

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

Estate of Jack PATTERSON, by and)
 through his Personal Representative,)
 Jeanette PATTERSON, Individually and)
 on behalf of the Statutory Beneficiaries,)
)
 Plaintiffs,)

WHITE OAK MANOR, Inc. and WHITE)
 OAK MANAGEMENT, Inc.,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS

RECEIVED
 APR 27 2020
 SC Court of Appeals
 ORDER

GRANTING DISMISSAL of ACTION
 Civil Action No. 2019-CP-42-00152

This matter comes before this Court on motion of the defendants White Oak Manor, Inc. (Manor) and White Oak Management, Inc. (Management) to dismiss the complaint in this civil action pursuant to Rules 12(b)(1), (2), and (8), SCRCP, or in the alternative to compel arbitration, and on motion of the plaintiff to compel discovery.

PROCEDURAL POSTURE

This matter was originally before this Court on motion of the defendants to dismiss pursuant to Rules 12(b)(1), (2), and (8), SCRCP, or in the alternative to compel arbitration of the claims, and on the plaintiff's motion to compel discovery. At the time of the hearing on the motions the court was informed that an arbitration hearing was pending in North Carolina between the plaintiff and White Oak Manor-Kings Mountain (Facility), a residential nursing facility located in the State of North Carolina, associated with the defendants in the present action. In that arbitration proceeding, the plaintiff was seeking an award of compensation for personal injuries to and the wrongful death of her husband Jack Patterson (Decedent) while a resident at Facility. The claim for compensation sought in the arbitration proceeding was for the same injury and wrongful death for which damages are now being sought against the defendants in the present civil action.

After hearing argument from counsel in support and opposition, and consideration of the memoranda submitted by the parties, and the posture of the pending arbitration case in a foreign jurisdiction, this Court previously denied all motions pending a final determination of the related arbitration proceeding then pending in the State of North Carolina.

That arbitration has now been conducted and proceeding concluded on those claims. The parties to the present action now mutually request this Court to determine the motions, previously made by the parties and heard by the Court, on the record of the case and taking into consideration that a final resolution, by way of an arbitration proceeding, has been determined on the claims made against Facility related to Decedent's death while a resident at Facility and that an arbitration award in favor of Plaintiff has been made by the arbitration panel, and fully satisfied by Facility.

ARGUMENT OF THE PARTIES

In support of their motions, Defendants argue that (1) Jeanette Patterson (Plaintiff) entered into a valid arbitration agreement with Facility upon Decedent's admission to Facility; (2) Plaintiff in her individual capacity and as the Personal Representative of the Estate of Jack Patterson, made a demand for arbitration pursuant to that valid and unchallenged arbitration agreement related to "injuries sustained by Jack Patterson during his residency ... at the WOM/Kings Mountain facility ... the injuries sustained ... include ... a fall resulting in a hip fracture and wrongful death;" (3) a hearing has been conducted before an arbitration panel resulting in an award of compensation to Plaintiff for the same claims for which she is now seeking compensation in the present civil action; (4) the Arbitration Agreement encompasses the claims now made against the defendants; and (5) the arbitration having now been concluded with all conditions precedent having been satisfied for release of the present defendants from any and all claims related to Decedent's admission to Facility as expressly provided for by the terms of the Arbitration Agreement, this civil action should be dismissed.

Plaintiff argues that (1) the defendants in the present action are not parties to nor are they signatories to the Arbitration Agreement between Plaintiff and Facility; (2) the defendants may not avail themselves of any term, right, or benefit emanating from an agreement to which they are not a party and for which they have provided no consideration; (3) the defendants have not made a demand for, agreed to, or participated in the arbitration proceeding which was conducted pursuant to the agreement; (4) Plaintiff's claims against the defendants are made under different legal theories than the professional negligence claims made against Facility; (5) Plaintiff makes claims which are not based upon any contract entered into between Plaintiff and Facility; and therefore (6) the defendants motion to dismiss, or in the alternative to compel arbitration, should be denied and the defendants should be compelled to respond to Plaintiff's requests for discovery.

