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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. William A. McKinnon, Circuit Court Judge

Case No. 2023-CP-42-04147

Appellate Case No. 2024-000468

Lorraine Voros, by and through her duly appointed Attorney-In-Fact, John Voros, . Respondents,

v.

Pacifica Skylyn, LLC, ... Appellant.

INITIAL BRIEF OF APPELANT

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s/*Paul E. Allen, Jr.*
Jonathan G. Roquemore (SC Bar No. 68274)
Joshua D. Shaw (SC Bar No. 77835)
Paul E. Allen, Jr. (SC Bar No.: 104062)
Hedrick Gardner Kincheloe & Garofalo LLP
1230 Main Street, Suite 325
Columbia, SC 29201

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

STATEMENT OF THE CASE

This case arises from Plaintiff Lorraine Voros' ("Plaintiff's") residence at Pacifica Senior Living Skylyn ("Pacifica" or "the Facility") in Spartanburg, South Carolina. (R. 11-12). Plaintiff moved into Pacifica's assisted living facility in January 2022. (*Id.*). Plaintiff's son and duly appointed attorney-in-fact, John Voros, executed a Residence and Services Agreement ("the Agreement") in connection with Plaintiff's admission to the Facility. (R. 31-52). John Voros sued Pacifica on October 23, 2023, in his capacity as Plaintiff's duly appointed attorney in fact, and asserted claims for negligence and neglect of a vulnerable adult. All causes of action stem from Voros' residency and care at Pacifica. (R. 11-21).

Pacifica promptly moved to compel Plaintiff's claims to arbitration under the Agreement's arbitration provision on November 29, 2023. (R. 28). After a hearing, Judge William McKinnon denied Pacifica's motion to compel arbitration on the grounds that the arbitration provision did not demonstrate a mutual intent to be bound by the provision's terms. (R. 1). Pacifica timely moved to reconsider under Rule 59(e), SCRCP, which was denied by a Form 4 Order without a hearing. (R. 6, 98). This appeal timely followed.

FACTUAL BACKGROUND

Plaintiff moved into Pacifica's Spartanburg, South Carolina facility in January 2022. (R. 12). In connection with her admission to the facility, Plaintiff's attorney in fact executed the

Agreement, which provided the terms of Plaintiff's residence at Pacifica. (R. 52). The Agreement outlined Pacifica's obligations to Plaintiff concerning the provision of various residential services at the facility. (R. 31-36). In return, Plaintiff agreed to assume certain obligations to Pacifica, including a set monthly fee, an agreement to abide by community rules and policies, and other obligations related to Plaintiff's residence at the facility. (R. 40-43). The first page of the Agreement states in all capital, underlined letters, "THIS AGREEMENT IS SUBJECT TO ARBITRATION. See Section XI.P below." (R. 32). The Agreement contains several "Miscellaneous" provisions, including a provision requiring binding arbitration of disputes in subparagraph P., titled "**Arbitration**." (R. 49-50). The Agreement's arbitration provision provides as follows:

> 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. If someone other than the resident signs this arbitration clause, he/she understands and agrees that he/she is agreeing to arbitrate on behalf of the resident and on behalf of him/herself as an individual. **You give up your constitutional right to have any such dispute decided in a court of law before a jury, and instead accept the use of arbitration.**

(R. 49) (emphasis in original). Additionally, the arbitration clause includes an agreement concerning certain parameters for arbitration—the parties must agree upon an arbitrator in accordance with the Federal Arbitration Act, and each party must bear its own costs for arbitration. (R. 49-50). Plaintiff's attorney in fact signed the arbitration clause on December 27, 2021. (R. 50).

Plaintiff had various preexisting medical diagnoses at the time she was admitted to Pacifica's facility, including Multiple Sclerosis and an intellectual disability. (R. 11). According to the Complaint, Plaintiff's medical diagnoses rendered her unable to consent to sexual intercourse. (R. 11-12). Plaintiff alleges that, during her residence at Pacifica's facility, another resident had sex with her despite Plaintiff's inability to consent. (R. 17). Plaintiff asserted claims for negligence and neglect of a vulnerable adult against Pacifica on the theory that Pacifica's staff failed to prevent the non-consensual sexual activity between Plaintiff and her fellow resident. (R. 17-18).

Pacifica promptly moved to compel Plaintiff's claims to binding arbitration under the Agreement. (R. 28). In support of the Motion to Compel Arbitration, Pacifica provided a copy of the Agreement executed by John Voros, Plaintiff's attorney in fact, and a copy of the power of attorney document providing John Voros the power to pursue litigation claims on Plaintiff's behalf. (R. 30-52; 64-73). Pacifica argued the Agreement's arbitration provision was valid and enforceable under the Federal Arbitration Act ("FAA"), encompassed Plaintiff's claims in this lawsuit, and contained mutual promises sufficient to provide consideration for the arbitration provision. (R. 59-62). Plaintiff did not challenge the applicability of the FAA or the scope of the arbitration provision in relation to the specific claims in this lawsuit. Instead, Plaintiff argued that the arbitration provision did not contain mutual promises sufficient to provide consideration based on the use of the term "you" in the provision. (R. 76-78).

