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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

LAURA A. THOMPSON	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: 3:18-CV-1126-LCB
	)	
GENERALI WORLDWIDE INSURANCE COMPANY LIMITED	)	
	)	
Defendant.	)	

Memorandum Opinion and Order

This case involves a long-term disability insurance policy ("the Policy")[1] that was issued by the defendant, Generali Worldwide Insurance Company Limited ("Generali"). The plaintiff, Laura A. Thompson, submitted a claim for long-term disability under the Policy that was denied by Generali. Thompson filed a complaint on July 23, 2018, in which she alleged that Generali, by denying her claim for long-term disability, breached its contract with her, acted in bad faith, and committed fraud. (Doc. 1).

On December 13, 2018, Generali filed a motion to compel arbitration. (Doc. 12). In its motion, Generali noted that the Policy under which Thompson was allegedly covered contained an arbitration provision requiring any claims arising out of the Policy to be arbitrated. In response, Thompson argued that the

[1] The Policy is formally known as the "IARC Death and Disability Benefit Plan."

arbitration provision grossly favored Generali, and that she had no meaningful choice of whether to accept or reject the terms of the arbitration provision. Thompson also contended that the cost to arbitrate her claim would be excessive and unreasonable. Therefore, Thompson argued, the arbitration provision is unconscionable and, consequently, unenforceable. For the reasons set forth below, this Court finds that Generali's motion to compel arbitration is due to be granted.

I. Background

Thompson is a former employee of the International Fertilizer Development Center ("IFDC"), a nonprofit corporation whose primary objective is to assist developing nations in increasing agricultural production through the use and development of fertilizers. The IFDC is part of the larger Association of International Agricultural Research Centers ("AIARC"). Thompson was employed as an accountant at an IFDC center located in Decatur, Alabama.

Generali is an international insurance company that is headquartered on the Island of Guernsey. The Policy in question is between Generali and the International Agricultural Research Centers Retirement Plan Trustee Limited ("the Trustee"). Under the Policy, Generali is "the Insurer" and the Trustee is "the Insured." (Doc. 12-1, p. 2-3). The AIARC is "the Plan Administrator." (Doc. 12-1, p. 3). The Policy provides to the insured certain defined benefits "which are for the benefit of those persons who have been accepted as Members of the Plan…."

(Doc. 12-1, p. 4). "Members of the Plan" include, among others, certain employees of the IFDC and their dependents. The Policy provides, among other benefits, a monthly disability payment to members who become unable to work due to certain medical conditions. Thompson claimed to be entitled to these benefits.

As noted, Thompson is a former employee of the IFDC. Thompson stated that she began missing substantial amounts of work "on or around August 1, 2016," due to various health problems. (Doc. 1, p. 4). Thompson alleged that she last worked on August 14, 2016, after which she was placed on unpaid medical leave. It is undisputed that, on November 28, 2016, Thompson's employment with the IFDC ended after Thompson exhausted her medical leave. According to Thompson, she contacted her employer "[o]n or about November 28, 2016," to inquire about filing a claim for long-term disability under the Policy. However, Thompson's claim was not formally submitted by the IFDC to Generali until February 22, 2017.[2] Generali denied the claim on the basis that Thompson was no longer employed by the IFDC when she filed her claim and, therefore, was not a "Member of the Plan" who was covered under the Policy. Generali cited to the section of the Policy which provided that coverage under the policy would terminate "forthwith on termination of [the] Member's employment with a

[2] Thompson alleged that she also formally submitted a claim directly to Generali on March 2, 2017.

Participating Employer." (Doc. 12-1, p. 7). Accordingly, the ultimate issue to be decided is whether, under the terms of the Policy, Generali correctly determined that Thompson was not covered under the Policy when her claim was submitted.

However, the issue presently before this Court is whether the arbitration clause contained in the Policy is enforceable. For purposes of this memorandum opinion the Court will accept as true Thompson's assertion that she was covered under the Policy when her claim was filed with Generali.

II. Discussion

A. Standing

In order to reach the issue of whether the terms of the arbitration provision are unconscionable, the Court must first determine whether Thompson has standing to sue to enforce the terms of the policy. The Eleventh Circuit has held that "'standing is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims.'" *Interface Kanner, LLC v. JPMorgan Chase Bank, N.A.*, 704 F. 3d 927, 932 (11th Cir. 2013), *quoting Bochese v. Town of Ponce Inlet*, 405 F. 3d 964, 974 (11th Cir. 2005). *quoting in turn Dillard v. Baldwin Cnty. Comm'rs*, 225 F.3d 1271, 1275 (11th Cir. 2000)). The Court in *Interface Kanner* held that a plaintiff can only establish standing if it is an intended third-party beneficiary of the agreement. *Id.* (" Interface can only

establish standing if it is an intended third-party beneficiary of the P & A Agreement."). The Eleventh Circuit continued, holding:

