

35546

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JEFFREY TAYLOR, Personal
Representative of the Estate of
LEO TAYLOR

Plaintiff,

v.

Civil Action No.: C-08-00000000
Judge: Stucky

FILED
2009 SEP 29 PM 3:41
CLERK OF COURT
KANAWHA CO. CIRCUIT COURT

MHCC, INC., f/k/a MARMET HEALTH CARE CENTER;
CANOE HOLLOW PROPERTIES, LLC;
GENESIS HEALTHCARE CORPORATION d/b/a
MARMET HEALTH CARE CENTER;
GLENMARK ASSOCIATES, INC.;
GLENMARK LIMITED LIABILITY COMPANY I;
GLENMARK PROPERTIES, INC.;
GENESIS HEALTH VENTURES of WEST VIRGINIA, INC.;
GENESIS HEALTH VENTURES of WEST VIRGINIA, LP
GENESIS ELDERCARE CORPORATION;
GENESIS ELDERCARE NETWORK SERVICES, INC.;
GENESIS ELDERCARE MANAGEMENT SERVICES, INC.;
GENESIS ELDERCARE REHABILITATION SERVICES, INC.;
GENESIS ELDERCARE STAFFING SERVICES, INC.;
GENESIS ELDERCARE PHYSICIAN SERVICES, INC.;
GENESIS ELDERCARE HOSPITALITY SERVICES, INC.;
HORIZON ASSOCIATES, INC.; HORIZON MOBILE, INC.;
HORIZON REHABILITATION, INC.; GMA PARTNERSHIP HOLDING CO.,
INC.; GMA-MADISON, INC.; GMA-BRIGHTWOOD, INC.; HELSTAT, INC.;
FORMATION CAPITOL, INC.; FC-GEN ACQUISITION, INC.;
GEN ACQUISITION CORPORATION; and JER PARTNERS, LLC,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
DEFENDANT MHCC, INC. f/k/a MARMET HEALTH CARE CENTER
("MHCC")

FINDINGS OF FACT

1. Leo Taylor was a resident of Marmet Health Care Center ("Marmet") between February 8, 2006 and December 6, 2006. ("The Stay"). (On November 30, 2006, the owners of Marmet- Larry Pack and Calvin Sutphin, sold Marmet to Genesis.)

2. On January 23, 2009, Plaintiff Jeffrey Taylor, as personal representative of the Estate of Leo Taylor, filed this wrongful death and nursing home negligence action against MHCC and others allegedly arising out of breaches of the applicable standard of care during The Stay.
3. At the time of his admission, Leo Taylor was not legally competent and suffered from advanced dementia and Alzheimer's disease.
4. At the time of his admission, Leo Taylor was married to Ellen Taylor, who held a medical power of attorney for Leo Taylor and had been his representative for the previous thirteen (13) years.
5. The medical power of attorney expressly grants to Ellen Taylor the right to make any and all decisions regarding Leo Taylor's care, including nursing home care; to act on his behalf; to consent where deemed in his best interests; and provides that no decision made by Ellen Taylor be subject to review by anyone, including "any judicial agency." There are no special directives or limitations noted on the power.
6. Ellen Taylor died before Jeffrey Taylor filed this action.
7. As a part of the admissions process to Marmet Health Care Center, Ellen Taylor as ("representative") signed and initialed the Admission Agreement, as Leo Taylor was incapable of doing so.
8. The Admission Agreement contains a mandatory arbitration provision.
9. The mandatory arbitration provision is mutual and does not impose on the Plaintiff any potential burden or cost which is not also potentially imposed upon MHCC.
10. The Admissions Agreement reflects under the Acknowledgement section that the representative has read and completely understood the agreement; had the opportunity to consult with counsel regarding the execution of the agreement; and that the parties freely consent to be legally bound by all the terms of the Agreement.
11. There is no evidence that Ellen Taylor was under duress, coerced, confused or that she did not intend to accept the terms of the mandatory arbitration provision.
12. Ellen Taylor had also been a resident of Marmet, was appreciative of the care and attention she received and wanted her husband to be a resident at Marmet.
13. Ellen Taylor did not have to agree to the mandatory arbitration provision in order to secure the admission of Mr. Taylor to Marmet. Marmet would have

admitted Leo Taylor even if Mrs. Taylor had refused to accept the mandatory arbitration provision.

