STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Civil Action No. 2020-CP-23-04832
Debra Lynn B Peele, as Personal Representative of the Estate of Iola Aileen Bagwell,	)	
Plaintiff,	)	**Order**
v.	)	
Greenville Retirement Properties, LLC d/b/a Pendleton Manor Assisted Living, Reatha Connelly, Regency Hospice of Georgia, LLC, d/b/a Regency Southerncare,	)	
Defendants.	)	

This comes before this Court on Defendants Greenville Retirement Properties, LLC's and Reatha Connelly's Motion to Stay and Compel Arbitration. Plaintiff opposed such motion. Both parties submitted memorandums of law and attended a hearing during which this Court heard oral arguments from counsel for each party.

FINDINGS OF FACTS

On or about May 17, 2018, Aileen Bagwell entered Pendleton Manor Assisted Living[1] (hereinafter Pendleton Manor) and contemporaneously executed a lease agreement with several appendixes. Aileen Bagwell had a diagnosis of dementia and would not have understood the particulars of this transaction. However, Cindy Bagwell, her attorney-in-fact and daughter, also signed the lease and its appendixes.[2] One appendix was a voluntary arbitration agreement. The arbitration agreement states that signing is not a condition of admittance.

[1] Pendleton Manor is owned and operated by Defendants Greenville Retirement Properties, LLC.
[2] There are serious factual questions regarding the patient's capacity to sign the Durable Power of Attorney that enabled the designated person to sign the arbitration agreement and waive Iola Bagwell's rights. The FAA allows a

The arbitration agreement is very specific about who and how disputes would be arbitrated:

> By signing this agreement, the resident agrees with the facility that any dispute between you and us, including any services rendered prior to the date this agreement was signed and any dispute arising out of the diagnosis, treatment, or care of the resident, including the scope of this arbitration clause and the arbitrability of any claim or dispute, against whomever made (including, to the full extent permitted by applicable law, third parties who are not signatories to this Agreement) **will be resolved by binding arbitration by the National Arbitration Forum**, under the Code of Procedure then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction.

However, the National Arbitration Forum (hereinafter "NAF") has ceased performing pre-dispute "consumer cases" and is unavailable to conduct or administer the arbitration in this case. The arbitration agreement also states that if a court "finds any portion of this agreement unenforceable, that portion will not be effective, and the remainder will be effective." Further, the agreement also states that "Information may be obtained, and claims may be filed at any office of the National Arbitration Forum, at www.arbitration-forum.com or at P.O. Box 50191, Minneapolis, MN 55405."

CONCLUSIONS OF LAW

A. Arbitration is a Matter of Contract.

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609, 571 S.E.2d 711, 713 (Ct. App. 2002) citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Arbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. *See e.g., Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). "The parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate." *Grant v. Magnolia*

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jury trial to determine factual issues, but this Court's ruling that the arbitration is unenforceable renders this issue moot.

Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) *citing Dowling v. Home Buyers Warranty Corp., II*, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993). This case is governed by the Federal Arbitration Act (FAA).

To have a valid and enforceable contract, there must be a meeting of the minds between the parties about all essential and material terms of the contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). "Although South Carolina Courts are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis." *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007). "Our courts' statements that the law "favors" arbitration were never intended to elevate a contractual right of arbitration above the procedural rules of the court or other contractual provisions." *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 856 S.E.2d 150, 152 (2021), *reh'g denied* (Apr. 20, 2021).

B. The Designation of the NAF as the Arbitral Forum is Integral to the Arbitration Agreement and the Unavailability of the NAF Mandates that Defendants' Motion to Compel Arbitration be denied.

