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

Constance Krebs, as the independent administrator of the estate of Ronald Krebs, deceased,	)	
Plaintiff,	)	
v.	)	20 L 8985
Alden Gardens of Waterford, Inc., a domestic corporation, Alden of Waterford Investments, L.L.C., a domestic corporation, and Alden of Waterford, L.L.C., a domestic corporation,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Arbitration agreements that are procedurally or substantively unconscionable are unenforceable. Arbitration agreements are also unenforceable as a matter of law against Wrongful Death Act causes of action. Here, the plaintiff has failed to present affirmative matter establishing that the arbitration agreement executed by the decedent is unconscionable as to Nursing Home Care Act causes of action. The agreement is, however, unenforceable against Wrongful Death Act causes of action. For these reasons, the defendants' motion to dismiss is granted, in part, and denied, in part.

Facts

On October 26, 2018, Ronald Krebs fell and injured himself while at home in his family's care. On October 31, 2018, Ronald became a resident of Alden of Waterford, an Aurora, Illinois nursing home care facility owned and operated by Alden Gardens of Waterford, L.L.C. At the time of his admission, Ronald executed an arbitration agreement co-

signed by Alexia Goblet on Alden's behalf. The arbitration agreement provides in various parts that:

> Any legal controversy, dispute, disagreement or claim of any kind now existing or occurring in the future between the parties arising out of or in any way relating to this Agreement or any occurrence related to the Resident Agreement or the Resident's stay at the Facility shall be settled by binding arbitration, including, but not limited to, all claims based on breach of contract, negligence, medical malpractice, tort, breach of statutory duty, resident's rights, any departures from accepted standards of care, and all disputes regarding the scope, enforceability and/or interpretation of this Agreement, allegations of fraud in the inducement or requests for rescission of this Agreement.
>
> If the parties are unable to resolve the dispute informally, BOTH PARTIES AGREE TO WAIVE THEIR RIGHT TO JURY TRIAL AND AGREE TO HAVE THE MATTER RESOLVED BY BINDING ARBITRATION BEFORE AN ARBITRATOR AS DESCRIBED IN THIS AGREEMENT. . . .
>
> Signing this Agreement is not a condition of admission, and that care and treatment will be provided whether or not Resident signs this Agreement.

While at Waterford, Ronald fell, and his injuries caused or contributed to his death.

On August 21, 2020, Constance Krebs, the independent administrator of Ronald's estate, filed a six-count complaint against the defendants. Counts one, three, and five are directed against the various Alden entities pursuant to the Illinois Nursing Home Care Act. 210 ILCS 45/1-101, *et. seq.* Counts two, four, and six are directed against the same defendants, respectively, pursuant to the Wrongful Death Act. 740 ILCS 180/1, *et. seq.* On December 16, 2020, the Alden defendants filed a motion to dismiss the complaint in its entirety and compel

enforcement of the arbitration agreement. The parties subsequently filed their response and reply briefs.

Analysis

The Alden defendants seek to dismiss the complaint based on Ronald's agreement to settle by binding arbitration any disputes related to his stay at Alden. A motion to compel arbitration and dismiss a lawsuit is similar to a section 2-619(a)(9) motion authorizing dismissal if the claim is barred by affirmative matter. *Griffith v. Wilmette Harbor Ass'n*, 378 Ill. App. 3d 173, 179-80 (1st Dist. 2007); 735 ILCS 5/2-619(a)(9). "Affirmative matter" includes any defense other than the negation of a cause of action's essential allegations. *Travis v. American Mfgs. Mut. Ins. Co.*, 335 Ill. App. 3d 1171, 1174 (5th Dist. 2002). Since a motion to compel arbitration and dismiss is based on an exclusive remedy of arbitration, the motion is, essentially, a section 2-619(a)(9) motion. *Id.* "Such a motion admits the legal sufficiency of the plaintiff's complaint but interposes some affirmative matter that prevents the lawsuit from going forward." *Id.*

Section two of Federal Arbitration Act makes a trial court's decision to compel arbitration non-discretionary. *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135, 142 (2006); *Griffith*, 378 Ill. App. 3d at 180; 9 U.S.C. § 2. Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements" and "to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Section 2 provides an arbitration contract "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. §2 (emphasis added).

Under state law, Illinois recognizes 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 & Cas. Co. v. Watts Regulator Co.*, 2016 IL App (2d) 160275, ¶ 27 (citing *J & K Cement Constr., 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 questions of arbitrability, enforceability, or unconscionability are to be decided by an arbitrator, a court is to enforce those provisions as 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.*).

