

STATE OF SOUTH CAROLINA)
)
COUNTY OF BAMBERG)
)
 Willie Clay Banks as Personal)
 Representative of the Estate of)
 Willie Banks, deceased,)
)
 Plaintiff,)
)
 vs.)
)
 Pruitt Health-Bamberg, LLC,)
)
 Defendant.)
)
 _____)

IN THE COURT OF COMMON PLEAS
 SECOND JUDICIAL CIRCUIT

Civil Action Number: 2017-CP-05-0038

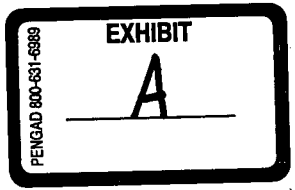
ORDER

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 SC Court of Appeals

The matter before the Court is a medical malpractice case arising out of the death of Willie Banks while a resident of Pruitt Health Bamberg, a nursing home. Mr. Banks died on September 24, 2016. The Plaintiff timely filed a Notice of Intent to Sue and the parties conducted pre-suit mediation without success. After the failed mediation, the Defendant filed a Motion to Dismiss. The Defendant asserts that there is a valid and enforceable arbitration agreement that was executed by Janie Banks who they contend had a power of attorney. A hearing was held before the undersigned on April 2, 2018.

The motion was originally styled as being pursuant to S.C. Rule of Civil Procedure 30(j)(3), which addresses answering questions at a deposition and Rule 26(c) which relates to protective orders for discovery.

The Defendant, several days prior to the motion being heard, alleged in its memorandum that it was moving under Rules 12(b)(1)(2) and (6) to dismiss. 12(b)(1) governs lack of



jurisdiction over the subject matter. 12(b)(2) governs lack of jurisdiction over the person and 12(b)(6) indicates that sufficient facts were not alleged to constitute a cause of action.

12(B)(1) PERSONAL JURISDICTION OVER THE SUBJECT MATTER

The Defendant asserts that the Court does not have subject matter jurisdiction because of the existence of what they contend is a valid binding arbitration agreement that was signed by Janie Banks who was an attorney in fact for Willie Banks. They further contend that the case is subject to the Federal Arbitration Act (9 U.S.C. §§ 1-16) and excludes this Court from having subject matter jurisdiction over the medical malpractice action.

The Court has proper jurisdiction to decide the validity of the purported arbitration agreement relied upon by the Defendant. *Simpson v. MSA of Myrtle Beach, Inc.* 373 S.C. 14, 644 S.E. 2d 662 (2007). S.C. Ann §§ 15-49-20(a) (2005).

In this case, the Defendant submitted on Thursday, March 29, 2018, its brief accompanied by unauthenticated medical records, a purported power of attorney, an affidavit of a Pruitt employee and other documents from Pruitt which were also unauthenticated. The Court finds that it should not consider the documents in considering the Defendant's Motion To Dismiss.

Motions to Dismiss are governed by S.C.R.C.P. Rule 12(b). The Court must base its decisions on the allegations in the Complaint. *Spence v. Spence*, 368 S.C. 106, 628 S.E. 2d 869 (2006).

If, on a motion asserting the defense numbered (6) for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to *and not excluded* by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56 S.C.R.C.P. 12(b) emphasis added.

The Court has discretion to disallow extrinsic matter and finds that it should do so in this case. The Court finds that the material is not authenticated and was not provided to the Plaintiff by discovery prior to the hearing although it was requested in April 2017. There exists a Motion to Compel regarding failure to answer discovery including some of the documents submitted by the Defendant. The Court will not allow consideration of those documents at this time. The Court does have subject matter jurisdiction and is the proper forum to decide the validity of the purported arbitration agreement presented by the Defendant.

12(B)(2) LACK OF JURISDICTION OVER THE PERSON

The Defendant asserts that the Court does not have personal jurisdiction over the parties. Both parties are residents of South Carolina and the Court has jurisdiction over the parties.

12(B)(6) FAILURE TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION

The Defendant contends that the action should be dismissed for “failure to state facts sufficient to state a cause of action.” In a Motion to Dismiss, “If the facts alleged and inferences reasonably deductible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under the Rule 12(b)(6) is improper.” *Carnival*

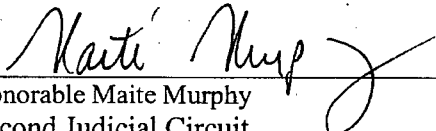
Corp v Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 74-75, 753 S.E. 2d 846, 850 (2014).

The Defendant is using the Motion to Dismiss to address its desire to avoid jury trial and resolve the matter by forced arbitration. The only authority the Defendant cited in its original motion was *Dean v. Heritage Healthcare of Ridgeway, Inc.*, 408 S.C. 371, 759 S.E. 2d 727 (2014). In that case, the Defendant nursing home, sought dismissal as an alternative to an order to compel arbitration. The Plaintiff argued that because AAA, the forum specified in the arbitration agreement at issue, would not take the case, the agreement was void. Here, the issue is whether a valid agreement exists at all.

In reviewing the four corners of the Complaint, I find sufficient allegations of fact and law to support causes of action for negligence against the defendant in wrongful death and survival. The Defendant in its original filing attached a purported Arbitration Agreement and Admission Agreement. The documents assert an agreement between the facility and Willie Banks and Janie Banks. The Arbitration Agreement although initialed "JB" on each page, is not signed by either Willie Banks or Janie Banks, nor by the facility itself. The Admission Agreement filed by the Defendant with its motion lacks a signature page altogether. The Defendant has not responded to discovery regarding these issues and Plaintiff has a pending Motion To Compel Discovery. "Where allegations of the complaint give rise to competing inferences on a question of material fact, dismissal of the case under 12(b)(6) is not appropriate. *Jensen v. Conrad*, 297 S.C. 73, 76, 374 S.E. 2d 897, 899 (Ct. App. 1968).

Based on my review of the pleadings and memorandums of law, I find that the Motion to Dismiss is not granted and the parties should undertake discovery in this matter.

AND IT IS SO ORDERED.



Honorable Maite Murphy
Second Judicial Circuit

~~May~~ June 4, 2018