STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	C/A No. 2020-CP-21-02290
Mary Tisdale as Personal Representative of the Estate of Earlene Seabrook,	)	
Plaintiff,	)	**ORDER DENYING DEFENDANT'S MOTION TO STAY ACTION AND COMPEL ARBITRATION**
Versus	)	
Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center and Jeffrey Gibbs,	)	
Defendants.	)	

This matter was before the Court on Tuesday, February 9, 2020, at 9:30 a.m., in Florence County, South Carolina, upon Defendants Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center and Jeffrey Gibbs Motion to Dismiss and Compel Arbitration. Oral argument was conducted via Webex. Attorney Bradley H. Banyas of Hughey Law Firm, LLC was present representing the interests of the Plaintiff. Attorney Russell G. Hines of Clement Rivers, LLP was present representing the interests of the Defendant. For the following reasons set forth herein, the Defendants Motion to Dismiss and Compel Arbitration is hereby DENIED.

FACTS

Earlene Seabrook was admitted to the Defendants' skilled nursing facility on or about June 25, 2019. The Defendants operate a skilled nursing facility, licensed by the South Carolina Department of Health and Environmental Control, subject to R.61-17, *Standards for Licensing Nursing Homes*. Plaintiff alleges that while Ms. Seabrook was a resident and under the Defendants' care, she was allowed to develop pressure ulcers which became infected, leading to her decline and eventual death. Ms. Seabrook died on August 31, 2019.

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). While the Federal Arbitration Act ("FAA") imposes a presumption favoring arbitration, the presumption does not apply to the "identity" of the parties who may be bound to such an agreement. Wilson v. Willis 426 S.C. 326, 335 827 S.E.2d 167, 179 (2019). In fact, there is a presumption against arbitration when enforcement is sought against a non-signatory. Id. 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. THERE IS NOT AN ENFORCEABLE ARBITRATION AGREEMENT

a. Earlene Seabrook's Health Care Power of Attorney Did Not Authorize Mary Tisdale to Execute the Arbitration Agreement.

It is undisputed that Earlene Seabrook never signed the arbitration agreement. Mary Tisdale executed documents on behalf of Earlene Seabrook upon her entry to the Defendants' facility, including an Arbitration Agreement and Admissions Agreement. The Court notes the distinctions among the two documents. An admissions agreement sets fort the terms of the resident's admission and scope of healthcare to be provided while at the facility. An arbitration agreement is a legal document which sets forth the terms of resolving potential disputes.

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. Mary Tisdale was not the court appointed legal guardian of Earlene Seabrook, nor did she have a durable power of attorney. The only authority that Ms. Tisdale was given by Ms. Seabrook was a health care power of attorney ("HCPOA"), which applies only to healthcare decisions.

The HCPOA's language expressly states Ms. Tisdale's limited authority and did not grant her power to sign the Arbitration Agreement on Ms. Seabrook's behalf. Under South Carolina law,

an action to interpret a power of attorney is similar to a contract interpretation action. Watson v. Underwood, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014). Accordingly, contract interpretation principles apply to determine the HCPOA's scope. Stott v. White Oak Manor, Inc., 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019) (citing In re Thames, 344 S.C. 564, 571, 544 S.E.2d 854, 857 (Ct. App. 2001)). Contracts (and powers of attorney) must be interpreted to carry out their parties' intent as determined primarily by the language they chose in the document itself. A court may not read terms into a contract or power of attorney or infer the parties intended a meaning inconsistent with the language they expressed. Radalytic Labs, Inc. v. Culver, 329 S.C. 380, 383, 495 S.E.2d 782, 784 (1997) (citing Blakeley v. Rabon, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976)).

The Defendant facility is a sophisticated business entity frequently interacting with residents and their families during the nursing home 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. Based on the plain language of the agreements, it is abundantly clear that the Plaintiff cannot be bound to arbitration because the decision to agree to arbitrate disputes is not contemplated by the plain language of Ms. Seabrook's HCPOA.

Starting with its title, the clear language of the HCPOA defines its limited scope as a "South Carolina Advance Health Care Directive." Ms. Seabrook chose to create only a health care power of attorney with a specific eye toward her preferences on life-sustaining end of life medical treatments ("Declaration of Desire for a Natural Death"). Ms. Tisdale was appointed not as Ms. Seabrook's general financial or legal representative but only as an "agent to make health care decisions for me as authorized."

Defendants' reliance on section "D" of the "Agent's Powers" listed in the HCPOA is also

misplaced as that section granted Ms. Tisdale only the authority to take actions:

> Necessary to making, documenting, and assuring implementation of decisions concerning [Earlene Seabrook's] health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply.

