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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2022-CP-42-00454

Appellate Case No. 2022-001210

Ed Medford, in his individual capacity, and on behalf of those similarly situated, ...Respondents,

v.

Deepak Israni, R Cucamonga, LLC, PAC R Cucamonga LP, Pacifica Skylyn, LLC, d/b/a Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ... Appellants.

INITIAL BRIEF OF APPELLANTS

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1. Whether the circuit court erred in denying Pacifica's motion to compel Plaintiffs' claims to arbitration.

    a. Whether the circuit court erred in finding the Agreement's arbitration provision did not evince a mutual intent to be bound to binding arbitration.

    b. Whether the circuit court erred in finding the Agreement's arbitration provision was not supported by sufficient consideration.

STATEMENT OF THE CASE

This appeal arises from a putative class action, filed on February 8, 2022, related to alleged deficiencies with the independent senior living accommodations at Pacifica Senior Living Skylyn ("Pacifica" or "the Facility"). (*See* Pl.'s Compl.). Plaintiff Ed Medford ("Plaintiff") was a resident of an independent living apartment on Pacifica's campus, and had lived on Pacifica's campus for five years at the time this suit was filed. (*Id.* ¶ 1.). Plaintiff brought this action individually and on behalf of a putative class of other residents, alleging breach of contract, negligence, and related causes of action against: Pacifica; allegedly related entities R Cucamonga, LLC and Pac R Cucamonga, LP; former director Matthew Arledge; management consultant ETROS, LLC; and individual Deepak Israni as an alleged "manager" of Pacifica. (*See* Pl.'s Compl.). The allegations relate to the operation and maintenance of the facility and non-medical services provided by Pacifica; all allegations stem from Plaintiff's residence in independent living at Pacifica, though Plaintiff purports to represent a class of residents living in both the independent living apartment building and a separate assisted living facility on the campus. (*Id.*).

Plaintiff signed a Residence and Care Agreement ("the Agreement") that governed the terms of his residency at Pacifica. (*See* Residence and Services Agreement, Ex. 1 to Mem. in Supp. of Mot. to Compel Arbitration). Section H of the Agreement contains numerous "Miscellaneous" provisions, including a provision requiring binding arbitration of disputes in subparagraph 11,

titled "**ARBITRATION**." (*Id.* at Section H.11). The scope of the arbitration clause is broad—the parties agreed to binding arbitration of "any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity. . . ." (*Id.*). The arbitration clause includes an exception for "any claim or dispute involving unlawful detainer proceedings (eviction) or any claims that can be brought in small claims court" unless both parties agree to arbitrate such a claim." (*Id.*). Additionally, the arbitration clause includes an agreement concerning certain parameters for arbitration—the parties must mutually agree upon an arbitrator in accordance with the Federal Arbitration Act, and each party must bear its own costs for arbitration. (*Id.*). Plaintiff personally signed the arbitration clause on November 7, 2018, the same date on which the Agreement was executed by Plaintiff and the executive director of Pacifica. (*Id.*).

On April 11, 2022, Pacifica filed a Motion to Dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6), SCRCP, or in the alternative, to Stay and Compel Arbitration. (*See* Pacifica's Mot. to Stay and/or Compel Arbitration). Following a hearing, the circuit court denied the Motion to Compel Arbitration on July 28, 2022. (*See* Judge Hayes Or. Denying Mot. to Stay and/or Compel Arbitration, July 28, 2022). This appeal timely followed.

STANDARD OF REVIEW

A trial court's determination concerning arbitrability is subject to de novo review. *See Johnson v. Heritage Healthcare Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016). Nevertheless, a trial court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003). Issues of law, however, are reviewed without any particular

deference to the trial court. *See e.g. Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016).

ARGUMENT

I. The circuit court erred in denying Pacifica's motion to compel arbitration.

The circuit court concluded the Agreement's arbitration clause failed to form a valid contract because it lacked mutual intent to be bound or sufficient consideration. The circuit court erred in failing to consider the arbitration clause as a whole or the demonstrated intent of the parties. Contrary to the circuit court's conclusion, the arbitration clause demonstrates a mutual intent to be bound, and contains concurrent, mutual promises sufficient to provide consideration for a valid and enforceable contract. Thus, this Court should reverse the circuit court's order denying Pacifica's Motion to Compel Arbitration.

