

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

Aysha Kines, independent administrator of)	
the estate of Linda Kines, deceased,)	
)	
Plaintiff,)	
)	
v.)	No. 21 L 8438
)	
LaGrange Skilled Nursing Facility, LLC, d/b/a)	
The Grove of LaGrange Park Living & Rehab,)	
The Grove of LaGrange Park, LLC, and Legacy)	
Healthcare Financial Services, LLC,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

Agreements for admission to nursing facilities and for the arbitration of disputes are interpreted and enforced as all other contracts. The admission agreement in this dispute did not incorporate the arbitration agreement and was improperly executed by a party without authority. For those reasons, the defendants' motion to dismiss this case and compel arbitration is denied.

Facts

On November 18, 2016, The Grove of LaGrange Park Living and Rehab ("The Grove") admitted Linda Kines as a resident. Linda presented to The Grove with dissociative and conversion disorder, seizures, convulsions, hemiplegia, cognitive impairment, and a history of falls. LaGrange Skilled Nursing Facility, LLC, The Grove of LaGrange Park, LLC, and Legacy Healthcare Financial Services, LLC, all manage and operate The Grove.

On December 28, 2016, Aysha Kines signed a document titled "Certification for Surrogate Decision-Making for Residents without Qualifying Conditions" on Linda's behalf. The form explains that a physician evaluated Linda and determined her Alzheimer's disease adversely affected her capacity to make decisions regarding her treatment. Additionally, the form provides, "the appointed surrogate can only make decisions affecting the ongoing treatment of the resident."

On January 17, 2017, Aysha executed a "Dispute Resolution Agreement" ("the Agreement") on Linda's behalf. Section one of the Agreement provides:

1. Civil Disputes Subject To This Agreement. To the fullest extent allowed by law, Resident and Facility agree that all civil claims arising in any way out of (1) the separate admissions contract between Facility and Resident under which the Facility agreed to provide Resident with nursing care, incorporated by reference into this Agreement, or (2) any nursing care that Facility, its employees, or agents provide to Resident, shall be resolved exclusively through the Dispute Resolution Procedures described below, except for actions by the Facility to collect money for past-due bills and involuntary discharge actions, which shall not be governed by this Agreement.

Section two of the Agreement is titled "Dispute Resolution Procedures" and states: "All civil disputes between Resident and Facility covered by paragraph 1 above shall be resolved using the procedures stated in this paragraph 2." Section two explains how parties are to meet about a dispute and, if they are unable to resolve the conflict, are to be subject to mandatory mediation. Each party is to pay an equal share of the mediator's fees and costs and pay their own attorney's fees and costs. If mediation is unsuccessful, the parties agree to subsequent binding arbitration. As subsection C provides:

C. Binding Arbitration. If the attempts to mediate the dispute in the manner described in sub-paragraph 2B fail, then Resident and Facility agree to binding arbitration of any such dispute in an arbitration using a JAMS arbitrator in Chicago. To begin arbitration either party shall serve a written Notice of Demand for Arbitration upon each other and JAMS along with a statement of the claim in substantially the same form required for a Complaint under the Illinois Code of Civil Procedure. A single arbitrator shall preside over any arbitration. The arbitrator shall not be the same person who acted as the mediator under the preceding sub-paragraph. The parties shall select the arbitrator utilizing the procedures in JAMS commercial arbitration rules. Except as provided in this sub-paragraph, JAMS commercial arbitration rules shall apply.

Section three, titled "Punitive/Treble Damages Waived," explains the parties will only seek actual damages and that neither party will pursue a claim for punitive damages, treble damages, or any other type of damages to punish a party.

Section four of the Agreement further provides:

4. Other Understandings About Mediation and Arbitration.

A. Resident and Facility agree that either of them may use this Agreement as a reason to ask any court to dismiss any civil action that Resident or Facility bring against each other, except for actions by the Facility to collect unpaid bills for services rendered or to involuntarily discharge the Resident.

