

STANDARD OF REVIEW

A parties' right to a jury trial in South Carolina is governed by state law. Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978). While the Federal Arbitration Act (“FAA”) imposes a presumption favoring arbitration, the presumption does not apply to the “identity” of the parties who may be bound to such an agreement. Wilson v. Willis 426 S.C. 326, 335 827 S.E.2d 167, 179 (2019). In fact, there is a presumption against arbitration when enforcement is sought against a non-signatory. Id. The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that “where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement to arbitrate exists in the first place...If no agreement is found to exist, the court must deny any application to arbitrate.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) citing S.C. Code Ann. § 15-48-20(a) (2005). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

In determining whether an agreement to arbitrate exists, “the court should apply ‘ordinary state-law principles that govern the formation of contracts.’” Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (Ct. App., 1999). Arbitration is available only when the parties involved contractually agree to arbitrate. Id. 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, (1989). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).

ANALYSIS

I. THERE IS NOT AN ENFORCEABLE ARBITRATION AGREEMENT

a. Shirley Mallory's Health Care Power of Attorney Did Not Authorize Lynn Sanborn to Execute the Arbitration Agreement.

The exact issue before the court regarding the authority Lynn Sanborn had via the HCPOA (see Lynn Sanborn's filed Affidavit) with respect to Shirley Mallory and as a result her ability to bind her to an Arbitration Agreement and thereby waiving her constitutional right to a jury trial was recently addressed by the South Carolina Supreme Court in the case of Arredondo v SNH SE Ashley River Tenant, LLC, 433 S.C. 69, 856 S.E.2d 550 (2021)(Attached hereto as "Exhibit B"). In Arredondo, SNH SE Ashley River Tenant, LLC ("Ashley River") was an assisted living facility. Once the resident, Hubert Whaley, was admitted to Ashley River an Arbitration Agreement was signed by Whaley's GDPOA and HCPOA, Thayer Arredondo. As in this case, it was not necessary for Thayer or Arredondo to sign the Arbitration Agreement in order for the resident Thayer to be admitted to the assisted living facility and be provided care. In Arredondo, the Court stated "[o]ur courts have looked to contract law when reviewing actions to set aside or interpret a power of attorney. The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties, and, in determining that intention, the court looks to the language of the contract. When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. *Accordingly, we look to the specific language of the GDPOA and HCPOA to determine whether either document authorized Arredondo to execute a pre-dispute arbitration agreement.*" *Id.* at 75 (emphasis added)(citations and quotations omitted). In addressing the GDPOA, the South Carolina Supreme Court in Arredondo stated "we look to the actual language of the GDPOA to determine what authority it granted Arredondo. While the GDPOA gave Arredondo significant authority to make business and property decisions for Whaley, the mere title of the document did not increase Arredondo's authority beyond the plain meaning of the provisions contained in the document." *Id.* at 80.

The South Carolina Supreme Court in Arredondo also addressed the authority granted by Health Care Power of Attorney (“HCPOA”). In addressing this issue, the Court stated, “Arredondo clearly had no authority to take any action under the first clause of subparagraph 11(d) unless the action taken was necessary to making, documenting, and assuring implementation of a decision concerning Whaley's health care. The only health care decision in play when Arredondo signed the arbitration agreement was Arredondo's decision to seek Whaley's admission into the facility. Consequently, we must determine whether signing the arbitration agreement was necessary to Arredondo making, documenting, and assuring implementation of that decision. Id. at 81. After its analysis, the Court held, “[t]he plain, ordinary, and popular meaning of the word 'necessary' is 'absolutely needed' or 'required.' We hold Arredondo's signature on the arbitration agreement was not 'absolutely needed' or 'required' to ensure Whaley's admission into the facility.” Id.