14. Ellen Taylor had the right to take Mr. Taylor to any facility she chose. She chose Marmet.
15. The Admissions Agreement expressly provides that its terms and conditions are binding on all successors, assigns and family members (including Plaintiff).

CONCLUSIONS OF LAW

1. The Federal Arbitration Act ("FAA") embodies a strong federal public policy in favor of enforcing arbitration agreements and is designed to ensure judicial enforcement of privately made agreements to arbitrate. **Adkins v. Labor Ready, Inc.**, 185 F.Supp. 2d 628, 633 (S.D.W.Va. 2001)
2. The United States Supreme Court recently ruled that the FAA preempts any state anti arbitration law or statute relating to matters of commerce and withdraws the power of states to require a judicial forum for the resolution of claims. **Preston v. Ferrer**, 128 S.Ct, 978 (2008)
3. Plaintiff's argument that **WV Code 16-5C-1, et seq** prohibits nursing home residents from agreeing to arbitrate disputes by entering into arbitration agreements like the one at issue is refuted by and in direct conflict with the US Supreme Court's holding in **Preston**.
4. Moreover, Plaintiff's argument that the arbitration agreement violates **WV Code 16-5C-1, et seq**, is also without merit. The US Supreme Court has ruled that "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." **Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.**, 473 U.S. 614 (1985)
5. **WV Code 16-5C-1 et. seq.** does not prohibit arbitration or the waiver of a right to trial. It does prohibit the waiver of certain rights, none of which are sought here. Other West Virginia Courts have rejected Plaintiff's argument and ruled that agreements to arbitrate are enforceable and do not violate **WV Code 16-5C-1 et. seq.**
6. West Virginia is not alone in allowing arbitration in nursing home cases. A majority of jurisdictions has also upheld arbitration provisions in contracts with nursing homes. See for example, **Mannion v. Manor Care Inc.**, 2006 WL 6012873 (Pa.Com.Pl.), wherein an arbitration agreement signed by decedent's daughter was enforced and the estates' wrongful death action was ordered to arbitration; **Sanford v. Castleton Health Care Center**, 813

N.E.2d 411 (Indiana 2004) rehearing denied, 2004, wherein the court determined no great disparity in bargaining power because plaintiff did not sign arbitration clause unwillingly; **Briarcliff Nursing Home, Inc. v. Turcotte**, 894 So2d 661 (S.Ct. Alabama 2004) arbitration clause not unconscionable; **Community Care Center of Vicksburg, LLC v. Mason**, 966 So2d 220 (Ct. of App. Mississippi 2007); **Miller v. Cotter**, 671 N.E. 2d 537 (Mass. 2007), finding arbitration provision in nursing home admission contract not unconscionable; and **Owens v. National Health Corp.**, 263 S.W.3d 876 (Tenn. 2007), finding arbitration agreements in nursing home contracts do not per se violate public policy. See, also, **Mathews v. Life Care Ctrs. Of America, Inc.**, 177 P.3d 867 (Ariz. Ct. App. 2008); **Moffett v. Life Care Ctrs. Of America**, 2008 WL 2053067 (Colo. Ct. App. May 15, 2008); **Raper v. Oliver House, L.L.C.**, 637 S.E.2d 551 (N.C. App. 2006) and **Rainbow Health Care Ctrs., Inc. v. Crutcher**, 2008 WL 268321 (N.D. Okla. Jan. 29, 2008).

