UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE: COAL CLINICS, Inc., Debtor.	Case No. 98-32074 Chapter 7
SUSAN L. SOWELL, Trustee in Bankruptcy for COAL CLINICS INC., Plaintiff, vs. MARBEE GINGRAS and GINGRAS FAMILY LIMITED PARTNERSHIP, Defendant.	Adversary Proceeding No. 99-3016
RICHARD GINGRAS, Plaintiff, vs. SUSAN L. SOWELL, Trustee in Bankruptcy for COAL CLINICS, INC., Defendant.	Adversary Proceeding No. 98-3170
NOVACARE ORTHOTICS AND PROSTHETICS EAST, Plaintiff, vs. SUSAN L. SOWELL, Trustee in Bankruptcy for COAL CLINICS, INC. and RICHARD GINGRAS, Defendants.	Adversary Proceeding No. 99-3036

[redacted] APR 3 2000

ORDER DETERMINING OBJECTIONS TO IDENTITY OF CLAIMANTS ENTITLED TO ARBITRATION AND SCOPE OF ISSUES SUBJECT TO ARBITRATION, AND GRANTING IN PART, AND DENYING IN PART, REQUEST FOR A PERMANENT INJUNCTION

This matter is before this Court upon the Amended Demand for Arbitration of Richard Gingras ("Gingras") and COAL Clinics, Inc. ("COAL Clinics"); the Objection thereto filed by Novacare Orthotics and Prosthetics East, Inc. ("NovaCare") and NovaCare's Renewal of Preliminary and Permanent Injunction Motions; COAL Clinics' and Gingras' Response thereto; and the Supplemental Partial Objection of NovaCare to Amended Demand for Arbitration of Gingras and COAL Clinics and Renewal of Preliminary and Permanent Injunction Motions Previously Filed With the Court. A hearing was conducted on February 17, 2000.

At this stage of this consolidated adversary proceeding, Gingras and COAL Clinics are demanding arbitration against NovaCare on several causes of action which stem from NovaCare's purchase of COAL Clinics' businesses in September 1997 and subsequent operations of those businesses. NovaCare contests the identities of the parties seeking to arbitrate and the scope of the issues for which arbitration has been sought.

FACTUAL BACKGROUND & PRIOR PROCEEDINGS

The relevant facts are not in dispute. Until September 30, 1997, COAL Clinics provided orthotic and prosthetic services and operated a medical supply store in Charlotte, North Carolina. COAL was owned by Gingras' wife and brother-in-law. Gingras was its

chief operating officer. The three comprised its Board of Directors.

In 1997, COAL Clinics' Board decided to sell its businesses and retained a brokerage firm. A prospective purchaser, NovaCare, was located and negotiations for a sale began. These negotiations resulted in COAL Clinics and NovaCare entering into a series of agreements dated September 30, 1997, whereby NovaCare purchased the COAL Clinics orthotic and prosthetic businesses. The written agreements consisted of an Agreement of Purchase and Sale ("Purchase Agreement"); a Management and Administrative Services Agreement ("Management Agreement"); a Bill of Sale; an Assignment and Assumption Agreement; and a Consent to Use of Name (for the use of COAL Clinics' name). At the same time, Gingras, in his individual capacity, executed an Employment Agreement with NovaCare that provided for his continued employment in the businesses. Gingras also individually agreed to a Non-Competition Agreement and a Finder Fee Agreement with NovaCare.

The purchase of COAL Clinics' businesses was structured so that part of the purchase price was paid at closing, but additional sums would be paid by NovaCare to COAL Clinics if the businesses met certain revenue targets in future years (the "Earn-Out" payments).

Around the same time period, but independent of the NovaCare closing, COAL Clinics entered into an Assignment Agreement with Gingras dated September 30, 1997. Under the Assignment Agreement, COAL Clinics assigned to Gingras "all power and authority to

collect, receive and give acquittance of any sum or sums due with respect to the earnout payments." Gingras says the assignment was an inducement for him to enter into the Employment and Non-Competition Agreements with NovaCare and was made in lieu of future compensation from COAL Clinics.[1] After closing, NovaCare took over the businesses, and Gingras went to work for NovaCare.

From the outset, COAL Clinics had trouble paying its creditors. On September 1, 1998, COAL Clinics' creditors responded by filing an involuntary bankruptcy petition against the company in this Court. An Order for Relief was entered and Susan Sowell was appointed Chapter 7 Trustee ("Trustee").

