

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

C/A Nos. 2015-CP-04-00100
2015-CP-04-00101

Terry Lamar Whitfield and Cheryl Lynn
Whitfield, individually and as Personal
Representatives of the Estate of Robert
Lamar Whitfield, deceased,

Plaintiffs,

v.

North Pointe Assisted Living, CSL North
Pointe SC LLC, Capital Seniore Living
Corporation,

Defendants.

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SC Court of Appeals
Order

A TRUE COPY
AUG - 7 2015
Richard X. Kinley
CLERK OF COURT

PRESIDING JUDGE: R. Scott Sprouse
DATE OF HEARING: July 28, 2015
PLAINTIFF'S ATTORNEY: Jennifer Burnett
DEFENDANT'S ATTORNEY: Sandra L. Miller
COURT REPORTER: Renee Tollison

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COMMON PLEAS AND
GENERAL SESSIONS

This matter was before the Court pursuant to the Defendants' Motion to Dismiss and Compel Arbitration. The Court heard arguments from counsel. The parties submitted written memoranda along with exhibits for the Court to review. The Court also gave the parties an additional forty-eight (48) hours to supplement the record.

The Court, after hearing the arguments of counsel and reviewing the pleadings, memoranda, affidavit and exhibits, makes the following

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FINDINGS OF FACT

1. The Plaintiff is the Estate of Robert Whitfield. Terry Lamar Whitfield and Cheryl Lynn Whitfield are co-personal representatives of the estate and brought this lawsuit in that capacity.

2. The Defendant is an assisted living facility located in Anderson County, South Carolina.

3. Terry Lamar Whitfield, having been granted durable general power of attorney by Robert Whitfield in a document dated July 17, 2008 (Defendant's Exhibit B in the Defendant's Brochure) entered into an agreement on behalf of Robert Whitfield with the Defendant on January 1, 2010, wherein the Defendant would provide assisted living services to Robert Whitfield. There is no allegation that the above-mentioned durable power of attorney was invalid.

4. Terry Lamar Whitfield executed several documents with the Defendant on January 1, 2010 (Exhibit A in the Defendant's Brochure). The first of these documents is entitled "Assisted Living Lease Agreement (Lease Agreement)." This document is six pages long and outlined basic terms of the agreement. Paragraph 14 (Page 4) is entitled "Insurance: Liability and Release." The pertinent parts of said paragraph read as follows:

"Resident agrees that the Operator will not be liable to Resident for any personal injury... suffered by Resident, unless the injury or damage is caused by the gross negligence of the Operator or its employees or agents. Resident hereby releases the Operator from any

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liability for personal injury...suffered by Resident..., unless caused by the gross negligence of the Operator or its employees or agents...

Because of the delay and expense of the court systems, the Operator and Resident agree to use confidential binding arbitration, instead of going to court, for any controversy or claims that arise between the Resident and the Operator, or owner, or management company, and/or their related companies. This includes any claim concerning this Lease Agreement, resident rights, resident care, resident services and policies and procedures. Before arbitration, Resident agrees first to present any claims in writing and in full detail to the Operator and next, to cooperate with any internal review process by the management company. Such review shall be conducted and completed within ten (10) days of Resident's notice to the Operator. In any arbitration, the then-prevailing rules of the American Arbitration Association shall apply."

The second document is entitled "Addendum to Current Resident Agreement", which is a document which notifies the resident of "the inherent risks that come from our community (page 2)." The third document is entitled "Arbitration Agreement" which states that any claim "except for Community's effort to collect monies due from Resident and Community's option to discharge Resident for such failure," shall be submitted to binding arbitration. The document directs that the arbitration be done "in accordance with the *Commercial Arbitration Rules* of the American Arbitration Association then in effect." This document sets forth the method of payment of the arbitrator and the powers of the arbitrator. The final provision of this document is that the "obligation of Community and Resident to arbitrate their disputes or disagreements shall survive termination of this agreement." The remaining documents are the "Addendum: Assisted Living Personal Care Fee Agreement," the "Addendum: Responsible Party Agreement," an

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untitled document which gives the Defendant the right to handle personal money on behalf of the resident, a document entitled "Resident's Grievance Procedures (SC)," and a final document entitled "Pet Addendum." All of these documents appear to have the signature of Terry Lamar Whitfield. All were signed on the same day. All but the "Pet Addendum" document bear the trademark/seal of the Defendant at the top of the document. All of these documents appear to be pre-prepared forms that could be used for any new resident. Included in the documents provided by defense counsel is a "Basic Services Addendum (which provides for three meals per day plus snacks, among other things)." This document is not signed by any party, although the date "1/1/10" is typed at the bottom.

5. Robert Whitfield is now deceased. The Plaintiff brought suit against the Defendant in a wrongful death and survival action in the Court of Common Pleas of Anderson County. The Defendant has moved to dismiss the Plaintiff's Complaint and compel arbitration in this matter.

