

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF ORANGEBURG)	FOR THE FIRST JUDICIAL CIRCUIT
)	
Bertha Tyler, as Guardian of Henrietta Mayes,)	C/A No.: 2011-CP-38-1513
)	
Plaintiff,)	
)	
v.)	ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION
)	
)	
Uni-Health Post Acute Care-Orangeburg, LLC and Catherine Pavlick,)	
)	
Defendants.)	

This matter was before the Court on the Defendants Uni-Health Post Acute Care-Orangeburg, LLC and Catherine Pavlick's ("Defendants") Motion to Dismiss this matter and to Compel Arbitration. For the following reasons, the Court denies the Defendants' Motion and orders that the parties proceed with discovery.

FACTUAL BACKGROUND

Henrietta Mayes had a history of severe strokes. Following these strokes, Ms. Mayes was bed bound and unable to communicate. Ralph Williams was hired in January of 2010 as a certified nursing assistant (CNA) at the Uni-Health nursing home facility in Orangeburg, South Carolina. The Plaintiff has alleged that prior to his employment with Uni-health, Mr. Williams had a criminal history in South Carolina, which included possession of crack cocaine, shoplifting and disorderly conduct. The Plaintiff further alleged that prior to his employment with Uni-Health, Mr. Williams was charged in Missouri with Third Degree Assault and repeated violations of the Adult Abuse Act, and had an indication in his criminal file that he was a suspect in an armed burglary involving the shooting of a victim. Despite this criminal history, Plaintiff

alleges Mr. Williams was hired to work in the Uni-Health facility with frail and vulnerable adults like Henrietta Mayes. On June 21, 2010, Mr. Williams was working as a CNA at the Uni-Health facility. Plaintiff alleges that Mr. Williams was found sexually assaulting Ms. Mayes. Plaintiff's allegations in this case involve Defendant's negligence and gross negligence in the hiring, supervision and retention of Ralph Williams.

Burden of Proof

Defendants carry the burden to prove that a valid and enforceable arbitration agreement exists. The party seeking to establish contractual waiver of jury trial bears the burden of proof to establish that the waiver was signed in a "knowing, voluntary and intentional" capacity. Of those courts that have decided this question, most have held that it is the proponent of the waiver who bears the burden, reasoning that the jury trial right is fundamental, and should not be waived absent clear evidence. *IHS Acquisitions v. Beatty-Ortiz*, 2012 WL 1658644 (Tex 2012); *In re Dillard Dept. Stores, Inc.*, 186 S.W. 3d 514, 515 (Tex. 2006). Here the burden of proof is on Defendants to prove (1) the existence of a valid and enforceable arbitration agreement; and (2) the arbitrability of the dispute at hand.

The policy of this state is to favor arbitration of disputes. *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. For an arbitration provision to be valid and enforceable, it must come within the Federal Arbitration Act, and involve interstate commerce. *Timms v. Green*, 310 S.C. 469, 427 S.E.2d 642 (1993). Further, the matter must be arbitrable. Arbitration is a matter of state contract law. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). A dispute must be one that is foreseeable to the parties at the time the arbitration agreement was signed to be arbitrable. *Aiken v. World Finance Corporation of South*

Carolina, 373 S.C. 144, 644 S.E.2d 705 (2007).

Discussion

1. **The Agreement does not involve interstate commerce, therefore the FAA does not apply.**

The Federal Arbitration Act (“FAA”) provides that a written provision in any contract involving interstate commerce that requires disputes be resolved by arbitration shall be “valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” *See* 9 U.S.C. section 2 (1988). If interstate commerce is affected, the FAA will preempt state laws that would otherwise render the arbitration agreement unenforceable. *Id.*

In this case, the arbitration agreement is between Uni-Health PAC Orangeburg, LLC, South Carolina limited liability corporation¹, and Henrietta Mayes and Bertha Tyler, South Carolina residents. Mr. Williams was a South Carolina resident. All of the actions between the parties took place in South Carolina. It appears the hiring was done in South Carolina; the training was done in South Carolina; the supervision was done in South Carolina; the retention was done in South Carolina; and the assault was in South Carolina. In none of the affidavits supplied by Defendants, do they argue that any of these transactions between the parties forming the basis of the dispute occurred outside of South Carolina. The arbitration provision and the agreement of the parties is not a transaction involving interstate commerce.

¹ The Defendants have produced no evidence as to the identity and citizenship of the individual members of the LLC. The only evidence before this Court is that Uni-Health PAC Orangeburg, LLC is a South Carolina limited liability corporation.

