STATE OF SOUTH CAROLINA)) COUNTY OF SPARTANBURG)	IN THE COURT OF COMMON PLEAS SEVENTH CIRCUIT
ED MEDFORD, in his individual capacity, and on behalf of those similarly situated, Plaintiff, 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, Defendants.	C.A. No.: 2022-CP-42-00454 **ORDER DENYING DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULES 12(B)(1) AND 12(B)(6), SCRCP, OR IN THE ALTERNATIVE TO STAY AND COMPEL ARBITRATION**

This matter came before the Court on Wednesday, June 29, 2022, on Defendants' Motion to Dismiss Pursuant to Rules 12(B)(1) and 12(B)(6), SCRCP, or in the Alternative to Stay and Compel Arbitration (Defendants' Motion).

Defendants were represented by Joshua B. Shaw, and the Plaintiff was represented by Patrick E. Knie and Mitch Slade. Both parties provided the Court with memorandums of law arguing their respective positions. The hearing was held in the virtual courtroom. After hearing the arguments, and after careful consideration of each side's memorandum, the Defendants' Motion is **DENIED**.

BACKGROUND

The Plaintiff was a resident at Defendant Pacifica Skylyn LLC, d/b/a Pacifica Senior Living Skylyn (Defendant Pacifica). On November 7, 2018, Plaintiff signed a contract with

Defendant Pacifica titled "Pacifica Senior Living Residence and Services Agreement" (The Residence Agreement).[1] The Residence Agreement governs the terms of Plaintiff's residence at Defendant Pacifica's facility. The Residence Agreement contains an arbitration agreement found at Section II, Subsection H., 11, and it is labelled "Arbitration".

On February 8, 2022, Plaintiff filed suit, in his individual capacity, and on behalf of others, alleging various ongoing deficiencies in Defendants' operation of Defendant Pacifica's facility. Plaintiff demanded a jury trial and Defendants responded with Defendants' Motion,[2] in which it moved the Court to compel arbitration based on the arbitration agreement found at Section II, Subsection H., 11 in the Residence Agreement.

THE ISSUE

The Plaintiff challenges the validity of the arbitration agreement contained within the Residence Agreement. He contends that it is invalid because it lacks elements essential to the formation of a valid contract, elements which have been deemed essential by long established principles of South Carolina contract law.

LEGAL ANALYSIS

A. BASIS OF THE FRAMEWORK FOR ANALYZING THE ARBITRATION AGREEMENT FOR VALIDITY.

The framework for the analysis of the validity of an arbitration agreement was laid down by Prima Paint[3], the foundational text for analysis of arbitration agreements. The specific holding of Prima Paint is that a court analyzing a challenge to an arbitration agreement must restrict itself

[1] Defendants attached a copy of the Residence Agreement to their memorandum as Exhibit A.
[2] Defendant Deepak Israni notes that he had not been served as of the time of the hearing, and disputes the validity of Plaintiff's effort at service by publication. The argument on his behalf is made by special appearance.
[3] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801 (1967).

solely to the consideration of issues bearing directly on the **formation** and performance **of the arbitration agreement itself**:

> We hold, therefore that in passing upon a s3 [Section 3 of the FAA] application for a stay while the parties arbitrate, a federal court *may consider only issues relating to the making and performance of the agreement to arbitrate*.[4]

Since Prima Paint, courts have reasoned through issues concerning the validity of arbitration agreements and the basic principles of arbitration analysis have been established. One of these principles, outlined in Prima Paint's holding, is that the validity of the arbitration agreement must be analyzed separate and apart from the contract in which it is embedded.

The South Carolina Supreme Court consistently upholds this principle in analyzing arbitration agreements.

In Smith v. D.R. Horton, Inc.[5], a case cited in Plaintiff's argument and memorandum, the South Carolina Supreme Court analyzed an arbitration agreement. While the challenge to the arbitration agreement was based on unconscionability, the crux of the disagreement between the majority and the dissent was over which terms were to be included in the arbitration agreement. Implicit in the arguments of both the majority and the dissent was the recognition of the principle that only the terms of the arbitration agreement could be analyzed in order to decide validity. Both sides recognized that validity must be decided solely from terms within the four corners of the arbitration agreement. Thus, the disagreement was over how wide the four corners of that arbitration agreement were. It is clear and well established that the arbitration agreement must be

[4] Prima Paint, 388 U.S. at 404 (emphasis added)
[5] Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 SE 2d 1 (2016).

severed and extracted from the contract in which it is embedded in order for the court to conduct the analysis of its validity.

