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Re: ***Francis X. Speidel, M.D. and Doreen E. Speidel v. St. Francis Hospital, Inc.*** **C.A. No. 98C-05-227 RRC**

Submitted: January 7, 2002
Decided: January 30, 2002
Reissued: July 11, 2002

On Plaintiffs' "Motion to Enforce Settlement Agreement, for Sanctions and for Damages." **DENIED.**

On Defendant St. Francis Hospital, Inc.'s "Motion for Judicial Intervention in Case Sent to Stipulated Arbitration and for Costs."
DENIED.

Dear Counsel:

This is the Court's decision on Plaintiffs' "Motion to Enforce Settlement Agreement, for Sanctions and for Damages" and Defendant's "Motion for Judicial Intervention in Case Sent to Stipulated Arbitration and for Costs". For the reasons stated herein, both motions are **DENIED**.

INTRODUCTION

The issue before the Court is whether the Court can compel the performance of a "high/low" binding arbitration settlement agreement with an agreed-upon arbitrator when

that arbitrator subsequently disclosed (immediately prior to the arbitration hearing) a past adversarial relationship with a witness important to the Defendant's case.

The parties' binding arbitration settlement agreement provided in part that it was to be conducted pursuant to Superior Court Civil Rule 16.1: "The arbitration hearing shall be conducted in accordance with Superior Court Civil Rule 16.1(f) and (g), as relates to procedure." Upon the disclosure, the arbitrator invited Defendant's counsel to confer with her client. After consulting with her client and with certain witnesses, Defendant's counsel "reluctantly" withdrew from the scheduled arbitration because of concern (apparently shared by both Defendant and Defendant's counsel) over this disclosed prior involvement of the arbitrator with a witness for Defendant.

Plaintiffs now seek an order compelling "high/low" binding arbitration with that designated arbitrator, for sanctions and for damages. By contrast, Defendant asks the Court to require the parties to arbitrate the dispute under the existing arbitration agreement but with another arbitrator chosen by the Court, irrespective of the consent of Plaintiffs to the particular new arbitrator. For the reasons set forth below, both motions are **DENIED**.

FACTUAL AND PROCEDURAL BACKGROUND

In May 1998, Plaintiffs filed a complaint asserting claims for breach of employment contract and negligence; Plaintiff Doreen Speidel also asserted a claim for loss of consortium. The gist of Plaintiffs' complaint was that Defendant, in an effort to save money in the middle of a fiscal crisis, deliberately fabricated reasons to terminate Dr. Speidel's employment agreement. In July 1999, pursuant to a substitution of counsel, Victor F. Battaglia entered his appearance on behalf of Plaintiffs. In August 1999,

Defendant raised a concern over a possible conflict of interest involving Mr. Battaglia's representation of Plaintiffs, due to the fact that Mr. Battaglia had previously represented Defendant in another unrelated matter. In September 1999, Mr. Battaglia requested an advisory opinion on this issue from the Delaware State Bar Association Committee on Professional Ethics.

The Committee issued an opinion in June 2000 that stated that the law firm of Biggs and Battaglia need not withdraw from its current representation of Plaintiffs, as the Committee on Professional Ethics determined there to be no conflict of interest.[1] Once that issue was settled, a new trial scheduling order was established and the case moved forward. Significant advancement of the case was, however, delayed for about 10 months pending the advisory opinion.

In June 2001, Defendant filed a motion for summary judgment, arguing that 1) Plaintiffs' breach of contract claim was barred by the terms of his employment agreement; 2) Plaintiffs' negligence claim was barred by the exclusivity provisions of the Delaware Worker's Compensation Act; 3) Plaintiff Doreen Speidel's consortium claim was derivatively barred because Plaintiff Francis Speidel's negligence claim was barred; and 4) former defendant Catholic Health Initiatives-Eastern should be dismissed from the action because it never employed Plaintiff Francis Speidel and consequently was not a party to his employment agreement. The Court denied the first three of Defendants'