This issue was addressed by the South Carolina Supreme Court in a nursing home context in the case of *Timms v. Green*, 310 S.C. 469, 427 S.E.2d 642 (1993). The *Timms* case involved an action by a nursing home resident seeking damages for injuries sustained while she was left unattended under a hair dryer at the defendant's facility. The arbitration agreement between Timms and the Defendant required submission of any dispute to binding arbitration. The Defendant argued that interstate commerce was involved in the contract as the defendant was a division of a national corporation; it hired employees from out of state; it marketed its services out of state; purchased the majority of its goods and equipment from out of state; and contemplated payments from Medicare and Medicaid. The lower court disagreed with the Defendants' position finding the contract did not involve interstate commerce. This was affirmed on appeal by the Supreme Court. The Court in *Timms* states, "[A]lthough these factors could evidence the center's involvement in interstate commerce, we find that their relationship to the agreement between the center and the respondent is insufficient to form the basis of a contract between the parties." *Id.*

Interstate commerce is a necessary basis for the application of the FAA. Because interstate commerce was absent in the contract between Timms and the Defendant, the Supreme Court refused to require arbitration because Timm's cause of action was not subject to the Arbitration Act of South Carolina and the FAA was not applicable.

In this case, there is no evidence of interstate commerce in the arbitration agreement between the parties. Here, the Defendant attempts to create interstate commerce by filing an affidavit from Brenda Parris, the administrator for UPAC-Orangeburg. She states in her affidavit that, (1) the care and services provided by UPAC-Orangeburg to Ms. Mayes would not have

been possible were it not for supplies, materials and services provided by entities located outside the state of South Carolina; (2) UPAC-Orangeburg routinely provides nursing services to residents from other states, mostly the Southeast; (3) Uni-Health participates in and receives reimbursements under the Medicare and Medicaid programs; (4) accepts insurance payments from out-of-state insurance companies; and, (5) that Ms. Mayes received Medicaid benefits. These same factors were rejected under *Timms*. There, the Supreme Court of South Carolina found the affidavit failed to demonstrate interstate commerce sufficient to save the arbitration provision, a provision almost identical to the one at issue here.

The Defendant's contention that interstate commerce is stipulated between the parties to the agreement is unavailing. Although the contract between the parties in this case contained an acknowledgment that Uni-Health was engaged in interstate commerce, the contract or transaction which is sought to be enforced must *itself* involve interstate commerce. *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 533 S.E.2d 110 (2001). Just as parties cannot "stipulate" to subject matter jurisdiction, parties cannot "stipulate" to interstate commerce that would invoke the FAA. "Like the construction of a contract, it is improper subject for stipulation and any attempted stipulation is not binding on a court." *Morris v. Beacham*, 262 S.E.2d 921 (1980). It is not enough to say it, it must be evidenced in the contract itself. *Timms, supra*. This Court will not relinquish its jurisdiction and authority to hear disputes merely because of a contract term.

2. **Is the dispute between the parties one that is arbitrable or does it fall under the outrageous conduct exception?**

The Arbitration Agreement at issue in this case states:

THE PATIENT/RESIDENT AND THE HEALTHCARE CENTER

UNDERSTAND AND ACKNOWLEDGE THAT THIS AGREEMENT IS A VOLUNTARY AGREEMENT TO SUBMIT FOR RESOLUTION BY ARBITRATION ANY DISPUTES THAT MAY ARISE IN THE FUTURE BETWEEN THE PARTIES. THE PARTIES FURTHER UNDERSTAND AND ACKNOWLEDGE THAT, AS TO ALL DISPUTES THAT ARE GOVERNED BY THIS AGREEMENT, EACH OF THE PARTIES IS WAIVING THE RIGHT TO TRIAL BY JURY, AND INSTEAD, ANY DISPUTES BETWEEN THE PARTIES SHALL BE RESOLVED THROUGH BINDING ARBITRATION. (Emphasis in original).

The Defendants argue that since the arbitration agreement at issue here calls for “any dispute” to be resolved through arbitration, that the Plaintiffs claims for negligence, negligent hiring, negligent supervision and negligent retention must also be resolved through binding arbitration. The Court disagrees. Under the specific facts of this case, the hiring, supervision and retention of an employee who had an extensive criminal history prior to his employment, and who committed a sexual assault on a vulnerable adult, would fall into the outrageous conduct exception enunciated by our Supreme Court in *Aiken v. World Finance Corporation of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007).

