STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS
The Estate of Charles S. Rudd, deceased, through the duly appointed Personal Representative, Thelma Rudd, Individually and on behalf of statutory beneficiaries, Plaintiffs, vs. Pepper Hill Nursing & Rehab Center, LLC d/b/a Pepper Hill Nursing & Rehab Center and Shiloh Management Company, Inc. Defendants.	)	C. A No. 2019-CP-02-02840 ORDER DENYING MOTIONS TO STRIKE, DISMISS AND COMPEL ARBITRATION

This matter came before the Court on Defendants' Motion to Dismiss and Compel Arbitration filed on March 2, 2020 which was heard on May 5, 2020. Defendants also filed a related Motion to Strike on May 4, 2020 which was heard on May 19, 2020. Having listened to oral arguments from counsel and reviewed the parties' legal memoranda and exhibits, and for the reasons more fully set forth below, the Court hereby denies Defendants' Motion to Dismiss and Compel Arbitration, and Defendants' Motion to Strike.

This case involves a tort action with allegations of nursing home neglect and corporate negligence which Plaintiffs claim occurred while Mr. Rudd was a resident of a skilled nursing facility allegedly owned and operated by the Jones Family through the above related Defendants. Charles Rudd was admitted to Defendants' facility on July 27, 2016. Plaintiffs stated that they

are not asserting any contract claim based on the Admission Agreement; Plaintiffs allege only common-law negligence claims.

Defendants must show a valid and enforceable arbitration agreement between Charles Rudd and the Facility to prevail on its motion. Based on the evidence available to the Court, the Court is unable to determine at this time that the arbitration agreement is enforceable. It is undisputed that Mr. Rudd's signature does not appear on the Admission Agreement provided to the Court.

The Court finds that at this early stage of the litigation, it lacks sufficient grounds to enforce the "Arbitration Agreement" on which Defendants' motion relies because it cannot find that the Contract was entered with the mutual assent of its proposed parties. Defendants failed to meet this burden. The Court finds that it lacks evidence to establish at this time that Mr. Charles Rudd manifested assent establishing Thelma Rudd, his wife, as his agent for purposes of arbitration. The Court is also without evidence at this time demonstrating that Thelma Rudd was Mr. Rudd's power of attorney at the time she signed the Admission paperwork. The Court finds that it lacks evidence at this time to determine that Ms. Thelma Rudd had legal authority to bind Mr. Rudd to the Arbitration Agreement. The Court finds that Ms. Thelma Rudd's signature, standing on its own, is not sufficient to find that she had legal authority to bind Mr. Rudd to arbitration.

The recent South Carolina Supreme Court case Wilson v. Willis, 827 S.E.2d 167 (2019) discusses a presumption against arbitration in the insurance context where the party resisting arbitration is a non-signatory:

> Although arbitration is viewed favorably by the courts, it is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts." Moreover, because arbitration, while favored, exists solely by agreement of the parties, **a presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate.**

The Court finds, based on well-established case law in South Carolina including the Coleman, Hodge, and Thompson cases, that it lacks sufficient evidence to enforce the arbitration agreement. Defendants asserted the affirmative defenses of equitable estoppel, ratification and third-party beneficiary theories. However, the Court finds that it lacks evidence to apply these defenses at this time. Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts.[1] The Court finds that the evidence presented at this time does not support application of equitable estoppel. Further, the party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id. Defendants failed to meet this evidentiary burden.

For a party to be estopped in these circumstances the Court in Hodge and reaffirming its stance in Thompson stated that the elements for a party to be estopped are: 1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; 2) intention, or at least expectation, that such

[1] Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007).

conduct shall be acted upon by the other party; and 3) knowledge, actual or constructive, of the real facts. *See* Hodge v. Unihealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813, S.E. 2d. 292 (Ct. App. 2018). The Court lacks evidence at this time that would demonstrate whether Mr. Rudd made a false representation or concealed any material fact. As a result, the Court lacks evidence that there was an intent that any such representation or concealment be acted upon.

To establish a ratification of the Arbitration Agreement Defendants must show (1) acceptance ***by the principal*** of the benefits of the agent's acts, (2) the ***principal's full knowledge*** of the facts, and (3) circumstances or an ***affirmative election demonstrating the principal's intent*** to accept the unauthorized arrangement.[2] Here the Court finds that the Defendants have not shown that Plaintiffs meet any of the elements required for ratification. The Court finds it lacks evidence establishing the elements for the affirmative defense of ratification. Defendants' Motion to Dismiss and Compel Arbitration is **DENIED.**

Defendants' Motion to Strike arose from Plaintiffs' Memo in Opposition to Defendants' Motion to Compel Arbitration. S.C.R.C.P. 12(f) provides, in part "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "In a motion to strike as irrelevant, immaterial or redundant, only the pleadings may be considered."[3] In determining whether to grant a motion to strike, the court "enjoys wide discretion... in order to minimize delay, prejudice and confusion by narrowing the issues for discovery and trial."[4] "Rule 12(f) motions are generally viewed with disfavor because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a

[2] Lincoln v. Aetna Gas. & Sur. Co., 300 S.C 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989).

[3] Lancaster v. Sweat, 239 S.C. 120, 124, 121 S.E.2d 444, 446 (1961).

[4] Haley Paint Co. v. E.I. du Pont de Nemours & co., 279 F.R.D. 331, 335 (D. Md. 2012).

dilatory tactic."[5] In other words, the relevance of allegations may turn on disputed issues of fact or law so as to render it premature to strike them.

The Court finds that denial of this motion is appropriate and within its discretion, and therefore Defendants' Motion to Strike is **DENIED**.

Judge Clyburn-Pope
Second Judicial Circuit

August 13, 2020
Dated:

[5] Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 347 (4th Cir. 2001).