2012 IL App (1st) 11-3617-U

THIRD DIVISION
October 31, 2012

No. 1-11-3617

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

FAMILY DOCTOR/FAMILY HEALTH CARE, S.C., an Illinois Corporation,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant,	)	
v.	)	No. 11 L 6841
INVENT HORIZON, INC., an Illinois Corporation,	)	Honorable Daniel J. Pierce,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Salone and Justice Steele concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in granting defendant's motion to compel arbitration and stay proceedings where the wavier of proceedings in a court of law and agreement to arbitration were conspicuously written in the dispute resolution clause of an agreement even though the acronym "NAF" was not defined in that clause or elsewhere in the agreement. Issues not raised before the circuit court are waived on appeal.

¶ 2 In this interlocutory appeal, plaintiff Family Doctor/Family Health Care, S.C., (Family

Doctor) claims that the circuit court erred in granting defendant Invent Horizon, Inc.'s motion to compel arbitration and stay proceedings. Family Doctor raised claims of gross negligence, fraud and fraudulent inducement against Invent Horizon when an electronic medical record system implemented and supported by Invent Horizon failed to properly backup Family Doctor's patient medical records. On appeal, Family Doctor claims that the parties' assent to arbitration was not expressly set forth in the parties' written agreement. Family Doctor also claims that the failure to define the acronym "NAF," which stands for National Arbitration Forum, in the agreement renders it ambiguous. Family Doctor further claims that Invent Horizon's gross negligence voids arbitration of the dispute based on the language in the agreement. Lastly, Family Doctor claims that use of NAF as an arbitrator should be precluded on public policy grounds since a perception exits that NAF is not a neutral arbitrator. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

Family Doctor's business consists of providing medical services to patients at its office located in the Village of Skokie. Invent Horizon's business consists of providing specialized information technology consulting and system support services to its customers, which included Family Doctor. In approximately June or July 2009, Invent Horizon consulted with Family Doctor to determine the specific computer hardware components and operating software that would be needed to implement an electronic medical records and practice management software system (software system). After completing its consultation, Invent Horizon provided Family Doctor with a quotation for the necessary equipment, software and installation charges. In August 2009, Family Doctor purchased the software system from Invent Horizon, and it was

implemented at Family Doctor's office from September 2009 through January 2, 2010.

¶ 4 In approximately December 2009 or January 2010, Invent Horizon's representatives discussed with Family Doctor the various system maintenance, real-time monitoring and offsite backup services that it could provide to Family Doctor. On January 11, 2010, Family Doctor and Invent Horizon executed a System Management Services and Support Agreement (Agreement) regarding the hardware and software system that Invent Horizon implemented and installed for Family Doctor. The Agreement included a provision providing for the nightly offsite backup services for up to one gigabyte of Family Doctor's data, and Invent Horizon would monitor the status of the data backups.

¶ 5 In the second week of April 2010, Invent Horizon informed Family Doctor that its data was over-written with another client's data, but the error was resolved and Family Doctor's data was once again being backed-up properly. At approximately 3:30 p.m. on April 13, 2010, Family Doctor's computer system froze and it was unable to access any of the data in the system. Family Doctor contacted Invent Horizon regarding the problem, but Invent Horizon could not resolve the issue remotely and arranged to be onsite the next day to resolve the issue.

¶ 6 Following an onsite service call on April 14, 2010, Invent Horizon determined that the issue could not be resolved because there was a problem with the hard drive, controller or motherboard within the server. Invent Horizon ordered a new motherboard and removed the server for further diagnosis. Also on April 14, 2010, Family Doctor requested the backup data to be restored to a workstation or to a default server. At a minimum, Family Doctor requested the retrieval of its patient schedule, but Invent Horizon told it that the requested function could not

be performed and provided no explanation as to why.

¶ 7 On April 15, 2010, Invent Horizon informed Family Doctor that it lacked the employee resources to install the new motherboard and to simultaneously restore the backup. On April 16, 2010, Invent Horizon informed Family Doctor that due to a problem with the backup, it had no data to restore. Invent Horizon also stated that there was a problem with Family Doctor's controller inside the server, which caused the problems that Family Doctor experienced on April 13, 2010. Invent Horizon, Family Doctor and another equipment vendor participated in a conference call to determine a resolution to the problems encountered by Family Doctor. A new server was required, and Invent Horizon offered to pay for it. Invent Horizon also sent four of Family Doctor's hard drives to a company in North Carolina in an effort to recover additional data. On April 19, 2010, Invent Horizon replaced the original motherboard. On April 21, 2010, Invent Horizon informed Family Doctor that no additional data was recoverable from the hard drives. On the following day, the North Carolina company informed Family Doctor that of the four drives, three had no information on them and one drive had data, but other drives were necessary to recover any working data.