It is undisputed that NAF is unavailable to conduct the arbitration of claims in this case. In this case, NAF is designated as the specific arbitral forum. The entire promise to arbitrate is contained in one sentence which specifically provides that claims "will be *resolved by binding arbitration by the National Arbitration Forum* under the Code of Procedure then in effect." (Emphasis added). This language resembles that which was the subject of *Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. 125, 678 S.E.2d 435 (S.C. 2009). In *Grant*, the Supreme Court held that where an arbitration agreement requires that proceedings be "administered by" a specific arbitral forum, then such forum is an "integral part" of the arbitration agreement.

In *Deans v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 382–83, 759 S.E.2d 727, 733 (2014), the South Carolina Supreme Court reaffirmed the holding in *Grant* and provided additional guidance which reinforces its application to the current case. In *Dean,* the Supreme Court stated as follows:

> Thus, in examining similar clauses, a majority of jurisdictions distinguish agreements requiring a proceeding "administered by" the named forum from those requiring a proceeding conducted "in accordance with" the named forum's rules. In the case of proceedings "administered by" a named forum, most courts view the forum selected as an integral term of the agreement because it is an express statement of the parties' intent to arbitrate exclusively before that forum; therefore, if the forum is unavailable, a material term of the agreement has failed, rendering the entire arbitration agreement invalid.

Id. at 382–83, 759 S.E.2d at 733 c*iting Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. at 131-132, 678 S.E.2d at 439; (other citations omitted). However, *Dean* was distinguishable from *Grant* in two respects. First, the arbitration agreement in *Dean* did not require the proceedings be "administered by" a specific arbitral forum but only that the proceedings be conducting "in accordance with" a specific set of rules.

Secondly, like the instant case but unlike *Grant,* the *Dean* arbitration agreement contained a severability clause. In *Dean,* the Supreme Court found that the severance provision was evidence that the arbitration forum was not integral. However, unlike *Dean*, this arbitration agreement in this case contains more than a single reference to NAF, but provides separately that a claimant must initiate the arbitration through NAF: "Information may be obtained, and claims may be filed at any office of the National Arbitration Forum, at www.arbitration-forum.com or at P.O. Box 50191, Minneapolis, MN 55405." Thus, the arbitration agreement at issue not only provides that NAF is the specific arbitral forum but provides that the NAF Code of Procedure should govern the proceedings and that claims should be initiated by filing with NAF. The listing

of the web address for NAF as the place for Plaintiff to obtain information about arbitration and filing claims is additional evidence that the NAF was integral to this arbitration agreement.

The Supreme Court in *Dean* cited two cases that also contained severance provisions, but those courts ultimately decided that the specified arbitral forum was integral to the agreement. *See Crossman v. Life Care Ctrs. of Am., Inc.*, 738 S.E.2d 737, 740 (N.C. Ct. App. 2013); *Rivera v. Am. Gen. Fin. Servs., Inc* 150 N.M. 398, 259 P.3d 803 (Sup. Ct. NM 2011). Like those cases, the arbitration in the instant case contains multiple references to a specific arbitral forum, the rules of the forum, and referencing the forum's address and/or website for initiating claims and obtaining additional information. This Court believes that the provisions read in their entirety reveal an intention to make NAF the arbitral forum. Accordingly, this Court concludes that NAF serving as the arbitral forum is integral to the arbitration agreement.[3]

Therefore, this Court denies Defendants' motion to stay this case and to compel arbitration.

IT IS SO ORDERED.

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Judge R. Scott Sprouse
Court of Common Pleas

[3] The Supreme Court in *Grant* did not decide whether Section 5 of the FAA permitted a court to appoint an arbitrator where a specifically designated arbitrator becomes unavailable, but the Court suggested strongly that it was inclined to follow the United States Court of Appeals for the Second Circuit which has held that Section 5 does not permit a court to appoint an arbitrator where a specifically designated arbitrator becomes unavailable. This Court does not decide this issue.

Greenville Common Pleas

Case Caption: Debra Lynn B Peele Personal Representative , plaintiff, et al vs. Greenville Retirement Properties LLC , defendant, et al

Case Number: 2020CP2304832

Type: Order/Other

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit