

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Ashley S. Smith as Guardian ad Litem)
 for Jaywayne L. Henderson,)
)
 Plaintiff,)
)
 v.)
)
 Glorified Health & Rehab of)
 Greenville, LLC, New Glorified)
 Health and Rehab of Greenville, LLC,)
 New Ark Investment, Inc., f/k/a Ark)
 Holding Company, Inc., Covenant)
 Dove, LLC, Covenant Dove Holding)
 Company, LLC, Ark South Carolina)
 Holding Company, LLC, Olive Leaf,)
 LLC, Greenville RE II, LLC, a/k/a)
 Glorified RE, LLC, Ark III Real)
 Estate, LLC, Ark Real Estate, LLC,)
 New Ark SC Operator Holdings, Inc.,)
 New Ark Operator Holding, LLC,)
 New Ark Master Tenant, LLC, New)
 Ark Investment, Inc., DES New Ark)
 TR, 4 West Holding, LLC, 4 West)
 Investors, JS New Ark TR, HS New)
 Ark TR and Heather Burton,)
)
 Defendant(s).)
)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2014-CP-23-06975

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 SC Court of Appeals

**ORDER DENYING DEFENDANTS'
 MOTION TO COMPEL
 ARBITRATION AND MOTION FOR
 PROTECTIVE ORDER AND
 GRANTING PLAINTIFF'S MOTION
 TO COMPEL DISCOVERY**

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSINER
 2015 DEC 11 AM 9 41

PROCEDURAL HISTORY

This matter came before the Court on November 3, 2015, in Greenville, South Carolina. All parties were represented by counsel.

This matter rises out of certain claims set forth in complaints against Glorified Health & Rehab of Greenville, LLC (hereinafter "Facility"), New Glorified Health and Rehab of Greenville, LLC, New Ark Investment, Inc., f/k/a Ark Holding Company, Inc., Covenant Dove, LLC, Covenant Dove Holding Company, LLC, Ark South Carolina

Holding Company, LLC, Olive Leaf, LLC, Greenville RE II, LLC, a/k/a Glorified RE, LLC, Ark III Real Estate, LLC, Ark Real Estate, LLC, New Ark SC Operator Holdings, Inc., New Ark Operator Holding, LLC, New Ark Master Tenant, LLC, New Ark Investment, Inc., DES New Ark TR, 4 West Holding, LLC, JS New Ark TR, HS New Ark TR and Heather Burton (hereinafter collectively referred to as "Defendants") for allegations of nursing home neglect and negligence involving the care and treatment of Jaywayne Henderson (hereinafter "Resident").

This matter was before the Court on Plaintiff's Motion to Compel Discovery and Defendants' Motion to Compel Arbitration and Motion for Protective Order. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda and attachments to same, for the reasons more fully set forth below, the Court hereby denies Defendants' Motion to Compel Arbitration and Motion for Protective Order and grants Plaintiff's Motion to Compel Discovery in the above-captioned matter.

This action is brought by Resident's daughter Ashley Smith (hereinafter "Daughter") as Guardian *ad Litem* for Resident. Plaintiff has specifically alleged that Resident developed skin breakdown and bedsores as a result of chemical burns from being left in and exposed for extended periods of time to feces and urine, that this required his emergent transfer to St. Francis Hospital and then emergent transfer to the Georgia Burn Center. Plaintiff has also alleged claims against Defendants other than the licensed facility alleging direct negligence for corporate negligence, underfunding the facility, understaffing the facility and negligently managing and operating the facility. The Defendants vigorously deny all of the allegations.

At the time of admission, Resident's brother, Michael Henderson (hereinafter "Brother"), entered into an Admission Agreement for the provision of healthcare services. Further, subsequent to entering into the Admission Agreement, Brother signed an Arbitration Agreement regarding claims which might arise during the admission. In the Arbitration Agreement, under Brother's signature, it is checked that Brother signed as "General Power of Attorney" and as "Family". No Power of Attorney or authority for Brother to act on behalf of Resident has been introduced, submitted or discovered. In fact, Facility admits that Daughter was Resident's Power of Attorney during his residency at Facility.

If enforceable, the Arbitration Agreement would purport to, among other things, require that the claims alleged in Plaintiff's Complaint be subject to binding arbitration instead of Plaintiff having a right to a trial in court before a judge and/or jury.

Plaintiff filed the Notice of Intent on July 8, 2014. The parties engaged in the required pre-suit mediation on November 21, 2014. Thereafter, Plaintiff filed the Summons and Complaint and Defendants were served no later than January 20, 2015. Plaintiff served her First Interrogatories and First Requests for Production with the Summons and Complaint. The Defendants answered the Complaint on February 19, 2015, and served their first set of Interrogatories and Requests for Production with the Answer. An Amended Complaint was filed shortly thereafter with consent regarding name changes of some of the Defendants, for which the Defendants timely answered.

Plaintiff requested responses to discovery from the Defendants on multiple occasions between January and July. When Plaintiff did not receive any responses to her First Interrogatories and First Requests for Production, a Motion to Compel was filed in

July, 2015. Shortly before the hearing on the Motion to Compel was to be heard, Defendants provided limited answers (according to Plaintiff's Motion to Compel Discovery) on August 23, 2015. Plaintiff subsequently wrote to the Defendants seeking full and complete responses to discovery requests which were in issue. Defendants did not supplement these discovery requests and filed a Motion to Compel Arbitration on the day before the hearing on Plaintiff's Motion to Compel Discovery. At the first hearing, the trial court instructed the parties to try to resolve the discovery disputes and continued the Motion to Compel Discovery until the Motion to Compel Arbitration and Motion for Protective Order could be heard at the same time. The parties engaged in discovery limited to the arbitration issues after the filing of Defendants' Motion to Compel Arbitration.

LEGAL ANALYSIS AND CONCLUSIONS

Whether the parties agreed to arbitrate is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007). The courts, not arbitrators, are charged with deciding certain "gateway matters" including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E. 2d 1, 5 (Ct. App. 2008). In making a determination as to whether a valid arbitration agreement exists, courts must consider "general contract defenses" to ensure a meeting of the minds existed. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001). Further, §2 of the F.A.A provides that state law contract defenses apply to the enforceability of an arbitration agreement. 9 U.S.C. §2. For the reasons set forth below, the Arbitration Agreement is

not enforceable, and the Defendants' Motion to Compel Arbitration and Motion for Protective Order is denied.

I. THE ARBITRATION AGREEMENT IS UNENFORCEABLE AGAINST RESIDENT BECAUSE BROTHER HAD NO AUTHORITY TO EXECUTE THE ARBITRATION AGREEMENT

a. Third Party Beneficiary is Not Applicable

The Defendants rely upon two Federal District Court cases for their contention that the Arbitration Agreement is enforceable. Specifically Defendants rely upon McCutcheon v. THI (2011, U.S. Dist. Lexis 144288 D.S.C. 2011) and THI v. Wiggins (2011, U.S. Dist. Lexis 103638 D.S.C. 2011).

In light of this State's third party beneficiary law, and in light of Coleman v. Mariner, et al., 755 S.E.2d 450; 755 S.E.2d 450 (2014), this Court rejects Defendants' arguments. In Coleman, the South Carolina Supreme Court affirmed the trial court's refusal to enforce an arbitration agreement that was signed and executed by the resident's sister, who had no power of attorney, guardianship or other authority to act on her behalf. In addition to other contentions, the Defendants in Coleman argued that the Plaintiff was a third party beneficiary to the arbitration agreement, and therefore, the arbitration agreement should be enforced. The South Carolina Supreme Court rejected the nursing home Defendants' arguments in Coleman.

Furthermore, as argued by Plaintiff's counsel, the nursing home Defendants in Coleman argued the McCutcheon and Wiggins cases to the South Carolina Supreme Court. McCutcheon and Wiggins are both 2011 cases, which existed three (3) years prior to Coleman. As such, the South Carolina Supreme Court did not follow McCutcheon and Wiggins, and Coleman is controlling on these issues. See also Malloy v. Thompson, 409

S.C. 557, 762 S.E.2d 690 (2014), (discussing third party beneficiary and estoppel but not enforcing arbitration.)

