IN THE STATE OF SOUTH CAROLINA) COUNTY OF CHARLESTON)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO: 2017-CP-10-5984
VICTOR RAWL as Personal Representative of the ESTATE OF VERA BROWN, Plaintiff, v. WEST ASHLEY REHABILITATION AND NURSING CENTER-CHARLESTON, SC, LLC d/b/a HEARTLAND OF WEST ASHLEY REHAB AND NURSING CENTER, Defendant.	ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION

This matter came before the court on March 21, 2018 on Defendant's Motion to Dismiss and Compel Arbitration. For the reasons set forth below, Defendant's Motion to Dismiss and Compel Arbitration is **DENIED**.

BACKGROUND FACTS

Vera Brown was admitted to Defendant's facility on August 25, 2014. Upon admission, Ms. Brown was asked to sign admission paperwork as well as the Arbitration Agreement, which was separate from the admission paperwork. The Arbitration Agreement was not necessary for admission. Additionally, there was no bargain for exchange nor consideration in Ms. Brown's agreement to the Arbitration Agreement. Ms. Brown passed away approximately four (4) days after her admission into Defendant's facility, while under Defendant's care.

LEGAL ANALYSIS

While there is a presumption in favor of arbitration agreements, this presumption only applies where there is a valid arbitration agreement. EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler's Cove Homeowners Ass'n v.

Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 D.E.2d 581 (2003). However, not all arbitration clauses are enforceable. Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreement. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). While federal law preempts state laws that would invalidate arbitration agreements on most public policy grounds, the FAA looks to state law to decide the threshold questions of contract formation. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'"). Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

A. The Arbitration Agreement lacks valuable consideration and is unenforceable where there was no additional consideration in Plaintiff's agreement to the Arbitration Agreement and future promises are not valuable consideration.

The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d 161, 166 (S.C. 2003) "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." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)). Where a contract lacks valuable consideration, the contract will be deemed unenforceable.

Our courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. See Riedman Corp. v. Jarosh, 290 S.C. 252, 253, 349 S.E.2d 404, 405 (1986); see also O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274-5 (4th Cir. 1997). However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confides of the four corners of the instrument. State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). Therefore, our courts must assess whether the arbitration agreement itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate.

In the case at hand, it is clear that the Arbitration Agreement lacks valuable consideration. Paragraph 3 of the Arbitration Agreement states that the FAA applies to the Agreement. Therefore, we must look at state law to decide the threshold question of contract formation and whether consideration exists. Munoz, 343 S.C. at 542 S.E.2d 360, 364; Towles, 338 S.C. at 37, 524 S.E.2d at 844; Rent-A-Center, West, Inc, 561 U.S. at 130 S. Ct. at 2776, 177 L.Ed.2d 403; Simpson, 373 S.C at 14, 644 S.E.2d at 663. Upon admission Ms. Brown was asked to sign the admission paperwork. Ms. Brown then signed the Arbitration Agreement separate from the admission paperwork. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. In fact, the Arbitration Agreement states "[t]he patient will receive services in this center whether or not this agreement is signed." Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party,

when agreeing to the Arbitration Agreement. Id. Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself. Consequently, where the Arbitration Agreement is guided by the FAA and principles of contract law - the Arbitration Agreement is unenforceable where the Arbitration Agreement lacks valuable consideration.

B. Plaintiff's agreement to the Arbitration Agreement was unconscionable in the absence of meaningful choice on part of Plaintiff due to the one-sided contract provisions, the relative disparity in the parties' bargaining power, and the Defendants relative sophistication over Plaintiff's decedent.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the agreement. S.C. Code Ann. § 36–2–302(1) (2003).

In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999). It is under this general rubric that courts must determine whether a contract is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. See Carlson v. General

Motors Corp., 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," id. at 295, courts should take into account 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. Id. at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17A Am.Jur.2d Contracts § 279 (2004))).

In the case at hand, it is clear that the Arbitration Agreement is unconscionable because Vera Brown lacked absence of meaningful choice and the terms in the Arbitration Agreement are oppressive, one-sided terms. Vera Brown was admitted into Defendants' facility on August 25, 2014. She passed away at Defendants' facility four (4) days later on August 29, 2014. Upon admission the standard Arbitration Agreement form was presented to an ill Vera Brown on a take-it-or leave it basis. Ms. Brown did not contribute to the drafting of the Arbitration Agreement or possess the bargaining power to negotiate the terms of the Arbitration Agreement. See Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (recognizing a contract of adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms). Nevertheless, finding a contract to be one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable. Lackey, 330 S.C. at 395, 498 S.E.2d at 902.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). In determining whether there

is an absence of a meaningful choice, courts consider the relative disparity in the parties' bargaining power; the parties' relative sophistication; the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id.

In the case at hand, there was an inherent disparity in bargaining power between the parties as this was a transaction between an ill patient who died four (4) days after executing the Arbitration Agreement and a commercial entity. Vera Brown was transferred from the hospital via ambulance to Defendants' facility with diagnosis that included chronic kidney disease, Anemia, dementia, urinary tract infection, upper respiratory disease, acute kidney failure, congestive heart failure, hypertension, weakness, and difficulty in walking. She was also marked as a fall risk.

Furthermore, the arbitration agreement was inconspicuously buried in the admission paperwork and "hastily" presented to Ms. Brown for her signature. This is evident by the "x's" where Ms. Brown was asked to print and sign her name, and date. Moreover, Vera Brown's injuries include death as this is a wrongful death claim.

Moreover, we must also consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences. The loss of the right to a jury trial is an obvious result of arbitration. However, this particular arbitration clause also required Vera Brown to forego certain remedies that were otherwise required by statute. While certain phrases are in bold, the arbitration clauses in their entirety are written in the standard small print, and embedded in paragraphs one (1) through fourteen (14). The Court cannot ignore the inconspicuous nature of these provisions, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Ms. Brown by law.

Therefore, this Court denies Defendant's Motion to Dismiss and Compel Arbitration where the Arbitration Agreement is guided under the FAA and principles of contract law because the Arbitration Agreement lacks valuable consideration and was unconscionable.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss and Compel Arbitration is **DENIED.**

IT IS SO ORDERED!

Dated this 27 day of April 2018

The Honorable Dianne Goodstein
Presiding Judge, Ninth Judicial Circuit