Shortly thereafter, the first year Earn-out payment (1998) became due to COAL Clinics. NovaCare was unwilling to recognize Gingras' assignment and sought to pay these monies over to the COAL Clinics Trustee. Gingras reacted by filing the first of the three adversary proceedings in this matter, Gingras v. Susan Sowell, Trustee, Adv. No. 98-3170, on December 11, 1998. Based on his assignment, Gingras asked this Court to enjoin the Trustee from accepting the 1998 Earn-out payment and to order NovaCare to pay these sums to him instead. For reasons described in greater detail below, the undersigned was unable to order the requested relief. However, the Court elected to have the Trustee hold the funds in escrow, pending the outcome of this litigation. Order dated December 23, 1998.

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[1] COAL Clinics' bankruptcy trustee later disputed this contention, but the issue has since been mooted by their settlement in this action.

NovaCare then paid the monies which it believed were due COAL Clinics for the first year Earn-out into the Trustee's escrow account.[2] The Trustee counterclaimed against Gingras and attacked the validity of the Earn-out Assignment, under 11 U.S.C. §§ 547 and 548.

Having failed to secure these monies by preliminary injunction, Gingras then mounted a flank attack by filing a Demand for Arbitration against NovaCare with the National Health Lawyers Association on December 22, 1998.[3] In his Demand, Gingras claimed that NovaCare had breached its contractual obligations to COAL Clinics under both the Purchase Agreement and the Management Agreement, in addition to breaching certain oral promises.

This prompted NovaCare to file the third of these proceedings,[4] NovaCare Orthothics and Prosthetics East, Inc. v. Sowell and Gingras, (Adv. No.99-3036) seeking a declaratory judgment that Gingras was not entitled to assert these claims and an injunction staying his arbitration demand.

Effectively, the NovaCare action was an interpleader suit. Before either Gingras or the Trustee could be permitted to seek

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[2]Additional sums due COAL Clinics under the 1998 Earn-out payment were deposited by NovaCare in its attorney's trust account as a potential offset to a creditor claim then pending in a separate adversary proceeding.

[3]The Purchase Agreement and the Management Agreement both contained arbitration clauses.

[4]In the meantime, the Trustee had filed an action against Marbee Gingras and the Gingras Family Limited Partnership, Adv. No. 99-3016, seeking to recover other sums allegedly due the Estate and to avoid other prepetition transfers.

arbitration with NovaCare, it would be necessary to determine which was the holder of these various contract rights. To do otherwise would subject NovaCare to prospects of double litigation and double liability. Allowing one of the two disputes to proceed separately could also impair the claims themselves. A preliminary injunction was therefore granted staying arbitration, the three adversary proceedings were administratively consolidated, and the Court expedited trial of the issues pertaining to the Assignment.

Trial of the assignment issues began on September 22, 1999. However, only a day into the trial, the Trustee and Gingras settled. They then noticed their settlement for approval in accordance with the Rules of Bankruptcy Procedure.

NovaCare had not been allowed to participate in this portion of the trial. It objected to the proposed settlement, arguing that the arrangement improperly purported to resolve issues relating to NovaCare, such as which claims could be arbitrated and by whom. The settlement was redrawn to clarify that, while it resolved claims between the Trustee and Gingras, NovaCare's right to assert defenses to any arbitration demand was not affected.

With that, a Consent Judgment was agreed upon by all three parties and entered on December 3, 1999 (the "Consent Judgment"). The Consent Judgment settled all claims and causes of action between the Trustee and Gingras. Under its terms, the Trustee kept the 1998 Earn-out payment monies previously escrowed with the Trustee and one-half of the monies held by NovaCare's local counsel.

Gingras received the other one-half of these funds and, to the extent that he did not already hold them, all of the estate's rights to the Earn-out payments under the Purchase Agreement and any other agreement between COAL Clinics and NovaCare. To this end, the Trustee assigned and/or abandoned all of these rights to Gingras. The Consent Judgment indicated that Gingras would be entitled to pursue these claims for himself and for his sole benefit, in the name of COAL Clinics or in his name any other claim or cause of action that the estate may have against NovaCare.

Again, this was without prejudice to NovaCare's right to assert defenses to the arbitration demand, including the enforceability or the effect of the Trustee's assignment and/or abandonment.

As contemplated by the Consent Judgment, on December 13, 1999, Gingras and COAL Clinics, represented by the same law firm, filed an Amended Demand for Arbitration (the "Demand"). In it, arbitration is demanded against NovaCare by both Gingras on his individual claims, and on behalf of COAL Clinics. The Demand recites numerous claims against NovaCare for alleged breaches of the Purchase Agreement and the Management Agreement; breaches of oral contracts; breaches of implied covenants of good faith and fair dealing; fraudulent misrepresentations; fraud; unfair trade practices under NCGS 75-1.1; interference with business relations; and both state and federal RICO claims.

