SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH A. DE MARO

Justice

TRIAL/IAS, PART **3**
NASSAU COUNTY

DR. WILLIAM J. DITOLLA, on behalf of himself and all others similarly situated,

Plaintiff,

MOTION DATE:
January 25, 2007
INDEX No. 2070/06

-against-

SEQUENCE No. 2

DORAL DENTAL IPA OF NEW YORK, LLC, DORAL DENTAL USA, LLC and DENTAQUEST VENTURES, LLC,

Defendants.

The following papers read on this motion:

Notice of Motion and Supporting Papers
Plaintiff's Memorandum of Law in Opposition
Defendants' Reply Memorandum in Support

Motion pursuant to CPLR Article 75 by the defendants for an order compelling arbitration of the claims set forth in the plaintiff's complaint.

In February of 2006, the plaintiff William J. Ditolla, DDS, commenced the within, putative class action against the defendants Doral Dental IPA of New York, LLC, Doral Dental USA, LLC and Dentaquest Ventures, Inc., [collectively "Doral"], seeking an accounting and "to compel disclosure" from Doral -

"the largest multi-state, Medicaid dental administrator in the country" (Cmplt., ¶ 4).

More particularly, the plaintiff contends that Doral regularly enters into contracts with various health maintenance organizations and state governments, pursuant to which it administers dental plans in some seventeen different states, including New York (Cmplt., ¶¶ 3-6).

According to the plaintiff, he and other similarly situated dentists entered into contracts with Doral by which they agreed to provide dental services to medicaid patients - in exchange for which Doral was to make payments in accord with a published fee schedule (Cmplt., ¶¶ 10-12).

Pursuant to the parties' agreement and relevant attachments, the total "amount available to be paid to participating dentists is deposited in a `Dental Reimbursement Pool'"(Cmplt.,¶ 12).

Significantly, the parties' agreement also allegedly permits Doral to "enter into contracts with * * * certain brokers and consultants" and further provides that the Pool may be reduced by any commissions and/or other fees ultimately paid by Doral to these third parties (Cmplt.,¶ 15).

The plaintiff contends that the effect of these third party payments, is to reduce the Pool amounts available to participating dentists for "services rendered to the Medicaid population"(Cmplt.,¶ 21).

The plaintiff further alleges that since the contract permits Doral to retain these consultants and brokers - and then

to deduct their compensation from the pool - Doral owed a fiduciary duty to the plaintiffs, *i.e.*, Doral was duty-bound to retain only if the services provided would actually further the best interests of the plaintiffs (Cmplt.,¶ 16).

Although the plaintiff's complaint does not currently accuse Doral of any wrongful acts, the plaintiff advises that grand juries in three states are currently investigating whether Doral fraudulently paid out sums from the Pool to public officials in exchange for, *inter alia*, political favors (Cmplt.,¶¶ 16-20).

Notably, section 10[h] of the parties' "Dental Service Provider Agreement"' contains an arbitration clause, which states in full:

"**Arbitration. If a dispute regarding payment arises between the parties involving a contention by one party that the other has failed to perform its obligations and responsibilities under this Agreement, then the party making such contention shall promptly give notice to the other. Such notice shall set forth in detail, the basis for the party's contention, and shall be sent by Certified Mail-Return Receipt Requested. The other party shall within thirty (30) calendar days of receipt of the notice provide a written response seeking to satisfy the party that gave notice regarding matters as to which notice was given. Following such response, or the failure of the second party to respond to the compliant [sic] within thirty (30) calendar days, if the party that gave the notice of dissatisfaction remains dissatisfied, then the party shall so notify the other party and the matter**

shall be promptly submitted to inexpensive and binding arbitration."

Based upon the facts recited above, the plaintiff has interposed a single cause of action, which requests an "equitable accounting of all amounts by which the pool was funded and reduced throughout the period in which * * * [Doral] has been under contract to provide dental services to the New York Medicaid and Medicare populations * * *" (Cmplt.,¶¶ 33-36).

Specifically, the plaintiff's accounting claim requests information relating to, *inter alia*, the amount, date and basis for each payment, as well as the identity of each recipient and the recipient's legal and/or familiar relationship - if any - to employees, directors, agents or officers of Doral (Cmplt.,¶ 36).