¶ 8 After receiving all of the previously sent hard drives back, Family Doctor sent all six of the hard drives to Kroll Ontrack Data Recovery for an analysis and recovery of additional data. Kroll Ontrack determined that the data on the hard drives was overwritten on April 19, 2010 when Invent Horizon replaced the original motherboard with an incompatible one. Data, including data relating to account receivables, for the period of January 4, 2010 through April 13, 2010 was not recovered from the hard drives.

¶ 9 On July 1, 2011, Family Doctor filed a complaint against Invent Horizon, and on July 5, 2011, it filed a first amended complaint, which alleged misconduct by Invent Horizon relating to the contract dated January 11, 2010 and included counts for gross negligence, fraud and fraudulent inducement. On August 26, 2011, Invent Horizon filed a motion to compel arbitration and stay the instant proceeding claiming that the Agreement mandates the parties to resolve any dispute through binding arbitration. Invent Horizon also claimed that arbitration was mandatory and all other forums, judicial or otherwise, were expressly waived by the parties. Family Doctor filed a response on October 11, 2011 claiming that the dispute resolution section of the Agreement did not, in fact, require arbitration and absent from that provision was clear and unequivocal language indicating that the parties intended that disputes between them would be resolved by arbitration.

¶ 10 On November 17, 2011, the circuit court heard oral arguments on the issue of whether the dispute between the parties was subject to arbitration. Family Doctor argued that the Agreement's failure to specify the meaning of "NAF" rendered the arbitration clause ambiguous because a reasonable person would not know what that acronym stands for, and more specifically, that it stands for National Arbitration Forum. After some discourse, the court and Family Doctor agreed that a word is "ambiguous" if it is susceptible to more than one meaning. Because the circuit court did not consider the acronym "NAF" to be ambiguous, it granted Invent Horizon's motion to compel arbitration and stay the instant proceedings. On December 6, 2011, Family Doctor filed a timely motion for an interlocutory appeal.

¶ 11 ANALYSIS

As a preliminary matter, Invent Horizon maintains that the following claims raised by Family Doctor are waived because it raised them for the first time on appeal: (1) that the Agreement's language requiring arbitration is void since Invent Horizon's conduct was grossly negligent; (2) that the dispute resolution section requiring arbitration is ambiguous when considered with the other sections of the Agreement in its entirety; (3) that a substitute arbitrator may not be selected if NAF is unavailable because the selection of NAF as arbitrator was integral to the mandatory arbitration provision; and (4) that equity and public policy grounds invalidate the arbitration provision if the language is determined to be unambiguous.

¶ 12 It is a commonly known proposition that issues not raised by a party in the circuit court are deemed waived for this court's review. *Haudrich v. Howmedica, Inc.,* 169 Ill. 2d 525, 536 (1996). The rational underlying the waiver rule is "to preserve finite judicial resources by creating an incentive for litigants to bring to the trial court's attention alleged errors, thereby giving trial courts an opportunity to correct their mistakes.' " *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453 (2007), quoting *People v. McKay*, 282 Ill. App. 3d 108, 111 (1996). The waiver rule was also intended to prevent unfair prejudice to an opposing litigant by eliminating the possibility of raising an argument on appeal where no new evidence may be presented. *Id.*

¶ 13 In the case *sub judice*, Family Doctor failed to raise the contested issues during oral argument on Invent Horizon's motion to compel arbitration and stay proceedings and in its response to Invent Horizon's motion to compel arbitration and stay proceedings. Instead, both

the written pleading and the oral argument focused on the alleged ambiguity that was created by using the "NAF" acronym without a corresponding explanation of it. Because Invent Horizon was not afforded the opportunity to argue the merits of Family Doctor's contentions raised for the first time on appeal before the circuit court nor was the circuit court able to rule on those issues, we conclude that it would be prejudicial to address those issues now and, instead, adhere to the waiver rule. See *Haudrich*, 169 Ill. 2d at 536 (concluding that an issue raised for the first time on appeal was waived because neither the plaintiff nor the court had a "rightful opportunity to address the question in the first instance.") Accordingly, we will only address Family Doctor's non-waived claims of error.