Thus, Ms. Tisdale had limited power to take actions necessary only to health care decisions. Defendants' reliance on "pursuing any legal action in my name…" is misplaced. This language, read in the totality of the HCPOA is clearly intended to provide the agent the authority to ensure the principal's health care related wishes are carried out, but the authority ceases outside of the health care arena.

b. South Carolina Courts Define "Health Care" to Exclude Execution of an Arbitration Contract.

South Carolina appellate courts have held that "health care" decisions do not encompass arbitration contracts. In Coleman v. Mariner Health Care, Inc., the South Carolina Supreme Court was tasked with determining whether committing a loved one to arbitration was a "health care" decision. 407 S.C. 346, 755 S.E.2d 450 (2014). Coleman considered this key term as it was defined in South Carolina's Adult Health Care Consent Act ('the Act"), holding that the statutory definition of "health care" includes medical procedures, nursing care, placement in a nursing home, and agreeing to pay for nursing home services. Id. at 352, 755 S.E.2d at 453. However, a separate arbitration contract—like the Arbitration Agreement Daughter signed—was not a "health care" matter because it was (1) not required for the resident's admission to the nursing home; (2) contained no provisions for medical or nursing services; and (3) did not require any financial commitment for medical or nursing services. Id. at 353, 755 S.E.2d at 454. Coleman is directly

on point here because, while it construed the term "health care" in the context of the Act, the statute governing health care powers of attorney instructs courts to apply the Act's terms to documents like the HCPOA. S.C. Code Ann. § 62-5-502(c) (stating that generally the Act's provisions "apply to the making of decisions by a health care agent").

c. Mary Tisdale Lacked Actual or Apparent Authority to Sign the Arbitration Agreement for Earlene Seabrook

The legal consequences of an agent's actions can only be attributed to the principle when the agent as actual or apparent authority. Charleston Registry v. Young Clement, 359 S.C. 635, 598 S.E.2d 717 (Ct. App. 2004). It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority. Frasier v. Palmetto Homes of Florence, 473 S.E.2d 865 (Ct. App. 1996). South Carolina law requires that to prove apparent authority, the Defendant must show "… (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. Id.

Defendants have produced no evidence indicating that Mary Tisdale had authority to enter a contract on Earlene Seabrook's behalf or waive Ms. Seabrook's right to a jury trial. The issue

of arbitration agreements in skilled nursing facilities has been addressed at the Court of Appeals and Supreme Court, and the case is very similar to Coleman v. Mariner Health Care, Inc, 407 S.C. 346, 755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, South Carolina Courts have found Arbitration Agreements to be unenforceable where a family member signed an Arbitration Agreement near the time of admission to a skilled nursing facility for the Decedent and did not have any actual authority to do the same. In all three cases, the Courts found that no implied authority nor estoppel applied. Presently, a review of the admissions and arbitration documents by the Defendants would have informed them that Mary Tisdale did not have actual authority by way of a Durable Power of Attorney, nor Court Appointed Guardianship to bind her aunt, nor did she ever indicate that she had any apparent authority to enter contracts on behalf of her aunt. The only power conferred upon Mary Tisdale by Earlene Seabrook was limited to the narrow scope provided by the HCPOA.

II. PLAINTIFF IS NOT EQUITABLY ESTOPPED FROM DENYING THE ARBITRATION AGREEMENT.

Defendants also argue that Plaintiff should be equitably estopped from denying enforcement of the Arbitration Agreement. Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must 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 the conduct of the party to be estopped. Id.

Defendant has not met its burden to establish these elements. There is no evidence Ms. Tisdale acted in a way amounting to a false representation to Defendant regarding Ms. Seabrook's status or that Ms. Tisdale intended for Defendants to act in reliance on her conduct. Additionally, the evidence shows Defendants cannot meet possibly its burden to show they lacked knowledge or the means of knowledge of the truth of the facts in question. Ms. Seabrook provided a copy of her health care power of attorney to the Defendants at the time of admission. The plain language of the HCPOA sets forth the scope of authority. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, the Defendants had the capacity to determine whether Ms. Tisdale had the authority to sign an arbitration agreement on Ms. Seabrook's behalf. Stated again, the Defendants should be familiar with these requirements as they frequently interact with residents and their families during the nursing home admission process. The Defendants are or should be familiar with the legal concepts of guardianship and powers-of-attorney. Since the Defendant has not cited or provided evidence on all required elements of equitable estoppel, Plaintiff is not equitably estopped from denying the arbitration agreement.

