. Paragraph 14 is also in conflict with S.C. Code Ann. § 15-7-120(B) which provides:

> A provision in an arbitration agreement that arbitration proceedings must be held outside this State is not enforceable with respect to a cause of action, which, but for the arbitration agreement, is triable in the courts of this State. The enforceability of the remaining provisions of the arbitration agreement and the method of selecting a forum for the conduct of the arbitration proceedings is as provided in this title, the Federal Arbitration Act, and any applicable rules of arbitration.

S.C. Code Ann. § 15-7-120(B) (1995). The court in *Insurance Products* found that, by enacting S.C. Code Ann. § 15-7-120, the "legislature of South Carolina did not agree with the federal courts' favorable view of forum selection clauses and desired to insulate South Carolina litigants from their effect." *Ins. Prods. Mktg., Inc. v. Indianapolis Life Ins. Co.*, 176 F.Supp.2d 544, 550 (D.S.C.2001); *see also Spinks v. Krystal Co.*, No. 6:07-2619-HMH, 2007 WL 2822788 (D.S.C. Sept. 26, 2007).

Although, the South Carolina Court of Appeals held in *Tritech* that the FAA preempts S.C. Code §15-7-120 in certain circumstances, I find that the circumstances at issue in *Tritech*, are distinguishable from the facts of this case. *Tritech Electric, Inc., v. Frank M. Hall& Co.*, 343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2000). In this instance, S.C. Code §15-7-120 does not void the entire arbitration clause but rather the venue selection provision within the arbitration clause.

The possible application of the arbitration provision in that same conflicted Paragraph 14 raises the underlying issue of whether the Federal Arbitration Act would apply under any circumstances. While the Court recognizes the premise that the Act is liberally construed and

that arbitration is often favored over litigation that is only the beginning of any analysis. The Act, by its very terms, does not apply except to disputes arising in interstate commerce which is unclear in this case. The record reflects that Defendant's offices are in Illinois and that the Defendant agreed to help Plaintiff with its billings, all of which arise from services rendered in Columbia, South Carolina. The record is void of other evidence which would explain any interstate commerce connection. Further, Paragraph 21 of the contract addresses this issue specifically when it provides, "this Agreement shall be governed by the internal laws of the State of South Carolina, applicable to agreements made and to be performed entirely within such State,..." Since the parties agreed that the contract was to be construed as one involving intra-state services only, this Court is hesitant to reach the exact contrary result in considering this Motion. I do not conclude on the record before me that the Federal Arbitration Act would apply in this case.

Finally, in consideration of the general principles surrounding forum and venue selection clauses, it would be nonsensical, to force the parties to physically arbitrate in Illinois when: (1) the contract and any disputes arising out of the contract are to be governed by South Carolina law, (2) the contract was for services to be rendered in South Carolina, (3) the Defendant approached and contracted with a South Carolina business; and (4) the entire transaction has no connection to Illinois other than the fact that the Defendant, which sought out business in South Carolina, was incorporated in Illinois. To require the parties to arbitrate in Illinois would, pursuant to Paragraph 21, require Illinois arbitrators to apply South Carolina law. This is neither efficient nor practicable.

Based on the South Carolina code provision §15-7-120, South Carolina's general disfavor of forum selection provisions, and the specific bargained for requirements of Paragraph 21 within the contract, South Carolina law should govern.

Defendant's Motion is denied.

AND IT IS SO ORDERED.

L. Casey Manning
Judge, Fifth Judicial Circuit

Columbia, South Carolina

April ____, 2018

Richland Common Pleas

Case Caption: Capital City OB GYN Associates P A vs Medorizon Inc

Case Number: 2017CP4003750

Type: Order/Alternative Dispute Resolution

So Ordered

s/L. Casey Manning, 2061