A. The circuit court erred in finding the arbitration provision did not evince a mutual intent to be bound.

General contract principles of state law apply to arbitration clauses governed by the Federal Arbitration Act ("FAA"). *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001). Plaintiff did not challenge the applicability of the FAA to the parties' dispute, and the circuit court's order assumes the application of the FAA. (Or. Denying Motion to Stay and/or Compel Arbitration at p. 2-3). As noted in the order, arbitration clauses implicating the FAA are subject to judicial challenge based on generally applicable contract defenses, provided that the contractual defense is limited "to the arbitration agreement itself, and not the contract as a whole." *See Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801 (1967)). Plaintiff's assertion of generally applicable contractual defenses was the sole challenge to Pacifica's motion

to compel arbitration and the basis of the circuit court's order. Thus, the dispositive issue is whether Plaintiff has established a viable contractual defense to the arbitration agreement.

South Carolina law requires a meeting of the minds between the parties as to all essential and material terms of a contract, and the parties must manifest a mutual intent to be bound by the terms of the contract. *See Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989); *Stanley Smith & Sons v. Limestone Coll.*, 283 S.C. 430, 433, 322 S.E.2d 474, 477 (Ct. App. 1984). Here, the circuit court erred in determining the arbitration agreement did not demonstrate a mutual intent to be bound to arbitration.

The circuit court's analysis focuses almost exclusively on the following language in the Agreement's arbitration clause:

> By signing below, you agree that any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity, including, without limitation, personal injury or wrongful death claims, shall be resolved by submission to neutral, binding arbitration in accordance with the Federal Arbitration Act; except that any claim or dispute involving unlawful detainer proceedings (eviction) or any claims that can be brought in small claims court shall not be subject to arbitration unless both parties agree to arbitrate such proceedings.

(Residence and Services Agreement, Ex. 1 to Mem. in Supp. of Mot. to Compel Arbitration at Section H.11).

The circuit court erred in its conclusion that the term "you" indicates only the Plaintiff agreed to arbitration. A similar argument was addressed by the Fourth Circuit applying South Carolina law in *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997). In *O'Neil*, the arbitration clause at issue used the pronoun "I", and the plaintiff argued that the agreement was invalid because it was not binding on the defendant hospital. The Fourth Circuit rejected the argument: "Here the agreement to be bound by was a mutual one. The contract to arbitrate was

proffered by the employer. Such a proffer clearly implies that both the employer and the employee would be bound by the arbitration process." *O'Neil*, 115 F.3d at 274. The Court continued,

> [Plaintiff's] argument is especially misplaced in the circumstances of this case. Not only has the [defendant] consistently argued that it is bound by the arbitration agreement, it has, by virtue of this suit, shown its commitment to the arbitration process. Indeed, the only party to this case who has shown a desire to avoid binding arbitration is [plaintiff] herself.

Id. at 275.

Plaintiff's grammatical argument focusing on the word "you" in the Agreement's arbitration clause is just as misplaced as the one before the Fourth Circuit in *O'Neil*. Here, the mutual intent to be bound is clear from the whole scope and effect of the language used in the arbitration clause. *See Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000) ("The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the *whole scope and effect of the language used*.") (emphasis added). The circuit court erred in limiting its analysis to selected clauses or words in the arbitration clause without reference to the "whole scope" of the clause. For example, the parties agreed that arbitration under the provision "shall be conducted in Spartanburg, South Carolina by a *mutually agreed upon* single neutral arbitrator." (Residence and Services Agreement, Ex. 1 to Mem. in Supp. of Mot. to Compel Arbitration at Section H.11) (emphasis added). Additionally, "[t]he *parties*" agreed to treat the results of arbitration as confidential unless the "parties" provide written consent to disclose the results. (*Id.*). Concerning the cost of arbitration, "[e]ach party" agreed to bear its own costs and fees. (*Id.*). In the event any portion of the arbitration agreement is found unenforceable, the agreement provides that "the remaining portions of the clause shall remain valid and shall be enforceable by *the parties*." (*Id.*). Thus, the terms of the arbitration clause demonstrate a mutual intent to be bound by both parties.

The mutual intent to be bound is also evident by the conduct of each party following the execution of the Agreement. Plaintiff and Pacifica each performed under the Agreement. For example, Plaintiff moved into the independent living facility according to the terms of the Agreement and lived at the independent living facility for five years prior to filing suit. (Pl.'s Compl. ¶ 1). Additionally, Pacifica promptly filed a motion to compel arbitration and has consistently maintained that Plaintiff's claims are subject to binding arbitration. (*See* Mot. to Stay and/or Compel Arbitration). Therefore, the terms of the Agreement's arbitration clause, as well as the conduct by each party, demonstrate a clear mutual intent to submit claims arising from the Agreement to binding arbitration.

