

Stroud experienced a series of falls with resulting injury and other circumstances that deviated from the accepted standard of care.

As part of the admissions process, Defendants' representative required Mrs. Debbie Stroud, Mr. Stroud's wife, to sign the Facility- Resident/Representative Arbitration Agreement on March 3, 2017. Defendants' Ex. A. Notably, the agreement is signed only by Debbie Stroud, in her representative capacity, not by James C. Stroud, the resident.

Defendants have filed Motions to Dismiss and to Compel Arbitration or in the alternative for additional time to conduct discovery on the issue of the arbitration issue. Defendants filed the Admission Agreements and the Arbitration Agreements in question. In addition, the Defendants filed the relevant Power of Attorney which Mr. Stroud executed in favor of his wife Debbie Stroud and which the Defendants were provided at the time of Mr. Stroud's admission. Defendants did not file any Affidavits or Deposition testimony in support of their Motions.

Law and Analysis

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See 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 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).

Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 668 (2007) (“General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause”). The courts, not arbitrators, are charged with deciding certain “gateway matters,” including “whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy.” Simpson, 373 S.C. at 23, 644 S.E.2d at 668; See also New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008).

I. Whether Debbie Stroud had actual or apparent authority to sign the Arbitration Agreements for James Stroud .

In deciding a motion to compel arbitration, the Court looks to contract law to determine whether a valid and enforceable contract to arbitrate has been entered by the parties. “[A]rbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law.” Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). A person possessing contractual capacity, acting as grantor, can authorize another to contract on the grantor's behalf under the specific terms of a power of attorney. See Gaddy v. Douglass, 359 S.C. 329, 344-45, 597 S.E.2d 12, 20 (Ct. App. 2004). “A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney.” Watson v. Underwood, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) (quoting In re Thames, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001) “Our courts have looked to contract law when reviewing actions to set aside or interpret a power of attorney.” Stott v. White Oak Manor, Inc., 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019).

"The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties, and, in determining that intention, the court looks to the language of the contract." *Id.* (quoting Watson v. Underwood, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct. App. 2014)). "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* (quoting Watson, 407 S.C. at 455, 756 S.E.2d at 161).

Earlier this year, our Supreme Court ruled that the specific language of a Power of Attorney determines whether the principal has authorized his attorney-in-fact to execute an agreement for binding arbitration. Arredondo v. SNH Ashley River Tenant, LLC, Op. 28011, S.C. Filed March 10, 2021. Absent the grant of such authority, the Attorney-in-Fact has no authority or legal capacity to enter the arbitration agreement in question. The arbitration agreement is invalid and unenforceable if the Attorney-in-Fact had no authority to waive the right to jury trial or enter an arbitration agreement. Arredondo at 2. In Arredondo, the Supreme Court made clear that the beginning of the inquiry is to read a relevant Power of Attorney and determine not just whether the Power of Attorney appears broad but whether the language can be read so as to conclude that it grants unto the attorney in fact the authority to enter an agreement to waive the right to jury trial and replace the resolution of disputes with binding arbitration before any actual dispute even arises. Id.

In the present case, this Court must examine the relevant Power of Attorney which the Defendants filed with the Court. Article VII of the Power of Attorney signed by Mr. Stroud in favor of his wife on November 22, 2016 contains specific restrictions on the authority granted by Mr. Stroud to his attorney-in-fact. Section (6) provides as follows:

Reservation of Right to Trial by Jury. I reserve unto myself and do not grant unto my Attorney in Fact the power to waive my right to jury trial and enter into Arbitration Agreements. I do not favor Arbitration, and for that reason I do not grant unto my Attorney in Fact the power to enter Arbitration Agreements.

Durable Power of Attorney of James C. Stroud, Article VII, paragraph (6)(emphasis in original).

As a result of the specific restrictions in Mr. Stroud's Power of Attorney, the present case is an even stronger case for denial than the one at issue in the recent Supreme Court reviewed in Arredondo cited above. Here, the Power of Attorney document, in clear and unambiguous language, specifically states that the Principal chose **not** to grant the power to waive the right to jury trial or enter into arbitration agreements. The plain language of the Power of Attorney controls. The Arbitration Agreement is not valid or enforceable because it is expressly beyond the scope of authority granted to Mrs. Stroud by her husband. Mrs. Stroud had no authority, express or apparent, to enter the agreement for binding arbitration in question here.

The legal consequences of an agent's actions can only be attributed to the principle when the agent has actual or apparent authority. Charleston Registry v. Young Clement, 359 S.C. 635, 642, 598 S.E.2d 717 (Ct. App. 2004). Apparent authority is based on "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). Apparent authority exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that "a person of ordinary prudence, reasonably familiar with business usages and custom is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption." Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 142, 399 S.E.2d 430, 433 (Ct. App. 1990), rev'd on other grounds, citing Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982); Watkins v. Mobil Oil Corp., 291 S.C. 62, 352 S.E.2d 284 (Ct. App. 1986).

