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

Cheryl Parker, as independent administrator of the estate of Mae Jefferson, deceased,	)	
Plaintiff,	)	
v.	)	No. 21 L 1995
Symphony of Evanston Healthcare, LLC, an Illinois limited corporation d/b/a Symphony of Evanston, and Maestro Consulting Services, LLC, an Illinois limited liability corporation,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Agreements for admission to a nursing facility and the arbitration of disputes are interpreted and enforced as all other contracts. The agreements at issue in this dispute were properly drafted and executed by parties with authority. For those reasons, the defendants' motion to dismiss various counts of the complaint is granted while other counts are stayed pending the outcome of arbitration.

Facts

On May 20, 2005, Mae Jefferson executed an Illinois statutory short form power of attorney for health care appointing her daughter, Kathy Jefferson, as Mae's attorney in fact. The power of attorney became effective the same day. On September 17, 2017, Mae became a resident of Symphony of Evanston. On October 16, 2017, Kathy and a Symphony representative executed an admission agreement for Mae's residency at Symphony. Section G of the admission agreement is entitled, "Arbitration Agreement," and states: "The Resident and Facility have entered into a separate Health Care Arbitration Agreement in connection with this Contract and expressly affirm and state that said Health Care Arbitration Agreement be incorporated into this document as though stated and contained herein."

On the same day, Kathy and a Symphony representative executed a health care arbitration agreement. The first recital to the arbitration agreement plainly states that:

(A) This health care arbitration agreement is not a condition to the rendering of health care services by any party. . . .

Section one of the arbitration agreement provides that:

> In the event of any claim arising out of (1) any dispute between you and us, (2) any dispute relating to services rendered for any condition, (3) injuries alleged to have been received by patient, (3) death of patient, due to health care provider negligence or other wrongful act, but not including intentional torts, (4) services rendered for any condition and arising out of the diagnosis, treatment or care of patient, and (5) collection proceedings in excess of $50,000.00, the claim will be submitted to binding arbitration pursuant to the provisions of this health care arbitration agreement.

Section three of the arbitration agreement provides:

> In consideration for the execution of this agreement Facility agrees to pay up to $5,000.00 of Resident's arbitration costs, attorney's fees and out-of-pocket expenses. Resident further waives any and all right to the collection of Statutory Attorney's Fees, included but not limited to those provided for in the Illinois Nursing Home Care Act, associated with said action. All remaining expenses of the Arbitrators' will be apportioned equally among all parties to this agreement. All remaining costs and fees associated with prosecuting and defending said claim shall be borne by each party.

Section seven of the agreement further provides that:

> This agreement binds all parties, including, without limitation, any spouse or heirs of the Resident, any children, born or unborn, at the time of the occurrence giving rise to the claim, whose claims arise out of (1) injuries alleged to have been received by patient, (2) death of patient, due to health care provider negligence or other wrongful act, but not including intentional torts, (3) services rendered for any condition and arising out of the diagnosis, treatment or care of patient.

The following statements appear above the signature block:

> YOU CANNOT BE REQUIRED TO SIGN THIS AGREEMENT IN ORDER TO RECEIVE TREATMENT. BY SIGNING THIS AGREEMENT, YOUR RIGHT TO TRIAL BY A JURY OR A

JUDGE IN A COURT WILL BE BARRED AS TO ANY DISPUTE RELATING TO INJURIES THAT MAY RESULT FROM NEGLIGENCE DURING YOUR TREATMENT OR CARE, AND WILL BE REPLACED BY AN ARBITRATION PROCEDURE.

THIS AGREEMENT PROVIDES THAT ANY CLAIMS WHICH MAY ARISE OUT OF YOUR HEALTH CARE WILL BE SUBMITTED TO A PANEL OF ARBITRATORS, RATHER THAN TO A COURT FOR DETERMINATION. THIS AGREEMENT REQUIRES ALL PARTIES SIGNING IT TO ABIDE BY THE DECISION OF THE ARBITRATION PANEL.

