

STATE OF SOUTH CAROLINA)
)
 CHARLESTON COUNTY)
)
 Nancy Callaghan,)
)
 Plaintiff,)
)
 v.)
)
 Five Star Quality Care, Inc., Five Star)
 Quality Care-OBX Operator, LLC d/b/a)
 Sweetgrass Court Senior Living)
 Community, Sweetgrass Village Assisted)
 Living Community, Lisa McLeod, and)
 Derrick Defino,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 Civil Action No.: 2018-CP-10-3588

ORDER

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AUG 22 2019

SC Court of Appeals

FILED
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 JULIE J. ARMSTRONG
 CLERK OF COURT

This matter came before the Court on Defendants Five Star Quality Care, Inc., Five Star Quality Care-OBX Operator, LLC d/b/a Sweetgrass Court Senior Living Community, Sweetgrass Village Assisted Living Community, Lisa McLeod, and Derrick Defino’s (collectively “Defendants”) Motion to Dismiss and Compel Arbitration. A hearing was held on the motion on March 14, 2019. Based on a review of the parties’ written submissions and oral arguments at the hearing, the court **DENIES** the motion.

BACKGROUND

Ms. Callaghan alleges claims for negligence, negligence per se, fraud/misrepresentation, and violations of the South Carolina Unfair Trade Practices Act arising out of a sexual assault she suffered while a resident at Sweetgrass Village Assisted Living Community (“the Facility”) in Mt. Pleasant, South Carolina. In October 2016, Ms. Callaghan’s family began searching for an assisted living center for her since dementia and other health issues prevented Ms. Callaghan from continuing to live at home. (Compl. ¶¶ 17-18). The Complaint alleges the Facility

previously had difficulty with one of its residents engaging in inappropriate sexual conduct with fellow residents. (Compl. ¶¶ 42-44; 49). Ms. Callaghan alleges this individual had assaulted residents twice in April 2016, and the Facility's management-level personnel were aware of these prior incidents but failed to report them to the South Carolina Department of Health and Environmental Control ("SCDHEC"). (Compl. ¶¶ 50-52). She also alleges the perpetrator's own doctor recommended the perpetrator be removed from the facility. (Compl. ¶¶ 44-46).

On November 24, 2017, just over a month after she moved to the Facility, Ms. Callaghan was sexually assaulted by the same perpetrator. (Compl. ¶ 41). Ms. Callaghan alleges she suffered severe physical, emotional, and psychological losses as a result of the attack. Defendants served a joint Answer admitting the perpetrator was involved in prior "incidents" at the Facility (Answer ¶ 44) but denying Ms. Callaghan's allegations in all other material respects. On the same day as their Answer, Defendants filed the current Motion to Dismiss and Compel Arbitration, relying on the "Arbitration Agreement" signed by Ms. Callaghan's husband and a Five Star Inc. sales counselor.

LEGAL REASONING

Defendants argue Ms. Callaghan must arbitrate all her claims based on the Arbitration Agreement which Defendants argue applies broadly to all disputes between the parties. Defendants also contend arbitration applies to those Defendants which did not sign the Arbitration Agreement because its terms specifically intended to incorporate all Defendants. Ms. Callaghan counters that, despite the Arbitration Agreement's broad scope, its parties could not have intended it to include claims arising from "outrageous torts" including a nursing home's alleged failure to supervise a resident it allegedly knew to have a history of sexual assault in the Facility. Ms. Callaghan also argues the Arbitration Agreement cannot extend beyond its named

parties to include all Defendants because its language limits enforcement to the named parties or is at least ambiguous on this point. The parties also dispute whether the Arbitration Agreement's punitive damages exclusion provision is valid.


Based on the parties' written submissions and oral arguments, the Court agrees with Ms. Callaghan on the first two points. The Court finds this case is appropriate for applying the "outrageous tort" exception to arbitration as adopted and discussed in Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 644 S.E.2d 705 (2007) and Chassereau v. Global-Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007). Substantial persuasive authority supports applying this exception to torts arising out of sexual assaults. See Arnold v. Burger King, 48 N.E.3d 69, 78 (Ohio App. 2015); Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1214 (11th Cir. 2011); Jones v. Halliburton Co., 583 F.3d 228 (5th Cir. 2009); Smith v. Captain D's, LLC, 963 So.2d 1116 (Miss. 2007); Victoria v. Superior Court, 710 P.2d 833 (Cal. 1985).

On the second point, the Court finds the Arbitration Agreement does not apply to the Defendants who were not named as parties to the Arbitration Agreement because, in the aggregate, the Arbitration Agreement expresses an intent that its terms apply only to the named parties. A non-party may only enforce a contract if its parties "intended to create a direct, rather than an incidental or consequential, benefit to such third person." Burning v. S.C. Dep't of Health & Env'tl. Control, 418 S.C. 537, 552, 795 S.E.2d 290, 298 (quoting Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994)). The Arbitration Agreement's language does not meet this standard. See e.g., Arbitration Agreement ¶ 1 (limiting the Agreement to disputes "between the Parties" and providing that the results of any arbitration is "binding upon the Parties"). Moreover, one of the terms directly above the Arbitration Agreement's signature block states that arbitration "**MAY BE ENFORCED BY**

THE PARTIES.” Arbitration Agreement at 3 (emphasis in original). The Court finds this language shows the parties did not intend to make the non-signatory defendants into intended third-party beneficiaries entitled to enforce the Arbitration Agreement’s terms.

In light of the Court’s ruling on these two points, the Court finds it unnecessary to address the parties’ remaining argument regarding the validity of the Arbitration Agreement’s punitive damages exclusion provision.

IT IS SO ORDERED.


Hon. William F. Seals Jr.
Circuit Court Judge

July 23, 2019