> Under federal common law, the court looks to general contract principles in interpreting the P & A Agreement. *Ellinger v. United States*, 470 F. 3d 1325, 1336 (11th Cir. 2006); *see also Belize Telecom, Ltd. v. Gov't of Belize*, 528 F. 3d 1298, 1307 n. 11 (11th Cir. 2008) ("When interpreting contracts under federal law, courts look to general common law on contracts."). One such principle is that only a party to a contract or an intended third-party beneficiary may sue to enforce the terms of a contract. *GECCMC, 2005–C1 Plummer St. Office L.P. v. JPMorgan Chase Bank, N.A.*, 671 F. 3d 1027, 1032–33 (9th Cir. 2012) (applying federal common law); Restatement (Second) of Contracts § 304 (1981). In contrast, a beneficiary whose benefit is merely incidental has no right to sue to enforce a contract as a non-party. *GECCMC*, 671 F. 3d at 1033; *see also* Restatement (Second) of Contracts § 315 (noting that an incidental beneficiary acquires "no right against the promisor or the promisee").

Interface Kanner, LLC, 704 F. 3d at 932-33.

There is no doubt that Thompson is not a party to the Policy. The cover page of the Policy indicates that the insurance policy is "between [Generali] (the Insurer) and [the Trustee] (the Insured) and [the AIARC] (the Plan Administrator)." (Doc. 12-1). The Policy was signed by representatives of the AIARC and Generali. (Doc. 12-1, p. 20). However, the Policy indicates that it is for "the benefit of those persons who have been accepted as Members of the Plan…." As an employee of the IFDC, Thompson was a Member of the Plan and, therefore, the Court concludes that she was an intended third-party beneficiary of

the Policy. Therefore, Thompson has standing to sue regarding the terms of the Policy.

B. The Arbitration Provision

The Policy contains a broad arbitration provision which provides as follows:

> Any difference arising out of this Policy (save as provided otherwise in this Policy) or concerning its validity shall be submitted to arbitration for decision by a panel of arbitrators…. The arbitration so requested shall be conducted under the rules of the United Nations committee on international trade law (uncitral). The arbitral tribunal shall be composed of three arbitrators. The place of arbitration shall be London, England and the arbitral procedure shall be conducted in the English language. The arbitral tribunal shall make its award in accordance with the substantive laws of England.

(Doc. 12-1, p. 18). Thompson does not appear to dispute that her claim arises out of the Policy. Rather, her only argument is that the arbitration provision contained in the Policy is unconscionable.

The Alabama Supreme Court has held:

> "Both federal and state courts have consistently recognized that the duty to arbitrate is a contractual obligation and that a party cannot be required to arbitrate any dispute that he or she has not agreed to submit to arbitration. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986); *A.G. Edwards & Sons, Inc. v. Clark*, 558 So. 2d 358 (Ala. 1990). Because arbitration is a creature of contract, ordinary contract principles govern the interpretation of an agreement to arbitrate. *Ex parte Jones*, 686 So. 2d 1166 (Ala. 1996). It is a well-established principle of Alabama law that a contract made for the benefit of a third person may, at his election, be accepted and enforced by him. *Michie v. Bradshaw*, 227 Ala. 302, 149 So. 809 (1933). However, '[i]f he claims the benefits [of the contract], he also assumes the burdens.' *Michie*, 227 Ala. at 308, 149 So. at 814. *See also*, *Ex parte Dyess*,

> 709 So. 2d 447 (Ala.1997) (nonsignatory plaintiff claiming the benefit of a contract as a third-party beneficiary is subject to arbitration agreement within that contract). 'The law is clear that a third party beneficiary is bound by the terms and conditions of the contract that it attempts to invoke. "The beneficiary cannot accept the benefits and avoid the burdens or limitations of a contract."' *Interpool Ltd. v. Through Transport Mut. Ins. Ass'n Ltd.*, 635 F.Supp. 1503, 1505 (S.D. Fla. 1985), *quoting Trans–Bay Engineers & Builders, Inc. v. Hills*, 551 F. 2d 370, 378 (D.C.Cir.1976). *See also, Dunn Constr. Co. v. Sugar Beach Condominium Ass'n*, Inc., 760 F .Supp. 1479 (S.D. Ala.1991); *Lee v. Grandcor Medical Systems, Inc.*, 702 F.Supp. 252, 255 (D. Colo. 1988) ('A third party beneficiary must accept a contract's burdens along with its benefits'). It is thus clear that a third-party beneficiary cannot accept the benefit of a contract, while avoiding the burdens or limitations of that contract."