B. The circuit court erred in finding the Agreement's arbitration provision is not supported by sufficient consideration.

Under South Carolina law, mutual and concurrent promises set forth within a contract afford sufficient legal consideration to validate the contract. *Furman Univ. v. Walker*, 124 S.C. 68, 117 S.E. 356 (1923); *see also Electro-Lab of Aiken, Inc. v. Sharp Const. Co. of Sumter, Inc.*, 357 S.C. 363, 369, 593 S.E.2d 170, 173 (Ct. App. 2004) ("A typical contract contains mutual promises and is created by an acceptance constituting a return promise by the offeree."). South Carolina law has long held that mutual promises constitute sufficient consideration to support a valid, enforceable contract. *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996); *Evatt v. Campbell*, 234 S.C. 1, 106 S.E.2d 447 (1959).

In *O'Neil*, discussed in Section A above, the Fourth Circuit addressed the plaintiff's argument that the arbitration agreement was not supported by adequate consideration. 115 F.3d at 275. The Fourth Circuit noted that the defendant employer included the arbitration agreement in a job offer to the plaintiff, which clearly implied "that both the employer and the employee would be bound by the arbitration process." *Id.* The Fourth Circuit held "[a] mutual promise to arbitrate

constitutes sufficient consideration" for a valid arbitration agreement under South Carolina law. *Id.* The *O'Neil* court noted that the employer was committed to the arbitration process because it sought the arbitration forum. *Id.*

Here, Pacifica included the contract to arbitrate in its offer to provide an independent living facility to Plaintiff, which clearly implied Pacifica's promise to be bound by the arbitration process. Additionally, Pacifica filed its motion to compel arbitration promptly after Plaintiff filed suit, "demonstrating its commitment to the arbitration process." As in *O'Neil*, the only party seeking to avoid the arbitration forum is Plaintiff.

The arbitration clause in this case contained mutual promises to submit to binding arbitration "any and all claims and disputes arising from or related to" the Agreement. (Residence and Services Agreement, Ex. 1 to Mem. in Supp. of Mot. to Compel Arbitration at Section H.11). Such a clause should be construed broadly to include mutual and concurrent promises between Pacifica and Plaintiff to submit all claims arising from the Agreement to arbitration. To require something more for valid, legal consideration would place the arbitration provision on an unequal plane with other contracts. *See Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421, 1426-27 (2017) (invalidating a state rule that failed "to put arbitration agreements on an equal plane with other contracts"). Thus, the Agreement includes mutual and concurrent promises sufficient to provide valid, legal consideration.

The circuit court relied on an exception in the arbitration clause which provides that certain claims are excluded from the agreement to arbitrate, including eviction proceedings and claims that can be brought in small claims court, "unless both parties agree to arbitrate" such claims. (Or. Denying Motion to Stay and/or Compel Arbitration at p. 9). The circuit court erroneously concluded that this exception indicates Pacifica did not promise to be bound to arbitration of any

claims "unless both parties agree." (*Id.*). Contrary to the circuit court's conclusion, the whole scope and effect of the language in the arbitration clause clearly demonstrates mutual and concurrent promises to arbitrate all claims arising from the Agreement, except for eviction proceedings or claims that can be brought in small claims court. The parties agreed to "mutually" decide on a single arbitrator for arbitration proceedings, and the "parties" agreed to treat the arbitration decision confidentially. (*Id.*). Pacifica's motion to compel Plaintiff's claims to arbitration is further evidence of Pacifica's promise to submit all claims arising out of the Agreement—such as Plaintiff's claims in this litigation—to binding arbitration. Therefore, the circuit court erred in finding the arbitration clause was not supported by sufficient consideration for a valid contract.