B. Resident and Facility agree that the mediation and arbitration procedures described above provide each of them with adequate protection and consideration, and that these mediation and arbitration procedure shall be read in the broadest possible manner so as to compel these mediation and arbitration procedures to the exclusion of filing any civil claims against each other in any federal, state, or local civil court, except for actions by the Facility to collect unpaid bills for services rendered or to involuntarily discharge the Resident. If someone other than the Resident himself or herself signs this Agreement on the Resident's behalf, then such signature is the signer's representation that he or she has all the necessary authority from the Resident to enter into this Agreement, and that the Resident has expressly granted the signer authority to resolve disputes in the manner detailed in this Agreement.

On or about July 11, 2020, Linda suffered a fall and sustained injuries. Linda was transferred to Adventist LaGrange Memorial Hospital for treatment and then was then discharged back to The Grove. On or about October 15, 2020, Linda passed away.

On August 23, 2021, Aysha, as the independent administrator of Linda's estate, filed a complaint against the defendants consisting of three counts under the Nursing Home Care Act and the Survival Act. Count one is against LaGrange Skilled Nursing Facility, LLC, and The Grove. Count two is against The Grove of LaGrange Park, LLC. Count three is against Legacy Healthcare Financial Services, LLC. Aysha alleges the defendants owed Linda a duty of care as a resident of The Grove. Aysha claims the defendants breached this duty by, among other things, failing to: (1) protect Linda from neglect; (2) provide Linda with the necessary services to maintain her well-being; (3) develop and implement appropriate fall-risk interventions; and (4) provide sufficient staffing and supervision.

On November 15, 2021, The Grove of LaGrange Park, LLC, and LaGrange Skilled Nursing Facility, LLC (collectively, the "defendants")

moved to dismiss the case and compel arbitration. The parties fully briefed the motion and provided various exhibits. After briefing had been completed, this court requested a copy of the admissions agreement as part of the record.

Analysis

The defendants bring their motion to dismiss based on this court's alleged lack of jurisdiction as well as being barred by affirmative matter. 735 ILCS 5/2-619(a)(1) & 735 ILCS 5/2-619(a)(9). The defendants' central argument is that the 2017 Dispute Resolution Agreement ("Agreement") is enforceable and requires this court to dismiss the case and compel arbitration.

A section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. See *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. See *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. See *Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). As has been stated: "The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski*, 227 Ill. 2d at 369.

The current dispute lies at the intersection of three areas of law—statutes, arbitration, and contracts. By way of background, the legislature enacted two statutory short form powers of attorney, one for property, 755 ILCS 45/3-1 – 3-5, and one for healthcare, 755 ILCS 45/4-1 – 4-12. The healthcare power of attorney authorizes the designated agent, "to make any and all health care decisions on behalf of the principal," including admission and discharge, "from any and all types of hospitals, institutions, homes, residential or nursing facilities, treatment centers, and other health care institutions. . . ." 755 ILCS 45/4-10(c). The healthcare statute also has an enabling clause giving the agent authority to carry out other powers such that the agent, "may sign and deliver all instruments, negotiate and enter into all agreements and do all other acts reasonably necessary to implement the exercise of the powers granted. . . ." *Id.*

As to the confluence of arbitration and contracts, it is plain that arbitration agreements are contracts, *Carr v. Gateway*, 241 Ill. 2d 15, 20 (2011), and are interpreted in the same way and according to the same rules as other contracts. See *State Farm Fire & Casualty Co. v. Watts Regulator Co.*, 2016 IL App (2d) 160275, ¶ 27 (citing *J & K Cement Construction, Inc. v. Montalbano Builders, Inc.*, 119 Ill. App. 3d 663, 669 (2d Dist. 1983)). As in all

instances, the primary objective in construing a contract is to give effect to the parties' intent. *See Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). Intent is discerned from the contract's language, by giving each provision its plain and ordinary meaning, and by viewing each provision within the context of the entire agreement. *See id.* at 233.

If an arbitration agreement provides that "gateway questions" of arbitrability, enforceability, or unconscionability are to be decided by the arbitrator, a court is to enforce the arbitration agreement as a matter of contract. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69-70 (2010). If, however, a party challenges the arbitration provision's enforceability or validity, a court is to address first the provision's enforceability. *Id.* at 70. As the Illinois Supreme Court recognized, "an arbitration agreement may be invalidated by a state law contract defense of general applicability, such as fraud, duress, or unconscionability, without contravening section 2 [of the Federal Arbitration Act]." *Carter v. SSC Odin Operating Co.*, 2012 IL 113204, ¶ 18 (citing 9 U.S.C. § 1 *et seq.*).

