STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C/A No. 2020-CP-10-02811
	)	
William Davis, Jr. as Power of Attorney for Betty Davis,	)	
	)	
Plaintiff,	)	ORDER
	)	
Versus	)	
	)	
BKD Charleston South Carolina, LLC d/b/a Brookdale West Ashley and Kathryn Daugherty,	)	
	)	
Defendants.	)	

This matter was before the Court during the week of October 12, 2020 in Charleston County, South Carolina, upon Defendants BKD Charleston South Carolina, LLC d/b/a Brookdale West Ashley and Kathryn Daugherty's Motion to Dismiss and/or Stay and Compel Arbitration. This matter was decided based on written submissions and without oral argument.

FACTUAL BACKGROUND

The Defendants operate a community residential care facility, more commonly known as an assisted living facility. The facility is licensed by the South Carolina Department of Health and Environmental Control, pursuant to R. 61-84, *Standards for Community Residential Care Facilities*. Betty Davis was admitted to the Defendants' community residential care facility on or about April 13, 2017. Mrs. Davis' granddaughter, Jennifer Poston signed several documents upon admission, including an arbitration agreement which is the subject of Defendants' Motion. At this time, Jennifer Poston did not have legal authority to contractually bind Mrs. Davis to arbitration, by way of a Power of Attorney nor any Court appointed Guardianship. While a resident in the Defendants' facility, Mrs. Davis was allowed to suffer from numerous falls which required multiple hospitalizations. On September 22, 2017, Betty Davis executed a Durable Power of Attorney, naming her son William Earl Davis, Jr. to serve as her agent, and naming Jennifer Poston as a substitute or successor agent.

STANDARD OF REVIEW

A parties' right to a jury trial in South Carolina is governed by state law. Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978). The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement to arbitrate exists in the first place...If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) citing S.C. Code Ann. § 15-48-20(a) (2005). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

In determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'" Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (Ct. App., 1999). Arbitration is available only when the parties involved contractually agree to arbitrate. Id. South Carolina common law requires that, 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 agreement. Player v. Chandler, 299 S.C. 101, 105, (1989). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).

ANALYSIS

I. The Arbitration Provision is Not Enforceable Because Jennifer Poston Lacked the Capacity to Contract on Behalf of Her Grandmother, and Betty Davis Did Not Sign the Arbitration Agreement.

Of utmost importance in this matter, it is undisputed that Betty Davis never signed the arbitration agreement. Jennifer Poston executed an Admission Agreement on behalf of Mrs. Davis upon her entry to the Defendants' facility on April 13, 2017. Ms. Poston did not have any legal authority to sign on behalf of Mrs. Davis though a Power of Attorney or Court Ordered Guardianship or Conservatorship. At the time of admission, Ms. Poston was not Mrs. Davis' Power of Attorney nor did she have legal guardianship over Mrs. Davis.

The mere fact that an arbitration exists does not automatically refer any dispute to arbitration. Like any contract, the agreement must be valid to be enforceable, signed by the parties who had the express and legal authority to do so. Jennifer Poston was not the court appointed legal guardian of Betty Davis, nor did she have a durable power of attorney. There is no evidence that Betty Davis was incapacitated or unable to sign the agreements herself. In fact, several months later on September 22, 2017, Mrs. Davis executed a valid durable power of attorney. This power of attorney was properly witnessed and notarized and was subsequently filed with the Dorchester County Register of Deeds on December 7, 2017. Mrs. Davis had legal capacity to enter into contracts following her admission to Defendant's facility as evidenced by the power of attorney; therefore Ms. Poston's signature on the residency agreement is invalid as to the arbitration agreement. The Defendant facility is a sophisticated business entity frequently interacting with residents and their families during the admission process. It should be well aware of the differences between a durable power of attorney, a healthcare power of attorney, and other forms of guardianship, or in this case, the lack thereof.

a. A Residency Agreement and an Arbitration Agreement are two separate agreements and one cannot be bound by the other.

Our South Carolina Supreme Court has ruled the difference between a residency contract and an arbitration agreement, and that just because the two agreements are contained in one document does not make them one in the same. The Supreme Court has ruled that:

> Assent to this contract [the admission agreement] was a condition for Decedent's admission to Facility. On the other hand, the AA was not required for Decedent's admission, contained no provision for medical, nursing, or health care services to be provided for Decedent, and did not require any financial commitment to pay for such services. The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014). A decision to admit a resident to a community residential care facility such as the Defendants is a healthcare decision. As such, signing an admission agreement to a skilled nursing facility is a healthcare related agreement, not a legal agreement. Conversely, agreeing to settle disputes through arbitration is a legal decision. The Defendants' argument that all of the Plaintiff's claims are dependent on the duties which arise from the Admission Agreement is fundamentally flawed; an admission agreement involves making a healthcare decision, and an arbitration agreement involves making legal decision. *see also* Thompson v. Pruitt Corp., 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016) ("The Act confers authority on a health care surrogate to consent on the patient's behalf 'to the provision or withholding of health care' and to make financial decisions obligating the patient to pay for the medical care provided." (quoting Coleman, 407 S.C. at 351-52, 755 S.E.2d at 453)).