The same holding in Arredondo is applicable with regard to Shirley Mallory. Mallory's HCPOA applies only to healthcare decisions and did not grant Lynn Sanborn the authority to bind Shirley Mallory to arbitration agreements or waive her constitutional rights to a jury trial. Paragraph 4, subpart D of Mallory's HCPOA, states the following:

D. To take any other action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my

As in Arredondo this provision only authorized Lynn Sanborn to take these actions if ‘necessary’ for Shirley Mallory's healthcare. It was not necessary for Lynn Sanborn to sign Defendants' Arbitration Agreement in order for Shirley Mallory to be admitted to the Defendants' facility and receive nursing care. The Arbitration Agreement was optional. Just like Arredondo, Lynn Sanborn was only authorized to take necessary actions for Shirley Mallory's healthcare, signing the Arbitration Agreement was not necessary for Shirley Mallory's healthcare. Accordingly, Lynn

Sanborn DID NOT have the authority to sign the Arbitration Agreement and/or waive Shirley Mallory's constitutional right to a jury trial. As a result, with respect to the HCPOA, the Arbitration Agreement is not enforceable.

b. A Residency Agreement and an Arbitration Agreement are two separate Agreements, and one cannot be bound by the other. Accordingly, there is no equitable estoppel applicable in this matter.

Our South Carolina Supreme Court has ruled the difference between a residency contract and an Arbitration Agreement, and that just because the two Agreements are contained in one document does not make them one in the same. The Supreme Court has ruled that:

Assent to this contract [the admission agreement] was a condition for Decedent's admission to Facility. On the other hand, the AA was not required for Decedent's admission, contained no provision for medical, nursing, or health care services to be provided for Decedent, and did not require any financial commitment to pay for such services. The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014). A decision to admit a resident to a community residential care facility such as the Defendants' is a healthcare decision. As such, signing an Admission Agreement to a skilled nursing facility is a healthcare-related agreement, not a legal agreement. Conversely, agreeing to settle disputes through arbitration is a legal decision. The Defendants' argument that all of the Plaintiff's claims are dependent on the duties which arise from the Admission Agreement is fundamentally flawed; an Admission Agreement involves making a healthcare decision, and an Arbitration Agreement involves making legal decision. *see also* Thompson v. Pruitt Corp., 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016) ("The Act confers authority on a health care surrogate to consent on the patient's behalf 'to the provision or withholding of health care' and to make financial decisions obligating the patient to pay for the medical care provided." (quoting Coleman, 407 S.C. at 351-52, 755 S.E.2d at 453)).

This exact matter was also recently decided by the South Carolina Court of Appeals in Solesbee v. Fundamental Clinical And Operational Services, LLC d/b/a Magnolia Manor-Inman, where the Appellants, Magnolia Manor-Inman (“Magnolia”), argued the Arbitration Agreement merged with the Admission Agreement because merger is presumed when the instruments in question are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. Solesbee v. Fundamental Clinical And Operational Services, LLC d/b/a Magnolia Manor-Inman, 438 S.C. 638, at 647 (S.C. App. 2023). Under very similar facts to this case, the Court held “there was no merger in this case and Magnolia's equitable estoppel argument was properly denied.” Id. at 649.

The same is true here, there was no merger of the Admission Agreement and Arbitration Agreement and the Defendants’ equitable estoppel argument is denied.

c. Plaintiff did not Possess Statutory Authority to Bind Shirley Mallory under the Arbitration Agreement

i. S.C. Adult Health Care Consent Act

In addition to the Arredondo case discussed above, the South Carolina Adult Health Care Consent Act (“AHCCA”), defines “health care” as including intermediate or skilled nursing care. S.C. Code Ann. § 44-66-20(1). It also specifically includes the placement or removal from a facility that provides these forms of care.” Id. A party may consent to health care on behalf of a patient, if the patient is deemed unable to consent to treatment after two licensed physicians have examined the patient and certify an inability to consent. S.C. Code Ann. § 44-66-20(8). S.C. Code Ann. § 44-66-30 lists the appropriate persons who may make health care decisions for a patient who is unable to consent and provides an order of priority for who is able to make those decisions. It reads:

- (A) Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in the following order of priority:
- (1) a guardian appointed by the court pursuant to Article 5, Part 3 of the South Carolina Probate Code, if the decision is within the scope of the guardianship;

- (2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant Section 62-5-501, if the decision is within the scope of his authority;
- (3) a person given priority to make health care decisions by another statutory provision;
- (4) a spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:
 - a. entry of a pendent lite order in a divorce of separate maintenance action;
 - b. formal signing of a written property or marital settlement agreement; or
 - c. entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;
- (5) an adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;
- (6) a parent of the patient;
- (7) an adult sibling of the patient; or if the patient has more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation;
- (8) a grandparent of the patient; or if the patient has more than one grandparent, a majority of the grandparents who are reasonably available for consultation;
- (9) any other adult relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient, or if the patient has more than one other adult relative, a majority of those adult relatives who are reasonably available for consultation.