In this case, Constance argues that the arbitration agreement is unenforceable because it is procedurally unconscionable. The Illinois Supreme Court has defined procedural unconscionability as:

> 'some impropriety during the process of forming the contract depriving a party of a meaningful choice.
>
> Factors to be considered are all the circumstances surrounding the transaction including the manner in which the contract was entered into, whether each party had a reasonable opportunity to understand the terms of the contract, and whether important terms were hidden in a maze of fine print; both the conspicuousness of the clause and the negotiations relating to it are important, albeit not conclusive factors in determining the issue of unconscionability.'

Kinkel v. Cingular Wireless, LLC, 223 Ill. 2d 1, 23 (quoting *Frank's Maint. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 989-90 (1st Dist. 1980) (citations omitted).

Constance argues that Ronald did not have a meaningful choice in signing the agreement because Goblet never told Ronald that he did not

have to sign the agreement to be admitted. According to Constance, it is reasonable to believe that Ronald felt obligated to sign the agreement. Constance also argues that Ronald was a merely an individual faced with a prepared, non-negotiable agreement, proving his lack of bargaining power. Finally, Constance argues that Ronald could not be expected to understand the legal jargon contained in the agreement.

Constance's arguments are based on conjecture, not facts. Goblet may have never explained that Ronald did not have to sign the agreement to be admitted, but Goblet explained in her deposition that she read the agreement to Ronald, and it makes plain that admission was not contingent on executing the arbitration agreement. Further, there is nothing in the record to support the argument that Ronald must have felt obligated to sign the agreement. There is also nothing to suggest that Ronald did not have the opportunity to review the agreement or that he did not understand its terms.

Separately, there is nothing in the record suggesting that the arbitration agreement lacked consideration. "'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 (quoting *McInerney v. Charter Golf, Inc.*, 176 Ill. 2d 482, 487, (1997)). "'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.* (quoting *Steinberg v. Chicago Med. Sch.*, 69 Ill. 2d 320, 330 (1977)). The values exchanged do not need to be equivalent. *Id.* ¶ 24.

The plain language of the arbitration agreement in this case shows that nearly all provisions were mutual and burdened or benefited each party equally. The parties mutually agreed that all disputes would be subject to arbitration except payments due to Alden, and Alden agreed to pay the first $2,000 of costs, with the remainder split evenly between the parties. The agreement did not cap any potential arbitration award. In short, there is nothing one-sided about the arbitration agreement and it was supported by adequate consideration.

Constance also argues that the arbitration agreement is substantively unconscionable. As the Illinois Supreme Court has explained:

> 'Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed. Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity.'

Kinkel, 223 Ill. 2d at 28 (citations omitted) (quoting *Maxwell v. Fidelity Fin. Servs., Inc.*, 184 Ariz. 82, 89 (1995)).

Constance argues that the arbitration agreement is substantively unconscionable because it creates a dual standard: all of Ronald's potential claims had to be arbitrated, while Alden's potential claims of non-payment would go to court. Since the only claims Alden would likely have against Ronald would be financial, the agreement imposed on him an unequal and unacceptable burden. Constance's argument is, in fact, based on a misreading of the agreement. The agreement provides that payments owed to Alden are to be adjudicated in a court *or by arbitration*, if mutually agreed to by the parties. Thus, the agreement is not so one-sided or oppressive that it would exclude Ronald from arbitrating a rent or other financial dispute.

Finally, Constance argues that the arbitration agreement cannot apply to her Wrongful Death Act causes of action. The *Carter* court undertook a detailed analysis of the Wrongful Death Act and whether a cause of action pursuant to the statute is an asset of the deceased's estate. 2012 IL 113204, ¶¶ 30-41. The court scrutinized the statute and its legislative history and determined that,

> [t]he language in section 2.1 of the Wrongful Death Act, and the language in the statute as a whole, does not evince an intent by the legislature to treat a wrongful-death action as an asset of the deceased's estate for the purpose defendant

> urges, *i.e.*, to allow the deceased to control the forum and manner in which a wrongful-death claim—in which the deceased has no interest—is determined.

Id. ¶ 44. The court ultimately concluded that a wrongful-death action is not an asset of the deceased's estate that was subject to an arbitration provision. *Id.* ¶ 46. Given that holding, Constance's Wrongful Death Act causes of action are not subject to arbitration.

Conclusion

For the reasons presented above, it is ordered that:

1. Alden's motion to dismiss is granted, in part, and denied, in part;
2. The motion to dismiss is granted as to counts one, three, and five, and those causes of action are subject to arbitration; and
3. The motion to dismiss is denied as to counts two, four, and six.

John H. Ehrlich

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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