[1] Delaware State Bar Ass'n Comm. on Professional Ethics, Op. 2000-1 (June 29, 2000).

contentions and reserved decision (with the agreement of the parties) on whether to dismiss Catholic Health Initiatives-Eastern from the action.[2]

In July 2001, Defendant filed a motion to limit damages on the Plaintiffs' breach of contract claim on the grounds that Dr. Speidel's employment contract provided for discharge without breach so long as 120 days notice was given, and that, should a jury determine that Dr. Speidel was terminated under that provision, his recovery should be so limited. The Court granted Defendant's motion, limiting the time frame for which Plaintiffs could recover damages pursuant to the employment contract provision.[3] The Court's decision did not apply to damages a jury may have assessed if it were to determine that Dr. Spiedel had been wrongfully discharged.[4]

Following the Court's decision on limitation of damages, the parties agreed to submit the case to a mediator. At mediation, the parties were unable to reach agreement; as a result, the case did not settle. Shortly before trial, however, which was scheduled to begin on September 17, 2001, the parties then agreed to submit the case to "binding arbitration".[5] As part of the binding arbitration settlement agreement, the parties, at the original suggestion of Plaintiffs' counsel, agreed to Rodman Ward, Jr., Esquire, as arbitrator.

The parties then entered into a "Confidential Binding High/Low Arbitration Agreement" on or about September 20, 2001. The Agreement provides in pertinent part:

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[2] Speidel v. St. Francis Hospital, Inc. and Catholic Health Initiatives-Eastern, Del. Super., C.A. 98C-05-227, Cooch, J. (July 20, 2001) (Bench Ruling). Catholic Health Initiatives-Eastern was subsequently dismissed from the case by agreement of the parties.

[3] Speidel v. St. Francis Hospital, Inc., Del. Super., C.A. 98C-05-227, Cooch, J. (September 7, 2001) (Letter Op.)

[4] Id.

1. Plaintiffs and Defendant have agreed to submit all of Plaintiffs' claims to binding arbitration. The parties agree that Rodman Ward, Jr., Esq. shall act as the arbitrator. The fees for the arbitration shall be subject to the decision of the arbitrator.
2. Defendant will agree to pay Plaintiffs, and Plaintiffs agree to accept, the sum of [ ] should the arbitrator either (a) return a decision in favor of Defendant against Plaintiffs or (b) return a decision in favor of Plaintiffs and against Defendant, but for a sum less than or equal to [ ].
3. Defendant agrees to pay to Plaintiffs, and Plaintiffs agree to accept, the sum of [ ] if the arbitrator returns a decision in favor of Plaintiffs and against Defendant for a sum equal to or in excess of [ ].
4. If the arbitrator returns a decision in favor of Plaintiffs and against Defendant in an amount greater than or equal to [ ] but less than or equal to [ ], Defendant agrees to pay to Plaintiffs in the amount awarded by the arbitrator.
5. The amount awarded to Plaintiffs hereunder shall be in full and final resolution of any and all claims Plaintiffs, or either of them, have or may have against Defendant, including but not limited to Plaintiffs' claims for damages, costs and attorneys [sic] fees.
6. The arbitration hearing shall be conducted in accordance with Superior Court Civil Rule 16.1(f) and (g), as relates to procedure. None of the terms or conditions referred to in this Agreement, including its high/low parameters, shall be disclosed to the arbitrator before, during, or after the arbitration hearing.
7. The decision of the arbitrator shall be final and binding with respect to any and all claims Plaintiffs have or may have against Defendant. Plaintiffs and Defendant waive, and agree not to pursue, any and all rights to trial *de novo* or appeal.

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13. Pending this arbitration Agreement, Superior Court shall retain jurisdiction for the purpose of enforcing the terms of the Agreement.