SALIENT FACTS

On February 28, 2017, Decedent was admitted to Facility in the State of North Carolina. At the time of admission, Plaintiff had a valid Power of Attorney and a valid Healthcare Power of Attorney authorizing her to enter into, and to execute any necessary documents relating to, any contracts necessary to Decedent's admission into Facility. Pursuant thereto, she executed an Admission Agreement and a separate Arbitration Agreement memorializing the conditions of Decedent's admission. The Resident and Facility Admission Agreement provided that:

21. **ARBITRATION.**

WITH REGARD TO ALL MONETARY CLAIMS ARISING BETWEEN THE FACILITY AND RESIDENT/AUTHORIZED REPRESENTATIVE, TO THE EXTENT THAT THEY ARE FOR MORE THAN \$25,000.00, ARBITRATION (PURSUANT TO THE FEDERAL ARBITRATION ACT) IS MANDATORY (SUBJECT TO THE "OPT OUT" PROVISIONS SET FORTH IN PARAGRAPH 16 OF THE ARBITRATION AGREEMENT), BINDING AND FINAL. THE EXACT TERMS FOR ARBITRATION ARE SET FORTH IN A SEPARATE DOCUMENT OF EVEN/RECENT DATE, ENTITLED "ARBITRATION AGREEMENT" AND ARE INCORPORATED HEREIN BY REFERENCE. WITH REGARD TO ANY NONMONETARY CLAIM, OR ANY CLAIM FOR LESS THAN \$25,000.00, ARBITRATION SHALL NOT BE REQUIRED.

Plaintiff did not exercise the arbitration "opt out" provision of the admission agreement and the parties do not dispute that a valid arbitration agreement was entered into between Plaintiff and Facility "with regard to all monetary claims arising between the facility and the resident/authorized representative, to the extent that they are for more than \$25,000.00."

On December 2, 2017, Decedent sustained an injury at Facility which Plaintiff claims was proximately caused by the negligence of Facility employees and that the injuries sustained by him ultimately resulted in his death.

On December 6, 2018, Plaintiff submitted a Demand for Arbitration to Facility stating that, "Jeanette Patterson, Individually, and as Personal Representative of the Estate of Jack Patterson demands arbitration for negligent acts and omissions related to the injuries sustained by Jack Patterson during his residency from February 28, 2017 to December 5, 2017 at the WOM/Kings Mountain facility ... The injuries sustained by Mr. Patterson include but are not limited to, a fall resulting in a hip fracture and wrongful death."

Based upon the demand and pursuant to the Arbitration Agreement, an arbitration proceeding was conducted in the State of North Carolina which resulted in

an award to Plaintiff which has now been paid by Facility and thereby releasing it as to all claims arising out of Decedent's admission to Facility.

The Arbitration Agreement, separate and distinct from the Admission Agreement entered into between Jeanette Patterson on behalf of Jack Patterson and White Oak Manor – Kings Mountain, Inc., expressly provides that:

14. An award against the Facility will be paid within thirty (30) days after the arbitrators make their decision and notify the Facility in writing of that decision. Upon payment, the Facility, as well as all other "White Oak" facilities, including specifically White Oak Manor, Inc., and White Oak Management, Inc., and their respective shareholders, directors, officers and employees, will be deemed to be released and forever discharged from any and all other claims arising prior to the date of the hearing.

Plaintiff commenced the present action in the State of South Carolina on January 11, 2019, pursuant to S. C. Code Ann. Sections 15-5-90 (Survival Action) and 15-51-10 (Wrongful Death Action) against the defendants for injuries sustained by and the wrongful death of Decedent after his admission to Facility and during his residency. Plaintiff claims that "White Oak Manor, Inc. is the Principal that owns and controls the related entities ... including ... White Oak Management and White Oak Manor-Kings Mountain that manage and operate the facility" and "that at all material times ... were engaged in a joint venture with White Oak Manor-Kings Mountain" in the operation of the facility. Plaintiff further claims that "Defendants are jointly, directly, and vicariously liable and responsible for the acts and delicts of their employees, agents, and servants" "under the principle of respondeat superior" and "institute this action in order to recover for Jack Patterson's injuries and wrongful death" while in residency at Facility.