¶ 14 On appeal, Family Doctor claims that the circuit court erred in granting Invent Horizon's motion to compel arbitration and stay proceedings because the Agreement's language fails to set forth a clear intent or meeting of the minds that any dispute between the parties would be subject to arbitration. Family Doctor also claims the Agreement was ambiguous because the acronym "NAF" was not defined in the Agreement.

¶ 15 Family Doctor asks this court to review and interpret the Agreement's language. Since our task on appeal is to interpret the language of an agreement to arbitrate, which is a matter of contract and a question of law, we will employ a *de novo* standard of review. *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 20 (2011). A *de novo* standard of review is also appropriate where, as here, the circuit court rules on a motion to compel arbitration without conducting an evidentiary hearing and without rendering a finding on any factual issue. *Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976, 981 (2005).

¶ 16 Turning to the Agreement's language, section 9 entitled "Dispute Resolution" is at issue and states in its entirety:

> "The arbitration will be conducted before a single arbitrator, and will be limited solely to the dispute between the parties. The arbitration, or any portion of it, will not be consolidated with any other arbitration and will not be conducted on a class wide or class action basis. The non-prevailing party in the arbitration of any dispute will reimburse the prevailing party for any fees paid to NAF in connection with the arbitration. Any decision rendered in such arbitration proceedings will be final and binding on the parties, and judgment may be entered thereon in any court of competent jurisdiction. Should either party bring a dispute in a forum other than NAF, the arbitrator may award the other party its reasonable costs and expenses, including attorneys' fees, incurred in staying or dismissing such other proceedings or in otherwise enforcing compliance with this dispute resolution provision. CLIENT UNDERSTANDS THAT, IN THE ABSENCE OF THIS PROVISION, CLIENT WOULD HAVE HAD A RIGHT TO LITIGATE DISPUTES THROUGH A COURT, INCLUDING THE RIGHT TO LITIGATE CLAIMS ON A CLASS WIDE OR CLASS ACTION BASIS, AND THAT CLIENT HAS EXPRESSLY AND KNOWINGLY WAIVED THOSE RIGHTS AND AGREED TO RESOLVE ANY DISPUTES THROUGH BINDING ARBITRATION IN ACCORDANCE WITH THE PROVISIONS OF THIS PARAGRAPH. This arbitration provision shall be governed by the Federal Arbitration Act, 9 U.S.C. Section 1, *et. seq.* For the purposes of this provision, the term 'dispute' means any dispute, controversy, or claim arising out of or

> relating to: (i) this Agreement, its interpretation, or the breach, termination, applicability or validity thereof; (ii) the related order for, purchase, delivery, receipt or use of any product or service from IH; or (iii) any other dispute arising out of or relating to the relationship between Client and IH. The term 'IH' means Invent Horizon, its parents, subsidiaries, affiliates, directors, officers, employees, beneficiaries, agents, assigns, component suppliers (both hardware and software), and/or any third party who provides products or services purchased from or distributed by Invent Horizon."

Family Doctor claims that the above language fails to demonstrate a meeting of the minds to arbitrate any dispute arising between the parties. We disagree.

¶ 17 By using all capital letters, the quoted language above addressing waiver conspicuously informed Family Doctor that it waived its right to litigate disputes through a court, and that it agreed to resolve any disputes through binding arbitration. Family Doctor maintains that the Agreement does not contain any language reflecting the clear and unequivocal intent of the parties that disputes between them will be resolved by arbitration. However, the Agreement states in part that the client, Family Doctor, "AGREED TO RESOLVE ANY DISPUTES THROUGH BINDING ARBITRATION IN ACCORDANCE WITH THE PROVISIONS OF THIS PARAGRAPH." Although the dispute resolution provision of the Agreement did not start with language reflecting Family Doctor's agreement to arbitration, its acceptance of arbitration was expressly provided a few sentences later. Accordingly, this provision's language in its entirety expressly provides for Family Doctor's acceptance of arbitration as the method to resolve disputes between the parties. Moreover, Invent Horizon drafted the Agreement and based on the

language used, it is clear that Invent Horizon acquiesced in the use of an arbitrator to settle any dispute between it and Family Doctor. Thus, the Agreement's language supports the conclusion that the parties intended to arbitrate any dispute between them. See *Buenz v. Frontline Transp. Co.*, 227 Ill. 2d 302, 308 (2008) (stating that "the cardinal rule of contract interpretation is to discern the parties' intent from the contract language.")