Once the arbitration agreement is severed and extracted from the contract in which it is embedded, the analysis of its validity must be conducted according to established principles of contract law. This requirement also follows from Prima Paint. Prima Paint declared that, under the FAA, the arbitration agreement is a contract, subject to judicial challenge on the same basis as any other contract challenged in a court:

> [T]he purpose of Congress in 1925 [enacting the FAA] was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge…would be to elevate it over other forms of contract….[6]

From Prima Paint's categorical assertion that arbitration agreements are contracts subject to judicial challenge just as other forms of contract are, it necessarily follows that the arbitration agreement is a contract to be treated, and therefore analyzed, by the same principles of contract law as other forms of contract.

And this is exactly what South Carolina courts do: "The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et. seq.* (2018) commands that *arbitration agreements be treated the same as all other contracts* – no more, no less".[7]

Therefore, this Court must apply the established principles of contract law to the analysis of the arbitration agreement in the Residence Agreement.

B. The Application of the Principles of Contract Analysis to the Instant Arbitration Agreement

1. The Mutual Intent to be Bound is a Necessary Element.

[6] Prima Paint, 388 U.S. 395, 404 n.12 (1967).
[7] Simmons v. Benson Hyundai, Inc., Appellate Case No. 2019-000344, 2022 WL 791174, at *1 (Ct. App. Mar, 16, 2022). (emphasis added)

It is an established principle of contract law that each of the parties to the contract must manifest a mutual intent to be bound to the contract. This principle was recently re-affirmed in Simmons v. Benson Hyundai: "The parties must also 'manifest a mutual intent to be bound'."[8] It is critical that the parties' mutual intent to be bound be manifested – plainly shown – because the court must interpret the contract according to the objective manifestation of the parties' assent at the time the contract was made. "Interpretation of the contract is governed by the objective manifestation of the parties' assent at the time the contract was made."[9]

The language in the arbitration agreement which purports to form a valid contract is found in the first sentence:

> "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."[10]

In oral argument, Plaintiff pointed out that the word "you" is the term that Defendant Pacifica specifically designated for the Plaintiff.

Then according to Defendant Pacifica's own designation for the parties, only one party, the Plaintiff, is agreeing to this contract, the arbitration agreement. Construing this contract according to the designations of the parties chosen by Defendant Pacifica, there is no objective manifestation of both parties' mutual intent to be bound.

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[8] *Id.* at *3. (citing Stanley Smith & Sons v. Limestone Coll., 283 S.C. 430, 433, 322 SE 2d 474, 477 (Ct. App. 1984)).
[9] Bannon v. Knauss, 282 S.C. 589, 593, 320 SE 2d 470, 472 (Ct. App. 1984) (citing Blakely v. Rabon, 266 S.C. 68, 221 SE 2d 767 (1976)).
[10] The Residence Agreement, Section II, Subsection H., 11, first sentence. (emphasis added)

The court must conclude that there is no objective manifestation of a mutual intent to be bound, and therefore, no contract has been formed.

The court's conclusion is supported by the Defendants' own argument. The Defendants' Memorandum of Law in Support of Its Motion to Compel Arbitration contains this sentence arguing the validity of the arbitration agreement:

> 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…." (Ex. A at Section H. 11)[11]

The language within the quotation marks is taken directly from the first sentence of Defendant Pacifica's arbitration agreement. The words that Defendant Pacifica actually put in the arbitration agreement immediately preceding the language Defendants quote in their memorandum are:

> 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….[12]

This comparison shows that in the arbitration agreement itself, the words "the parties agreed to binding arbitration" do not precede the language Defendants quote from the arbitration agreement. The words "the parties agreed to binding arbitration" do not appear anywhere in the arbitration agreement. In the arbitration agreement, the actual words that precede the quoted language are "you agree that". When they cited language from the arbitration agreement to argue validity, Defendants deleted the words "you agree that" and substituted the words "the parties agreed to

[11] Defendants' Memorandum of Law in Support of Its Motion to Compel Arbitration, p. 2. (emphasis added)
[12] The Residence Agreement, Section II, Subsection H, 11 (emphasis added)

binding arbitration". The significance of this substitution is that it substitutes a term signifying that only one party agreed ("you") for a term which signifies both parties agreed ("parties"). This substitution of the words "the parties agreed to binding arbitration" for the words actually in the contract ("you agree") shows that the Defendants recognize that both parties must mutually agree to be bound to the contract. But that is not the language they put into this arbitration agreement. When Defendants recognize the need to change the names (or pronoun designations) of the parties agreeing to the contract in order to make their argument that the contract is valid, they are implicitly revealing the lack of mutual agreement to be bound that renders this agreement invalid.

