

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2017-CP-42-0326

Appellate Case No. 2020-000357

Rita St. Aubin, Personal Representative of the Estate of Irene Ramsey,

Respondent,

v.

THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care; THI Of South Carolina, LLC; Hunt Valley Holdings, LLC; THI of Baltimore, Inc.; and Casey Caddell as Officer/Manager of THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care,

Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court err by finding the Arbitration Agreement unenforceable due to material terms being vague, indefinite, and/or completely omitted?
- II. Did the circuit court err in finding the Arbitration Agreement lacks valuable consideration necessary to form an enforceable contract?

STATEMENT OF THE CASE

On February 6, 2017, Ms. Irene Ramsey (Ms. Ramsey) was admitted to Respondent THI of South Carolina at Camp Care, LLC's facility, commonly referred to as Lake Emory Post-Acute Care. (R. pp. 18-19.) On February 6, 2017, Rita St. Aubin ("Ms. St. Aubin") signed the Arbitration Agreement. (R. pp. 88.) There is no evidence on the record that Ms. Ramsey was incompetent on February 6, 2017, and unable to execute the Arbitration Agreement on her own behalf. Regardless, Ms. St. Aubin was Ms. Ramsey's duly appointed attorney-in-fact, pursuant to a durable power of attorney recorded in Spartanburg County on November 7, 2012. (R. pp. 114 – 122.)

The Arbitration Agreement, in pertinent part, provides as follows:

This Agreement is made between Lake Emory Post Acute Care¹ ("Facility"), its agents, employees and servants, and Irene Ramsey² ("Resident") or _____ ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative"). It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

It is understood by Resident/Representative that he/she is not required to use the aforesaid Facility for Resident's healthcare needs and that there are numerous other health care providers in

¹ "Lake Emory Post Acute Care" was handwritten on to the Arbitration Agreement.

² "Irene Ramsey" was handwritten on to the Arbitration Agreement.

the State where Facility is located that are qualified to provide such care to Resident.

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes") and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration. As provided by the South Carolina Alternative Dispute Resolution/Mediation Rules.

The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The arbitrator shall hear and decide the controversy, and the decision shall be binding on all parties, and may be enforced by a court of competent jurisdiction.

(R. pp. 88.)

On September 10, 2019, Ms. St. Aubin, as Personal Representative, filed this wrongful death and survival action in Spartanburg County, in the Court of Common Pleas. (R. pp. 16 - 49.) Appellants THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post-Acute Care and Casey Caddell as Officer/Manager of THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post-Acute Care moved to dismiss and compel arbitration. (the "Motion to Compel Arbitration") (R. pp. 86-87; 96-97.) The remaining Appellants moved to stay the proceedings. (R. pp. 90 - 93.)

On December 18, 2019, the Honorable Grace Gilchrist Knie heard the Motion to Compel Arbitration, and by order filed on January 9, 2020, denied the Motion to Compel Arbitration. (R.

pp. 1 – 10.) Judge Knie found the Arbitration Agreement unenforceable for two reasons: (1) material terms being vague, indefinite, and/or completely omitted; and (2) lack of valuable consideration. (R. pp. 5 – 9.) Appellants moved for alteration, amendment, and/or reconsideration of Judge Knie’s January 9, 2020 order. (R. pp. 182 – 195.) The court denied Appellants’ motion by order filed February 14, 2020. (R. pp. 11 – 15.)

After several requests for extension by Appellants, this appeal followed.

STANDARD OF REVIEW

Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, the Court of Appeals will not overrule those findings. *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct.App.2012).

ARGUMENT

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 Federal Arbitration Act (“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.”).

In *Grant v. Magnolia Manor*, the Supreme Court of South Carolina spoke to the proof required to establish an enforceable agreement to arbitrate:

Arbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). The parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate. *Dowling v. Home Buyers Warranty Corp., II*, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993). In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract. *Player vs. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). An agreement that omits material terms may be determined to be unenforceable for indefiniteness. *Lindsay v. Lindsay*, 491 S.E.2d 583 (S.C. App. 1997); *Ellis v. Taylor*, 449 S.E.2d (S.C. App. 1994).

An agreement which neglects material terms may be found unenforceable for indefiniteness. *Lindsay v. Lindsay*, supra. “Ordinarily, a court will not supply omitted terms to an agreement, and an agreement where the parties did not agree to essential terms will simply not be enforced.” *Id.* In this particular case, even if the Arbitration Agreement was validly executed, which Respondent argues it was not considering there was no evidence that Ms. Ramsey was incompetent on the date the Arbitration Agreement was executed, there was no “meeting of the minds” as to the “essential terms” of arbitration; specifically, how the parties would choose arbitrators and who would be responsible to pay for arbitration.

I. The circuit court did not err in denying the Motion to Compel Arbitration due to the Arbitration Agreement lacking material terms, where the Arbitration Agreement omitted material terms pertaining to the procedure to choose arbitrator(s) and who is responsible for costs associated with arbitration

a. There was no meeting of the minds as to the process to choose an arbitrator.