NovaCare objects to the Demand.

CONCLUSIONS OF LAW

In the Consent Judgment, the parties stipulated that this Court has both subject matter and in personam jurisdiction over, and authority to address and adjudicate with binding force, any and all objections by NovaCare to: (1) the identity of the claimants entitled to proceed to arbitration and (2) the scope of the issues to arbitration. Consent Judgment dated December 3, 1999.

NovaCare poses five specific objections to the Demand. It contends:

> 1. Any claimed breaches of the Management Agreement cannot be abandoned/or assigned to Gingras because that Agreement states that it is nonassignable, and Gingras is not a party to that Agreement.
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> 2. The claims sought to be arbitrated include alleged oral contracts and promises which were not assignable as a matter of law, and no agreement exists between these parties to arbitrate any such agreements.
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> 3. The Demand for Arbitration is not timely under the terms of the Agreements.
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> 4. The amount of the first year Earn-out is not subject to redetermination in arbitration, because that number was established by a judicial admission of COAL Clinics' Trustee earlier in this action.
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> 5. The Demand for Arbitration includes claims outside the scope of the Agreements and the scope of any arbitration clause.

HELD: Arbitration may be sought against NovaCare on the claims of COAL Clinics asserted in the Demand, but not by Gingras for any individually held claims. All of the claims asserted in the Demand of COAL Clinics fall within the scope of the parties' agreements to arbitrate, and arbitration may be invoked by COAL Clinics and/or Gingras, as assignee, as to those claims. However,

any individual claims of Gingras, that is, those claims held by him personally, and not as COAL Clinics or as its legal successor in interest, are not within the parties' agreement to arbitrate and must be raised, if at all, in a court of competent jurisdiction.

A discussion of Nova Care's specific objections, COAL Clinics/Gingras' responses, and the Court's conclusions follow.

DISCUSSION

I. Are the claims for breach of the Management Agreement ineligible for arbitration, because they were abandoned/assigned to Gingras in violation of the Management Agreements' restriction against assignment?

The Demand for Arbitration was filed on behalf of both Gingras and COAL Clinics. Both contend that they were injured by NovaCare's breach of the Management Agreement. However, only COAL Clinics is a party to that contract.

NovaCare argues that Gingras possesses no rights under the Management Agreement. He was not a party to that Agreement. Further, he could not have acquired any rights under the Agreement by assignment or through abandonment, because the Management Agreement specifically precludes assignment absent consent. Management Agreement ¶ 9.2. Since NovaCare consented neither to the prepetition assignment of the Earn-out payments to Gingras nor to the Trustee's postpetition assignment/abandonment in the Consent Judgment, NovaCare believes Gingras has no claims which may be asserted under the Management Agreement.

Gingras and COAL Clinics dispute NovaCare's position, arguing that while assignment to Gingras may have been precluded by the

Management Agreement, abandonment under 11 U.S.C. § 554 is not an assignment. The Consent Judgment purported to do both. From their perspective, because the Trustee abandoned COAL Clinics' rights under these Agreements, these rights revested in COAL Clinics, and COAL Clinics is now entitled to assert these claims in arbitration against NovaCare. They cite several cases holding that abandonment causes title to estate property to revert to the debtor, and that this reversion relates back to the date of bankruptcy. See, e.g., Brown v. O'Keefe, 300 U.S. 598, 57 S.Ct. 543, 81 L.Ed. 827 (1937).

In order to determine this specific objection, one must first ask the broader question of who is entitled to demand arbitration under these Agreements. In the Demand, each claim against NovaCare is asserted jointly by Gingras and COAL Clinics, without differentiation.

From the pleadings, it appears Gingras asserts standing to arbitrate in three separate capacities: 1) as COAL Clinics, which is the Debtor and a party to the Agreements; 2) as COAL Clinics' assignee, by virtue of the prepetition and postpetition assignments; and 3) in his individual capacity, as a party to the Employment and Noncompete Agreements.

The last theory can be disposed of quickly. Arbitration is a contract right. Without an agreement to arbitrate, a party cannot be compelled to do so. LaCourse on Behalf of LaCourse v. Firemen's Ins. Co. of Newark, N.J., 756 F.2d 10 (3rd Cir. 1985); Chicago Pneumatic Tool Co. v. Smith, 890 F. Supp. 100 (N.D.N.Y. 1995).

Here, COAL Clinics and NovaCare agreed to arbitrate disputes arising under or relating to their Agreements. NovaCare had no such understanding with Gingras. Neither the Employment nor the Noncompete Agreements contemplate arbitration. It would appear that Gingras individually has no right to arbitrate with NovaCare.