South Carolina law requires that to prove apparent authority, the Defendants 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. The present 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, 567, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, either the South Carolina Supreme Court or the South Carolina Court of Appeals 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 such. In all three cases, the Courts found that no implied authority and that no estoppel applied. As the Court noted in Thompson and in Hodge, there was no evidence that the resident being admitted to the nursing home took any action to create an agency relationship for Son. See Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018). The present case is nearly identical to Hodge and Thompson.

Here, the Defendants have submitted no evidence that Mr. Stroud said or did anything other than the clear restrictive language contained in the Power of Attorney. The clear language of the

present Power of Attorney controls. Defendants' representative had an obligation of due diligence to review the Power of Attorney to determine whether in fact Mrs. Stroud had authority granted to her to sign the Arbitration Agreement. A simple review of the Power of Attorney would make clear that such authority was simply beyond the scope of authority granted to Mrs. Stroud.

II. Whether a mandatory agreement for binding arbitration is enforceable where the resident in question is a recipient of Medicare.

An illegal contract is unenforceable. Berkebile v. Outen, 311 S.C. 50,53 n.2, 426 S.E.2d 760, 762 n.2 (1993). "The general rule is that courts will not enforce a contract is violative of public policy, statutory law, or provisions of the Constitution." Id. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare reimbursement rates as payment in full. See 42 C.F.R Section 489.30; 42 C.F.R. Section 447.15 Moreover, such facilities, in the case of an individual who is entitled to medical assistance, must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan...any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility." 42 U.S.C. Section 1396r(c)(5)(A)(iii).

Clearly here, it is undisputed that Mr. Stroud was a recipient of Medicare at the time of his admission and throughout his stay at Defendants' facility and the Defendants' facility was billing and accepting payment from Medicare for Mr. Stroud's care. As such, the purported agreement for binding arbitration which the facility mandated that Mrs. Stroud sign is not valid or enforceable because by its terms it violates federal law.

III. Whether the agreement for binding arbitration was not valid or enforceable where not supported by valuable consideration.

It is well settled that to be valid and enforceable, a contract must be supported by valuable consideration. Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984) (“a contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act”). Consideration may “consist of “some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.” Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998).

The clear language of the purported arbitration agreement makes clear that the Defendants required Mrs. Stroud to sign as condition of admission to their facility. As such, this requirement was a clear violation of Federal Law. 42 U.S.C. Section 1396r(c)(5)(A)(iii) prohibits a facility such as Defendants’ from soliciting or accepting “any other consideration” as a condition to admission outside of the Medicare payments when admitting a patient in Mr. Stroud’s position. By requiring Mrs. Stroud to sign the document attempting to require waiver of the right to jury trial as a condition of admission, Defendants were requiring and accepting consideration in addition to Medicare payments. Therefore, the arbitration agreement in question is not valid or enforceable.

IV. Whether the Defendants are entitled to conduct discovery as to the Arbitration Agreement.

The Defendants had the burden to prove that there was an enforceable Arbitration Agreement. Defendants had the opportunity to use the South Carolina Rules of Civil Procedure to conduct discovery related to arbitration. This case was pending for a sufficient period such that Defendants’ could have prepared Affidavits or taken limited Depositions on any issues related to the Arbitration issue. The Court noted in Hodge, discovery issues are within the discretion of the trial court. Hodge

v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 576, 813 S.E.2d 292, 309 (Ct. App. 2018). Further, as noted in Hodge, additional discovery would likely not change the outcome of the Court's decision as issues related to Mrs' Stroud's actions are not relevant to any implied or apparent authority. Id. It is the actions of Mr. Stroud that would be relevant; therefore, discovery is not necessary as the discoverable information would not change the outcome of the Court's decision as the discovery issues would not be dispositive. The actual language of the Power of Attorney which was submitted here is dispositive.

Conclusion

After careful consideration of the pleadings, motions, memoranda, documents filed, and arguments of counsel, I find that there is no valid Arbitration Agreement.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendants' Motions to Dismiss and Compel Arbitration are denied; and further

Defendants' Motion to Conduct additional discovery as to the Arbitration Agreement issue is denied.

IT IS SO ORDERED.

Honorable Alex Kinlaw, Jr.
Resident Judge, Thirteenth Circuit

Dated:
Greenville, South Carolina



Greenville Common Pleas

Case Caption: Debbie Stroud , plaintiff, et al vs. THI Of South Carolina At
Greenville LLC , defendant, et al

Case Number: 2020CP2301728

Type: Order/Other

So Ordered

s/Alex Kinlaw, Jr., #2763