Furthermore, for a third party beneficiary argument to be successful, the court must find that the underlying agreement is a valid contract. As the Arkansas Court of Appeals recently noted in Progressive Elder Care Services-Chicot, Inc., et al. v. Sue Long, as the Administrator for the Estate of Marion L. "Sugar" Long, 449 SW 3d 324, 2014 Ark. App. 661, there must be a valid contract underlying the premise of the third party beneficiary argument. In Progressive Elder Care Services-Chicot, Inc., et al., the nursing home sought to compel arbitration where the signatory to the arbitration agreement (not the resident) did not have authority to contract or enter into the arbitration agreement on behalf of the resident. Rather, the nursing home, as the Defendants do here, argue that the resident was a third party beneficiary. The trial court denied the nursing home's motion and the Arkansas Court of Appeals agreed. The court ruled that there was not a valid underlying agreement between the signatories to the contract/agreement because the signatory was not authorized to sign the documents. With no valid underlying contract, there could be no third party beneficiary. In the present case, there is no evidence that Brother had any authority to sign the Arbitration Agreement on behalf of Resident.

Plaintiff submitted the transcript of the 30(b)(6) deposition of Nursing Home Defendants. The 30(b)(6) designee (hereinafter "Wright") was the admission's director for Facility and presented the Admission Agreement and Arbitration Agreement to Brother. Wright's testimony reveals that Defendants' policies and procedures required them to: 1) obtain a copy of Brother's Power of Attorney (if it existed); 2) explain



Brother's relationship to Resident in the relevant signatory portions of the Arbitration Agreement (Defendants did not provide any explanation); and 3) obtain Daughter's signature to the Arbitration Agreement and Admission Agreement when they learned Daughter had Power of Attorney for Resident during his admission (which they never did). Wright's testimony reflects that it was unclear who checked the line indicating that Brother had General Power of Attorney for Resident under the Arbitration Agreement signature.

Because the evidence shows that Brother had no authority to sign the Arbitration Agreement on behalf of Resident, there can be no third party beneficiary argument because there is no valid underlying agreement. Furthermore, as noted hereinabove, Coleman is controlling and the third party beneficiary argument fails when there is no authority for the signatory to the Arbitration Agreement to sign on behalf of the resident.

Finally, it is clear that the Admission Agreement and the Arbitration Agreement were two separate contracts (which is addressed more fully herein below), and as such, Resident is not a beneficiary under the unenforceable Arbitration Agreement.

a. Estoppel Does Not Apply

The Defendants also rely upon the McCutcheon case to argue that the resident is equitably estopped from denying the validity of the Arbitration Agreement. McCutcheon v. THI (2011, U.S. Dist. Lexis 144288 D.S.C. 2011). The Court rejects this argument for multiple reasons.

First, as noted hereinabove, this argument was made before the court in Coleman and rejected under the facts of the Coleman case, which are very similar and analogous to

the case at hand. Second, equitable estoppel applies only to prevent a party from relying on one part of a contract while seeking to deny another part of the same contract.

The testimony of the Wright explicitly states that these were two separate contracts. Wright's testimony reflects: 1) the Arbitration Agreement was not a requirement to be signed before admission; 2) the Arbitration Agreement is entered into separately from the Admission Agreement; 3) the Arbitration Agreement is signed after the Admission Agreement; and 4) facility policies and procedures require that the Admission Agreement be signed, but not the Arbitration Agreement.

Additionally, the Arbitration Agreement attempts to include as parties the Facility's "parent, affiliates, any subsidiary companies, owners, officers, shareholders, directors, medical directors, employees, administrators, rehabilitation company, successors, assigns, agents, attorneys and insurers," while, the Admission Agreement purports to only include the Facility and the resident. Therefore, different entities are parties to the Arbitration Agreement and the Admission Agreement.

Furthermore, as the Coleman court noted, and as exists in this case, the Arbitration Agreement may be revoked within thirty (30) days of admission, and the revocation of the Arbitration Agreement does not affect the Admission Agreement. Also, the Admission Agreement states clearly that it is governed by South Carolina law and the Arbitration Agreement states clearly that it is governed by Federal law (Federal Arbitration Act). As in Coleman, the Arbitration Agreement here is not a pre-condition to admission and is not a requirement for the Admission Agreement, but the Admission Agreement must be signed and entered into before admission according to the Wright's testimony.

