2015-CP-05-124

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BAMBERG	)	SECOND JUDICIAL CIRCUIT

Polly McGill and Mary Broxton, as Co-Personal Representatives of the Estate of Virginia Butler, deceased

Plaintiffs,

v.

The Regional Medical Center Foundation d/b/a The Regional Medical Center and Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post-Acute Care of Bamberg, LLC,

Defendants.

ORDER

FILED
BAMBERG COUNTY
2015 OCT -5 AM 9: 52
JAMES D. MEERS
CLERK OF COURT
BAMBERG, SC

RECEIVED
DEC 04 2015
SC Court of Appeals

This matter comes before the Court on Defendant Pruitt Health-Bamberg, LLC's Motion to Dismiss and to Compel Arbitration. Based on the Court's review of the parties' written submissions and oral arguments during a hearing on September 9, 2015, the Court **DENIES** Defendant's motion.

BACKGROUND

Virginia Butler was a resident at Defendant's Bamberg nursing home in January-February 2014. As all times relevant to this action, Ms. Butler's medical records indicated that she suffered from dementia. Ms. Butler was transferred to Defendant's facility from The Regional Medical Center where she had received treatment for a broken leg suffered in a fall. While at Defendants' facility, Ms. Butler had pressure ulcers that progressed to stage 4. Ms. Butler's pressure ulcers became infected and she died a few weeks later. Plaintiffs' Complaint alleges that Defendant breached its duty in caring for Ms. Butler's pressure ulcers.

When Ms. Butler arrived at the nursing home, Defendant's staff approached Ms. Butler's family members with several documents. Mary Robinson, Ms. Butler's niece, was approached by a representative from Defendant while Ms. Robinson was at work. M. Robinson Aff. ¶ 4. Ms. Robinson was not Ms. Butler's guardian, conservator, or attorney in fact. M. Robinson Aff. ¶ 5. The documents included an Admission Agreement and a separate Arbitration Agreement. By its terms, "the signing of th[e] [Arbitration] Agreement [was] not a precondition to admission, expedited admission, or the furnishing of services" to Ms. Butler. Arbitration Agreement at 5. The Arbitration Agreement granted the resident 30 days to revoke its terms without affecting the resident's admission at the home. Id. Following Ms. Butler's death, Plaintiffs filed the current action in the Bamberg County Court of Common Pleas on June 11, 2015. On July 10, 2015, Defendant filed a Motion to Dismiss and Compel Arbitration.

ANALYSIS

Defendant presents two arguments in support of its motion. First, Defendant argues that Plaintiffs must arbitrate their claims because Ms. Robinson was authorized to enter the Arbitration Agreement by the Adult Health Care Consent Act (S.C. Code Ann. §§ 44-66-10 to -80) ("the Act"). Second, Defendant asserts the contract defense of equitable estoppel and argues Plaintiffs are equitably estopped from denying enforcement of the Arbitration Agreement. However, neither argument is supported by South Carolina law. The Act only applies to "health care decisions" and not to independent agreements regarding resolution of legal claims. Equitable estoppel does not apply in this case because Defendant has failed to meet its burden of proving all required elements of the doctrine as identified in earlier South Carolina Supreme Court precedent.

A. Adult Health Care Consent Act

The Act's primary purpose is to identify and authorize individuals to make "decisions concerning . . . health care" on behalf of a person "unable to consent." S.C. Code Ann. § 44-66-30(A). The Act intends "to insure that the patient's wishes **concerning her medical treatment** are honored whenever possible." Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014) (emphasis added). The Act establishes the order of priority for those individuals authorized to make health care decisions. The first level of decision-making priority, pursuant to the Act, is granted to a legally-appointed guardian and an attorney-in-fact empowered pursuant to a duly executed durable power of attorney. S.C. Code Ann. § 44-66-30(A). An incapacitated individual's adult children and extended family members are further down in priority. Id.

The Act expressly limits the decision-making power of any individual to only "health care" decisions. S.C. Code Ann. § 44-66-30(A). "Health care" is defined in the Act and the South Carolina Supreme Court recently construed the definition to limit an individual's decision-making authority to: (1) "provision or withholding of medical care including placement in a facility which provides such care;" and (2) "certain financial decisions . . . to pay for services rendered." Coleman, 407 S.C. at 352, 755 S.E.2d at 453. An individual's power under the Act applies "primarily to traditional health care decisions" and only "secondarily" to financial matters related to those decisions. Id. at 353, 755 S.E.2d at 454.