The circuit court was correct when it stated the Arbitration Agreement “is silent as to what ‘panel’ the arbitrator is to be chosen from . . . ,’ and ‘[w]ithout a designated process to select an arbitrator from a ‘panel’ to choose from, or any indication of what that ‘panel’ would be or who it includes, the Court would be forced to fill in the parties’ alleged contract with an arbitrator selection clause.” (R. pp. 6.)

The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate, and to say otherwise undermines the purpose of the arbitration process. Both parties, rightfully, want an arbitrator that will be favorable to their position. More often than not, the plaintiff chooses a plaintiff’s friendly arbitrator; the defendant chooses a defense friendly arbitrator. Of course, parties rarely agree on an arbitrator hints provisions which instruct the court’s involvement should there be a stalemate. However, in the case at hand, without a “meeting of the minds” between the parties as to how the parties would first attempt to agree to an arbitrator without resorting to the court’s involvement, or at least where to choose the panel of arbitrators from and the number of arbitrators on the panel, there can be no valid contract to arbitrate.

The pertinent part in the Arbitration Agreement reads as follows:

The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The arbitrator shall hear and decide the controversy, and the decision shall be binding on all parties, and may be enforced by a court of competent jurisdiction.

(R. pp. 88.)

Appellants argue that the “Arbitration Agreement does not say that the ‘panel’ process must first be tried and fail before any alternative can be implemented. It simply says, ‘if the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court.” (R. pp. 88.) This argument has no merit, as the Arbitration Agreement specifically says “if the parties cannot reach a mutual decisions...”, meaning the parties must first attempt to decide on an arbitrator (from a panel), but if that does not work the arbitrator shall be selected by the court. (R. pp. 88.)

Additionally, Respondent assumes, based on common sense, that a panel consists of two or more people. Of course the Arbitration Agreement fails to provide the parties with exactly how many arbitrators shall be included on the panel. Is it two, three, ten? The Arbitration Agreement also fails to instruct the parties where this panel shall be chosen from and/or who gets to decide what arbitrators will be on the panel. This is important because the panel must consist of a “panel having experience and knowledge of the health care industry” considering the underlying cause of action involves the “health care industry.” (R. pp. 88.) For instance, are the Appellants supposed to pick one (1) arbitrator, the Respondent pick one (1) arbitrator, and those two (2) arbitrators pick a third (3rd) for a panel of three (3) arbitrators?

Appellants’ argument also seems to suggest that the word “panel” is non-existent. Simply stating “the only reasonable interpretation of this plain language is that either the parties can agree on an arbitrator or the court will decide.” Unfortunately for the Appellants, the Arbitration Agreement does not state “either the parties can agree on an arbitrator or the court will decide.” Appellants’ own argument goes hand-in-hand with the lower court’s reasoning, as the Appellants’ argument does nothing more than add language to, and/or delete language from the

Arbitration Agreement. Simply put, Appellants ignore the word “panel” as if it is non-existent. If Appellants’ position were true, the Arbitration Agreement would simply read that the parties can confer on choice of one (1) arbitrator and if the parties cannot agree on an arbitrator the parties shall move for the court to select an arbitrator.

Finally, Appellants, for the first time in Appellants’ Initial Brief, refer to *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 82, 749 S.E.2d 139, 147 (Ct. App. 2013). Appellants argue that *York* stands for the position that “cost allocations, or arbitration initiation procedures are not material terms but rather “ancillary logistical” ones” that are “not required within an arbitration agreement.” *York*, 406 S.C. at 83, 749 S.E.2d at 147 (citing *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 131-132, 678 S.E.2d 438, 439 (2009)). However, Appellants ignore the distinction noted in *Grant* between “integral terms, which may substantially affect the substantive outcome, and ancillary logistical concerns, which do not.” *Cf. Grant*, 383 S.C. at 131–32, 678 S.E.2d at 439.

To determine whether a named arbitrator is an integral part of the agreement or an ancillary logistical concern, courts look to the “essence” of the arbitration agreement. *Grant*, 383 S.C. at 131–32, 678 S.E.2d at 439. In *Grant*, the parties were bound to a *panel* of arbitrators selected by the American Health Lawyers Association (“AHLA”). *Id.* At 132, 678 S.E.2d at 439. (*emphasis added*). However, the court determined that the arbitration agreement was unenforceable due to the forum, AHLA, being unavailable. *Id.*

The distinction between the arbitration agreement in *Grant* and the Arbitration Agreement in the case at hand is that in *Grant* the arbitration agreement specifically provided that the AHLA would select the *panel* of arbitrators for the parties *Id.* (*emphasis added*). We do not even get there in the case at hand, as the Arbitration Agreement has no provision as it pertains to who

selects the panel of arbitrators for the parties to then choose from. (R. pp. 88.) Why is this an integral part? Because this matter involves “the health care industry” and the Arbitration Agreement requires a “panel having experience and knowledge of the health care industry.” (R. pp. 88.) To say otherwise, undermines the intent of the parties. For instance, the parties did not agree to a panel having experience in motor vehicle collisions because that is not the “essence” of the cause of action and the Arbitration Agreement. *Grant*, 383 S.C. at 131–32, 678 S.E.2d at 439.

b. There was no meeting of the minds as to who shall be responsible for costs associated with arbitration

The Arbitration Agreement is also ambiguous as to who actually pays for arbitration. The South Carolina Supreme Court has held that “[a] contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or practice. *Williams v. GEICO*, App. Case No. 2011-196449, 2014 WL 4087598, at *3(S.C. Aug. 20, 2014) (quoting *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997)). The Arbitration Agreement does not indicate who shall be responsible for costs associated with the arbitration. There can be no doubt that this is a material and essential term of the Arbitration Agreement.