The Admission Agreement also has portions and sections of the agreement that state that it shall withstand all other agreements, even if they are revoked. The Admission Agreement also states that it is the “entire agreement among the parties pertaining to the subject matter contained in it and supersedes all prior arrangements, representations, and all understandings of the parties.” Therefore, in light of these facts, it is the Court’s determination that the Arbitration Agreement and the Admission Agreement are two separate agreements and that it was the Defendants’ intent to make these two separate agreements and therefore, there is no merger with the Arbitration Agreement and the separate Admission Agreement. As the court noted in Pearson v. Hilton Head Hospital, 400 S.C., 281, 290, 733 S.E.2d 597, 601 (2012) , the South Carolina Court of Appeals has ruled “in the arbitration context, the doctrine [of equitable estoppel applies]...when [one party] has consistently maintained that other provisions of the **same contract** should be enforced to benefit him”. *Id. emphasis added*. In the present case, Plaintiff is not relying upon the Arbitration Agreement for any of the claims or causes of action Plaintiff is pursuing. Because there are two separate contracts with no merger of the documents, equitable estoppel cannot apply.

Further, for equitable estoppel to apply there must be a misrepresentation by the party. Underneath the signature on the Arbitration Agreement where it requests the “title or relationship to resident”, it was written “brother”. Brother did not write that he was Power of Attorney. Wright testified that she did not know who checked the lines indicating that Brother was general power of attorney. Wright also agreed the Facility failed to indicate the relation to the resident as required by Facility’s policies and procedures. Wright also agreed that “responsible party” as indicated in the Admission

Agreement does not define the relationship to Resident or indicate that Brother had any authority to sign for Resident. Further, Wright testified that there was no specific recollection of conversations with Brother during the admission process where Brother represented that he had authority for Resident, but only that she had the "impression" that he was power of attorney. Wright also acknowledged that many times family members believe that just because they are a family member of the resident that they have a power of attorney. Based upon the evidence submitted, there is no evidence that Brother misrepresented his position and relationship with Resident and that Resident made a misrepresentation.

Equitable estoppel also requires that there is reasonable reliance by the party claiming estoppel and a lack of knowledge and means of knowledge of the truth as to the facts in question. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 589, 553 S.E.2d 110, 116 (2001). Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 589, 553 S.E.2d 110, 116 (2001).

The evidence points to the fact that Facility knew or should have known that Brother had no power of attorney. The Defendants never obtained a power of attorney from Brother as required by Facility's policies, there was no power of attorney on record for Brother as required by the policies and procedures, and Facility actually became aware that Daughter had the Power of Attorney during Resident's admission and obtained a copy of Daughter's Power of Attorney, yet never had her sign the Admission Agreement and Arbitration Agreement as required by their policies and procedures.

Therefore, Defendants cannot contend that they should not have known that Brother had no power of attorney or that they were misled by Brother or Resident.

Finally, estoppel cannot apply because the Defendants must prove that the party to be estopped (Resident) acted in a way amounting to a false representation, intended such conduct to be acted on by the Defendants, and had actual or constructive knowledge of the facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). Defendants present no evidence that Resident allowed Brother to falsely represent himself or that Resident had any knowledge of the facts or intended that Facility act upon Brother's representations. In fact, Wright testified that Resident likely was not present at the facility when Brother signed the Arbitration Agreement. Further, it is Nursing Home Defendants' contention that Resident was incompetent. There is no evidence that Resident acted in any way to amount to a false representation.

II. Defendants Other than Glorified Rehab are not Parties to the Arbitration Agreement

The Arbitration Agreement alleges to be between the Facility to include the "particular facility where the resident resides, its parents, affiliates, and any subsidiary companies, owners, officers, shareholders, directors, medical directors, employees, administrators, rehabilitation company, successors, assigns, agents, attorneys and insurers." However, these entities are not signatories to the Arbitration Agreement, nor did anyone sign on their behalf. The only entity that had a signatory on its behalf was Facility.

Wright testified that the only parties to the Arbitration Agreement were Facility and the Resident. Wright testified that she signed on behalf of Facility-Glorified Health

& Rehab. Wright, who signed on behalf of the Facility also testified that she was employed by Facility (not other Defendants), received her paychecks from Facility, and had no authority to act on behalf of any other company other than Facility. She also testified that when she signed, she signed on behalf of Facility. Because Defendants other than Facility are not parties to the Arbitration Agreement, they cannot move to compel arbitration on the claims against them. The South Carolina Court of Appeals held in Pearson v. Hilton Head Hospital, et al, 400 S.C. 281, 733 S.E.2d 597 (S.C. Ct. App. 2012), that “generally arbitration is a matter of contract and a party cannot be required to submit to arbitration in a dispute which he has not agreed so to submit. Id. at 288 citing International Paper Company v. Schwabedissen Maschinen and Anlagen GMBH 206 F.3d 411 416 (4th Cir. 2000).¹ As the Pearson court noted, courts must not “ignore the corporate form of a non-signatory based solely on the interrelatedness of the claims alleged.” Id. at 294.