The Act grants only limited decision-making power related to nursing home admission. An individual authorized by the Act may enter an agreement to admit a resident to a nursing home and may enter a contract agreeing to pay for nursing home services. Coleman, 407 S.C. at 353-54, 755 S.E.2d at 454. A potential resident or her family are typically presented with

multiple contracts and other documents when the family contemplates admitting their loved one to a nursing home. Coleman demonstrates that the Act does not apply to all documents associated with nursing home admission. Specifically, the Act does not apply if a document "was not required for [the resident's] admission, contained no provision for medical, nursing, or health care services to be provided for [the resident], and did not require any financial commitment to pay for such services." Id. at 353, 755 S.E.2d at 454.

Based on the Coleman standard, the Act does not apply to the Arbitration Agreement. Plaintiffs do not contest that Ms. Butler meets the Act's definition of a patient that is "unable to consent" and does not contest whether Ms. Robinson fits within the category of individuals identified in the Act as authorized to make "health care" decisions on Ms. Butler's behalf. Instead, Plaintiffs argue that Ms. Robinson was not authorized by the Act to enter the Arbitration Agreement because the Arbitration Agreement does not involve "health care" decisions. The Court agrees the Arbitration Agreement does not contain any provision for medical, nursing, or health care services. The bolded and underlined language in Section I of the Arbitration Agreement indicates that its provisions are intended only for dispute resolution. Arbitration Agreement at 1. The Arbitration Agreement also does not contain any provisions relating to payment for medical, nursing, or health care services. Only the scope of arbitrable disputes and procedures for an arbitration hearing are included in the Arbitration Agreement.

Despite its focus on dispute resolution, Defendant argues that the Arbitration Agreement is still governed by the Act's provisions because it merged with the Admission Agreement, a "health care" contract signed at the same time as the Arbitration Agreement. Coleman acknowledged a common law merger rule. 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)).

However, there are several express limitations on the merger rule's operation. First, the rule only applies "where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction." Id. Second, the rule may be displaced by the parties' contrary intentions as expressed in the contract. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. Third, in determining whether the rule applies and in determining whether the parties expressed a contrary intent, all ambiguities in the Arbitration Agreement must be construed against Defendant since it was the sole drafter of all contracts presented to Ms. Butler's family before her admission to Defendant's facility. Id. at 355-56, 755 S.E.2d at 455 (citing Davis v. KB Home of S.C., Inc., 394 S.C. 116, 713 S.E.2d 799 n. 4 (Ct. App. 2011)).

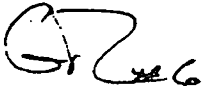
After reviewing the parties' memoranda along with the Arbitration Agreement and Admission Agreement, the Court finds that the common law merger rule does not apply because the parties clearly expressed their intent that the documents were to be considered separate and independent agreements.[1] The Arbitration Agreement identifies itself as a "voluntary agreement," indicating that a resident's potential admission to Defendant's facility was not dependent on any agreement to arbitrate. That notion was explicitly reaffirmed later in the Arbitration Agreement where Defendant drafted language indicating that "The signing of this Agreement is not a precondition to admission, expedited admission, or the furnishing of services to the Patient/Resident by the Healthcare Center." Arbitration Agreement at 5. Additionally, the

[1] Defendant argues that the Court should not rely on the separate and independent nature of the Arbitration Agreement largely for policy reasons. Defendant argues that applying merger to separate and independent arbitration agreements is advisable because, without merger, nursing home providers have an incentive to relocate arbitration provisions from a separate document to their admission agreements where they are less likely to be noticed or seriously considered by a resident or her representative. See Coleman, 407 S.C. at 358, 755 S.E.2d at 456-57 (Toal, C.J., dissenting). With full respect for the Chief Justice's dissent, the four-justice majority in Coleman found that, under Klutts, separate and independent agreements overcome the common law merger rule. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. Pursuant to *stare decisis*, this Court is bound by the opinion of the Court in Coleman and not by its dissent.

Arbitration Agreement includes a 30 day revocability period in which a resident could choose to repudiate the Arbitration Agreement without any effect on the Admission Agreement or admission to Defendant's facility. Id. Coleman identified a 30 day revocability clause in an arbitration agreement as "evidencing an intention that each contract remain separate." Id. at 355, 755 S.E.2d at 455.