Finally, Pacifica would further point to other portions of the Agreement as evidence of the clear intent of the parties to be bound by mutual promises and obligations, including an agreement to arbitrate all disputes. For example, the first page of the Agreement includes the following introductory provisions: "The purpose of this Agreement is to provide a statement of the accommodations and services that we will furnish to you at the Community, and the other legal obligations that we will assume. This Agreement also sets forth your legal obligations to us, both financial and non-financial." (Residence and Services Agreement, Ex. 1 to Mem. in Supp. of Mot. to Compel Arbitration at p. 1.) The first page goes on to state in all capital, underlined letters, "THIS AGREEMENT IS SUBJECT TO ARBITRATION. See Section II.H.11 below." (*Id.*)

The circuit court erred in expressly rejecting references to any portion of the Agreement other than the arbitration clause itself. The order discusses the "framework" for analyzing the validity of the arbitration provision over the course of several pages, correctly identifying *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801 (1967), as the key authority

guiding its analysis. (Or. Denying Motion to Stay and/or Compel Arbitration at p. 2-4.) *See also Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1 (2016) (analyzing the "*Prima Paint* doctrine"). *Prima Paint* stands for the proposition "that to avoid arbitration, a party must assert a contractual defense to the arbitration agreement itself, and not to the contract as a whole." *Smith*, 417 S.C. at 48, 790 S.E.2d at 4.

Pacifica agrees that the court must focus on the terms of the arbitration clause itself to find that the arbitration clause is invalid. However, the circuit court's order deploys *Prima Paint* for a slightly different proposition and purpose. The purpose of the *Prima Paint* doctrine is to advance the rights of parties to arbitration under the FAA— it isolates the arbitration clause and protects its validity despite the existence of contractual defenses to other portions of the agreement. The circuit court, rather than isolating the arbitration clause to *protect* the arbitration clause, isolated the arbitration clause to *attack* it. The difference is subtle but meaningful. The circuit court found that *Prima Paint* required the arbitration clause to be "severed and extracted" and that "only the terms of the arbitration agreement could be analyzed in order to decide validity." (Or. Denying Motion to Stay and/or Compel Arbitration at p. 3-4.). As a result, the circuit court failed to consider provisions on the first page of the Agreement that provided context as to the intent of the parties to enter into a mutually binding agreement. Thus, the circuit court effectively utilized the *Prima Paint* doctrine to attack the arbitration agreement, frustrating the very purpose of the doctrine.

In this regard, it is worth observing that the Fourth Circuit in *O'Neil*, decided well after *Prima Paint*, found it logical and persuasive to rely upon "the multiple references in the [defendant's] employee handbook" when examining whether there was a mutual intent to be bound by the arbitration agreement and adequate consideration. *O'Neil*, 115 F.3d at 275. Indeed, the *O'Neil* court's concluding observations apply equally to this action:

> The Supreme Court has repeatedly emphasized that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. The district court's analysis turned this clear injunction on its head, pursuing every possible avenue to avoid the binding arbitration agreement between [plaintiff] and [defendant].

115 F.3d at 276 (internal marks and citations omitted).

The arbitration clause at issue was separately signed by Plaintiff himself. The clause's scope is broad and there is no dispute that it encompasses the controversy. Its language applies equally to both parties and is fair—there has been no allegation that the arbitration clause contains any unconscionable terms. Yet, the circuit court still found an avenue to avoid arbitration, finding that the arbitration clause lacked mutual intent and consideration because it used the pronoun "you." For the reasons outlined above, Pacifica respectfully submits there is ample evidence of mutual intent and consideration within the arbitration clause itself and the Agreement as a whole, and requests reversal of the circuit court's order denying Pacifica's Motion to Dismiss and/or Compel Arbitration.

CONCLUSION

For the foregoing reasons, Pacifica requests this Court reverse the circuit court and stay this action in favor of arbitration of Plaintiff's claims, or remand the case to the circuit court with instructions to stay the case and compel the Plaintiff's claims to arbitration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Initial Brief of Appellants in the above-captioned case has been served on the following parties via e-mail, on February 2, 2023, pursuant to the South Carolina Supreme Court Order No. 2020-000447, as amended on May 5, 2022:

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February 2, 2023

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February 2, 2023

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RE: Ed Medford, in his individual capacity, and on behalf of those similarly situated v. Pacifica Skylyn LLC, d/b/a Pacifica Senior Living Skylyn, et al.
Civil Action No.: 2022-CP-42-00454
Appellate Case No.: 2022-001210

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter is Appellants' Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Certificates of Service. Please do not hesitate to contact me if you have any questions or concerns.

Very truly yours,

s/ Paul E. Allen, Jr.

Paul E. Allen, Jr.

PEA/pea

Cc: All Counsel of Record (via e-mail)

Enclosure(s)