Mr. Ward scheduled the arbitration to begin November 26, 2001. On or about November 23, in preparing for the arbitration, Mr. Ward became aware that Jea Street had been listed as a possible trial witness for the Defendant. Apparently Mr. Street was a witness to an altercation involving Dr. Speidel on or about August 29, 1997 in the St. Francis Hospital emergency room; Defendant argues that Dr. Speidel's conduct during this altercation in part formed a basis for Dr. Speidel's termination. Upon meeting with counsel the morning of November 26, Mr. Ward advised that he had previously represented the State Board of Education in a school desegregation case in the United States District Court for the District of Delaware, and in 1994, he had deposed Mr. Street, who was an adverse party witness in that case. Defendant in the present case had listed Mr. Street as a Defendant's witness in a pretrial stipulation. Mr. Ward described his

[5] So characterized in a letter from Victor F. Battaglia to the Court of September 18, 2001.

deposition of Mr. Street to counsel as "a little acrimonious". Mr. Ward also advised defense counsel that Mr. Battaglia had represented the plaintiffs in the school desegregation case; Mr. Street was apparently a principal of the plaintiffs in that case. Mr. Battaglia had apparently represented Mr. Street at that "acrimonious" deposition taken by Mr. Ward. (Tr. Arb. Hr'g at 4.)

Mr. Ward further informed counsel that he had "no feeling about Mr. Street one way or another," and that he had "no concern but that [he] could evaluate Mr. Street's testimony as if it were anyone." Mr. Ward stated that defense counsel should however ascertain their client's position in light of this disclosure because he did not want "to go forward and have [the arbitration] fall apart." (Tr. Arb. Hr'g at 8.) Following a recess, at which time Ms. Norcross consulted with her client and other witnesses about Mr. Ward's disclosure, Ms. Norcross stated "reluctantly"[6] that the arbitration could not proceed as her client was uncomfortable in having the case arbitrated by Mr. Ward under the just-disclosed circumstances.

CONTENTIONS OF THE PARTIES

Following the abandoned attempt at arbitrating the matter with Mr. Ward, plaintiffs filed the instant motion, stating, among other things, that "[t]here was no basis for Defendants to terminate the arbitration" (Pls.' Mot. ¶ 10.), and that "Defendant had no power or authority to unilaterally terminate the proceedings". (Pls.' Mot. ¶ 14.) Plaintiffs argue that a trier of fact who assures the parties of his or her impartiality should be allowed to determine the matter before them; plaintiffs advance the analogy of a judge who need not disqualify himself or herself "simply because…years before being

[6] Tr. Arb. Hr'g at 9.

appointed to the bench, [the judge] had contact in his capacity as an attorney with a witness…." (Pls.' Mot. ¶ 11.) Plaintiffs therefore seek an order compelling the binding arbitration to proceed with Mr. Ward as arbitrator.[7]

Defendant contemporaneously filed its motion asking this Court to appoint a new arbitrator to conduct binding arbitration under the same terms as the original binding arbitration agreement. Defendant, citing Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968), reh. den., 393 U.S. 1112 (1968) (holding that an arbitrator's failure to disclose a substantial relationship with a party or a party's attorney, *i.e.*, a relationship substantial enough to create a reasonable impression of bias, justifies vacatur under the federal "evident partiality" standard), argues that arbitration with Mr.

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[7] Plaintiffs attached two alternative proposed forms of order to their motion. The first provides, in pertinent part, that:

> 1. The arbitration shall go forward with Mr. Ward acting as arbitrator; and
> 2. The arbitrator is instructed to enter a Default Judgment against the Defendants in the [amount of Plaintiffs' "ascertainable past and future economic loss as computed by their expert economist"], such amount to be adjusted by the Court upon application of the parties.