III. Nursing Home Defendants Waive Their Right to Compel Arbitration

The right to enforce an arbitration clause may be waived. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 249, 251 (Ct. App. 2007); Davis v. KB Home of South Carolina, Inc., 394 S.C. 116, 713 S.E.2d 799, (Ct. App. 2011). Courts generally consider the following factors when determining whether a party has waived his rights to compel arbitration:

- (1) Whether a substantial length of time transpired between commencement of the action and the commencement of a motion to compel arbitration;

¹ Pearson's holding regarding third party beneficiary for the non-signatory defendants is distinguishable from the present case because Plaintiff is not relying upon the Arbitration Agreement for any claim, and there is no evidence that there is arbitration agreements controlling the relationship between the Defendants, and there is no merger.

- (2) Whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and
- (3) Whether the non-moving party was prejudiced by the delay in seeking arbitration. Id.

Furthermore, the South Carolina Supreme Court recognized nursing homes can waive arbitration rights in Dean v. Heritage Healthcare of Ridgeway, LLC 401 S.C. 371, 759 (2014). In this case, Plaintiff filed a Notice of Intent to File Suit under S.C. Code §15-79-125 on July 8, 2014. The parties participated in an unsuccessful mediation on November 21, 2014. Plaintiff then timely filed her Summons and Complaint on December 18, 2014, and served the Defendants in January 2015. The Defendants filed an Answer in February, 2015.

The Defendants then served discovery upon the Plaintiff. Defendants, while belated, served responses to Plaintiff's discovery on August 23, 2015. When Plaintiff's Motion to Compel Discovery was scheduled to be heard, Defendants filed this Motion to Compel Arbitration and Motion for Protective Order on September 8, 2015, the day before Plaintiff's Motion to Compel Discovery hearing.

Unlike the nursing home defendants in Dean, the Defendants in this case failed to move "to compel arbitration at their first opportunity." Dean at 388. Defendants could have sought to compel arbitration after the Notice of Intent was filed and after the Complaint was filed but delayed in both instances. The Motion to Compel Arbitration was filed fourteen (14) months after Plaintiff first filed the Notice of Intent to File Suit and over eight (8) months after the Plaintiff filed the Summons and Complaint.

Plaintiff further argues that Plaintiff has been prejudiced by the additional accrual of expenses in the litigation, which would not have been necessary if the parties were engaged in arbitration, and that Plaintiff has lost the ability to obtain witnesses or evidence through the Defendants' delay.

Given the substantial delay and participation in discovery and litigation process, the Defendants waived and abandoned their rights to compel arbitration.

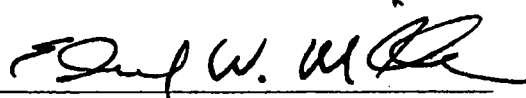
IV. PLAINTIFF'S MOTION TO COMPEL DISCOVERY IS GRANTED

Plaintiff filed a Motion to Compel Discovery on July 10, 2015. According to Plaintiff's Motion, Memoranda, and exhibits attached thereto, Defendants have refused to answer numerous discovery requests and objected to significant discovery requests. When these matters were before the Court and these motions were heard, the Defendants contended that their objections to Plaintiff's discovery were based upon their Motion for a Protective Order which resulted from the underlying Motion to Compel Arbitration. Defendants were explicitly given the opportunity to place any further objections to discovery on the record and no objections were so placed.

Therefore, all Defendants are ordered to provide full and complete responses to Plaintiff's First Interrogatories and First Requests for Production within forty-five (45) days of the date of this Order.

WHEREFORE, for the reasons stated herein, the Court denies the Defendants' Motion to Compel Arbitration and Motion for Protective Order and grants Plaintiff's Motion to Compel Discovery.

IT IS SO ORDERED.



The Honorable Edward W. Miller
Presiding Judge Thirteenth Judicial Circuit

Greenville, South Carolina

Date: 12/9, 2015