After a virtual hearing, Judge McKinnon issued a written Order denying Pacifica's Motion to Compel Arbitration. (R. 1-4). Judge McKinnon concluded that the Agreement's arbitration provision did not contain a mutual promise to be bound to binding arbitration. (*Id.*). Judge McKinnon construed the contract against Pacifica as the drafting party and determined that using the term "you" in the arbitration provision suggested that only Plaintiff agreed to arbitration. Judge

McKinnon also found that the arbitration provision lacked sufficient consideration and "was invalid for that reason alone." (*Id.*).

Pacifica timely moved to Reconsider under Rule 59(e), SCRCP. (R. 98-100). Pacifica first noted that mutual promises in a contract provide sufficient consideration to validate the contract. (R. 99-100). In other words, if the arbitration provision contains mutual promises to be bound, the provision is also supported by consideration. (*Id.*). Second, Pacifica urged the Court to evaluate the whole scope and effect of the language used in the arbitration provision rather than focusing on individual words in the provision. (*Id.*). Finally, Pacifica reiterated its position that *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997), supports a finding that the arbitration provision contains mutual promises. (R. 100). Judge McKinnon denied the Motion to Reconsider by Form 4 Order on February 20, 2024. (R. 6).

STANDARD OF REVIEW

A trial court's determination on 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). While a trial court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings, issues of law 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

1. 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. (R. 1-4). 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 reveals 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 Fin. 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. (R. 2-3). As noted in the order, arbitration clauses implicating the FAA are subject to judicial challenge based on generally applicable contract defenses, as long as 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 under 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). The circuit court erred in determining the 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.

(R. 49-50).

The circuit court erred in its conclusion that the term "you" indicates only Plaintiff agreed to arbitration. The Fourth Circuit, applying South Carolina law, addressed a similar argument in *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997).[1] There, 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.

[1] Pacifica notes that this Court recently cited *O'Neil* with approval in an unpublished opinion addressing an argument similar to the one Plaintiff makes in this case. *See Hackworth v. Bayview Manor, LLC*, Op. No. 2023-UP-096 (S.C. Ct. App. Filed March 15, 2023). Pacifica recognizes this case does not have precedential value pursuant to Rule 268(d)(2), SCACR, and has therefore not included it in the table of authorities.

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." (R. 49-50) (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.*). As to 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.*) (emphasis added). Thus, the terms of the arbitration clause establish a mutual intent to be bound by both parties.

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.,* 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 plaintiff, which 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.*

Pacifica included the contract to arbitrate in its offer to provide an assisted living facility to Plaintiff, which implied Pacifica's promise to be bound by the arbitration process. Pacifica moved 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 here contained mutual promises to submit to binding arbitration "any and all claims and disputes arising from or related to" the Agreement. (R. 49-50.). 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.

Finally, Pacifica would also 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." (R. 32). The first page adds in all capital, underlined letters, "THIS AGREEMENT IS SUBJECT TO ARBITRATION. See Section XI.P below." (*Id*.)

The circuit court erred in expressly rejecting references to any portion of the Agreement other than the arbitration clause itself. The order correctly identifies *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801 (1967), as the key authority guiding its analysis. (R. 2.). *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. In other words, as the order acknowledges, the FAA requires that "arbitration agreements be treated the same as all other contracts, no more, no less." (R. 2).

Pacifica agrees that the court must focus on the terms of the arbitration clause itself to find that the arbitration clause is invalid. But 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 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 Court to "apply state contract law principles to the language of the arbitration agreement without regard to the language of the rest of the agreement." (R. 2). As a result, the circuit court disregarded 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 used the *Prima Paint* doctrine to attack the arbitration agreement, frustrating the very purpose of the doctrine.

In this regard, the Fourth Circuit in *O'Neil*, decided well after *Prima Paint*, found it logical and persuasive to rely on "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 these reasons, Pacifica requests that 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 Plaintiff's claims to arbitration.

Respectfully submitted,

HEDRICK GARDNER KINCHELOE & GAROFALO LLP

s/ Paul E. Allen, Jr.
Jonathan G. Roquemore (SC Bar No. 68274)
Joshua D. Shaw (SC Bar No. 77835)
Paul E. Allen, Jr. (SC Bar No.: 104062)
1230 Main Street, Suite 325
Columbia, SC 29201

Attorneys for Appellant

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CERTIFICATE OF COUNSEL

It is hereby certified that the foregoing Final Brief of Appellants in the above-captioned case complies with the requirements of Rule 211(b), SCACR.

s/ Paul E. Allen, Jr.

Jonathan G. Roquemore (SC Bar No. 68274)
Joshua D. Shaw (SC Bar No. 77835)
Paul E. Allen, Jr. (SC Bar No.: 104062)
1230 Main Street, Suite 325
Columbia, SC *29201*
Attorneys for Appellants