The second, alternative proposed form of order submitted by Plaintiffs provides, in pertinent part, that:

> 1. The arbitration shall go forward with Mr. Ward acting as arbitrator.
> 2. Defendants shall pay the costs incurred by their delay of the arbitration hearing, including, all expert witness fees, court reporter fees, arbitrator fees, and any costs incurred by any witness who was scheduled to testify.
> 3. Defendants are to immediately pay to Plaintiff's the minimum agreed upon amount set forth in the Arbitration Agreement without prejudice to the rights of the Plaintiffs to seek additional compensation through the arbitration hearing.
> 4. Defendant will pay all reasonable attorney's fees incurred by the Plaintiffs in the preparation and presentation of their Motion to enforce the Settlement Agreement. Plaintiffs to submit to the Court an Affidavit for such fees.
> 5. Any amount awarded by the arbitrator after the hearing shall be increased by the amount of all reasonable attorneys' fees incurred by Plaintiffs throughout the remainder of this litigation, such amount to approved by the Court upon submission of an Affidavit by Plaintiffs' counsel.
> 6. Defendant shall pay interest at the legal rate on the amount awarded by the arbitrator, as increased by attorneys' fees referred to in the previous paragraph, from December 6, 2001 until payment in full is made.

Ward cannot proceed because an arbitrator "not only must be unbiased, but also must avoid even the appearance of bias." Defendant argues that the fact that Mr. Ward had previously deposed Mr. Street "was probative of prejudice in the proceeding" and the reason why, Defendant argues, that Mr. Ward disclosed that fact "at his first opportunity". (Def's. Mem. at 2-3.) To that end, Defendant has supplied an affidavit executed by Mr. Street in which he states that he believes Mr. Ward had held "disdain" for him in the prior litigation, and that he does not believe Mr. Ward would be a fair arbitrator in the present case.[8] Mr. Battaglia has represented that Mr. Street told him on November 28, 2001 (two days after the arbitration was terminated) that, in response to Mr. Battaglia's inquiry of whether Mr. Street knew that Mr. Ward was to arbitrate this case, Mr. Street responded, "We fired him."[9] Defendant argues that "[f]undamental fairness dictates that the parties submit to an arbitrator who has not personally engaged in a heated exchange with Mr. Street." (Defs.' Mem. at 5.)

DISCUSSION

The parties entered into a "Confidential Binding High/Low Arbitration

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[8] Mr. Street's affidavit provides:

1. I understand that St. Francis Hospital intends to call me as a witness in the trial or arbitration of this case.
2. I have known Victor Battaglia, Sr. for many years. He has represented me in a number of matters and I have referred clients to him.
3. In the summer of 2000, Mr. Battaglia told me he was representing the doctor with whom I had had a problem at St. Francis Hospital.
4. On November 28, 2001, Mr. Battaglia telephoned me. He asked when I first learned that Rodman Ward, Esq., was the arbitrator. I told him I had learned it earlier this week. I also remarked that Mr. Battaglia was aware of the disdain Mr. Ward had for me throughout the entire [school desegregation] trial in which the two of us were involved because Mr. Battaglia was there. Mr. Battaglia told me it was just aggressive cross-examination. He asked if I thought Mr. Ward would be fair. I told him no.

[9] Pls.' Resp. to Def.'s Mot. for Judicial Intervention at 4, n. 1.

Agreement" in September 2001. That agreement, which provides that Mr. Ward shall be the arbitrator, has no provision for a procedure whereby the parties would submit their dispute to another arbitrator in the event that Mr. Ward became ill or otherwise became unavailable, including the possibility of Mr. Ward's becoming unavailable due to a subsequently-discovered possibility of a conflict.

Both parties take the position that enforcement of the parties' "Binding High/Low Arbitration Agreement" is to be governed by Superior Court Civil Rule 16.1 ("Compulsory Arbitration") because the agreement provides (at ¶ 6) that "[t]he arbitration hearing shall be conducted in accordance with Superior Court Civil Rule 16.1(f) and (g), as relates to procedure", and because the agreement further states (at ¶ 13) that "[p]ending this arbitration agreement, Superior Court shall retain jurisdiction for the purposes of enforcing the terms of the Agreement."