¶ 18 Both parties on appeal discuss the Illinois Supreme Court's decision in *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 18 (2011). In *Carr*, a class action complaint was filed alleging that computer manufacturers mislead consumer purchasers by marketing the Pentium 4 processors and computers as being faster than its predecessors when, in fact, that processor was slower than the predecessor processors. *Id.* Gateway filed a motion to dismiss or, in the alternative, to compel arbitration. *Id.* at 19. In the "Limited Warranty Terms and Conditions Agreement" that was included with the computer that consumers purchased, the NAF was the designated forum for the arbitration. *Id.* at 17, 19. While the case was pending on appeal, the NAF ceased accepting consumer arbitrations. *Id.* at 17. The issue for review before the Illinois Supreme Court was whether the Federal Arbitration Act allows the court to appoint a substitute arbitrator upon the unavailability of the designated arbitrator. *Id.* at 18. Based on its analysis of the agreement's penalty provision, the *Carr* court held that the agreement to arbitrate must fail because the designation of the NAF as the arbitral forum was integral to the agreement to arbitrate, and a substitute arbitrator may not be selected under the Federal Arbitration Act if the NAF became unavailable. *Id.* at 33.

¶ 19 Relying on *Carr*, Family Doctor claims that selection of NAF as the arbitrator was

integral to the arbitration agreement since the penalty provision in the Agreement in the case *sub judice* was identical to the language in *Carr.* Because selection of NAF as the arbitrator was integral to the Agreement and no definition of the acronym was provided in the Agreement, Family Doctor maintains that the Agreement was ambiguous rendering any agreement to arbitrate void.

¶ 20 We, as does Invent Horizon, agree that the penalty provision in the instant case was identical to the penalty provision in *Carr*. Both agreements provide that "should either party bring a dispute in a forum other than NAF, the arbitrator may award the other party its reasonable costs and expenses, including attorneys' fees, incurred in staying or dismissing such other proceedings or in otherwise enforcing compliance with this dispute resolution provision." *Id.* at 32. Relying on this language, the Illinois Supreme Court in *Carr* concluded that selection of NAF as the arbitrator was integral to the agreement to arbitrate because the monetary penalty would be imposed if a party files a claim with an arbitral service other than NAF. *Id.* at 33. Because we must adhere to the Illinois Supreme Court's reasoning and rational in *Carr*, we conclude that based on the penalty provision's language, the use of NAF as the arbitrator was integral to the arbitration. See *Christiansen v. Masse*, 279 Ill. App. 3d 162, 167 (1996) (recognizing that Illinois Supreme Court rulings are binding on all other Illinois courts.)

¶ 21 However, we disagree with Family Doctor that the failure to define the acronym "NAF" in the Agreement renders it ambiguous thereby precluding arbitration. Although Family Doctor is correct that absent from the Agreement is the definition of the acronym "NAF," when reading that term in context with the language in the paragraph in its entirety, it is evident that NAF

relates to arbitration and is a forum for arbitration. Specifically, the Agreement states in part that "should either party bring a dispute in a forum other than NAF" and that in the arbitration of any dispute, the non-prevailing party "will reimburse the prevailing party for any fees paid to NAF in connection with the arbitration." Even though the Agreement does not specify that NAF stands for the National Arbitration Forum, the Agreement sufficiently discloses that NAF is an arbitrational tribune. Given the context that the term "NAF" was used in and considering the language of the Agreement in its entirety, the failure to define "NAF" as the National Arbitration Forum does not render the Agreement ambiguous. Moreover, when read in context, this court cannot conclude that the term "NAF" and selection of it as arbitrator was so difficult to identify, read or understand to fairly say that Family Doctor was not aware of what it was agreeing to. See *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 22 (2006) (stating that a contract may be considered unconscionable where a term is difficult to locate or comprehend because the individual may not have known that he was agreeing to that particular term.) Accordingly, the circuit court did not err in granting Invent Horizon's motion to compel arbitration and stay proceedings because the dispute resolution provision in the Agreement was not ambiguous and by executing the Agreement, Family Doctor waived its right to litigate any dispute in court and agreed to arbitration.

¶ 22 CONCLUSION

¶ 23 For the reasons stated, we affirm the circuit court's granting of Invent Horizon's motion to compel arbitration and stay proceedings.

¶ 24 Affirmed.