Defendant attempts to distinguish Coleman by arguing the 30 day revocability clause was not essential to Coleman's holding but offers the Court nothing from the Supreme Court's opinion to support this conclusion. Coleman found that the clause "evidenc[ed] an intent that each contract remain separate." Id. There is no indication that this clause alone is insufficient to overcome the common law merger rule. Under the plain language of Klutts, the merger rule is rebutted by "**anything indicating a contrary intention.**" Klutts Resort Realty, Inc., 268 S.C. at 88, 232 S.E.2d at 24 (emphasis added). The Court is also not persuaded by Defendant's argument that the revocability period should not be considered on the merger question because Plaintiffs did not exercise it. Coleman and Klutts considered the parties' intent based solely on the language used in the agreements and not based on any post-formation conduct. See also Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007) (finding contract parties' intention must be "derived from the language of the contract" and, in the absence of ambiguity, the contract language "alone determines the document's force and effect").

Additionally, the evidence does not demonstrate that the Arbitration Agreement and Admission Agreement meet Klutts' baseline requirements for merger. Merger can only potentially apply where two or more contracts are executed at the "same time, by the same parties, for the same purpose." Klutts Resort Realty, Inc., 268 S.C. at 88, 232 S.E.2d at 24. The



Admission Agreement and Arbitration Agreement are not between the same parties. The Admission Agreement names Defendant and Ms. Butler as parties while the Arbitration Agreement names Defendant, Ms. Butler, and Ms. Robinson as parties. Admission Agreement at 1; Arbitration Agreement at 1. While Defendant claims the agreements were executed for the same purpose, that conclusion is not supported by the contract language. Defendant argues that both contracts were executed for Ms. Butler's "admission and care at the facility." Def.'s Mem. in Supp. of Mot. to Dismiss at 8. However, the Arbitration Agreement was not executed for Ms. Butler's admission because, as is clear from the Arbitration Agreement itself, that agreement "is not a precondition to admission . . . or the furnishing of services to the Patient/Resident by the Healthcare Center." Arbitration Agreement at 5.

In sum, there is evidence that the parties intended that the Arbitration Agreement was not to merge with the Admission Agreement even though there was not an explicit anti-merger clause. The Arbitration Agreement was "voluntary," was explicitly intended to be independent of Defendant's decision to admit a resident to its facility, and could be revoked at the resident's option for 30 days without effect on admission. This evidence indicates the parties' anti-merger intent. Plus, the evidence does not demonstrate that the two agreements were executed by the same parties for the same purpose. For all these reasons, Defendant's motion is denied.

B. Equitable estoppel

Defendant also argues that Ms. Butler and Plaintiffs[2] are equitably estopped from denying enforcement of the Arbitration Agreement Ms. Robinson signed at the time of Ms.

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[2] Defendant asks the Court to find that Ms. Butler's wrongful death beneficiaries are equitably estopped from opposing arbitration even though they did not participate in Ms. Butler's nursing home admission and were not even ascertainable until Ms. Butler's death. See Jones v. Leagan, 384 S.C. 1, 16, 681 S.E.2d 6, 14 (Ct. App. 2009). Several courts have found Defendant's position untenable. Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (en banc); Bybee v.

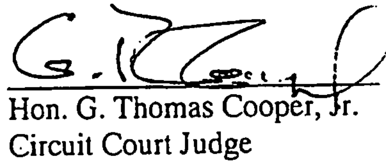
Butler's admission. Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id.

Defendant has not met its burden to establish these elements. There is no evidence Ms. Butler acted in a way amounting to a false representation to Defendant regarding Ms. Robinson's status or that Ms. Butler intended for Defendant to act in reliance on her conduct. Ms. Butler's diminished mental capacity prevented her from forming the required intent for Defendant to rely on her conduct. Additionally, the evidence shows Defendant cannot meet its burden to show they lacked knowledge or the means of knowledge of the truth of the facts in question. This element requires Defendant to show it did not know Ms. Robinson lacked authority to sign the arbitration agreement on her aunt's behalf and Defendant lacked the ability to make this determination. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. See Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

Abdulla, 189 P.3d 40, 43 (Utah 2003) ("a decedent does not have the power to contract away the wrongful death action of his heirs").

In this case, Defendant had the capacity to determine whether Ms. Robinson had authority to sign an arbitration agreement on Ms. Butler's behalf. Defendant is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. Defendant is familiar with the legal concepts of guardianship and powers-of-attorney. Defendant had the ability to ask Ms. Robinson whether she was Ms. Butler's guardian or attorney-in-fact and had the ability to request supporting documentation. Since Defendant has not cited or provided evidence on all required elements of equitable estoppel, its Motion is **DENIED**.

IT IS SO ORDERED.



Hon. G. Thomas Cooper, Jr.
Circuit Court Judge

Columbia, South Carolina

September 30, 2015