DISCUSSION AND ANALYSIS

"Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, ... (8) another action is pending between the same parties for the same claim." Rule 12, SCRPC.

RULE 12(b)(1), SOUTH CAROLINA RULES OF CIVIL PROCEDURE

A motion made pursuant to Rule 12(b)(1) challenges the court's authority to hear the particular matter that has been brought before the court. "Subject matter

jurisdiction is the power of the court to hear and determine cases of a general class to which the proceedings in question belong." Dove v. Gold Kist, Inc., 314 SC 235 (1994). The State Constitution establishes the jurisdiction of the circuit court, providing that, "The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts ..." S. C. Const. Art. V, Section 1, and therefore the subject matter jurisdiction of the circuit court is generally only limited where the legislature has granted exclusive jurisdiction of certain matters to another court. The legislature has not granted exclusive jurisdiction for action based in contract or tort to a court other than the circuit court.

It is evident that an action in tort clearly falls within the ambit of cases which a court of common pleas ordinarily has subject matter jurisdiction to hear. Posey v. Proper Mold & Engineering, Inc., 378 SC 210 (Ct. App. 2008). Any issue as to this Court having jurisdiction over the subject matter of this civil action cannot be reasonably disputed.

The defendants' **MOTION to DISMISS** pursuant to SCRPC Rule 12(b)(1) should be and **IS** therefore **DENIED**.

RULE 12(b)(2), SOUTH CAROLINA RULES OF CIVIL PROCEDURE

A motion made pursuant to Rule 12(b)(2) challenges the court's authority to render an effective judgment against a person due to the fact that the court has not acquired jurisdiction or the right to exercise judicial authority over that person. On a motion challenging personal jurisdiction, "the plaintiff need only make a *prima facie* showing that the defendant is subject to the jurisdiction of the court." Graham v. Lloyd's of London, 296 SC 249 (Ct. App. 1988).

A court may not render an effective judgment against a person without first having obtained authorization to render that judgment. The authorization to render judgment against a person is not available to the court unless the person against whom a claim has been made has been brought before the court by way of due process. Personal jurisdiction may be acquired when notice is provided as to the commencement of an action in accordance with statute or court rule. Rule 4(d)(3), SCRPC, provides that to effect service upon a corporation, a copy of the summons and complaint shall be delivered "to an officer, a managing or general agent, or to any agent authorized by appointment or by law to receive service of process ..." and if accomplished by mail, it shall be "by registered or certified mail, return receipt requested and delivery restricted to the addressee." Rule 4(d)(8), SCRPC.

As to the issue of personal jurisdiction over the defendants, the record reflects that a *prima facie* showing has been made establishing that each of the defendants was properly served with the summons and complaint pursuant to Rules 4(d)(3) and 4(d)(8), SCRCP, and that the *prima facie* showing has not been rebutted or disputed by the plaintiff. The defendants are therefore deemed to be properly within the jurisdiction of this Court.

The defendants' **MOTION** to **DISMISS** pursuant to SCRCP Rule 12(b)(2) should be and **IS** therefore **DENIED**.

RULE 12(b)(8), SOUTH CAROLINA RULES OF CIVIL PROCEDURE

A motion pursuant to Rule 12(b)(8) seeks dismissal of an action because another action is pending between the same parties for the same claim. In order for a dismissal of the claim to be proper pursuant to Rule 12(b)(8) it must be shown that there is (1) another action pending, (2) between the same parties, (3) for a claim that is precisely or substantially the same in both proceedings. Capital City Ins. Co. v. BP Staff, Inc., 382 SC 92 (Ct. App. 2009).