Highly pertinent to contract enforceability is whether the party executing the agreement has actual or apparent authority to do so. Actual agency requires a showing that: "(1) a principal/agent, master/servant, or employer/employee relationship existed; (2) the principal controlled or had the right to control the conduct of the alleged employee or agent; and (3) the alleged conduct of the agent or employee fell within the scope of the agency or employment." *Wilson v. Edward Hosp.*, 2012 IL 112898, ¶ 18; (citing *Oliveira-Brooks v. Re/Max International, Inc.*, 372 Ill. App. 3d 127, 134 (1st Dist. 2007)). In contrast, apparent agency requires a showing that: "(1) the principal or its agent acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the principal; (2) the principal had knowledge of and acquiesced in the acts of the agent; and (3) the [other party] acted in reliance upon the conduct of the principal or its agent, consistent with ordinary care and prudence." *Id.* (citing *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 525 (1993)).

Aysha argues first that the Agreement is invalid because it lacks consideration. Given that regular contract law principles apply, state contract law guides the analysis as to whether the agreement to arbitrate is an enforceable contract. In Illinois, an offer, an acceptance, and consideration are the basic ingredients of a contract. *Steinberg v. Chicago Med. Sch.*, 69 Ill. 2d 320, 329 (1977). "Consideration" is the "bargained-for exchange of promises or performances, and may consist of a promise, an act or a forbearance." *Carter*, 2012 IL 113204, ¶ 23. "Any act or promise which is of benefit to one party or disadvantage to the other is a sufficient

consideration to support a contract.” *Id.* (citing *Steinberg*, 69 Ill. 2d at 330). Contract law does not require the values of consideration exchanged be equivalent, *id.* at ¶ 24; *see also* Restatement (Second) of Contracts, § 79; and courts will not inquire into the adequacy of consideration. *Ryan v. Hamilton*, 205 Ill. 191, 197 (1903). Under Illinois law, a mutual promise to arbitrate is sufficient consideration to support an arbitration agreement. *Aste v. Metro. Life Ins. Co.*, 312 Ill. App. 3d 972, 976 (1st Dist. 2000).

Given these principles, the enforceability of Aysha’s promise to arbitrate rather than litigate her claims depends on whether the defendants suffered a detriment, or Aysha received a benefit, in exchange for that promise. To that end, Aysha relies on *Vassilkovska v. Woodfield Nissan, Inc.*, in which the court found the defendant’s obligation to arbitrate was illusory and unenforceable because the arbitration agreement contained no promise on the defendant’s part to submit claims to arbitration. 358 Ill. App. 3d 20, 29 (1st Dist. 2005). That is not the case here. The Agreement’s plain language requires the parties to submit:

all civil claims arising in any way out of (1) the separate admissions contract between Facility and Resident under which the Facility agreed to provide Resident with nursing care . . . or (2) any nursing care that Facility, its employees, or agents provide to Resident shall be resolved exclusively through the Dispute Resolution Procedures described below, except for actions by the Facility to collect money for past-due bills and involuntary discharge actions.

That language makes it plain the parties mutually agreed to arbitrate any and all civil disputes, except those concerning past due bills or an action for involuntary discharge. The parties also mutually agreed to divide equally the fees and costs associated with mediation and arbitration, and that each party would bear its own costs and attorney fees. The parties further mutually agreed to waive any right to punitive, treble, or any other damages calculated to punish one party. In sum, there is nothing one-sided about the arbitration provisions.

The defendants contend that apart from their own promises to arbitrate, Aysha’s promise to arbitrate is supported by the fact that the defendants have required mediation and arbitration. The defendants assert these means of expeditiously resolving conflict as opposed to the prolonged process of litigation constitute an additional benefit to Aysha. In contrast, Aysha asserts the *Carter* court determined an arbitration agreement between a nursing home and a resident contained consideration based on fee provisions and, in the absence of such provisions, there is no consideration.