7. It is presumed that parties intend to arbitrate where the contract so provides. **Adkins; State ex rel Wells v. Matish**, 600 S.E. 2d 583 (W.Va. 2004).
8. The Admissions Agreement is not unconscionable. **Strawn v. AT&T Mobile**, 593 F. Supp. 2d 894 (S.D.W.Va. 2008)
9. In order to prove that a contract provision is unconscionable, a party must prove that there was a "**gross inadequacy in bargaining power**" **and** "**terms unreasonably favorable to the stronger party.**" **Troy Mining Corp. v. Itmann Coal Co.**, 176 W.Va. 599, 604 1986)) (emphasis supplied) and see, **Art's Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co.**, 13 S.E.2d 670, 674 (1991) (quoting Restatement (Second) of Contracts 234 comment *637 d).
10. Mere inequity of bargaining power alone does not indicate an unconscionable contract." **Adkins**, 185 F.Supp.2d at 636. A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. A court can assume that a party to a contract has read and assented to its terms, and absent fraud, misrepresentation, duress, or the like, the court can assume that the parties intended to enforce the contract as drafted. Moreover, in an arbitration provision, "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability". **Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.**, 473 U.S. 614, 626, (1985).
11. The Plaintiff implies the arbitration provision only applies to them and this makes it unconscionable. However, under the Arbitration Agreement *both parties* waived their right to have any claim regarding Leo Taylor's case decided by a court of law and, in the alternative, agreed to arbitrate any disputes arising from the care of Leo Taylor and *both parties* have equal rights

in arbitration. See, **Miller v. Equifirst Corporation of WV**, 2006 WL 2571634 (S.D.W.Va 2006). In **Miller**, plaintiffs alleged that the Arbitration Agreement they signed along with loan agreements was invalid because the defendant retained access to judicial form for certain claims and arbitration for others while the plaintiff was required to arbitrate all claims. In dismissing plaintiffs' argument, the U. S. District Court for the Southern District of West Virginia concluded that when considering a totality of circumstances as a matter of law, such retention of rights by the defendant is not so one-sided as to render the agreement unenforceable. **Id.** at 11.

12. Under West Virginia's Act, the decision to admit someone to a nursing home is a "health care decision." See, **Owens v. National Health Corporation**, 263 S.W.3rd 876 (Tenn. 2007).
13. An agent has authority to do everything necessary or proper and usual, in the ordinary course of business, for affecting the purpose of his agency. The decision to enter into arbitration agreements in connection with placement in a health care facility, as occurred here, is a 'proper and usual' exercise of an agent's powers. See for example, **Briarcliff Nursing Home, Inc. v. Turcotte**, 894 So.2d 661 (Ala.2004); **Hogan v. Country Villa Health Servs.**, 148 Cal.App.4th 259, 55 Cal.Rptr.3d 450, 453-55 (2007) (citing **Garrison v. Superior Court of Los Angeles County**, 132 Cal.App.4th 253, 33 Cal.Rptr.3d 350 (2005); **Sanford v. Castleton Health Care Ctr., L.L.C.**, 813 N.E.2d 411 (Ind.Ct.App.2004).
14. Ellen Taylor's medical power of attorney was unrestricted. As in **Moffett v. Life Care Centers of America**, 187 P.3d 1140 (Colo. App. 2008), this power extended to and includes the authority to enter into a binding arbitration agreement upon admission to a nursing home.

Based upon all of the foregoing, the Court finds that Plaintiff is required to arbitrate all of the claims asserted against Marmet, which is so ORDERED.

Entered this 23rd day of September, 2009.



JAMES C. STUCKY, JUDGE
THIRTEENTH JUDICIAL CIRCUIT

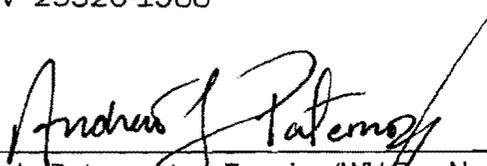
STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF October 2009
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 

CERTIFICATE OF SERVICE

I, Andrew L. Paternostro, hereby certify that on this the 21st day of January, 2010, caused service of the foregoing **DOCKETING STATEMENT** to be made upon counsel of record by depositing true and accurate copies of the same in the regular course of the United States mail, postage prepaid, in an envelope addressed as follows:

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