"ANOTHER ACTION PENDING"

"An 'action' is a pending proceeding to determine the rights and liabilities of the parties Until an action is commenced there is no proceeding pending" Chabek v. Nationwide Mutual Fire Ins. Co., 303 SC 26 (Ct. App. 1990). Although the defendants have not formally made a demand for arbitration pursuant to the agreement existing between Plaintiff and Facility, they do now move to compel arbitration of related claims made against them by Plaintiff in this civil action in which she seeks compensation for the same wrong for which she has been awarded compensation by an arbitration panel.

The existence of a pending arbitration proceeding, demanded pursuant to the terms of a valid and binding arbitration agreement, is to be considered "another action pending" so long as that proceeding is "capable of doing prompt and complete justice, involving the same parties and the same issues." The parties and the issues need not be identical but they must be substantially or functionally the same. LG Electronics, Inc. v. InterDigital Communications, Inc., 98 A.3d 135 (Del. Ch. 2014).

On December 6, 2018, pursuant to an existing arbitration agreement between Plaintiff and Facility executed in North Carolina, Plaintiff's counsel made a "Demand for Arbitration" "for negligent acts and omissions related to the injuries sustained by Jack Patterson during his residency from February 28, 2017 to December 5, 2017 at the WOM/Kings Mountain facility The injuries sustained by Mr. Patterson include but are not limited to, a fall resulting in a hip fracture and wrongful death." The arbitration

agreement provided that "WITH REGARD TO ALL MONETARY CLAIMS ARISING BETWEEN THE FACILITY AND RESIDENT/AUTHORIZED REPRESENTATIVE, TO THE EXTENT THAT THEY ARE FOR MORE THAN \$25,000.00, ARBITRATION (PURSUANT TO THE FEDERAL ARBITRATION ACT) IS MANDATORY". The present civil action filed by Plaintiff in the Court of Common Pleas in South Carolina on January 11, 2019, seeks "to recover for Jack Patterson's injuries and wrongful death and for damages ..." Plaintiff seeks the same relief in both the arbitration proceeding, where she has already prevailed, and in this civil action. It therefore appears that the arbitration proceeding is just as "capable of doing prompt and complete justice" as the circuit court. The prior duly instituted arbitration proceeding is clearly "another action pending" for which the same damages were being sought, awarded by an arbitration panel with proper authority, and fully paid by Facility.

"BETWEEN THE SAME PARTIES"

Arbitration of a claim is generally available only when the parties involved agree to arbitration by contract. A party cannot ordinarily be required to submit to arbitration of a dispute which he has not agreed so to arbitrate. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).

Ordinarily arbitration is a matter of contract but, "well established common law principles dictate that in an appropriate case a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." These common law principles include, (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; and (5) estoppel. Pearson v. Hilton Head Hosp., 400 SC 281 (Ct. App. 2012).

Defendants in the present civil action are not parties or signatories to the arbitration agreement entered into by Plaintiff and Facility. Ordinarily this would dictate that, due to a lack of privity of contract, the defendants could not seek enforcement of the terms of the arbitration agreement against Plaintiff who was an actual party and signatory to the agreement. However, a contract which is otherwise valid and enforceable made between parties which intentionally creates a direct, and not an incidental or consequential benefit, to a third party may be enforced by the third party even though that third party is not in privity of contract. Cothran v. Rock Hill, 211 SC 17 (1947); Hammond Const. Co. v. Banks Const. Co., 312 SC 422 (Ct. App. 1994).

Even though the defendants in the present civil action were never signatories nor were they parties to the Arbitration Agreement between Plaintiff and Facility and they did not participate in the arbitration proceeding arising out of the agreement requiring the arbitration of monetary claims exceeding \$25,000, "well-established

common law principles dictate that in an appropriate case a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000). This appears to be one of those "appropriate" cases.