Georgia Power Co. v. Partin, 727 So. 2d 2, 5 (Ala. 1998). Accordingly, Thompson is subject to the arbitration provision absent some reason for this Court to excise that provision from the Policy.

As noted, Thompson contends that the arbitration provision contained in the Policy is unconscionable and, therefore, unenforceable. In support of her argument, Thompson cites *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281, 115 S. Ct. 834, 843, 130 L. Ed. 2d 753 (1995), in which the United States Supreme Court held that "States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2 (emphasis added)."

The Alabama Supreme Court has held that "[w]hile it is true that a court may rescind a contract, or a portion of a contract, for unconscionability, '[r]escission of a contract for unconscionability is an extraordinary remedy usually reserved for the protection of the unsophisticated and uneducated.' *Layne v. Garner*, 612 So. 2d 404, 408 (Ala. 1992), *quoting Marshall v. Mercury Finance Co.*, 550 So. 2d 1026, 1028 (Ala. Civ. App. 1989), *quoting in turn E & W Building Material Co. v. American Savings & Loan Ass'n*, 648 F. Supp. 289, 291 (M.D. Ala.1986). The Alabama Supreme Court then set out the standard for determining whether a contractual provision was unconscionable:

> An unconscionable contract or contractual provision is defined as a contract or provision "such as no man in his sense and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Lloyd v. Service Corp. of Alabama*, 453 So. 2d 735, 739 (Ala. 1984), *quoting Hume v. United States*, 132 U.S. 406, 410, 10 S.Ct. 134, 136, 33 L.Ed. 393 (1889). Although Alabama law lacks an explicit standard for determining whether a contract or contractual provision is unconscionable, case law reveals that four factors are important in making this determination.
>
> In addition to finding that one party was unsophisticated and/or uneducated, a court should ask (1) whether there was an absence of meaningful choice on one party's part, (2) whether the contractual terms are unreasonably favorable to one party, (3) whether there was unequal bargaining power among the parties, and (4) whether there were oppressive, one-sided, or patently unfair terms in the contract. *See, Advertiser Co. v. Electronic Engineers*, 527 So. 2d 1317 (Ala. Civ. App. 1988); *Crestline Center v. Hinton*, 567 So. 2d 393 (Ala. Civ. App. 1990); *Lloyd v. Service Corp*., 453 So. 2d 735, 739; and *Wilson v. World Omni Leasing, Inc.*, 540 So.2d 713, 717.

Layne, 612 So. 2d at 408. Thompson argues that all four elements are satisfied in the present case.

In her response to Generali's motion to compel arbitration, Thompson appears to base her argument on the presumption that she was a party to the contract as opposed to a third-party beneficiary. Thompson asserted that she had no meaningful choice in whether to accept or reject the arbitration provision, and that she had no opportunity to purchase disability insurance elsewhere. However, it has already been established that Thomson is not a party to the contract, and that she took no part in the negotiation of the contract. Further, nothing in the contract prohibited Thompson from purchasing long-term disability insurance of her own through another provider.

In order for Thompson to meet the first three elements listed above, she would have to demonstrate that a party to the contract, i.e., the Trustee, had no meaningful choice regarding the arbitration provision, that the arbitration provision is unreasonably unfavorable to the Trustee, and that there was unequal bargaining power between the Trustee and Generali. Thompson has cast herself as an unsophisticated party to the contract who was overborne by Generali. However, that is not the case. Nothing in Thompson's response indicates that the parties to

the contract, i.e., Generali and the Trustee, were on unequal footing when they negotiated the arbitration provision.[3]

Thus, the only element that Thompson could potentially satisfy is the final element regarding patently unfair terms in a contract. In support of her contention that the terms of the arbitration provision are patently unfair, Thompson asserts that the cost to arbitrate her claim would be prohibitively expensive. Thompson cites *Leonard v. Terminix Intern. Co., L.P.*, 854 So. 2d 529, 539 (Ala. 2002), for the proposition that an arbitration provision is unconscionable "if it imposes excessive cost and thus prevents a party from entering an arbitral forum." (Doc. 17), citing *Leonard*, 529 So. 2d at 539. However, the court in *Leonard* actually held that the arbitration agreement in that particular case was unconscionable because it "restrict[ed] the Leonards to a forum where the expense of pursuing their claim far exceeds the amount in controversy." *Id.* (emphasis added). Plaintiff's counsel stated that he contacted a law firm in Geneva, Switzerland, to obtain an estimate of the cost of arbitration. Counsel stated: "Assuming the

