/s/ H. L. Kirkpatrick III
Circuit Court Judge
Ref. Code: 20FM29HI

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CC-41-2019-C-159
Raleigh County Circuit Clerk
Paul H. Flanagan

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

CYNTHIA F. HOOVER, Durable Power of Attorney of ELVERIA M. FAW,

Plaintiff,

v. **Civil Action No. 19-C-159-K**

BECKLEY HEALTH PARTNERS, LTD. d/b/a THE VILLAGES AT GREYSTONE; CHANCELLOR SENIOR MANAGEMENT, LTD., and MEGAN WARD WILSON, Residence Manager,

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION

On the 4th day of August, 2020, came the plaintiff by S. Andrew Stonestreet, Esquire, and came the defendants by Avrum Levicoff, Esquire, both via video presentation and pursuant to proper notice of hearing. Thereupon, counsel argued the Defendant's Motion to Compel Arbitration, which had been thoroughly briefed. The court took the matter under advisement, and has now had the full opportunity to reflect upon counsel's briefs and arguments and to consult legal authorities pertaining to the matter at bar. As a result of the court's deliberations, the court is compelled to deny the defense motion, for the reasons hereinafter set forth in this opinion order.

The principal facts of this case are straightforward and not disputed by the parties. Plaintiff Cynthia Hoover maintains this action against the defendants as

Administratrix of the estate of her mother, Elveria May Faw, deceased.[1] In her complaint, plaintiff asserts against these defendants statutory and common law claims based on alleged inadequacy of services provided to the decedent while she was a resident at an assisted living residence known as "The Villages at Greystone" (hereinafter "Greystone"), located in Daniels, Raleigh County, West Virginia.

Elveria May Faw became a resident of Greystone on or about September 3, 2017. Prior thereto, on August 30, 2017, Cynthia Hoover executed an Assisted Living Residency Agreement (hereinafter, "Residency Agreement") on behalf of her mother. During the period of time that Ms. Faw resided at Greystone, she was provided with care and services under the terms of the Residency Agreement. As part of the paperwork presented to her, Ms. Hoover also executed a "Community Arbitration Agreement" (hereinafter, "Arbitration Agreement") on behalf of her mother, which requires arbitration of "any legal dispute, controversy demand or claim...that arises out of or relates to the [Residency Agreement]". [2] The Arbitration Agreement also requires arbitration of "any claims for...violations of any right granted

1 Plaintiff Cynthia Hoover instituted this lawsuit as power of attorney of Elveria May Faw; however, subsequent thereto, Ms. Faw departed this life and Ms. Hoover qualified as administratrix of her estate. A Suggestion of Death filed herewith on October 16, 2019, indicates that the death of Ms. Faw occurred on October 5, 2019. An Order Amending Case Caption to reflect the death of Ms. Faw was entered herein on November 15, 2019.

2 Defendants assert that Ms. Hoover represented to the licensed owner and operator of Greystone that she was authorized to act on behalf of her mother in signing both the Residency Agreement and the Arbitration Agreement.

to Resident by law...for breach of contract, fraud, misrepresentation, negligence,...or any other claim based upon any departure from accepted standards of medical or health care or safety...." Lastly, the Arbitration Agreement contains an "opt-out" provision which states that "the execution of this Arbitration Agreement is not a precondition to the furnishing of services to the Resident..." and that "this Arbitration Agreement may be rescinded by written notice to [Greystone] from the Resident within 30 days of signature."

At the time of the execution of the Residency Agreement and Arbitration Agreement on August 30, 2017, Ms. Hoover had not been appointed power of attorney to act in the stead of Ms. Faw; however, she had been appointed her health care surrogate. Thereafter, Ms. Faw appointed Ms. Hoover as her General Durable Power of Attorney on September 8, 2017 — nine (9) days after execution of the Arbitration Agreement.

At issue before the court is the enforceability of the Arbitration Agreement.