The binding arbitration agreement, however, has basic contradictions with Rule 16.1 and in many ways seems more akin to a common law binding arbitration agreement, enforceable only in the Court of Chancery. See 10 Del. C. Ch. 57. First, Rule 16.1 arbitration is compulsory (unless, as here, the amount of damages claimed is more than $100,000), but here the parties voluntarily agreed to arbitration; arbitration was never compulsory in this case. Second, the parties' agreement provides (at ¶ 7) that rights of appeal are waived, whereas Rule 16.1(h) provides for a right of appeal of an arbitrator's order. Third, the parties agreed to a particular arbitrator in their agreement, but did not agree to a process whereby a new arbitrator would be selected if the agreed-upon arbitrator became ill or was otherwise unavailable; Rule 16.1 does not provide for selection by the judge assigned to the case of an arbitrator in Rule 16.1 arbitration in the

event the parties cannot agree on one. Further, Rule 16.1 does not require that an arbitrator must hear a case over a party's objection claiming a conflict on the part of the arbitrator. Fourth, Rule 16.1 does not authorize any "high/low" agreement, yet such a concept is embodied in the parties' agreement.

The Court has found that "enforcing" the parties' binding arbitration agreement in the confines of Rule 16.1 is somewhat like forcing a square peg into a round hole. Rule 16.1 does not address the situation presented in this case. But this Court will, at the parties' strong mutual urging, resolve the two pending motions. As the Court said in its December 17, 2001 letter to counsel, neither the parties nor the Court want this overly-protracted litigation to start anew in the Court of Chancery in the context of a complaint to enforce the arbitration agreement.

Plaintiffs want arbitration ordered again before Mr. Ward, and only before him. Defendant has submitted a list of 10 Delaware attorneys (all agreeable to Defendant) to Plaintiffs, but Plaintiffs refuse to agree to any arbitrator other than Mr. Ward. Defendant asks the Court to select an arbitrator irrespective of Plaintiffs' consent to conduct the binding high/low arbitration under the terms of the agreement.

This Court believes that all parties involved in this intensely litigated case must feel comfortable that the arbitrator in their case (however chosen) will make a fair and impartial finding. This Court has a high regard for Mr. Ward's professionalism and fairness. Counsel share this opinion. Superior Court Civil Rule 16.1, incorporated by the parties in their high/low binding arbitration agreement, provides at subsection (d)(3) that "[n]one of the arbitrators…may…have any conflict of interest that would disqualify a judge under the Code of Judicial Conduct." Delaware Judges' Code of Judicial Conduct

3(C)(1) provides that "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned…." The word "might" has been defined as "expressing especially a shade of doubt or a lesser degree of possibility,"[10]and when so defined, would seem to require "a judge to err on the side of caution by favoring recusal to remove any reasonable doubt as to his or her impartialty."[11] The appearance of bias or prejudice "undermines not only a litigant's confidence in the fairness of the proceeding but also public confidence in the integrity and impartiality of the judicial system."[12] The Court finds such statements applicable to the problem confronted by the parties to this litigation.

Elementary fairness demands that arbitration proceedings be under the control of a neutral and impartial arbitrator.[13] In Commonwealth Coatings Corp. v. Continental Cas. Co.[14], the United States Supreme Court found that an arbitrator's failure to disclose to the parties "any dealings which might create an impression of possible bias" was a ground for vacation of an arbitrator's award; the Court stated:

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators

[10] Webster's New World College Dictionary 859 (3d ed. 1997).

[11] Robin Farms, Inc. v. Bartholome, 989 S.W.2d 238, 247 (Mo. Ct. App. 1999) (stating such in dicta but holding that judge's prior representation of party in her capacity as personal representative of estate did not create an appearance of impropriety requiring recusal in subsequent unrelated lawsuit, where suits were unrelated and dissimilar, they came several years apart, and fee was paid by estate).

[12] S.S. v. Wakefield, 764 P.2d 70, 73 (Colo. 1988) (holding that an asserted impropriety of a judge's engaging in an *ex parte* communication with a party regarding the effectiveness of the party's court-appointed attorney is not an adequate substitute for a legally sufficient statement of facts regarding bias or prejudice).

