

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

Conswalo James, as independent administrator )  
of the estate of Alberta Hunt, deceased, )  
 )  
Plaintiff, )

v. )

No. 20 L 13273

The Ingalls Memorial Hospital, an Illinois )  
corporation, d/b/a/ UChicago Medicine Ingalls )  
Memorial Hospital; UCM Community Health & )  
Hospital Division, Inc., an Illinois corporation, )  
d/b/a Ingalls Health System; the University of )  
Chicago Medical Center, an Illinois corporation, )  
d/b/a/ Ingalls Memorial Hospital; Romuald )  
Warakomski, D.O., individually and as actual or )  
apparent agent of the Ingalls Memorial Hospital )  
and/or UM Community Health & Hospital )  
Division, Inc. and/or the University of Chicago )  
Medical Center; Manor Care of Homewood IL, )  
LLC, a Delaware LLC, d/b/a Manorcare Health )  
Services-Homewood; Andrew Ow, M.D., )  
individually and as actual or apparent agent of )  
Manor Care of Homewood IL, LLC, )  
 )  
Defendants. )

**MEMORANDUM OPINION AND ORDER**

The Illinois Administrative Code requires a nursing facility to execute a residency agreement with each person admitted to the facility. Here, the defendant nursing facility failed to execute an arbitration agreement that merged into the residency agreement, raising a question as to the arbitration agreement's enforceability. It is also plain that Wrongful Death Act causes of action brought by a decedent's heirs are not subject to arbitration.

For those reasons, the defendant's motion to dismiss the complaint and order mandatory arbitration is denied.

### Facts

On December 14, 2018, Ingalls Memorial Hospital admitted Alberta Hunt through the emergency department for a fractured right hip. The next day, doctors performed an open reduction and internal fixation of Hunt's hip. Following the surgery, Hunt developed pressure ulcers. On January 3, 2019, Ingalls discharged Hunt, and she was transferred to Manor Care of Homewood, a skilled nursing center.

On January 7, 2019, Alberta Hunt executed a voluntary arbitration agreement and admission agreement with Manorcare Health Services—Homewood. The arbitration agreement contains several key provisions that:

- the parties waive their rights to a jury trial;
- any disputes between them will be resolved exclusively through binding arbitration;
- a demand for arbitration is initiated by sending a written demand to the other party;
- upon execution, the arbitration agreement merges into the admission agreement; and
- the resident has 30 days to cancel the arbitration agreement.

Hunt remained a resident at Manor Care until January 25, 2019, during which time she continued to suffer from the hospital-acquired skin ulcerations that had become infected on her toes, feet, ankles, and buttocks. The record is unclear where Hunt went after January 25, 2019. On March 27, 2019, Hunt died.

On December 14, 2020, Conswalo James, the independent administrator of Hunt's estate, filed suit against various defendants, including Manor Care. Counts five and six are directed against Manor Care pursuant to the Survival Act and the

Wrongful Death Act, respectively. Both causes of action claim that the Manor Care through its physician and nursing staff breached various duties of care, including failing to assess and monitor Hunt's condition properly and begin treatment of her skin ulcerations in a timely fashion.

On July 2, 2021, Manor Care filed a motion to dismiss the complaint and compel binding arbitration of the parties' dispute. Manor Care's motion presents a straightforward argument that the arbitration agreement is binding on the parties and should be enforced. On August 4, 2021, James filed a response brief raising three arguments. First, James argues that the arbitration agreement is unenforceable because no one from Manor Care executed the arbitration agreement. Second, James argues that the affidavit Manor Care attached as an exhibit to its motion must be stricken for failing to attach a certified or sworn copy of the arbitration agreement as required by Illinois Supreme Court Rule 191(a). Third, James argues that he cannot be compelled to arbitrate the complaint's Wrongful Death Act claims.

### Analysis

A motion to compel arbitration and dismiss a lawsuit is similar to a section 2-619(a)(9) motion authorizing dismissal if affirmative matter bars the claim. *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 with all contracts, the primary objective in construing one 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, giving each provision its plain and ordinary meaning, and 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 those issues first. *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, James argues the arbitration agreement is unenforceable because it is substantively unconscionable.

Substantive unconscionability exists if a contract's terms are against public policy, or are one-sided or oppressive. *In re Marriage of Callahan*, 2013 IL App (1st) 113751, ¶ 20. An agreement violates public policy if its enforcement would run contrary to the public interest. *Phoenix Ins. Co. v. Rosen*, 242 Ill. 2d 48, 55 (2011) (quoting *In re Estate of Feinberg*, 235 Ill. 2d 256, 265-66 (2009)). Substantive unconscionability requires a court to analyze whether a contract is “so unfair that the court cannot enforce it consistent with the interests of justice.” *Phoenix Ins.*, 242 Ill. 2d at 60.

James argues that the arbitration agreement here is substantively unconscionable because public policy required Manor Care to execute the agreement. The Illinois Administrative Code explicitly provides that:

Section 300.630 Contract Between Resident and Facility

a) Contract Execution

1) Before a person is admitted to a facility, or at the expiration of the period of previous contract, or when the source of payment for the resident's care changes from private to public funds or from public to private funds, a written contract shall be executed between a licensee and the following in order of priority:

A) The person. . . .

77 Ill. Admin. Code § 300.630(a). Since an administrative agency is a “creature of statute,” an agency's rules and regulations constitute public policy. *See Prazen v. Shoop*, 2013 IL 115035, ¶ 36.

It is uncontested that a Manor Care representative did not execute the arbitration agreement that Hunt unilaterally signed. Even if the lack of the licensee's signature can be overcome through other contract enforcement defenses, such arguments would require an evidentiary record that is currently unavailable. For example, there remains a question of fact and law as to

whether a unilaterally executed arbitration agreement can merge into a residency agreement and be binding on the resident. That issue was not addressed by either side. Further, in its reply brief, Manor Care argues that it indicated its acceptance of the arbitration agreement by complying with its provisions. Examples of that compliance are, however, currently not of record.

James argues separately that the arbitration agreement cannot apply to his Wrongful Death Act causes of action. The court in *Carter* undertook a detailed analysis of the Wrongful Death Act to determine whether a cause of action pursuant to the statute is an asset of the decedants'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 is subject to an arbitration provision. *Id.* ¶ 46. Given that holding, James' Wrongful Death Act cause of action cannot be subject to arbitration.

Given the conclusions reached above, it is unnecessary to consider the validity of Manor Care's affidavit.

### Conclusion

For the reasons presented above, it is ordered that:

1. Manor Care's motion to dismiss based on the enforceability of the arbitration agreement is denied without prejudice;
2. Manor Care's motion to dismiss based on the arbitrability of to the Wrongful Death Act claim is denied with prejudice; and
3. Manor Care has until October 11, 2021 to answer the complaint.

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John H. Ehrlich, Circuit Court Judge