In her complaint Plaintiff asserts that "White Oak Manor, Inc. is the principal that owns and controls ... White Oak Management, Inc. and White Oak Manor-Kings Mountain that manage and operate the facility ..." At all material times, defendants White Oak Manor and White Oak Management "owned, operated, managed and controlled the operations of, and/or were engaged in a joint venture with White Oak Manor-Kings Mountain in the operation of White Oak of Kings Mountain." "Defendants are jointly, directly, and vicariously liable and responsible for the acts and delicts of their employees, agents and servants" "under the principle of respondeat superior." "Defendants, their related subsidiaries, related entities, officers, agents, servants, and employees negligently and carelessly failed to ... manage ... and operate the nursing home facility to keep and maintain the health, safety, ... of ... Jack Patterson" precipitated in the necessity of this civil action "to recover for Jack Patterson's injuries and wrongful death ..."

A signatory to an arbitration agreement may be required to arbitrate a claim with a non-signatory at the insistence of the non-signatory where it is shown that there is a "close relationship between the entities involved, as well as the alleged wrongs related to the non-signatories' obligations and duties" arising out of the underlying contractual arrangement between others who are signatories. When a claim against a parent company and its subsidiary is based upon the same factual premise and any claim against the parent is "intimately founded in and intertwined with the underlying contract obligation" applicable to the subsidiary such that the claims are "inherently inseparable," the parent may be referred to arbitration even though the parent is not a formal party or signatory to the existing arbitration agreement. Sunkist v. Sunkist, 10 F. 3d 753 (11th Cir. 1993); J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988). The same logic applies to the circumstances of the present case.

Plaintiff asserts in her complaint that an agency relationship existed between the defendants and Facility and that the relationship substantially involved the specific issues attendant to the present case. She claims the defendants "owned, operated, managed and controlled the operations of [Facility]" and that the defendants are "jointly" and "vicariously" liable for the acts, delicts, and omissions of Facility which caused injury and death to Decedent. It is apparent that the defendants in the present action are not liable for the judgment being sought against them by Plaintiff if Facility has not committed any legal wrong that caused the damages claimed by Plaintiff.

Focusing on the nature of the underlying claims made in both the arbitration proceeding and in this civil action, it is clear that those claims are encompassed within the scope of the agreements entered into between Plaintiff and Facility. In the present case, reference to the defendants in the Arbitration Agreement and including them in a provision for release from liability under conditions precedent provided for in the agreement, supports the conclusion that the claim against them is "inherently inseparable", "founded in," and "intertwined with," the existing arbitration agreement and underlying contract between Plaintiff and Facility. If the defendants were forced to try this case in the circuit court, "the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988).

It is abundantly clear that the parties in both the arbitration proceeding and in the civil action are substantially and functionally the same and therefore the arbitration proceeding is deemed to be between the "same parties".

"FOR A CLAIM THAT IS PRECISELY OR SUBSTANTIALLY THE SAME IN BOTH PROCEEDINGS"

As has been previously noted, Plaintiff in her demand for arbitration sought damages "for negligent acts and omissions related to the injuries sustained by Jack Patterson during his residency from February 28, 2017 to December 5, 2017 at the WOM/Kings Mountain facility ... The injuries sustained by Mr. Patterson include but are not limited to, a fall resulting in a hip fracture and wrongful death." In her complaint she asserts "Plaintiffs institute this action in order to recover for Jack Patterson's injuries and wrongful death ..." due to the defendant's being "jointly, directly, and vicariously liable and responsible for the acts and delicts of their employees, agents, and servants."

It is clear from the allegations and pertinent facts that the claims made and the damages sought in both the arbitration proceeding and in this civil action are "precisely or substantially the same" and are therefore deemed to be encompassed within the arbitration proceeding.

Based upon the foregoing this Court finds that (1) there is an action pending (2) between the same parties (3) for a claim that is precisely or substantially the same in both proceedings.

The defendants' **MOTION to DISMISS** pursuant to SCRCF Rule 12(b)(8) should be and **IS** therefore **GRANTED**.

LACK OF ACTUAL JURISDICTION

The Court interprets the defendants' argument regarding lack of jurisdiction as to the subject matter and over the defendants to reasonably include an argument that this Court lacks actual jurisdiction, or the legal power and authority to decide the controversy between parties that are properly before the court. Plaintiff asserts lack of judicial jurisdiction on the ground that the same claim made in this action and the relief sought by Plaintiff are subject to and encompassed by a valid unchallenged arbitration agreement governing all monetary claims in excess of \$25,000 resulting from Decedent's admission to Facility.