Hoping to sidestep this problem, Gingras suggests that the arbitration clauses of the Purchase and Management Agreements are sufficiently broad ("arising out of or relating to") so as to include a right to arbitrate his individual claims against NovaCare.

The undersigned disagrees. Broad though they are, there is no suggestion in the Agreements that NovaCare and COAL Clinics intended that arbitration rights would be afforded to third parties. Nor is it reasonable to presume that they intended these rights would extend to nonparties. Without an agreement, the claims asserted by Gingras in his individual capacity against NovaCare are not eligible for arbitration.

In short, if there is a right to arbitrate, it lies with COAL Clinics, the corporation, or with Gingras, as assignee of COAL Clinics' rights in the Agreements.

This is a more involved question for two reasons. First, the parties' settlement left unresolved the questions of whether COAL Clinics' prepetition assignment of the Earn-out Payments to Gingras was effective, and if so, exactly what rights were assigned to him.

Second, one can read the Consent Judgment to be either an assignment to Gingras of COAL Clinics' rights, or instead, an abandonment. An assignment and an abandonment have different legal meanings and different legal consequences.

Reading the Consent Judgment as an assignment, Gingras now would hold all of COAL Clinics' rights under the Agreements, save and except those arising under and related to the Management Agreement. As noted, rights under the Management Agreement could not be assigned due to the contractual restriction.

The other Agreements, including the Purchase Agreement, contain no such restriction. As to these, if the prepetition assignment was legally effective, then Gingras acquired the Debtor's rights to the Earn-out Payments under the Purchase Agreement before bankruptcy. Whatever other rights COAL Clinics had in these Agreements would have passed by the Consent Judgment's assignment to Gingras in December of 1999.

On the other hand, if the prepetition assignment was ineffective, then all of COAL Clinics' rights under the Agreements were assigned to Gingras in the Trustee's assignment. Either way, at the time of the Demand, Gingras was the holder of all of the Debtor's rights under these Agreements, excluding those under the Management Agreement.[5]

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[5]NovaCare contends that Gingras holds only the right to the Earn-out payments, without a right to enforce other Purchase Agreement rights. This argument is misplaced. After closing, the only substantive right of COAL Clinics under this agreement is the right to receive the Earn-out payments.

The question becomes: Who holds COAL Clinics' rights under the Management Agreement, Gingras or COAL Clinics? Gingras certainly did not acquire any rights under the Management Agreement by assignment. These were not given to him in the prepetition assignment, as this document dealt only with the Purchase Agreement's Earn-out payments.[6] As noted above, the Trustee could not have made a postpetition assignment to Gingras of COAL Clinics' rights in the Management Agreement, because this was prohibited by the Agreement itself.[7]

What then about abandonment? The Consent Judgment purports to abandon to Gingras, so can he not assert the Debtor's rights under these agreements? Although this is more of a theoretical than a practical issue in this case, the Court believes that to the extent the Consent Judgment abandons rather than assigns, the abandonment restores the rights under the Management Agreement (or any of the other Agreements) to COAL Clinics, the corporation, and not to Gingras.

The underlying reasons for this result are described in a recent abandonment case, In re Pliz Compact Disc Inc., 229 B.R.

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[6]Gingras tries to use the Purchase Agreement to bootstrap him into holding rights under the Management Agreement, under provisions in the former that make it superior to the Management Agreement where the two conflict. This fails because there is no disagreement between the documents on assignability. Simply put, one contract is assignable, the other is not.

[7] While the Bankruptcy Code contains provisions permitting a Trustee to assign a prepetition contract of the debtor to a third party notwithstanding a contractual provision prohibiting assignment, in order to do so, he must first assume the contract in accordance with 11 U.S.C. § 365. The Trustee has not assumed these contracts, so this provision does come into play.

630, 639 (Bankr. E.D.Pa. 1999). As that case holds, under 11 U.S.C. § 541, a filing creates an estate consisting of all of the debtor's property interests. The bankruptcy trustee is given control over these interests, but in contrast to prior law under the Bankruptcy Act, the trustee does not receive actual title. Title to the property remains with the debtor. Id. (citing In re Manchester Heights Associates, L.P., 165 B.R. 42, 44 (Bankr. W.D.Mo. 1994)).

Under the old Act, courts came to recognize a trustee's power to abandon property. This body of case law was codified in the 1978 Bankruptcy Code at 11 U.S.C. § 554. However, while the Code changed the Trustee's function from titleholder to controller of a debtor's property, the Code did not modify the Act's concepts concerning abandonment. Id.; accord, Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986). The effect of abandonment under the Code remains the same as it was under the Act: abandonment removes property from the bankruptcy estate and returns the property to the debtor, as though no bankruptcy occurred. However, since "abandonment acts only as an abandonment of the estate's interest in the property and not as an abandonment of the debtor's interest," the debtor's title to the abandoned property is effective, nunc pro tunc, to the filing date of the petition. Id. at 639.