That is too narrow a reading of *Carter*. The court did not limit its holding to fee provisions because it found that the “defendant’s promise to pay the arbitrators’ fees; defendant’s promise to pay \$5,000 of [the plaintiff’s] attorney fees and costs in any action against defendant; and [the plaintiff’s] right to choose the location of the arbitration” constituted consideration. *Carter*, 2012 IL 113204, ¶ 2. In this case, non-mutual provisions do not restrict the Agreement and fee provisions are not required; consequently, the Agreement is supported by adequate consideration.

Aysha next argues the arbitration agreement is unenforceable because Aysha was not authorized to sign on Linda’s behalf. In support of her argument, Aysha relies first on *Curto v. Illini Manors, Inc.*, 405 Ill. App. 3d 888 (3d Dist. 2010). In *Curto* the husband had not executed a power of attorney in his wife’s favor; consequently, she lacked actual and apparent authority to bind him to a nursing home’s residency agreement. *Id.* at 895-96. That set of facts contrasts here because Linda’s physicians’ evaluated her condition and Aysha executed the “Certification for Surrogate Decision-Making for Residents without Qualifying Conditions” which expressly gave her the power of healthcare.

Aysha also relies on *Fiala v. Bickford Senior Living Group*, 2015 IL App 141160 (2d Dist. 2015), to support her position that the Agreement is unenforceable. *Fiala* considered whether an agent acting under a statutory short form power of attorney for healthcare could sign a binding arbitration clause as part of admission to a long-term care facility. *Id.* at ¶ 7. The plaintiff’s daughter executed on her father’s behalf a residency agreement containing a mandatory arbitration provision. *Id.* The court found the daughter had the authority to bind her father because choosing to live in the facility was a healthcare decision. *Id.* at ¶¶ 40-44. Moreover, the arbitration provision was neither optional nor freestanding, but integral to the father’s admission. *Id.* The *Fiala* court also looked to cases from other jurisdictions where courts had refused to enforce arbitration agreements in the opposite situation. In other words, if the arbitration provision was optional or unnecessary for admission to a nursing facility, “the agent acting pursuant to a health-care power of attorney is not authorized to sign the arbitration provision and the patient cannot be bound by the agent’s action.” *Id.* at ¶ 45 (citing *Dickerson v. Longoria*, 414 Md. 419 (2010); *Life Care Ctrs. of Am. v. Smith*, 298 Ga. App. 739 (2009); *Koricic v. Beverley Enters.—Neb., Inc.*, 278 Neb. 713 (2009)). In contrast to *Fiala*, the admission agreement did not contain an incorporation clause governing the Agreement. In other words, the Agreement stood alone. That set of facts makes plain that, although Aysha may have had the authority to execute the admission agreement because it fell within her healthcare powers, she had no authority to execute the arbitration agreement because it was beyond her healthcare powers.

The defendants argue further that, if Aysha did not have actual authority to execute the agreement, she necessarily had apparent authority to execute it. The defendants base this argument on a clause in the Agreement providing:

if someone other than the Resident himself or herself signs the Agreement on the Resident's behalf, then such signature is the signer's representation that he or she has all necessary authority from the Resident to enter into this Agreement and that the Resident has expressly granted the signer authority to resolve disputes in the manner detailed in this Agreement. . . .

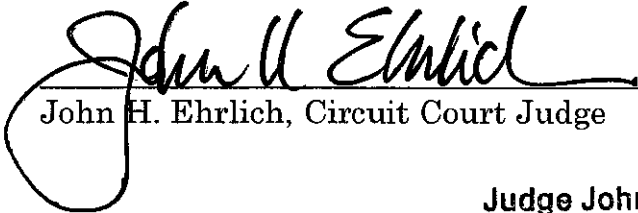
The defendants' argument is self-defeating. Even if this provision were otherwise valid, Aysha could not have had even apparent authority to execute the Agreement because she did not have authority to make decisions beyond those for healthcare. Further, there is nothing to suggest that, apart from the provision above, Linda or Aysha acted in a way that would have led The Grove to conclude Aysha had authority to execute the agreement. Finally, there is nothing to suggest Linda had any knowledge of or acquiesced in Aysha's act of executing the arbitration agreement. In short, even if the provision were valid, two of the elements necessary for apparent agency are missing.

□

Conclusion

For the reasons presented above, it is ordered that:

The defendants' motion to dismiss and compel arbitration is denied.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

MAR 17 2022

Circuit Court 2075