On June 9, 2019, Symphony care providers noted that Mae had developed a sacral pressure wound. Over the next several months, other notes indicated Mae had developed pressure wounds on her left ear, left clavicle, and left mandible. Mae left Symphony of Evanston on March 11, 2019. On August 26, 2019, Northshore Evanston Hospital admitted Mae for hypernatremia, and physicians there performed a debridement of her sacral pressure wound. On October 13, 2019, Cheryl Parker became the successor agent for Mae, replacing Kathy as Mae's attorney in fact. On January 4, 2020, Mae died.

In 2019, the Department of Health and Human Services, Center for Medicare and Medicaid Services, implemented a rule relating to the administration and enforcement of arbitration agreements as they relate to nursing home admission agreements. The rule provides:

> ***Binding arbitration agreements.*** If a facility chooses to ask a resident or his or her representative to enter into an agreement for binding arbitration, the facility must comply with all of the requirements in this section.
> (1) The facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility and must explicitly inform the resident or his or her representative of his or her right not to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility.
> (2) The facility must ensure that:
> (i) The agreement is explained to the resident and his or her representative in a form and manner that he or she understands, including in a language the resident and his or her representative understands;

(ii) The resident or his or her representative acknowledges that he or she understands the agreement;

(iii) The agreement provides for the selection of a neutral arbitrator agreed upon by both parties; and

(iv) The agreement provides for the selection of a venue that is convenient to both parties.

(3) The agreement must explicitly grant the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it.

(4) The agreement must explicitly state that neither the resident nor his or her representative is required to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility.

(5) The agreement may not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials, including but not limited to, federal and state surveyors, other federal or state health department employees, and representatives of the Office of the State Long-Term Care Ombudsman, in accordance with § 483.10(k).

(6) When the facility and a resident resolve a dispute through arbitration, a copy of the signed agreement for binding arbitration and the arbitrator's final decision must be retained by the facility for 5 years after the resolution of that dispute on and be available for inspection upon request by CMS or its designee.

42 C.F.R. § 483.70(n)(1)-(6).

On February 22, 2021, Parker, as administrator of Mae's estate, filed a complaint against the defendants. Counts one, two, and three are directed against Symphony under the Nursing Home Care Act and the Survival Act, common-law negligence and the Survival Act, and common-law negligence and the Wrongful Death Act, respectively. Parker alleges Symphony owed her a duty of care as a Symphony resident and Symphony breached its duty by, among other things, failing to: protect Mae from neglect; provide necessary services to maintain her well-being; implement appropriate pressure sore interventions; perform and document daily skin assessments; notify Mae's physician and family regarding changes in her condition; provide restorative and rehabilitative nursing measures; supervise and monitor Mae; train individuals who provided care; and maintain sufficient nursing staff. Counts four is directed against Maestro Consulting Services under common-law negligence and the Survival Act while count five is directed against Maestro under common-law negligence and the Wrongful Death Act. Parker alleges Maestro owed Mae a duty to use the skill and care ordinarily used by a management company in Maestro's operation and management of

Symphony. Parker claims Maestro breached its duty by, among other things, failing to: allocate sufficient resources to staff Symphony adequately; allocate sufficient resources to provide necessary medical supplies; hire trained nurses and other care provides; and allocate funds appropriately.

On June 10, 2021, the defendants filed a motion to dismiss. The parties then conducted limited discovery before Parker filed her response brief. On November 11, 2021, Kathy signed an affidavit averring that she does not have an independent recollection of signing the admission agreement on October 16, 2017. She believes she held a medical power of attorney but not a power of attorney for property. Kathy avers that Mae did not direct Kathy to sign the arbitration agreement and Mae did not adopt Kathy's signature as her own. She further avers she was unaware that signing the arbitration agreement would waive Mae's right to a trial by jury and attorney's fees. She avers that no one explained the arbitration agreement to her and, if they had, she would not have signed it. The defendants subsequently filed a reply.

Analysis

The defendants bring their motion to dismiss based on this court's alleged lack of jurisdiction. 735 ILCS 5/2-619(a)(1). They argue the 2017 arbitration agreement is enforceable and compels Parker's Nursing Home Care Act and Survival Act causes of action against Symphony—counts one, two, and four—be arbitrated rather than adjudicated. They also request that counts three and five against Maestro—brought under the Wrongful Death Act—be stayed pending the outcome of the 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.*).