The legislative history of the Bankruptcy Code suggests property of the estate may be abandoned to any party with a

possessory interest, and not just to the debtor. However, abandoning to a nondebtor is inconsistent with the legal doctrine of abandonment under which title remains in the debtor. Id.

In short, to the extent that the Consent Judgment abandoned property, it did not abandon to Gingras, but instead restored whatever rights COAL Clinics held under the Agreements immediately prior to the bankruptcy filing to COAL Clinics, the corporation.

The Consent Judgment then is contradictory. It simultaneously purports to assign to Gingras and to abandon (legally, to COAL Clinics) the debtor's rights in these agreements.

Fortunately, this is a distinction without meaning in the context of the present case. Gingras' family, primarily his wife, owns COAL Clinics, and practically speaking, Gingras controls and has always controlled the company.[8] As such, it makes no practical difference whether Gingras is asserting COAL Clinics' rights as its assignee or as its management. In the end, they are COAL Clinics rights and they are being asserted by COAL Clinics and/or its legal successor.[9]

Going back to the specific objection, COAL Clinics and NovaCare agreed to arbitrate alleged breaches of the Management Agreement. The Demand for arbitration of this dispute by COAL Clinics/Gingras is therefore proper. The objection is overruled as

[8]Marbee Gingras owns 97% of Coal Clinics stock. She, Richard and her brother are its directors.

[9]Hereafter, COAL Clinics, the corporation and Gingras, as assignee of COAL Clinics will be referred to collectively as "COAL Clinics/Gingras".

to COAL Clinics/Gingras, but is sustained as to Gingras for any individual claims he might possess against NovaCare.

II. Are alleged oral contracts and promises assignable, and if so, can they be arbitrated absent an express agreement between the parties?

COAL Clinics/Gingras demand arbitration on the issue of whether NovaCare breached alleged oral contracts or agreements to provide sufficient personnel to COAL Clinics after the sale.

NovaCare contends that it is not legally possible for the Trustee to abandon or assign to Gingras alleged oral contracts made to the Debtor. NovaCare's argument is twofold: first, as a matter of law, oral contracts are unassignable. Second, even if assignable, there was no agreement between NovaCare and COAL Clinics to arbitrate breaches of any oral promises.

NovaCare finds support for its argument in the integration clauses contained in § IX(C) of the Purchase Agreement and in ¶ 11 of the Management Agreement. These clauses state that the Agreements and documents constitute the entire agreement of the parties.

Again, COAL Clinics/Gingras disagree. They point to internal NovaCare records which suggest that even before the purchase, NovaCare recognized it would be necessary to hire an additional practitioner for COAL Clinics to insure revenue stability. Believing that NovaCare breached its duty to manage and properly administer COAL Clinics, they see the oral promises as falling within the arbitration provisions of the Purchase Agreement and Management Agreement.

As to the effect of the integration clauses, COAL Clinics/Gingras point out that an integration clause creates only the presumption that an agreement reflects the full and final understanding of the parties. This presumption may be rebutted by a showing of (1) fraud, (2) bad faith, (3) unconscionability, (4) negligent omission, or (5) mistake in fact. Zinn B. Walker, 87 N.C. App. 325, 333, 361 S.E.2d 314, 318 (1987).

Finally, COAL Clinics/Gingras argue that it would frustrate the parties' true intentions and would lead to an absurd result if such oral understandings were not considered a part of this arbitration. The Earn-out payment was premised on COAL Clinics' ability to reach agreed net revenue targets. COAL Clinics/Gingras believe that by failing to properly staff the business, NovaCare unilaterally and unjustifiably frustrated the mutual intention of the parties to the contract (i.e., to maximize the revenue of COAL Clinics).

Again, the Court agrees with NovaCare that Gingras has no individual claims for breach of oral promises which may be arbitrated. However, this Court finds that the claims of COAL Clinics/Gingras for breach of oral promises as stated in the Demand are in fact subject to arbitration, notwithstanding the integration clauses.

The facts set forth in the Demand by COAL Clinics/Gingras, if believed by the arbitrator, are sufficient to support a finding of fraud, bad faith, or unconscionablility. Even without a finding of bad intent, they could also support a finding of negligent omission

or mistake in fact. Simply stated, if two parties agree to a payment obligation based upon the future financial performance of a business, a demonstrated intention by one to avoid those obligations by hamstringing the business' operations would support a fraud verdict. Here, a prima facie case has been presented that rebuts the presumption created by the integration clauses.