The United States Supreme Court has explained that "arbitration is simply a matter of contract between the parties; it is a way to resolve disputes – but only those disputes – that the parties have agreed to submit to arbitration." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). Because it is well settled that arbitration is a matter of contract, as a general rule, only signatories to an arbitration agreement will be required to submit to arbitration. It is a central rule of contract law that "[a] party generally cannot be forced to participate in

an arbitration proceeding unless the party has, in some way, agreed to participate." Chesapeake Appalachia, L.L.C. v. Hickman, 236 W.Va. 421, 439, 781 S.E.2d 198, 216 (2015).

However, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-17 (4th Cir. 2000). Our Supreme Court has recognized several common law principles in which a signatory to an arbitration agreement can, in very limited circumstances, require a nonsignatory to comply with the agreement. A signatory to an arbitration agreement cannot require a non-signatory to arbitrate unless the non-signatory is bound under some traditional theory of contract and agency law. The five traditional theories under which a signatory to an arbitration agreement may bind a non-signatory are: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing / alter ego; and (5) estoppel. *Syllabus Point 10,* Chesapeake Appalachia, L.L.C. v. Hickman, 236 W.Va. 421, 439, 781 S.E.2d 198, 216 (2015). However, the Supreme Court has admonished trial courts asked to apply these theories to "be wary of imposing a contractual obligation to arbitrate on a non-contracting party." *Id.* at 440, 781 S.E.2d at 217.

Defendants rely upon these four theories to enforce the arbitration agreement against the non-signatory decedent: (1) the plaintiff herself signed the arbitration

agreement, (2) estoppel, (3) the doctrine of unilateral contract, and (4) ratification. Plaintiff counters by asserting that the agreement to arbitrate between the parties is simply invalid under law, and relies singularly upon State ex rel. AMFM, LLC v. King, 230 W.Va. 471, 740 S.E.2d 66 (2013), a case with similar facts to the instant one.

Although the plaintiff, Cynthia F. Hoover did in fact sign the Arbitration Agreement and is named as a party to this civil action, it is clear that she is pursuing this lawsuit, not in her own right, but as Administratrix of the Estate of the decedent, Elveria May Faw. Furthermore, it is clear that when she signed the Arbitration Agreement, she did so, not on her own behalf, but under purported authority on behalf of her mother, Ms. Faw. To be valid, the subject Arbitration Agreement must have (1) competent parties; (2) legal subject matter; (3) valuable consideration; *and* (4) mutual assent. Absent any one of these elements, the Arbitration Agreement is invalid. *Syllabus Point 3, in part,* Dan Ryan Builders, Inc. v. Nelson, 230 W.Va. 281, 737 S.E.2d 550 (2012). The first criterion that must be satisfied to enforce the subject Arbitration Agreement is "competent parties." To be a competent party, the person signing an arbitration agreement must have had the authority to do so. Here, because the power of attorney had not been executed by Ms. Faw at the time the Arbitration Agreement was signed, Ms. Hoover was not a "competent party" to act in her mother's stead.

At first blush, estoppel appears to be the defendants' strongest argument and is somewhat persuasive as a traditional theory to apply to bind a non-signatory.

Defendants argue that plaintiff is estopped from avoiding the Arbitration Agreement signed on behalf of her mother, based on her representations of authority. Furthermore, the defense points out that Ms. Faw received and accepted all the benefits and services under the Residency Agreement and now cannot avoid the implementation of the associated Arbitration Agreement.

However, a close analysis of these circumstances will demonstrate decidedly that reliance upon the concept of estoppel is misplaced. It must first be observed that the Arbitration Agreement is not a clause or provision contained within the Residency Agreement. Both contracts are separate, stand-alone instruments. The services provided by Greystone to the Resident are fully outlined in the Residency Agreement. Those services were provided to Ms. Faw because she or her daughter paid good money for them. The separate and distinct Arbitration Agreement expressly states that its execution is not a precondition to the furnishing of services to the Resident by [Greystone].[3] The Arbitration Agreement also set forth a means by which the Resident could rescind the agreement within 30 days of signature. Clearly then, Greystone would have provided health care services to Ms. Faw whether or not the Arbitration Agreement was in place; thus, the matter of arbitration was in no way part of the bargain.