[3] The Court notes that, at first blush, the arbitration provision does appear to favor Generali in that it would require an IFDC employee from Alabama to arbitrate her claims in London, England. However, Generali attached an affidavit to its reply brief from Francis Kehoe, an actuary employed by Generali who is familiar with the Policy. According to Kehoe, the "AIARC comprises more than 20 separate centers, located disparately throughout the world, with more than 1,800 personnel in more than 80 countries. Fewer than 4% of the centers' employees (referred to as members) are located in the U.S., a percentage less than half that of the members located in Europe." (Doc. 18-1, p. 3). Kehoe stated that the arbitration provision, including the location of any arbitration, was "the subject of specific negotiation between Generali and AIARC." *Id.*

estimated amount in dispute in this matter was between $125,000 and $250,000, the fees of the arbitral tribunal would likely exceed $100,000." (Doc. 17, p. 9). Thompson also submitted affidavits estimating the cost of traveling to London and employing an attorney there.

In its response, Generali points out that the UNCITRAL rules, under which the parties are to arbitrate, provide that a party may appear by telephone. Furthermore, Generali asserts that nothing in the arbitral rules require her to hire a London attorney to represent her. Therefore, Generali says, Thompson's argument regarding the cost of arbitration is baseless because nothing prevents her from appearing by telephone and being represented by her current attorney. As to the cost of the arbitration far exceeding the amount in controversy, Generali contends that Thompson's own complaint states that she is entitled to more than $1.3 million dollars from Generali.[4] Thus, Generali says, Thompson's claim regarding the arbitration fees is belied by her own pleadings.

This Court has reviewed all of the filings in this case including the UNCITRAL Arbitration Rules, which were attached as an exhibit to Generali's motion. (Doc. 12-4). Generali is correct in that the UNCITRAL rules provide that "[t]he arbitral tribunal may direct that witnesses, including expert witnesses, be

[4] A review of Thompson's complaint reveals that she has alleged $600,000 in compensatory damages and $2,000,000 in punitive damages in addition to the money she claims to be entitled to under the LTD Policy. (Doc. 1).

examined through means of telecommunications that do not require their physical presence at the hearing." (Doc. 12-4, p. 21). Thus, Thompson would not have to travel to London in order to participate in the arbitration. Additionally, nothing in the policy prohibits her present counsel from continuing to represent her.

Moreover, the issue to be decided at arbitration would not likely require a great deal of evidence or testimony. At this point, Thompson's claim has not been denied based on any medical determinations. Rather, her claim was denied because Generali does not believe that she was a "member" at the time she filed her claim. Thus, the only issue to be determined at this point is whether Thompson's claim was timely. The parties do not appear to dispute the timeline of events, i.e., that Thompson's employment ended on November 28, 2016, that she began to inquire about filing a claim "on or about" that day, and that Generali formally received claims on February 22, 2017, and March 2, 2017. Accordingly, an arbitral tribunal would need only to construe the language of the Policy to determine when Thompson's claim was filed and if Thompson was a member at that time. The cost estimates of employing arbitrators provided by plaintiff's counsel assumed a much lengthier and more complex proceeding. *See* (Doc. 17-4, p. 1). Additionally, Thompson ignores the fact that she would be able to recover the costs of the arbitration from Generali if she were successful at arbitration. *See* (Doc. 17-4, p. 1).

This Court concludes that the arbitration costs in the present case do not grossly exceed the amount in controversy. Accordingly, Thompson has failed to demonstrate that the arbitration provision in the Policy is unconscionable. Therefore, the Court finds that Generali's motion to compel arbitration is due to be, and is hereby **GRANTED**.

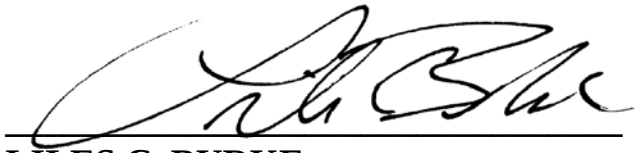
Generali also requested that this Court stay the proceedings in accordance with 9 U.S.C. § 3, which provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement….

Because this Court is granting the motion to compel arbitration, this case is hereby **STAYED** pending arbitration.

The Court notes that Generali filed a motion to dismiss Thompson's complaint contemporaneously with its motion to compel arbitration. (Doc. 11). In that motion, Generali requested that the Court rule on the motion to dismiss only if it denied the motion to compel arbitration. (Doc. 11, p. 1, n. 1). Because the Court is granting Generali's motion to compel arbitration, the motion to dismiss is **MOOT**.

DONE and **ORDERED** June 7, 2019.



LILES C. BURKE
UNITED STATES DISTRICT JUDGE