Secondly, it is difficult to distinguish at this point whether the alleged breaches would be considered breaches of oral promises, or simply breaches of implicit agreements within the written Agreements. If the latter, they are certainly within the scope of the arbitration clauses.

Thus these Agreements contain very broad rights to arbitrate. "Any claims" means exactly that - any. Likewise, the terms "arising out of or relating to" are equally expansive. As one court has held, "[a]n arbitration clause requiring arbitration of any dispute arising out of an agreement is `extremely broad.'" First Union Real Estate Equity & Mortgage Invs. v. Crown American Corp. 23 F.3d 406 (6th Cir. 1994) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)).

Moreover, the law favors arbitration and to this end, all doubts as to whether an arbitration clause covers a dispute should be resolved in favor of arbitration. First Union Real Estate, 23 F.3d at 406.

Given the prima facie showing, the parties' broad agreement to arbitrate and in view of the public policy favoring arbitration,

the undersigned believes that the oral promises alleged by COAL Clinics are subject to arbitration. This objection is overruled, except as to any individual claims of Gingras. As to these, the objection is sustained.

III. Are the Requests for Arbitration Timely Filed under the Agreements?

A. Are the claims barred by the Agreements' Statute of Limitations?

With one exception,[10] NovaCare asserts that all claims are time barred. These Agreements stipulate that the demand for arbitration must be filed within twelve months of the time that the facts constituting the claim arose or become known to the party seeking relief. Failure to timely assert a claim waives it. Purchase Agreement § IX, ¶ F.

NovaCare reads the Consent Judgment to mean that the Trustee held COAL Clinics' rights until they were abandoned/assigned. No demand was filed by the Trustee (Gingras filed the original demand), and COAL Clinics/Gingras did so only on December 13, 1999. NovaCare says this Demand was more than twelve months from any relevant date, and therefore beyond the contractual statute of limitations.

For example, NovaCare contends any claims under the Management Agreement, which itself had a life of only six (6) months beyond the closing, would have accrued at the latest by its end date

[10] See the discussion regarding the ripeness of the arbitration demand for the succeeding years' earn-outs below.

(March 29, 1998), and under a twelve-month statute, should have been asserted before March 29, 1999. Likewise, NovaCare contends that the limitations period for a claim for the alleged failure to hire an additional professional would have begun to run on the sale date (October 1, 1997) and therefore expired on October 1, 1998.

COAL Clinics/Gingras, on the other hand, believe that COAL Clinics' bankruptcy filing and this Court's injunction (prohibiting Gingras from seeking arbitration against NovaCare until it was determined who held these rights) suspended the statute of limitations until the Consent Judgment was docketed.

The undersigned agrees. None of these claims are time barred. There is no doubt that, but for the bankruptcy filing and this Court's injunction, COAL Clinics/Gingras would have demanded arbitration within the contractually prescribed time periods.

COAL Clinics was placed in bankruptcy on September 1, 1998. Gingras immediately attempted to assert his right to bring these claims. He filed this action and moved for a TRO/Preliminary Injunction to restrain the Trustee from accepting the 1998 Earn-out payment. Gingras also asked for a determination that he held the Debtor's rights under these Agreements. Of course, at this point in the litigation, the parties' rights in these Agreements were very much in doubt, and the Court could not grant him relief.

When his attempt to get an injunction failed on December 19, 1998, Gingras filed a demand for arbitration in the only way he

could - as an individual.[11] However, even then he was not permitted to proceed.

NovaCare filed suit and obtained a preliminary injunction prohibiting Gingras from going forward, pending the outcome of the litigation before this Court. That injunction was granted for two purposes. First, it was granted in order to protect NovaCare from the expense and double liability that could result if the Trustee and Gingras were allowed to seek arbitration separately. Second, it was intended to protect COAL Clinics' Estate if it turned out that the Trustee was the rightful holder of these claims.

The litigation was bifurcated, and a trial set on the transfer avoidance issues. In short, a qualifying round was established. Before turning Gingras or the Trustee loose to arbitrate with NovaCare, the undersigned intended to determine which was entitled to assert COAL Clinics' rights under these Agreements.

The trial of these "qualifying" issues was set, commenced, and then promptly settled. Only then, when finally armed with a ruling that these rights were not the Trustee's (albeit by consent), and with a release of the injunction, COAL Clinics/Gingras demanded arbitration against NovaCare. This incidently was within the ten (10) day period for doing so specified in the Consent Judgment.

The Injunction Order tolled the contractual statute of limitations under which COAL Clinics/Gingras could file an arbitration demand. This suspension was in effect until the

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[11]As discussed in Section I above, COAL Clinic's bankruptcy transferred control of the company from management to the Trustee.