The issue of who shall be responsible for costs is important for two (2) reasons. First, even if the circuit court assumed the Arbitration Agreement was enforceable, the parties would have to, once again, request that the circuit court add terms the Arbitration Agreement. Specifically, who should be responsible for costs associated with arbitration and/or how costs would be apportioned between the parties. That alone is rationally unfair as Respondent would

never agree to pay for arbitration considering it would cost Ten dollars and 00/100 (\$10.00) to file the notice of intent and One-Hundred Fifty and 00/100 (\$150.00) to file the Summons and Complaint. Essentially, it would cost no more than One-Hundred Sixty and 00/100 (\$160.00) Dollars for Respondent to try this matter in the circuit court.

Second, had language regarding payment of arbitration fees been included in the Arbitration Agreement it could have potentially been considered valuable consideration for Respondent agreeing to the Arbitration Agreement. Simply put, the parties cannot be bound to act on a promise that does not exist. If the circuit court found the Arbitration Agreement enforceable, the parties would then have to make arrangements and additional agreements outside of the Arbitration Agreement to begin the arbitration process. . Due to the vagueness and indefiniteness of the Arbitration Agreement's provisions and the lack of a "meeting of the minds" as to these essential terms, there is no enforceable contract.

Consequently, the circuit court's determination should be confirmed, because the Arbitration Agreement is vague, contains indefinite terms, and omits essential and/or material terms, and where ambiguity does exist, the terms should be construed against the Appellants as the drafter of the Arbitration Agreement.

II. The Arbitration Agreement is not enforceable where the Arbitration Agreement lacks valuable consideration.

The circuit court was correct when it found the Arbitration Agreement lacks valuable consideration and is unenforceable where there was no additional consideration to Respondent's agreement to the Arbitration Agreement. 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.” *Pla 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, or arbitration agreement guided by the FAA, lacks valuable consideration the contract will be deemed unenforceable. *Rent-A-Center*, 561 U.S. 63, 130 S. Ct at 2776; *Simpson*, 373 S.C at 14, 644 S.E.2d at 663.

In the case at hand, bearing down on the four-corners of the Arbitration Agreement there was no consideration for Respondent’s agreement to the Arbitration Agreement. *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)). In order to cure the deficiencies noted above, Appellants would have to argue that the Arbitration Agreement was negotiable, voluntary, and not a pre-condition to admission. Indeed, this is the way most skilled nursing facilities attempt to force such restrictive provisions upon their elderly and more often than not, incapacitated residents. However, due to the language of the Arbitration Agreement this argument would not alter the outcome because the Arbitration Agreement lacks additional, valuable consideration. It is axiomatic that every contract in South Carolina must be supported by mutual consideration in order to be valid and enforceable. Here, Appellants must concede that the Arbitration Agreement was not made in consideration of admission as that would be illegal, so there must exist some other consideration to make the clause enforceable. However, there is none.

Assuming Mrs. St. Aubin had authority, there is was no consideration in agreeing to the Arbitration Agreement. The one-page agreement contains no benefit or detriment to the parties and the court cannot consider those outside the four-corners of the Arbitration Agreement.

Admission alone is not consideration, and if argued, violates federal law and should be deemed unenforceable. A typical argument for finding consideration in an arbitration agreement is that arbitration is quicker and less costly than litigation. While this may or may not be true (often it is not considering Respondent's costs analysis above), the Arbitration Agreement is unclear on who pays for arbitration and the procedural process to follow. Id. Therefore, there is no rational argument that can be made that a person waiving his/her right to trial by jury enjoys some benefit. Especially when, as we have in the case at hand, Ms. Ramsey died from a fall while under Appellants' care or lack thereof.

Because Respondents reaps no benefit from the Arbitration Agreement, and because Appellants suffered no loss, the Arbitration Agreement is not supported by valuable (or any) consideration. As such, the Arbitration Agreement should be found to be unenforceable due to lack of valuable consideration.

CONCLUSION

Wherefore, based on the aforementioned the circuit court's decision should be affirmed because: (1) the Arbitration Agreement lacked material terms; and (2) the Arbitration Agreement lacked valuable consideration. Therefore, the Respondent respectfully requests that this Court affirm the circuit court's ruling.

[Signature block on following page]

Respectfully submitted,

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This 22 day of October, 2020