Parker argues first that Kathy lacked actual or apparent authority to execute the arbitration agreement on Mae's behalf. This argument is problematic for two reasons. First, Parker is effectively seeking to rescind a contract on which Kathy and Mae relied and, thereby, denying the defendants the benefit of their contractual bargain. Had the arbitration agreement been invalid *ab initio*, it did not take the defendants' alleged negligent conduct to make it so. Second, Parker improperly conflates the discrete issues of agency and substantive unconscionability; the former addresses an agent's authority, the latter, an agreement's contents. More on that later, but in the meantime, there is nothing in the record suggesting Kathy was not Mae's actual agent for health care as of May 20, 2005.

Parker next challenges the arbitration agreement as procedurally unconscionable. Illinois courts have likened procedural unconscionability "to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it. . . ." *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 22 (2006) (quoting *Razor v. Hyundai Motor Am.*, 222 Ill. 2d 75, 100 (2006) and citing *Frank's Maintenance & Eng., Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 989 (1st Dist. 1980)). A court is to consider all circumstances surrounding the transaction, including the manner in which the contract was entered into, if each party had a reasonable opportunity to understand the terms of the contract, and whether important terms were hidden in the fine print. *Frank's*, 86 Ill. App. 3d at 990.

The record establishes that the arbitration agreement is not procedurally unconscionable. The arbitration provision contained in section one is easy to find, plainly written, and appears in normal-sized font. The same is true for the limitation of attorney's fees in section seven. Further, the two paragraphs above the signature block make plain, in large-font, all-capital letters that Kathy was on notice the agreement eliminated the adjudication of any claim she might have under the agreement in favor of arbitration. There is simply nothing hidden, difficult to read, or understand. Also of note is that Kathy did not execute the agreement until October 16, 2017, one month after Mae became a Symphony resident. Kathy certainly had time to consider the agreement in the interim and contact legal and non-legal counsel had she wished. The delay in time certainly eliminates any suggestion of duress.

Parker further argues the arbitration agreement is substantively unconscionable for two reasons. First, she says the agreement violates public policy because the agreement limits the amount of attorney's fees Parker may receive in arbitration. Indeed, section seven explicitly provides that Symphony will pay up to $5,000 in arbitration costs and attorney's fees, with the remainder divided equally between the parties. Second, Parker argues that, based on Kathy's affidavit attached to the response brief, she was unaware of the arbitration agreement's contents and did not understand them when she executed the agreement in 2017.

Parker's arguments have little legal grounding. Although courts have found an agreement substantively unconscionable if its terms are "inordinately one-sided in one party's favor," *Razor*, 222 Ill. 2d at 100, "the usual maxim of contract law [is] that a party to an agreement is charged with knowledge of and assent to the agreement signed." *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135, 150 (2006) (citing *Black v. Wabash, St. Louis &*

Pacific Ry. Co., 111 Ill. 351, 358 (1884), and *Hintz v. Lazarus*, 58 Ill. App. 3d 64, 66 (2d Dist. 1978)). Further, a party who is given an opportunity "to read a contract before signing, but signs before reading, cannot later plead lack of understanding." *Breckenridge v. Cambridge Homes*, 246 Ill. App. 3d 810, 819 (2d Dist. 1993) (citing *State Bank v. Sorenson*, 167 Ill. App. 3d 674, 681 (2d Dist. 1988)).

Apart from the legal limits to Parker's argument are the contractual limits contained in the arbitration agreement. If Parker is correct that Kathy did not understand the agreement before she signed and, therefore, it is not enforceable, that is a "dispute between you and us" as defined in section one of the arbitration agreement. In other words, whether the agreement is enforceable is, itself, a gateway question subject to arbitration.

Parker next argues the arbitration agreement is unenforceable because Kathy was not authorized to sign on Mae's behalf. In support of her argument, Parker 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 markedly here because Mae affirmatively appointed Kathy as Mae's attorney in fact. *Curto* is, therefore, of no import.