Consent Judgment released the injunction. Id.; First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979).

However, even without an injunction, the Bankruptcy Code would have suspended this limitation period. Section 108 provides, in relevant part:

> (a) If...an agreement sets a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—
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> (1) the end of such period, **including any suspension of such period occurring on or after the commencement of the case;** or
>
> (2) two years after the order for relief.

Additionally, Section 108(b) states:

> (b) Except as provided in subsection (a)..., if...an agreement fixes a period within which the debtor ... may file any pleading, demand, ... or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—
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> (1) the end of such period, **including any suspension of such period occurring on or after the commencement of the case;** or
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> (2) 60 days after the order for relief.(emphasis added).

Had the case proceeded and she had been held to be the rightful holder of the Debtor's rights, the Trustee had two years from the order for relief to bring the arbitration demand. In the end, the Trustee chose instead to abandon/assign these claims. This does not change the result, because as the clear wording of the statute reveals, the pendency of the bankruptcy case suspended the limitations period for the time that the matter was mired up in this proceeding. Therefore, as of December 9, 1999, when it first

became clear that these were not the Trustee's claims, COAL Clinics/Gingras would have had the same number of days remaining under the statute of limitations as the Debtor did at the filing date of September 1, 1998. The Demand is not barred by the contractual statute of limitations.

B. Is the Demand for Arbitration for the Future Year Earn-Out Payments Ripe?

Going in the opposite direction, as to future Earn-out payments for the year 1999 and beyond, NovaCare contends that the claims are not ripe because the conditions precedent (i.e., meeting the Earn-out targets for these years) have not been met, nor has NovaCare had the chance to calculate the Earn-out payments for these years. COAL Clinics/Gingras disagree, pointing out that under North Carolina law, an action for damages for breach of contract may be brought before that breach has been completed. Pappas v. Crist, 223 N.C. 265, 25 S.E. 2d 850 (1943). They see the Purchase Agreement as an executory contract for performance of acts or services in the future. As such, they believe NovaCare has impliedly promised that it will not do anything in the meantime that would prejudice COAL Clinics/Gingras' ability to meet the net revenue targets and collect the Earn-out payments, including those coming due in future years.

The undersigned agrees with COAL Clinics/Gingras that these alleged breaches are ripe for arbitration, for the reasons they recite.

IV. Are COAL Clinics/Gingras bound by principles of judicial estoppel or judicial admission with the Trustee's allegations of the value of the 1998 Earn-out payment?

In prosecuting her counterclaim under § 548, the Trustee ascribed a value to the 1998 Earn-out payment of $285,127. NovaCare argues that in doing so, the Trustee made a judicial admission, binding on COAL Clinics/Gingras, as to the amount of the 1998 Earn-out Payment. It says the amount owing cannot now be arbitrated under principles of judicial estoppel.

COAL Clinics/Gingras respond that Gingras, pursuant to the prepetition assignment, was the owner of the Earn-out at the time these allegations were made, not the Trustee. Thus, Gingras is not a successor in interest to the Trustee and is not bound by her positions. Moreover, since the counterclaim was settled prior to trial, they believe that the Earn-out payments were never established as property of the bankruptcy estate. Even if the Earn-out was estate property, they contend the elements of judicial estoppel are not met in this case.

The undersigned agrees. Judicial estoppel is a policy designed to protect the Courts from being manipulated by litigants who seek to prevail twice on opposite theories. Levinson v. U.S. (In re Levison), 969 F.2d 260, 264 (7th Cir.), cert.denied, 506 U.S. 989, 113 S.Ct. 505, 121 L.Ed.2d 441 (1992). The doctrine has three elements: (1) A later legal position must be clearly and consistent with an earlier one; (2) the facts at issue must be the same in both cases; and (3) the party to be estopped must have been successful in convincing the first court to adopt its position.

Smith v. Dovenmuehle Mortgage, Inc., 859 F.Supp. 1138 (N.D. Ill. 1994).

This doctrine operates only in narrow circumstances and only as to a party who has both unequivocally and successfully asserted a position in a prior proceeding. This case does not present such a situation.

In the first place, the doctrine is meant to prevent one party from taking two contradictory positions. It certainly does not bind a Trustee's legal opponents with her allegations.

The distinction between the Trustee and COAL Clinics as to title versus control of assets has been described above. The Trustee is not COAL Clinics. The Trustee is not Gingras. Rather, at the time this alleged admission was made, Gingras and the Trustee were bitter opponents for the reason that each claimed to be the holder of the Earn-out rights.

Gingras vehemently disagreed with the Trustee's valuation of the 1998 Earn-out payment. Given these facts, he cannot be judicially estopped by a preliminary statement from the bankruptcy Trustee.