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3 To be fair, to state otherwise and provide that the Arbitration Agreement was, in fact, a precondition to the furnishing of services, would be strictly violative of law as being unconscionable.

Furthermore, it is well established that estoppel "prevents a non-signatory from 'cherry-picking' the provisions of a contract that it will benefit from and ignoring other provisions that don't benefit it or that it would prefer not to be governed by (such as an arbitration clause)." Bayles v. Evans, 842 S.E. 2d 235, 244 (2020), *quoting* Invista S.A.R.L. v. Rhodia, S.A., 625 F.3d 75, 85 (3rd Cir. 2010). Stated simply, a nonsignatory who seeks to reap the benefits of a contract must bear its burdens as well. But this is not a circumstance here where the plaintiff has embraced parts of either of the subject contracts, but turned her back on those portions that the nonsignatory finds distasteful. Lastly, the court is mindful of the premise that a nonsignatory is estopped from refusing to comply with an arbitration clause "when it receives a 'direct benefit' from a contract containing an arbitration clause." Bayles, supra., 245, *quoting* International Paper Co., 206 F.3d at 418. "Direct-benefit estoppel involve[s] non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract." Hellenic Inv. Fund, Inc. v. Det Norski Veritas, 464 F3d 514, 517. There is no indication that the plaintiff on behalf of the non-signatory has improperly obtained a direct benefit here from either of the contracts at issue and is now attempting to exploit that contract or a portion thereof.

"The doctrine of estoppel should be applied cautiously and only when equity clearly requires it to be done." *Syllabus Point* 3, Humble Oil & Ref. Co. v. Lane, 152

W.Va. 578, 165 S.E.2d 379 (1969); Samsell v. State Line Dev. Co., 154 W.Va. 48 174 S.E.2d 318 (1970). This court concludes that upon a circumspect application of the doctrine of estoppel, such concept is not warranted under the facts presented in the instant case.

Defendants further rely upon the proposition of unilateral contract, and invoke the holding of the West Virginia Supreme Court of Appeals in Citizens Telecommunications Company of West Virginia v. Sheridan, 239 W.Va. 67, 799 S.E.2d 144 (2017). In that case, customers of an internet service provider instituted a putative class action against the provider, alleging that the service was much slower than advertised, and sought declaratory relief that the action was not subject to arbitration. The provider moved for arbitration. The Court observed that a unilateral contract is established "where one party makes a promissory offer and the other accepts by performing an act rather than by making a return promise." Citizens Telecommunications, supra., 150, 73, *quoting* Cook v. Heck's Inc., 176 W.Va. 368, 373, 342 S.E.2d 453, 458 (1986). Furthermore, "an acceptance may be effected by silence accompanied by an act of the offeree which constitutes a performance of that requested by the offeror." First Nat'l Bank v. Marietta Mfg. Co., 151 W.Va. 636, 641-42, 153 S.E.2d 172, 176 (1967). The Court held that the provider presented its Terms and Conditions as a condition of providing Internet service to customers, and the provider's customers accepted those Terms and Conditions by using and paying for that Internet service, forming a unilateral contract.

However, the facts at bar may be distinguished from the Citizens Telecommunications case. The latter did not expressly address circumstances related to a non-signatory party; instead, the case focused upon whether or not the internet service provider's customers assented to an arbitration clause contained in changes to the provider's terms and conditions of service after the customers had signed up. At the time the subscribers signed up for internet service, the terms and conditions of service contained a provision that permitted the provider to propose changes to such terms, upon notice to customers. This pertinent language was included: "**You accept the changes, if you use the service after notice is provided**." Thereupon, the provider altered the terms and conditions by adding a binding arbitration provision.

In the present case, there is no dispute over altered terms, and there is no language in the subject Arbitration Agreement pertaining to the deemed acceptance of additional conditions under certain circumstances. As heretofore discussed, our Arbitration Agreement is not a part of a multi-clause contract between parties who both made certain promises regarding arbitration and other substantive rights. Instead, such Agreement is a separate instrument that stands on its own two hind legs, and is independent of promissory offers and health care duties provided by Graystone as outlined in the Residency Agreement or elsewhere.