b. Plaintiff did not Possess Statutory Authority to Bind Mrs. Davis under the Arbitration Agreement

i. S.C. Adult Health Care Consent Act

The South Carolina Adult Health Care Consent Act ("AHCCA"), defines "health care" as including intermediate or skilled nursing care. S.C. Code Ann. § 44-66-20(1). It also specifically

includes the placement or removal from a facility that provides these forms of care." Id. A party may consent to health care on behalf of a patient, if the patient is deemed unable to consent to treatment after two licensed physicians have examined the patient and certify an inability to consent. S.C. Code Ann. § 44-66-20(8). S.C. Code Ann. § 44-66-30 lists the appropriate persons who may make health care decisions for patient who is unable to consent and provides an order of priority for who is able to make those decisions. It reads:

> (A) Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in the following order of priority:
> (1) a guardian appointed by the court pursuant to Article 5, Part 3 of the South Carolina Probate Code, if the decision is within the scope of the guardianship;
> (2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant Section 62-5-501, if the decision is within the scope of his authority;
> (3) a person given priority to make health care decision by another statutory provision;
> (4) a spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:
> a. entry of a pendent lite order in a divorce of separate maintenance action;
> b. formal signing of a written property or marital settlement agreement; or
> c. entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;
> (5) an adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;
> (6) a parent of the patient;
> (7) an adult sibling of the patient; or if the patient has more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation;
> (8) a grandparent of the patient; or if the patient has more than one grandparent, a majority of the grandparents who are reasonably available for consultation;
> (9) any other adult relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient, or if the patient has more than one other adult relative, a majority of those adult relatives who are reasonably available for consultation.

Defendant has put forth no evidence that Mrs. Davis was unable to consent to treatment after two licensed physicians have examined the patient and certify an inability to consent, as required by the statute. In fact, based upon the evidence provided, Mrs. Davis was capable of making her own decisions at the time of the admission to the facility. Additionally, the AHCCA only deals "health care" related decisions, and not legal decisions. Nowhere in the entire AHCCA is the word "legal" or "arbitration" mentioned. Clearly the legislature intended this Act to govern

only those decisions as they relate to health care. The Defendants cite the case of Coleman v. Mariner Health Care, et al., 407 S.C. 346, 755 S.E.2d 450 (2014), which addresses the AHCCA. The Court in Coleman held that the sister of a nursing home resident could not bind the resident to an arbitration agreement at the time of admission, and that the arbitration agreement was not valid because it exceeded the scope of the sister's authority under the AHCCA. According to the Court, AHCCA specifically limited surrogates' authority to making health care decisions and associated financial arrangements. Arbitration is not a health care or related financial decision, and thus exceeds the authority granted by the AHCCA. Id. At 351-52, 755, S.E. 2d at 453.

ii. S.C. Bill of Rights for Residents of Long-Term Care Facilities

South Carolina Bill of Rights for Residents of Long-Term Care Facilities is codified in S.C. Code Ann. §44-81-10, et seq. Under the Bill of Rights, a "representative" is defined as "a resident's legal guardian, committee, or next of kin, or other person acting as agent of a resident who does not have a legally appointed guardian." S.C. Code Ann. § 44-81-30(3). This is substantially the same as the AHCCA. Under the Bill of Rights, decision making is limited to health care decisions, not legal decisions.

II. The Federal Arbitration Act (FAA) Does Not Mandate Enforcement of this Agreement.

Under the FAA, arbitration is required when there is a valid arbitration agreement and a dispute exists which is within the scope of the agreement. Under the arbitration clause, neither prong is satisfied. As discussed above in Section I, there is no valid arbitration agreement because Jennifer Poston did not have the legal authority to execute a valid arbitration. Second, Plaintiff's claims include negligence, negligence per se, fraud and misrepresentation, violations of the South Carolina Unfair Trade Practices Act, wrongful death and survivorship. Nowhere in the Defendants' arbitration agreement are those causes of action listed. Accordingly, the FAA does not apply.

III. Defendants Are Not Entitled to Conduct Jurisdictional Discovery.

Defendants request the case be stayed for the purpose of limited jurisdictional discovery on the issue of enforceability of the arbitration agreement to allow the Court can make a full inquiry on the issue is without merit and therefore denied.

CONCLUSION

After consideration of the pleadings and submissions of both parties, I find that there is no valid Arbitration Agreement. To prevail in its motion, the Defendants must show a valid and enforceable arbitration agreement between Ms. Davis and the facility. Defendants have not met this burden. As such, the Court finds no valid arbitration contract existed. Accordingly, for the foregoing reasons the Defendants' Motion to Dismiss and/or Compel Arbitration is DENIED.

IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW

Charleston Common Pleas

Case Caption: William Davis Jr , plaintiff, et al VS Bkd Charleston South Carolina Llc , defendant, et al

Case Number: 2020CP1002811

Type: Order/Other

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134