The South Carolina Supreme Court enunciated an exception to arbitration agreements. If conduct is unforeseeable to the parties and outrageous in nature, then the dispute is not arbitrable. In *Aiken*, as in the case at bar, the Plaintiff sued a finance company for the acts of its employees. The Plaintiff alleged causes of action for outrage, emotional distress, negligence, negligent hiring and negligent supervision as well as unfair trade practices, arising from the finance company’s former employees’ misuse of the plaintiff’s personal information and embezzled money. In that case, Aiken obtained a series of consumer loans from World Finance beginning in 1997 and continuing through late 1999. He paid off his last loan in 2000. With

each loan, Aiken entered into an arbitration agreement with World Finance. Each arbitration agreement provided that:

ALL DISPUTES, CONTROVERSIES OR CLAIMS OF ANY KIND AND NATURE BETWEEN LENDER AND BORROWER ARISING OUT OF OR IN CONNECTION WITH THE LOAN AGREEMENT, OR ARISING OUT OF ANY TRANSACTION OR RELATIONSHIP BETWEEN LENDER AND BORROWER OR ARISING OUT OF ANY PRIOR OR FUTURE DEALINGS BETWEEN LENDER AND BORROWER SHALL BE SUBMITTED TO ARBITRATION.....”(emphasis added)

Aiken then sued World Finance, the employer of the former embezzling employees. The Court stated:

Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings....in this case, we find the theft of Aiken’s personal information by World Finance employees to be outrageous conduct that Aiken could not possibly have foreseen when he agreed to do business with World Finance. Consequently, in signing the agreement to arbitrate, Aiken could not possibly have been agreeing to provide an alternate forum for settling claims arising from this wholly unexpected tortious conduct. Accordingly, we hold that Aiken’s claims for unanticipated and unforeseeable tortious conduct by World Finance’s employees are not within the scope of the arbitration agreement with World Finance.

Defendants argue that Ms. Mayes claims still fall into the arbitration agreement because the arbitration at issue here provides that *all disputes* shall be arbitrated. In Aiken, as noted above, the arbitration provision also provided that all disputes shall be arbitrated. The Supreme Court held that even the “*all disputes*” language would not save unforeseen tortious conduct from being arbitrated.

The Defendant further argues that the recent United States Supreme Court case of

Marmet Health Care Center, Inc., v. Brown, et al 565 U.S. _____ (2012) weakens the holding in *Aiken*. In *Marmet*, the Supreme Court addressed the issue of arbitration in three nursing home neglect cases. In each of those cases, a family member of a patient who had died sued the nursing home in state court alleging that negligence caused injuries or harm resulting in death. The Supreme Court of Appeals of West Virginia held that “as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence.” The US Supreme Court over ruled the West Virginia Court with the following language:

As this Court reaffirmed last Term, “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rule is displaced by the FAA.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. ____, ____ (2011) (slip op., at 6-7). That rule resolves these cases. West Virginia’s prohibition against predispute agreements to arbitrate personal injury or wrongful death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim and that rule is contrary to the terms and coverage of the FAA.

The Defendants argue that the Supreme Court’s ruling in *Aiken* runs afoul of the U.S. Supreme Court’s prohibition against categorical rules. This Court disagrees. The South Carolina Supreme Court addressed this very issue in *Aiken*. The Court said:

In establishing the line for claims subject to arbitration, this Court does not seek to exclude all intentional torts from the scope of arbitration. For instance, the parties in the instant case stipulate that a tort claim which essentially alleges a breach of the underlying contract (e.g., breach of fiduciary duty, misappropriation of trade secrets) would be within the contemplation of the parties in agreeing to arbitrate. We only seek to distinguish those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties. See *McMahon v. RMS Electronics*,

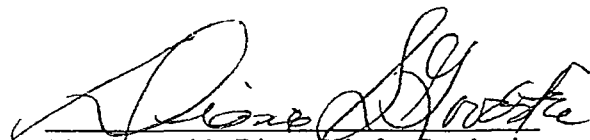
Inc., 618 F.Supp. 189, 191 (S.D.N.Y. 1985)

Our decision today does not ignore the state and federal policies favoring arbitration as a less formal and more efficient means for resolving disputes. *See Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 386, 498 S.E.2d 898, 902 (Ct. App., 1998). This Court merely seeks, as a matter of public policy, to promote the procurement of arbitration in a commercially reasonable manner. To interpret an arbitration agreement to apply to actions completely outside the expectations of the parties would be inconsistent with this goal.

The *Aiken* case complies with the Supreme Court's mandate not to create categorical rules prohibiting arbitration. The facts at issue in the case before me could not have been foreseen by the parties. Therefore, like in *Aiken*, I find that the acts here are so outrageous as to fall outside of the scope of the arbitration agreement.

Conclusion

The Defendants' Motion fails for the reasons discussed above. The Court therefore denies the Defendants' Motion to Dismiss or in the Alternative to Compel Arbitration and Stay Litigation and orders that the case shall proceed.


The Honorable Diane Schafer Goodstein

2-12-2013 ~~2012~~
Orangeburg, South Carolina