[13] Federico v. Frick, 3 Cal. App. 3d 872 (Cal. Ct. App. 1970) (holding that California State Arbitration Act permitted arbitration parties to agree to a non-neutral arbitrator and therefore statute would control in light of party's allegations of arbitrator impartiality).

[14] 393 U.S. 145 (1968), reh. den., 393 U.S. 1112 (1968).

> than judges, since the former have completely free rein to decide the law as well as the facts and are not [here] subject to appellate review.[15]

Thus, an arbitrator permitted to arbitrate a case or controversy "not only must be unbiased but also must avoid even the appearance of bias."[16] "Any doubt of qualification…should be resolved in favor of [the] party questioning it, bona fide, and upon grounds having substance and significance."[17] As one leading authority in the area of judicial ethics has written, "[t]he premise for the [appearance of partiality] standard is that the appearance of fairness is as important as fairness itself."[18]

This Court regrets the unique and, to a large extent, unpredictable circumstances that have led to this impasse. It appears that, had St. Francis Hospital originally been aware of Mr. Ward's 1994 deposition of Mr. Street, that St. Francis Hospital would not have originally agreed to Mr. Ward to serve as the arbitrator. It also seems to the Court that the possible "conflict" posed by Mr. Ward (out of an excess of caution) might not necessarily have risen to the level that truly required Defendant's non-participation, but this Court will not criticize St. Francis Hospital's unease with Mr. Ward as arbitrator in this hard-fought case. Plaintiffs' arguments notwithstanding, the Court will not order the parties to submit to binding high/low non-appealable arbitration with a person that Defendant believes may not make a fair and impartial finding. The fact that Mr. Ward made the disclosure accentuates the importance of proceeding with caution, particularly

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[15] Id. at 148-49.

[16] Id. at 150.

[17] Dotson v. Burchett, 190 S.W.2d 697, 700 (Ky. 1945) (holding that a judge who has disqualified himself to hear and decide a case may subsequently revoke his order and resume jurisdiction unless a special judge has qualified and assumed jurisdiction).

[18] Leslie W. Abramson, Appearance of Impropriety: Deciding When A Judge's Impartiality "Might Reasonably Be Questioned", 14 Geo. J. Legal Ethics 55, 66 (2000).

since the parties have voluntarily submitted to binding arbitration. This Court further notes that there has been a high level of acrimony between the parties since the inception of this litigation, which further militates in favor of a finding that an arbitrator in this case be completely clear of any perception of bias, however remote. As stated, it may well be the case that Defendant could have chosen to continue with Mr. Ward as arbitrator, even after the disclosure, but this is a gray area, and this Court, at the end of the day, cannot say that Defendant was unjustified in withdrawing from the arbitration.[19]

This Court strongly urges the parties to agree upon a new arbitrator to conduct an arbitration pursuant to the parties' agreement. Mr. Ward is not the only capable arbitrator in town, and the parties are apparently still willing to submit the case to binding arbitration. Failing that agreement, this Court sees no alternative but to reschedule the case for trial. Counsel shall confer and Plaintiffs' counsel shall advise the Court of the parties' positions (and, hopefully, agreement on a new arbitrator) on or before February 15, 2002.***CONCLUSION***

For all the above-stated reasons, the Court **DENIES** Plaintiffs' "Motion to Enforce Settlement Agreement, for Sanctions and for Damages." Likewise, this Court **DENIES** Defendant's "Motion for Judicial Intervention in Case Sent to Stipulated Arbitration and for Costs". No costs or attorneys' fees are awarded to either party.

IT IS SO ORDERED.

cc: Prothonotary

[19] Delaware courts recognize that judicial recusal may be appropriate even in circumstances where a judge may be free of actual bias. See Los v. Los, 595 A.2d 381, 385 (Del. 1991) (stating that "situations may arise where, actual bias aside, there is the appearance of bias sufficient to cause doubt as to [a] judge's impartiality").