ARGUMENTS AND ANALYSIS

The Defendant argues that the arbitration clause in the Lease Agreement is binding on the parties and that, accordingly, this case should be dismissed, compelling the dispute to go to arbitration. The Plaintiff argues that the pertinent portions of the Lease Agreement and the Arbitration Agreement are unconscionable, ambiguous and unenforceable. The Plaintiff also argues that this dispute is not governed by the South Carolina Uniform Arbitration Act or the Federal Arbitration Act.

In analyzing the claims of each party, the Court must begin by examining the basic law regarding arbitration. Whether a claim is subject to arbitration is an issue for judicial determination. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E. 2d 663 (2007).

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Accordingly, I conclude that this Court has jurisdiction over the parties and subject matter. Venue is proper.

Arbitration is a matter of contract. The Court must consider general contract defenses to ensure a meeting of the minds to arbitrate existed, and that such an agreement was not the result of fraud, duress or unconscionability. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E. 2d 110 (2001). South Carolina has established a strong presumption of validity of arbitration agreements. Simpson v. MSA of Myrtle Beach, Inc. 373 S.C. 14, 644 S.E.2d 663 (2007). South Carolina courts also are subject to the federal rule that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. Green Tree Fin. Corp.- Ala v. Randolph, 531 U.S. 79 S.Ct. 513 L.Ed.2d 373 (2000). The Federal Arbitration Act applies to any agreements that involve interstate commerce, which has been defined very broadly. In Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014), the South Carolina Supreme Court held that meals and medical supplies are “instrumentalities of interstate commerce.” The Court in Dean noted that the interstate commerce analysis “generally is a very fact-specific inquiry,” although the Court stated very clearly that “nursing home residency contracts usually entail providing residents with meals and medical supplies that are inevitably shipped across state lines from out-of-state vendors (Id.).”

The Basic Services Addendum in our present case is unsigned. It has the same date as the other documents typed in at the bottom and displays the Defendant’s trademark at the top of the page. The Defendant alleges that this document was part of the series of documents signed by Terry Lamar Whitfield on January 1, 2010. The Plaintiff denies that the Basic Services Addendum should be considered, arguing that it was not executed and is not otherwise incorporated into the Lease Agreement. The Defendant submitted an affidavit from Shae Stovall,

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who is the Executive Director of the Defendant's facility in question. In her affidavit, she alleges that the Basic Services Addendum was a part of the contract that she refers to as "the Residency Agreement." She also alleges in her affidavit that out-of-state vendors are utilized in securing food and supplies for the residents. In reviewing the Basic Services Addendum and the Stovall's affidavit, coupled with the very broad definition of interstate commerce set forth by the federal courts, I find that this agreement does affect interstate commerce and would be subject to the provisions of the Federal Arbitration Act should it otherwise be enforceable.

The Court must now determine if the agreement itself is enforceable. Defense counsel argued that the issue of unconscionability is one that should be determined by the arbitrator, not the Court. The Defendant relies on the case of Nitro-Lift Technologies, L.L.C v. Howard, 133 S.Ct. 500 (2012) in which it was held that "...when the parties commit to arbitrate contractual disputes, it is a mainstay of the Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved 'by the arbitrator in the first instance, not by a federal or state court.'" In that case, the parties did not challenge the validity of the arbitration clause, but other provisions in the contract. The state court then invalidated the entire contract. I find the Nitro-Lift case inapplicable in our present case since the Plaintiff, while also attacking the validity of the contract as it applies to the Plaintiff's remedies, is directly challenging the validity of the arbitration provisions. Even in cases where the Federal Arbitration Act (FAA) otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. 9 U.S.C.A. § 1 et seq. I find that this Court has jurisdiction to determine the validity of the contract in question and its arbitration provisions.

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The Plaintiff alleges that the parties' agreement regarding remedies and arbitration is unconscionable, ambiguous and unenforceable. South Carolina law defines unconscionability as "the lack of meaningful choice on the part of one party due to one-sided contract provisions, together with terms so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson, 373 S.C. at 24-25, 644 S.E. 2d at 668. In this case, the Plaintiff, in the Lease Agreement, relinquishes a right to his normal judicial remedies, including a jury trial in any dispute. I note that in the Lease Agreement, the Defendant gives up that right as well. Furthermore, in the Lease Agreement, the Plaintiff gives up the right to bring a personal injury claim against the Defendant for anything other than the "gross negligence of the Operator or its employees or agents."

In determining whether or not the Plaintiff lacked a meaningful choice in this agreement, the Court must consider the nature of the injuries suffered by the Plaintiff; whether the Plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. York v. Dodgeland of Columbia, 406 S.C. 67, 749 S.E.2d 139 (SC App. 2013).