Doral attempted to remove the matter to the Federal District Court for the Eastern District of New York. That application, however, was denied upon the ground that Doral could not meet the relevant, $5 million "amount in controversy" requirements for establishing federal jurisdiction under the Federal Class Action Fairness Act (*see*, 28 USC § 1332[d][2]).

By order dated November 11, 2006, the Second Circuit affirmed the District Court's dismissal, concluding in substance, that the value of the plaintiff's claim was indeterminate for federal "amount-in-controversy purposes" since, *inter alia*, the complaint did not "lay claim" to any specific portion of the pool or any particular monetary amount, but "at most, * * *

suggest[ed] a claim to some yet undefined portion, the amount of which is contingent on the outcome of the accounting" (*DiTolla v. Doral Dental IPA of New York*, 469 F.3d 271, 277 [2nd Cir. 2006]).

In July of 2006 and prior to the issuance of the Second Circuit's order, Doral made the above-mentioned application in this Court pursuant to article 75 for an order compelling the plaintiff to arbitrate its claim, as allegedly required by section 10[h] of the parties' Dental Service Provider Agreement (Cmplt., Exh., "A")(*see*, CPLR 7503[a]).

After the Second Circuit's remand order was issued, this Court, *inter alia*, directed the parties to file papers in connection with Doral's motion, which motion was then to be deemed submitted (Order of DeMaro, J., dated January 3, 2007).

The matter is now before the Court for resolution of Doral's application to compel arbitration. The motion is granted.

Preliminarily, while Doral contends that the Federal Arbitration Act ["FAA"] (9 USC § 1 *et seq*), is applicable (Doral Brief at 3, fn 2) (*see*, *Diamond Waterproofing Systems, Inc. v. 55 Liberty*, 4 NY3d 247 [2005])(Defs' Brief at 2-4), the parties' agreement broadly provides, *inter alia*, that "[t]his agreement shall be governed *in all respects* by the laws of the state of New York" (Agreement, ¶ 10[e])[emphasis added].

Turning to those principles, and accepting that both the FAA and New York law strongly favor arbitration of disputes (*e.g.*, *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 [1983]; *Singer v Jefferies & Co.*, 78 NY2d 76, 81-82 [1991]),

the Court agrees that the plaintiff's accounting cause of action falls within the ambit of the subject arbitration clause.

The governing language adopted by the parties expressly provides for arbitration where, *inter alia* : (1) a "dispute *regarding payment* arises between the parties" which; (2) involves a *contention* that a party has failed to perform "its obligations and responsibilities under this Agreement" [emphases added].

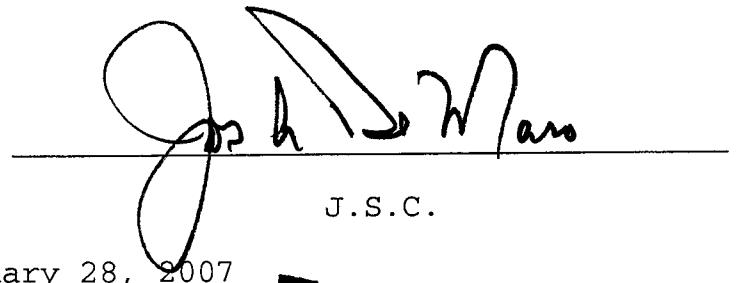
The very basis of plaintiffs's suit is the allegation that the manner of use of the funds in the "pool" by defendant is an irresponsible use, which lessens the amount of funds available to be paid out to plaintiff, as reimbursement for treating medicaid patients. This very scenario is fully addressed by the agreed upon binding arbitration clause. The Federal Court acknowledged that the complaint laid "claim to some yet undefined portion" of the pool (DiTolla v. Doral Dental IPA of New York, supra).

This Court is cognizant of the Court of Common Please, Pa, 2004, in Goldstein v. Doral Dental Service of PA, ____ AD2d ____ [NOR], 2004 WL 2979757, which concluded that the accounting claim of plaintiff therein, did not fall within the scope and ambit of section 10[h] and denied the motion to compel. This Court respectfully rejects said determination as inconsistent with its reading of the arbitration clause and the nature of the claim of the plaintiff herein.

Accordingly, it is,

ORDERED, that the motion by the defendants for an order compelling arbitration of the claims set forth in the plaintiff's complaint, is granted.

The foregoing constitutes the decision and order of the Court.



J.S.C.

Dated: February 28, 2007