

COPY

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

FRANK KORCIC, as trustee for the)
 heirs and next-of-kin of MANDA BAKER,)
)
 Plaintiffs,)
)
 vs.)
)
 BEVERLY ENTERPRISES-NEBRASKA,)
 INC. formerly d/b/a BEVERLY)
 HALLMARK; BEVERLY HEALTH &)
 REHABILITATION SERVICES, INC. and)
 BEVERLY ENTERPRISES, INC.,)
)
 Defendants.)

DOC. 1078 NO. 047

**ORDER GRANTING
DEFENDANTS' MOTION
TO STAY AND COMPEL
ARBITRATION**

This matter came on for consideration on Defendant's Motion to Dismiss or in the Alternative a Motion to Stay and Compel Arbitration filed January 23, 2008. A hearing was held on September 30, 2008. The Plaintiffs appeared through counsel, Richard Hitz and Drake Martin; the Defendants appeared through counsel, Jeanelle Lust. The Court received exhibits 1-6. The Court also reviewed Defendants' Brief in Support of Motion to Dismiss and Plaintiff's Response to Motion to Dismiss and/or Compel Arbitration. After having considered the evidence, the legal briefs submitted and other legal authorities, the Court now finds as follows:

1. On or about November 7, 2005, the Plaintiff signed a Resident and Facility Arbitration Agreement in favor of the Defendants (Ex. 1). The Arbitration Agreement provided that "any and all claims, disputes, and controversies arising out of, or in connection with, or relating in any to the Admission Agreement or any service or health care provided by the Facility to the Resident [Manda Baker] shall be resolved exclusively by binding arbitration... and not by a lawsuit or resort to court process. This

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agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections.”

2. On or about December 14, 2007, the Plaintiff filed a Complaint against the Defendants alleging negligence, breach of contract and breach of fiduciary duty.

3. All of the Complaint’s allegations would fall within the Arbitration Agreement if such Agreement was found to be valid and enforceable.

4. The Plaintiff contends that the Arbitration Agreement is void and unenforceable because it is unconscionable and that the Plaintiff did not have the actual or apparent authority to sign the Arbitration Agreement on behalf of his mother, Manda Baker. Plaintiff further contends that the Arbitration Agreement was not explained to him by the Defendants and that he did no read it before he signed the Arbitration Agreement.

5. The Defendants contend that the Arbitration Agreement is valid and enforceable because the Plaintiff had the actual authority to sign the document on Ms. Baker’s behalf.

6. An agency is a fiduciary relationship, resulting from one person’s manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and, further, resulting from another’s consent to so act. Oddo v. Speedway Scaffold Co., 233 Neb. 1, 6 (Neb. 1989).

7. In the relationship of principal agent, an agent’s actual authority is the power to act on the principal’s behalf in accordance with the principal’s consent to the agency. Oddo v. Speedway Scaffold Co., 233 Neb. 1, 6-7 (Neb. 1989).

8. In the instant case, a review of Plaintiff's testimony shows that he had the actual authority to sign documents on Ms. Baker's behalf. The Plaintiff began to sign medical documents on behalf of Ms. Baker around 1998 (18:23-20:1). The Plaintiff would discuss treatment with Ms. Baker before signing any documents and Ms. Baker would usually agree with him (21:19-22:5). With regard to signing documents the Plaintiff specifically testified:

Q. Did you ever sign documents where she said don't sign that document for me?

A. No, I never signed it, you know, if she disagree with me.

Q. Whenever you would sign a document, it was because she had told you it was okay?

A. Well, I was here trustee, you know, and now matter whatever I decided with her, I sign it. If she don't want it, I don't want it, we don't sign it.

Q. All right. You would not sign documents until she agreed with you; is that right?

A. Right.

Q. Did your mother ever tell you that you shouldn't sign documents on her behalf anymore?

A. No, because she trusts me, she know what I am doing. You know, we decide together—all the things that's going on, sign those documents, everything else, we discussed together, we decide this way or that way. If she said okay, I signed it.

Q. You always did it that way?

A. All the time

(Ex. 4, 23:10-19; 24:8-11; 31:5-15).

9. Plaintiff is not disputing that he signed the Arbitration Agreement but is arguing that he did not read it before doing so. One who signs a document without reading it cannot later avoid the effect of the signed document by claiming lack of knowledge concerning the documents contents. Oddo v. Speedway Scaffold Co., 233 Neb. 1, 7 (Neb. 1989).

10. The Court is further persuaded by the reasoning set forth in the recent decision in Bales v. Arbor Manor, 2008 WL 2660366 (D. Neb. Jul 3, 2008), in which the Federal District Court of Nebraska analyzed the applicability and enforceability of an Arbitration Agreement under the Federal Arbitration Act in a case involving a lawsuit over a death of a patient in a nursing home. In Arbor Manor, the Court found the arbitration agreement to be valid and enforceable and after discussing the administrative concerns to granting a stay dismissed the plaintiff's case without prejudice to arbitration.

IT IS THEREFORE ORDERED, that the Defendant's Motion to Dismiss is granted without prejudice to arbitration.

IT IS FURTHER ORDERED that Defendant's Motion to Stay and Compel Arbitration is denied as moot.

DATED this 27th day of October, 2008.

BY THE COURT:


MARLON A. POLK
DISTRICT COURT JUDGE

Cc:

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