The Defendants provide additional proof that Defendant Pacifica did not intend to be bound in this arbitration agreement by its explicit statement that it would not be subjected to arbitration "…unless both parties agree…". In the second clause of the first sentence, Defendant Pacifica underscores the necessity for both parties to agree to arbitrate in order to form a valid arbitration agreement:

> …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."[13]

Here Defendant Pacifica's explicit recognition that both parties must agree to arbitrate underscores the fact that language manifesting a mutual agreement to arbitrate is objectively lacking from the first part of the sentence.

In oral argument, Defendants asserted that the emphasis on the word "you" in this agreement is to simply provide adequate warning to a person in Plaintiff's position that he or she is about to give up the right to trial.

[13] Residence Agreement, Section II, Subsection H, 11, (second clause of first sentence). (emphasis added)

There is merit to emphasizing that persons in Plaintiff's position are being asked to relinquish a right, but this is unconvincing as a rebuttal to Plaintiff's challenge to the agreement's validity.

In the first place, nothing prevents or precludes Defendant Pacifica from using terms for both parties' agreement in addition to language putting a person in Plaintiff's position on notice that he or she is giving up the right to trial. In the third sentence under Section II, Subsection H. 11, ARBITRATION, Defendant Pacifica makes this statement in bold letters:

> **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.**

Defendant Pacifica had complete control of the words it put into this arbitration agreement. Had it wanted to, it could have easily included a similar sentence acknowledging that Defendant Pacifica too was giving up its right to trial. But it did not choose to objectively manifest that it was also giving up its right to trial.

Secondly, whatever emphasis Defendant Pacifica desires give to language clearly stating that the person in Plaintiff's position is giving up the right to trial, that desire in no way vitiates the essential requirement that there be an objective manifestation of the parties' mutual intent to be bound.

There is no objective manifestation in this arbitration agreement of a mutual intent to be bound.

That finding alone is sufficient to conclude that the arbitration agreement is invalid, but another element essential to the formation of a valid contract is also missing from this arbitration agreement.

2. Consideration is a Necessary Element to Form a Valid Contract.

It is well settled that consideration is a necessary element of a valid contract. In Sauner v. Public Service Authority of South Carolina, the Supreme Court stated: "The necessary elements of a contract are offer, acceptance and valuable consideration."[14]

Consideration is a promise to do something that a party has no legal obligation to do or to forbear from doing something it has a legal right to do. This definition of consideration has longstanding support in South Carolina caselaw: ' "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other" '.[15]

In the arbitration agreement it drafted, Defendant Pacifica objectively manifests neither a promise to do something it has no legal obligation to do, nor does it promise to forbear doing something it has a legal right to do. To the contrary, Defendant Pacifica explicitly states that it will not be bound to arbitration "…unless both parties agree to arbitrate…". In each instance where Defendants now argue that both parties have agreed to arbitrate, or give up their right to trial, Defendant Pacifica has, without exception, used the word "you" instead of using the words "both parties". By the language that Defendant Pacifica chose to use in the arbitration agreement, only "you" give up your constitutional right to a trial, and only "you" agree that any and all claims shall be resolved by arbitration.

Defendant Pacifica has not provided any consideration to the other party to the contract. There is a lack of consideration and therefore this arbitration agreement is invalid for that reason.

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[14] Sauner v. Public Service Authority of South Carolina, 354 S.C. 377, 406, 581 SE 2d 161 (2003).
[15] Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 SE 2d 714 (Ct. App. 2009) (citing Prestwick Golf club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 SE 2d 184, 186 (Ct. App. 1998)).

CONCLUSION

After consideration of the parties' arguments and their memorandums, the Court finds that the arbitration agreement in the Residence Agreement fails to form a valid contract.

THEREFORE, The Defendants' Motion to Dismiss Pursuant to Rules 12(B)(1) and 12(B)(6), SCRCP, or in the Alternative to Stay and Compel Arbitration is **DENIED.**

Spartanburg Common Pleas

Case Caption: Ed Medford, Indi.& On Behalf Of Others Similarly Situated VS Depek Israni , defendant, et al

Case Number: 2022CP4200454

Type: Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132