STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	C/A No. 2020-CP-18-01027
	)	
Paulette Walker as Personal Representative of the Estate of Albert Walker,	)	
	)	
Plaintiff,	)	**ORDER DENYING DEFENDANT'S MOTION TO STAY ACTION AND COMPEL ARBITRATION**
	)	
Versus	)	
	)	
Hallmark Longterm Care, LLC d/b/a Hallmark Healthcare Center and Durena Stinson,	)	
	)	
Defendants.	)	

This matter was before the Court on Monday, February 8, 2020, at 9:30 a.m., in Dorchester County, South Carolina, upon Defendants Hallmark Longterm Care, LLC d/b/a Hallmark Healthcare Center and Durena Stinson's 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 Kate C. Mettler 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

The Defendants operate a skilled nursing facility in Dorchester County, South Carolina. The facility is licensed by the South Carolina Department of Health and Environmental Control, pursuant to R. 61-17, *Standards for Licensing Nursing Homes*. Albert Walker was admitted to the Defendants' facility on or about January 2, 2019. Mr. Walker's wife, Paulette Walker signed several documents upon admission, including an arbitration agreement which is the subject of Defendants' Motion. At this time, Paulette Walker did not have legal authority to contractually bind her husband to arbitration, by way of a Power of Attorney nor any Court appointed Guardianship. While a resident in the Defendants' facility, Mr. Walker was allowed to suffer from numerous falls, one of which ultimately led to him being diagnosed with compression spinal fractures on or about June 16, 2019. Following Mr. Walker's admission, he executed a Durable

Power of Attorney, naming his wife to serve as his agent. The Power of Attorney was acknowledged on January 16, 2019 and recorded with the Charleston County Register of Deeds on January 18, 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. The Arbitration Provision is not enforceable because Paulette Walker lacked the capacity to contract on behalf of her husband, and Albert Walker did not sign the Arbitration Agreement

It is undisputed that Albert Walker never signed the arbitration agreement. Paulette Walker executed an Admission Agreement on behalf of her husband upon his entry to the Defendants' facility on January 2, 2019. Mrs. Walker did not have any legal authority to sign on behalf of Mr. Walker though a Power of Attorney or Court Ordered Guardianship or Conservatorship. At the time of admission, Mrs. Walker was not Mr. Walker's Power of Attorney nor did she have legal guardianship over Mr. Walker. At the time of admission, Mr. Walker had never been declared incapacitated. 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. Paulette Walker was not the court appointed legal guardian of Albert Walker, nor did she have a durable power of attorney which would confer her authority to make legal decisions on his behalf. There is no evidence that Albert Walker was incapacitated or unable to sign the agreements himself. In fact, several days later on January 16,2019, Albert Walker executed a valid durable power of attorney. This power of attorney was properly witnessed and notarized and was subsequently filed with the Charleston County Register of Deeds on January 18, 2019. Mr. Walker had legal capacity to enter into contracts following his admission to Defendant's facility as evidenced by the power of attorney; therefore Mrs. Walker'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.

The 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 Mr. Walker 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 Mr. Walker 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, Mr. Walker was capable of making his 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.

c. Paulette Walker Lacked Actual or Apparent Authority to Sign the Arbitration Agreement for Albert Walker

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 Paulette Walker had authority to enter a contract on Albert Walker's behalf or waive Mr. Walker'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 Paulette Walker did not have actual authority by way of a Durable Power of Attorney, nor Court Appointed Guardianship to bind Albert Walker, nor did she ever indicate that she had any apparent authority to enter contracts on behalf of Mr. Walker.

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 Paulette Walker acted in a way amounting to a false representation to Defendants regarding Mr. Walker's status or that Mr. Walker 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. 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. Walker had the authority to sign an arbitration agreement on Mr. Walker'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 Paulette Walker 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.

CONCLUSION

Based on the reasons set forth above, the Court respectfully DENIES the Defendant's Motion to Compel Arbitration.

IT IS SO ORDERED.

The Honorable Maite Murphy

St. George, South Carolina

Dorchester Common Pleas

Case Caption: Paulette Walker , plaintiff, et al VS Hallmark Longterm Care Llc , defendant, et al

Case Number: 2020CP1801027

Type: Order/Other

So Ordered

s/ Maite Murphy 2166