Defendants have put forth no evidence that Shirley Mallory, the principle, held Lynn Sanborn out as her agent with the authority to bind her to an Arbitration Agreement or waive her constitutional right to a jury trial. Lynn Sanborn has testified by Affidavit that she was not Shirley Mallory's agent with authority to bind her to an Arbitration Agreement or waive her constitutional right to a jury trial. Additionally, the AHCCA only deals with "health care" related decisions, and not legal decisions. Nowhere in the entire AHCCA is the word "legal" or "arbitration" mentioned. Clearly the legislature intended this Act to govern only those decisions as they relate to health care. The case of Coleman v. Mariner Health Care, et al., 407 S.C. 346, 755 S.E.2d 450 (2014), addresses the AHCCA. The Court in Coleman held that the sister of a nursing home resident could not bind the resident to an Arbitration Agreement at the time of admission, and that the Arbitration Agreement was not valid because it exceeded the scope of the sister's authority under the AHCCA. According to the Court, AHCCA specifically limited surrogates' authority to making health care decisions and associated financial arrangements. Arbitration is not a health care or related financial decision, and thus exceeds the authority granted by the AHCCA. Id. At 351-52,

755, S.E. 2d at 453.

The Court of Appeals also addressed this issue in Solesbee, holding “the Act was never meant to affect anything other than health care decisions and the Arbitration Agreement was not a health care decision because Solesbee could get the health care services covered in the Admission Agreement without agreeing to arbitrate.” Solesbee v. Fundamental Clinical And Operational Services, LLC d/b/a Magnolia Manor-Inman, 438 S.C. 638, at 650 (S.C. App. 2023). Therefore Dover, the person who signed the Arbitration Agreement, “did not have any authority to sign the Arbitration Agreement for Solesbee via the Act or a power of attorney.” Id.

ii. **S.C. Bill of Rights for Residents of Long-Term Care Facilities**

South Carolina Bill of Rights for Residents of Long-Term Care Facilities is codified in S.C. Code Ann. §44-81-10, et seq. Under the Bill of Rights, a “representative” is defined as “a resident’s legal guardian, committee, or next of kin, or other person acting as agent of a resident who does not have a legally appointed guardian.” S.C. Code Ann. § 44-81-30(3). This is substantially the same as the AHCCA. Under the Bill of Rights, decision making is limited to health care decisions, not legal decisions.

II. The Federal Arbitration Act (FAA) Does Not Mandate Enforcement of this Agreement.

Under the FAA, arbitration is required when there is a valid Arbitration Agreement and a dispute exists which is within the scope of the Agreement. Under the arbitration clause, neither prong is satisfied. As discussed, there is no valid Arbitration Agreement because Lynn Sanborn did not have the legal authority to execute a valid Arbitration Agreement. Second, Plaintiff’s claims include negligence, negligence per se, wrongful death and survivorship. Nowhere in the Defendants’ Arbitration Agreement are those causes of action listed. Accordingly, the FAA does not apply.

III. There is No Need for Limited Jurisdictional Discovery as The Parties had Already Agreed to Conduct Full Discovery Prior to The Motion to Dismiss Being Heard and It Would Have No Effect on This Determination.

The parties agreed to conduct discovery prior to the motion being filed and determined therefore, limited jurisdictional discovery is moot. Additionally, the Court of Appeals in Solesbee also addressed this issue holding “[b]ecause we find the trial court correctly held there was no merger of the Agreements and Magnolia's equitable estoppel argument was properly denied, we also find the court did not err in denying its request for further discovery when it would not have changed the result. Solesbee v. Fundamental Clinical And Operational Services, LLC d/b/a Magnolia Manor-Inman, 438 S.C. 638, at 651 (S.C. App. 2023). The same applies here and the Defendants request for limited Jurisdictional Discovery is denied.

CONCLUSION

Based on the reasons set forth above, the Court respectfully DENIES the Defendants’ Motion to Dismiss and Compel Arbitration.

IT IS SO ORDERED.



Kershaw Common Pleas

Case Caption: Lynn Marie Sanborn Pr , plaintiff, et al VS Palmetto Springdale
Operating, Llc , defendant, et al
Case Number: 2023CP2800524
Type: Order/Other

So Ordered

s/ Daniel Coble, 2774