Finally, defendants cite as their fourth validation device the concept of ratification. The defense points out that when Ms. Hoover signed the agreements in

question, she had been appointed as Ms. Faw's medical surrogate per West Virginia Code § 16-30-1, *et seq.*[4] As such, Ms. Hoover had direct authority to make health care decisions on behalf of her mother. Defendants argue further that Ms. Hoover also had the expanded authority to act on behalf of her mother in all affairs, pointing out that she never disavowed signing either the Residency Agreement or the Arbitration Agreement. As the argument goes, although Ms. Hoover may not have had the legal authority to sign the agreement at the time of execution, she then obtained such authority by power of attorney nine (9) days afterwards.

The aforegoing argument may be dispatched upon application of the principles of State ex rel. AMFM, LLC v. King, 230 W.Va. 471, 740 S.E.2d 66 (2013), which is remarkably similar to the case at bar in terms of the underlying factual scenarios. In AMFM, the decedent's daughter had been appointed as healthcare surrogate for her mother, who was admitted as a resident in a nursing home. Upon admission, the daughter signed a "Resident and Facility Arbitration Agreement", which required that any legal dispute or claim arising out of health care provided by the nursing home shall be resolved exclusively by binding arbitration. The Arbitration Agreement indicated that acquiescence thereto was not a precondition of the resident's admission to the nursing home or the receipt of services therefrom and that she could

4 Pursuant to West Virginia Code § 16-30-8, a "surrogate is authorized to make health care decisions on behalf of the incapacitated person...."

rescind the Arbitration Agreement within thirty days of its signing. Subsequently thereto, the daughter was appointed to serve as her mother's power of attorney.

In writing for the Court, Justice Davis observed that the decedent's daughter's role as health care surrogate permitted her to make only health care decisions and was not a "competent party" to the Arbitration Agreement because she did not have the authority to sign the subject document on her mother's behalf. "An agreement to submit future disputes to arbitration, which is optional and not required for the receipt of nursing home services, is not a health care decision under the West Virginia Health Care Decisions Act, *W. Va. Code § 16-30-1. et seq.* "Pursuant to West Virginia Code § 16-30-8, a "surrogate is authorized to make health care decisions on behalf of the incapacitated person...." *Syllabus Point 8*, AMFM, supra.

"The fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement." *Syllabus Point 5*, Virginian Export Coal Co. v. Rowland Land Co., 100 W.Va. 559, 131 S.E. 253 (1926).

In the instant case, Ms. Hoover possessed only the requisite authority to make strictly health care decisions on behalf of Ms. Faw, and was not a "competent party" to sign the Arbitration Agreement on her behalf. It is the authority that Ms. Hoover possessed at the time the Arbitration Agreement was signed, and not the authority with which she was imbued some nine days later, that is determinative of her

authority to bind Ms. Faw to the Arbitration Agreement. Insofar as the only authority that Ms. Hoover had to act on her mother's behalf as of the date of signing of the Arbitration Agreement was her status as Ms. Faw's health care surrogate, the decisions she could make for her mother were limited to those concerning Ms. Faw's medical condition and corresponding health care. The fact that Ms. Hoover was later appointed her mother's power of attorney is therefore of no moment in these circumstances.

In summary, Greystone was squarely charged with the task of determining the scope of Ms. Hoover's authority to act on Ms. Faw's behalf and with ensuring that its belief in Ms. Hoover's authority was reasonable. Greystone should have known that Ms. Hoover possessed authority only to make health care decisions for Ms. Faw and nothing more. To the extent that Greystone believed that Ms. Hoover's authority extended to the making of other, non-health decisions, its belief was not reasonable, particularly in light of the fact that the subject Arbitration Agreement was not a precondition for Ms. Faw's receipt of services.

Accordingly, the Defendants' Motion to Compel Arbitration must be denied.

WHEREFORE, based upon the aforegoing findings of fact and conclusions of law, it is **ORDERED, ADJUDGED** and **DECREED** that the Defendants' Motion to Compel Arbitration be, and it is hereby **DENIED,** with full exceptions reserved unto these defendants.

ENTER this Order this the 27th day of August, 2020.

JUDGE