Parker also mistakenly relies on *Fiala*. *Fiala v. Bickford Senior Living Group*, 2015 IL App 141160 (2d Dist. 2015). *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 signed on her father's behalf a residency contract containing a mandatory arbitration provision. *Id.* The court found the daughter had authority to bind her father because deciding to live in the facility was a healthcare decision, and the arbitration provision was neither optional nor freestanding, but integral to the father's admission. *Id.* at ¶¶ 40-44. *Fiala* relied on cases from other states in which courts 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, in which case, "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 Enterprises—Neb., Inc.*, 278 Neb. 713 (2009)).

Despite Parker's arguments, both the arbitration and admission agreements at issue here fully comport with *Fiala*'s holding. The arbitration

agreement Kathy executed states in the first recital that: "This health care arbitration agreement is not a condition to the rendering of health care services by any party. . . ." Similarly, the first sentence in the two paragraphs above the arbitration agreement's signature block provides: "YOU CANNOT BE REQUIRED TO SIGN THIS AGREEMENT IN ORDER TO RECEIVE TREATMENT." Both sentences make plain that treatment is not contingent on signing the arbitration agreement. Also in alignment with *Fiala* is the admission agreement providing in section G that: "The Resident and Facility have entered into a separate Health Care Arbitration Agreement in connection with this Contract and expressly affirm and state that said Health Care Arbitration Agreement *be incorporated into this document as though stated and contained herein.*" (Emphasis added). To accept Parker's argument that the arbitration agreement is wholly independent of the admission agreement is to misread the latter's plain language. In short, the arbitration agreement is part of the admission agreement.

This conclusion is significant because it also tracks an operative federal rule post-dating *Fiala*. In 2019, the Department of Health and Human Services, Center for Medicare and Medicaid Services, issued a rule providing that:

> The facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility and must explicitly inform the resident or his or her representative of his or her right not to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility.

42 CFR § 483.70(n)(1). As noted immediately above, neither the admission agreement nor the arbitration agreement makes admission or the receipt of care contingent on the parties executing the arbitration agreement. In sum, the agreements comport with the federal rule.

Finally, Parker argues the admission and arbitration agreements do not bind Maestro Consulting since it was not a party to them. The defendants argue that language on page 13 of the admission agreement indicates it applies to Symphony as well as related persons and entities, including affiliates and subsidiary companies. The admission agreement contains no such language, but the arbitration agreement's introductory paragraph defines "facility" to include "the particular facility where the Resident resides, its parents, affiliates, and subsidiary companies. . . ." The defendants posit that Maestro is an affiliate company with respect to

Symphony, a fact acknowledged by Parker, who would not have named Maestro as a defendant if the opposite were true.

Resolution lies with Parker's complaint. Count four, paragraph five of the complaint alleges that, "[a]t all times relevant to this Complaint, Defendant, Maestro Consulting Services, LLC, an Illinois Limited Liability Corporation, owned, operated, and/or managed the long-term care facility commonly known as Symphony Of Evanston." Parker is, therefore, bound by her own allegations acknowledging the relationship between Maestro and Symphony; therefore, the arbitration agreement applies to Maestro as well as Symphony.

Finally, it is well settled that arbitration agreements do not bind a decedent's beneficiaries who bring Wrongful Death Act claims. As explained:

> [A] wrongful-death action does not accrue until death and is not brought for the benefit of the decedent's estate, but for the next of kin who are the true parties in interest. . . . Plaintiff is not prosecuting the wrongful-death claim on behalf of [the decedent], and thus plaintiff is not bound by [the decedent's] agreement to arbitrate for purposes of this cause of action.

Carter, 2012 IL 113204, ¶ 57. This court acknowledges that the parties agree the arbitration agreement does not apply to Parker's causes of action under the Wrongful Death Act.

Conclusion

For the reasons presented above, it is ordered that:

1. The defendants' motion to dismiss is granted;
2. Counts one, two, and four are dismissed and are to be submitted for arbitration pursuant to the parties' agreements; and
3. Counts three and five are stayed pending resolution of the arbitration proceeding.

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John H. Ehrlich, Circuit Court Judge