STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	) IN THE COURT OF COMMON PLEAS) FOURTEENTH JUDICIAL CIRCUIT) CASE NO.: 2011-CP-07-1700
SAMUEL H. PRUETT, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF YVONNE CARRIE PRUETT, Plaintiff, v. BROOKDALE SENIOR LIVING, INC.; SOUTHERN ASSISTED LIVING, LLC, d/b/a CAROLINA HOUSE OF HILTON HEAD; and SONIA S. KING, Defendants.	**ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION**

2013 JUN 18 AM 10:25
JERRI ANN ROSENEAU
BEAUFORT COUNTY S.C.
CLERK OF COURT

This matter is before me on Defendants, Brookdale Senior Living, Inc. and Southern Assisted Living, LLC's ("Defendants") motion to compel arbitration against Plaintiff Samuel H. Pruett, as Personal Representative for the Estate of Yvonne Carrie Pruett ("Plaintiff"). A hearing was held on June 11, 2013, at 1:30 p.m. in which I heard oral arguments from Defendants' counsel, Manton R. Grier, Jr., and Plaintiff's counsel Susan Taylor Wall. Also present at the hearing for Plaintiff were Kelly M. Jolley and Kathleen G. Chewning.

This case is one of three elder abuse cases pending against Defendants stemming from alleged physical and verbal abuse suffered by residents at Defendants' assisted living facility. Defendants requested the court compel Plaintiff to arbitrate based on an alleged agreement by counsel contained in a letter and a series of email communications exchanged between counsel in October 2012, attached as Exhibits A and B to Defendants' motion. Plaintiff argued there was no agreement because Defendants did not satisfy certain conditions precedent or provide

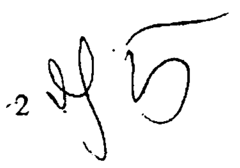
consideration for the agreement, citing to the October 2012 communications as well as emails between counsel in November 2012, attached as Exhibits 6 and 7 to Plaintiff's Memorandum in Opposition.

After hearing the arguments of counsel and reviewing the memoranda and exhibits presented, this Court finds there was no final and complete agreement to arbitrate. Therefore, there is nothing for this Court to enforce, and Defendants' motion is denied.

The case is currently on appeal regarding the enforceability of an arbitration provision in Mrs. Pruett's Residency Agreement. The Honorable Carmen T. Mullen denied Defendants' motion to compel arbitration based on the Residency Agreement and found the arbitration provision unenforceable. (Plaintiff's Exhibit 2). That order is currently on appeal, the issues are fully briefed, and the parties are awaiting oral argument. Since the motion before this Court involves a separate arbitration, this Court has jurisdiction to address the matter. *See* Rule 241(a), SCACR ("The lower court . . . retains jurisdiction over matters not affected by the appeal . . . .").

Mrs. Pruett died in May 2012, after she filed her action against Defendants. After Mrs. Pruett's death, and during the pendency of the appeal, the parties discussed a voluntary arbitration of her case. In October 2012, Plaintiff's counsel sent a letter to Defendants' counsel with proposed arbitration terms. (Defendants' Exhibit A). Counsel then exchanged emails regarding terms and conditions of an arbitration. One such condition related to the exchange of discovery. Plaintiff's counsel, in response to Defendants' counsel's inquiry about the discovery parameters of the proposed arbitration, stated:

> We will be requesting the same documents in Pruett that we did in Scheerle. The question from our side is whether you'll be providing the documents we request. If you do, we won't need the Scheerle documents. If our discovery requests only get us a string of objections, we won't be arbitrating at all.



(Defendants' Exhibit B).

It is undisputed that "Scheerle" refers to another of the abuse victims who also filed suit against Defendants for damages resulting from alleged abuse she suffered while a resident at their facility. At the time of Plaintiff's email quoted above, Plaintiff Scheerle had already served written discovery to Defendants. Thus, based on the reference to the requests in Mrs. Scheerle's case, Defendants knew what documents would be requested in any arbitration of Mrs. Pruett's case. Defendants responded to the email as follows: "With the qualification that you will not be using the [Scheerle] 30(b)(6) [deposition] information except for impeachment purposes, we will agree to those terms." (Defendants' Exhibit B).

Subsequent to the counsel's discussions described above, the parties exchanged discovery requests. In November 2012, the parties provided responses to each other's discovery requests. Defendants' responses contained numerous objections, including refusals to produce internal investigation documents which were requested in Mrs. Scheerle's case and which the court had ordered Defendants to produce in Mrs. Scheerle's case. (Plaintiff's Exhibits 5, 7 and 9). Upon receiving Defendants' responses with objections, Plaintiff withdrew from any further arbitration discussions.

Defendants first asked the scheduled arbitrator, retired Judge Thomas W. Cooper, Jr., to compel arbitration. Judge Cooper denied Defendants' request because he believed the court and not the arbitrator should decide the issue. Defendants then attempted to amend their notice of appeal from Judge Mullen's order regarding the enforceability of the arbitration provision in Mrs. Pruett's Residency Agreement. Plaintiff made a motion to dismiss the amended notice of appeal, and the Court of Appeals granted Plaintiff's motion. Defendants then filed the motion now before me.

At the hearing, Defendants argued the arbitration was not conditioned on them producing documents from a separate case—Mrs. Scheerle's case—and that Plaintiff breached the alleged agreement by withdrawing from it without justification. Defendants also stated they did eventually produce the internal investigation documents in Mrs. Scheerle's case, thus curing any deficiency to their discovery responses in Mrs. Pruett's case.

Plaintiff argued the letter and emails exchanged demonstrate that Defendants' production of written discovery without objection was a condition precedent to any agreement to arbitrate. Plaintiff also argued that the letter and emails show the occurrence of an arbitration by January 2013 was a condition precedent, as it would allow Mr. Pruett a resolution of the case in a timely fashion and make briefing of this case on appeal from Judge Mullen's order unnecessary, saving money and time. Plaintiff asserted Defendants failed to satisfy both conditions precedent. Plaintiff further argued at the hearing that production of the requested discovery without objection and arbitration by January 2013 was also the consideration for an agreement by Plaintiff to voluntarily arbitrate.

"[A]rbitration is a matter of contract, and [the court's] evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. The parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate." *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). "A condition precedent is a condition which must be performed before the agreement of the parties will become a binding contract." 17A C.J.S. *Contracts* § 450. "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989).

This Court finds the parties had no enforceable agreement to arbitrate. First, the evidence shows that counsel negotiated but never came to an actual agreement to the terms of an arbitration. No agreement was ever memorialized and signed by the parties or counsel. Second, the parties' disagreement as to the terms and the interpretation of their negotiations evidences there was no meeting of the minds and, therefore, no agreement.

For the foregoing reasons, Defendant's Motion to Compel Arbitration is denied.

AND IT IS SO ORDERED.

Marvin H. Dukes, III
Special Circuit Court Judge

June 14, 2013.