This Court has previously found that the claims made against the defendants are subject to and encompassed by an arbitration agreement, even though the defendants are not formal parties to it, and therefore are to be bound by it and permitted to enforce it. Pursuant to that arbitration agreement, those claims have been made, heard by an arbitration panel, and compensation awarded to Plaintiff. This civil action in the Court of Common Pleas is precluded because the claims have been resolved in the arbitration proceeding and, by the express terms of the arbitration agreement, the present defendants have been released from "any and all other claims" arising from Decedent's residency at Facility.

Plaintiff shall not be permitted to invoke the terms of a contract for which she has bargained for the purpose of receiving a benefit thereunder, and then repudiate it when some other provision of the contract denies her a right or benefit that she would otherwise have been entitled to but for the contractual provisions to which she has assented. Pearson.

Plaintiff's claims are encompassed in the Arbitration Agreement for which she bargained and received benefits under. Due to the applicability of an agreement to arbitrate, this court has no actual jurisdiction to entertain the matter as proper jurisdiction lies in the arbitration proceeding.

The defendant's **MOTION to DISMISS for LACK OF ACTUAL JURISDICTION** should be and **IS** therefore **GRANTED**.

CONCLUSION

In this case Plaintiff entered into a valid arbitration agreement which governed defined claims that might arise as a result of Decedent's admission to Facility. Plaintiff invoked her rights under the agreement and made a demand for arbitration thereunder relating to injuries sustained by, and the resulting death of, Decedent during residency at Facility. That arbitration hearing has been conducted and an award made in Plaintiff's favor by the arbitration panel. That award has now been fully paid by Facility

in accordance with the arbitration agreement. Plaintiff brings the present civil action seeking compensation for the same tort she asserted in the arbitration proceeding, the claim now made is for the same wrong and the compensation being sought is for the same loss as claimed in the arbitration proceeding.

The arbitration agreement entered into by Plaintiff under which she has received an award of compensation, expressly provides that "an award against the Facility will be paid within thirty (30) days after the arbitrators make their decision and notify the Facility in writing of that decision. Upon payment, the Facility, as well as all other "White Oak" facilities, including specifically White Oak Manor, Inc., and White Oak Management, Inc., and their respective shareholders, directors, officers and employees, will be deemed to be released and forever discharged from any and all other claims arising prior to the date of the hearing." Under the common law principles of "reference", "agency", and "equitable estoppel", Plaintiff shall not be permitted to invoke the terms of a contract for which she has bargained for the purpose of receiving a benefit, and at the same time repudiate it when some other provision of the contract denies her a right or benefit that she would otherwise have been entitled but for the contractual provisions to which she has assented. Under the terms of the arbitration agreement, when certain conditions were satisfied, Plaintiff contracted and agreed that White Oak Manor, Inc. and White Oak Management, Inc., "will be deemed to be released and forever discharged from any and all other claims". Those conditions precedent have now been met. The defendants have therefore been "released and forever discharged" from any further liability for claims arising out of Decedent's residency at Facility.

The defendants', White Oak Manor, Inc. and White Oak Management, Inc., **MOTION to DISMISS** having been **GRANTED** and the arbitration proceeding having been concluded with compensation awarded and paid by Facility, the defendants' **MOTION to COMPEL ARBITRATION** and the plaintiff's **MOTION to COMPEL DISCOVERY** are rendered **MOOT**.

April 13, 2020

J. DERHAM COLE, Presiding Judge
The Seventh Judicial Circuit Court



Spartanburg Common Pleas

Case Caption: Jack Patterson , plaintiff, et al VS White Oak Manor, Inc. ,
defendant, et al
Case Number: 2019CP4200152
Type: Order/Dismissal

IT IS SO ORDERED!

s/J. Derham Cole 2053