The agreement in question is an adhesion contract. South Carolina law defines an adhesion contract as "a standard form contract offered on a 'take it or leave it' basis with terms that are not negotiable." While not *per se* unconscionable, adhesion contracts are viewed with "considerable skepticism" under South Carolina law. Simpson, 373 S.C. at 27, 644 S.E. 2d at 669-70. The forms signed by Terry Lamar Whitfield, as noted above, appear to be pre-printed forms that all new residents must sign prior to being admitted into the facility. The Court reaches this conclusion because the documents are all signed at the same time, at the same place.

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They have blanks to be filled in. They are prepared by a business entity and presented to individuals. There is a significant disparity in the sophistication and bargaining power of the parties. The waiver of the Plaintiff's fundamental right to a jury trial is not conspicuously displayed in the text of the document.

After looking at the evidence before the Court, I find that the Plaintiff lacked meaningful choice in this agreement. The Court must now go to the second prong of the unconscionability test---whether the agreement consisted of oppressive, one-sided terms. The Defendant argues that there is mutuality in the agreement. As pointed out by defense counsel, it is possible to conceive of actions outside of the personal injury realm where the Plaintiff may have a claim against the Defendant. However, (assuming that the parties are operating under the terms of the second document entitled "Arbitration Agreement") the Defendant has carved out an exception to its benefit. Common sense points to the payment of fees and the expulsion of residents for the non-payment of fees as the most likely scenario in which the Defendant would be forced to initiate legal action against a resident. Common sense further dictates that personal injury claims would be the most likely scenario in which a resident would initiate legal action against the facility. The Court would note that the other area in which common sense would dictate that a resident may have a claim against the Defendant---the destruction or theft of the resident's personal property---is also covered under the arbitration clause. The fact that the Defendant has a separate document ("Addendum to Current Resident Agreement") which is devoted entirely to the notifying residents of potential risks (all of which pertain to personal injury or property damage/theft claims), indicates that the terms of the agreement are decidedly pointed in the Defendant's favor in the event of future litigation. The Plaintiff waived his right to a jury trial in the type of case he most likely would have against the Defendant, while the Defendant preserved

its full legal remedies in the type case it most likely would have against the Plaintiff. There also is a fee provision in the Arbitration ^{Agreement 155} ~~Addendum~~ that establishes a "loser pays" type arrangement covering arbitrator fees, attorney fees and costs with a \$10,000.00 cap that is absent in the Lease Agreement. There is no mention of the payment of arbitrator fees, attorney fees and/or litigation costs in the Lease Agreement. As noted, the Courts will not invalidate arbitration agreements for the omission of or unartful wording of ancillary terms. However, I find that the fee-shifting arrangement, like the waiver of the right to a jury trial, is a material and essential term that directly affects the Plaintiff's fundamental rights. This fee arrangement would only apply in cases going to arbitration and not if a suit was brought on the issue of non-payment of the resident's bill and/or eviction of the resident. I find these terms so oppressive and one-sided as to be unconscionable, especially in light of the Lease Agreement having the Plaintiff waive any claim to an ordinary negligence cause of action in a personal injury action-- a waiver which this Court considers unconscionable in itself.

The Plaintiff also argues that the arbitration provisions are so ambiguous as to be unenforceable. As stated in York and numerous other cases, the Court must interpret a contract by looking at its language in its natural and ordinary sense, with the discovery of the parties' intent as the ultimate goal. It is impossible to do so in this case. The two arbitration provisions, as outlined above, are contradictory on their face. One document waives each party's rights to a jury trial, while the other does not. They were executed at the same time and same place. One of the contradictory arbitration clauses is in the body of the Lease Agreement while the other is in a completely separate document. It is impossible for the Court to ascertain the parties' intent by reading the two documents. The Defendant relies on the Dean case and other cases in which arbitration clauses that omitted ancillary details, such as the method of choosing the arbitrator,

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were upheld by the courts. In our present case however, the type of claim to be arbitrated is a material and essential term on which the documents are facially inconsistent.

South Carolina law does not allow this Court to select one or the other of the facially inconsistent provisions. The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the Court will consider and construe them together. Cafe Assocs. v. Gerngross, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991). This Court may not re-write the contract in order to make the pertinent portions of the two documents in question consistent. The facial inconsistencies are in the body are not severable in that they are part of specific provisions pertaining to remedies in the two different documents. Accordingly, I find that the arbitration provisions as set forth in the simultaneous documents in the overall agreement are so ambiguous as to be unenforceable.

WHEREFORE, IT IS ORDERED, that.

- 1. The Defendant's Motion to Dismiss and Compel Arbitration is DENIED.

R. Scott Sprouse, Judge

Tenth Judicial Circuit

August 3rd, 2015
Walhalla, South Carolina

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Richard D. Butler
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