Second, the issues are different in the two disputes. The Trustee made this allegation as a necessary part of pleading a bankruptcy avoidance action against Gingras. The Trustee was alleging value as of the date of the assignment in late September, 1997. In contrast, the issue in the contemplated arbitration is not the value of the 1998 Earn-out payment on the date of assignment, but the amount due and payable by NovaCare for 1998.

These are different issues, and one cannot gainsay that the Trustee's position was inconsistent with Gingras' position in the arbitration Demand.

Finally, in order for judicial estoppel to apply, the party to be estopped must have been successful in convincing the court to adopt its position. Here, because the "qualifying round" issues were settled before a verdict was returned, it cannot be said the Trustee was successful in convincing the Court that the value of the earnout was $285,127.

In point of fact, the dispute was settled before Gingras even had an opportunity to present evidence about the value of the 1998 Earn-out payment. With no adjudication of the value, the third element necessary to judicial estoppel is missing.

V. Does the Demand for Arbitration include claims outside the scope of the Agreements and the scope of any arbitration clause contained therein?

NovaCare contends that the Demand for Arbitration includes claims outside the scope of the contractual arbitration clauses. These include Federal and State RICO claims (18 U.S.C. 1962(d), NCGS § 75D), North Carolina Unfair Trade Practices claims (NCGS 75-1.1), and interference with business relations. Additionally, since the statutory remedies for some of these causes of action include treble and punitive damages, NovaCare argues that these are not subject to arbitration. The Agreements do not allow the arbitrator to award consequential, exemplary, incidental, punitive, or special damages.

To COAL Clinics/Gingras, however, it is not the legal theory itself that matters. It is the relationship to the Agreements that is important. Again, the Purchase Agreement states: "any controversy or claim arising out of or relating to this Agreement, or any breach thereof, shall ... be settled by arbitration." Purchase Agreement § IX, ¶ F. Similarly, the Management Agreement provides: "any controversy or claim arising out of or relating to this Agreement, or any breach hereof, shall be settled by arbitration...." Management Agreement § 7. COAL Clinics/Gingras maintains that it is the relationship of the claim to the Agreement that counts, not the particular relief requested.

As before, where the terms call for arbitration of any dispute arising out of an agreement, courts view such clauses as having a very broad scope. First Union Real Estate Equity & Mortgage Invs. v. Crown American Corp. 23 F.3d. 406 (6th Cir. 1983). Given the strong policy favoring arbitration, if there is any doubt as to whether a dispute falls within such a clause, the courts lean toward arbitration. Id.

NovaCare's position appears to be that only breach of contract claims can be asserted in arbitration. This interpretation is too narrow, given the wording of these Agreements.

The Court agrees with COAL Clinics/Gingras. The key is not the legal classification of a claim, such as a contract claim versus a business tort or some other statutorily created right of action. The key is not the remedy sought be it actual or punitive damages. The key is whether the claims arise from or relate to

these Agreements. COAL Clinics and NovaCare agreed to arbitrate "any" controversies or claims, provided they are claims "arising out of or related to" these agreements.

Looking at the Demand, it appears that these claims are simply additional legal theories derived from a common set of facts. Given the terms "arising out of or related to" their natural meaning, one cannot escape the conclusion that these claims are within the scope of the contractual agreement to arbitrate. Since NovaCare drafted these Agreements and chose the terms to describe the arbitration right, it cannot reasonably complain that it has been prejudiced by giving these terms their plain meaning.

It is true that these Agreements prevent the arbiter from awarding consequential, exemplary, incidental, punitive, or special damages. However, this is not a limitation of the arbitration right but simply an election of remedies. The arbitration may go forward, but COAL Clinics cannot recover these types of damages. This Objection is overruled as to COAL Clinics/Gingras.

BASED ON THE FOREGOING:

1. Gingras' Demand for Arbitration of Claims in his individual capacity is DENIED. Gingras is enjoined from demanding arbitration from NovaCare as to any such claims. These claims may be asserted, if they lie, only in an action filed in a court of competent jurisdiction;

2. COAL Clinics/Gingras' Demand for Arbitration is ALLOWED and NovaCare's Objections thereto are OVERRULED. The parties are

directed to proceed to arbitration in accordance with their agreements and as by this Order.

3. The arbiter may not award consequential, exemplary, incidental, punitive, or special damages against NovaCare.

4. NovaCare's Motion for injunctive relief and an order permanently enjoining the arbitration proceedings, except as otherwise provided herein, is DENIED.

IT IS SO ORDERED.

This the 30 day of April, 2000.

United States Bankruptcy Judge