III. THE ADMISSION AGREEMENT AND ARBITRATION AGREEMENT ARE SEPARATE CONTRACTS THAT DO NOT MERGE.

The Admission Agreement and Arbitration Agreement are separate contracts that do not merge. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp, 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014) (Coleman refused to apply the doctrine of merger because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. Thompson and Hodge applied Coleman and provided further examples of factors demonstrating "separateness and preventing merger. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

As discussed above, there were two separate agreements signed separately, and they were not merged. Since there was no merger here, Defendants' equitable estoppel argument must be denied. *See* Coleman, 407 S.C. at 355–56, 755 S.E.2d at 455 (rejecting estoppel argument by finding no merger). South Carolina courts have three times refused merger arguments for nursing home admission and arbitration contracts, and Defendants' argument should be rejected as well. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 49-52, 784 S.E.2d at 683-84; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

The Klutts Resort Realty, Inc. v. Down'round Development Corp., 268 S.C. 80, 232 S.E.2d20 (1070) "merger" principle cannot apply unless the writings in question were executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts, 268 S.C. at 88, 232 S.E.2d at 24). Even then, merger does not apply if there is "anything indicating a contrary intention." Id. (emphasis added). Thus, multiple executed writings relating to the same general subject matter will not be viewed as a single or merged agreement if either their language or the

circumstances even hint that the parties actually intended the writings to be distinct, separate contracts. Three nursing homes have previously attempted but failed to meet these requirements, and South Carolina's appellate courts have never applied merger to nursing home admission and arbitration contracts. See generally Coleman, Thompson, and Hodge.

The terms and context of the admissions agreement and arbitration agreement show the parties intended the two to be separate contracts. Hodge is the key precedent here because it builds on Coleman and Thompson to provide the Court's most recent and complete illustration of the type of contract language or structure showing parties do not intend multiple agreements to be interpreted as one. For example, admission and arbitration contracts cannot merge if they contain inconsistent terms, especially provisions related to how each contract may be terminated or the substantive law governing their interpretation. Hodge, 422 S.C. at 562, 813 S.E.2d at 302; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. Moreover, courts look at the way the contracts are structured, finding it is unlikely parties intended two contracts to be treated as one if they chose separate titles and required separate signatures. Hodge, 422 S.C. at 15 562, 813 S.E.2d at 302; see also Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1. Finally, Hodge held a nursing home cannot argue for merger when it chose to separate arbitration and admission into two agreements while taking the position that agreeing to the former was not required to obtain the benefits of the latter. 422 S.C. at 562-63, 813 S.E.2d at 302.

With no valid underlying contract, there could be no third-party beneficiary. First, Plaintiff's action sounds solely in tort. There is no breach of contract claim asserted. Plaintiff's pleading does not specifically refer to any written contract or necessarily rely upon the language of any written contract. Plaintiff's tort claims presumably are based on common law and statutory or regulatory duties imposed by law. Second, as discussed above, the Arbitration Agreement is a

separate and distinct agreement from the Admission Agreement. Plaintiff does not rely upon the terms of the Arbitration Agreement to establish her tort claims.

IV. THE FEDERAL ARBITRATION AGREEMENT ACT 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, there is no valid arbitration agreement because Mary Tisdale did not have the legal authority to execute a valid arbitration agreement. 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.

V. LIMITED JURISDICTIONAL DISCOVERY IS DENIED

The Defendants' request for limited discovery focusing on the nature of Ms. Tisdale's agency relationship with Ms. Seabrook is denied. I find that the plain reading of the HCPOA is straightforward and limited discovery regarding the facts and circumstances surrounding the signing of the arbitration agreement would serve no useful purpose. Ms. Seabrook granted Ms. Tisdale authority to make health care related decisions only.

CONCLUSION

Pursuant to the South Carolina Uniform Arbitration Act Section 15-48-10(a) for a written agreement to arbitrate to be "valid, enforceable and irrevocable" "[n]otice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed

thereon the contract shall not be subject to arbitration." It is interesting to this Court that conspicuous notice is required for a person to enter a binding arbitration agreement yet Ms. Seabrook never signed the agreement to arbitrate herself. Further, she did not designate a General/Durable Power of Attorney to enter such type of contracts or make legally binding decisions on her behalf. This one step removed and further remoteness logically supports that under these circumstances the arbitration agreement must not be binding. Based on the reasons set forth above, the Court respectfully DENIES the Defendant's Motion to Compel Arbitration.

IT IS SO ORDERED.

The Honorable William H. Seals, Jr.

Marion, South Carolina

Florence Common Pleas

Case Caption: Mary Tisdale Personal Representative , plaintiff, et al VS Palmetto Lake City Operating Llc , defendant, et al

Case Number: 2020CP2102290

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IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157