

IN THE COURT OF COMMON PLEAS  
COLUMBIANA COUNTY, OHIO

DAVID GAMBLE, ETC.

Plaintiff

-vs-

VALLEY OAKS CARE CENTER, et al.

Defendants

**FILED**  
COLUMBIANA COUNTY  
COURT OF COMMON PLEAS  
Case No. 2018 CV 100

JAN 23 2019

DECISION AND  
JUDGMENT ENTRY

ANTHONY J. DATTILIO  
CLERK (CAP)

Background and Introduction

On July 20, 2018, Defendants Valley Oaks Care Center, Selfridge Leasing, LLC, Eli Gunzberg, Eli M. Gunzberg Irrevocable Trust, and Frank Gunzberg 2015 Succession Trust (collectively Defendants) filed their joint Motion to stay proceedings and compel/enforce arbitration (Joint Motion). On August 1, 2018, Plaintiff David Gamble, as the Personal Representative of the Estate of Janet I. Gamble (deceased), filed a Motion seeking the following relief: 1) striking Defendants' Joint Motion; and 2) granting sanctions; or, in the alternative, 3) granting an extension of time in which to more fully respond to Defendants' Joint Motion; and 4) compelling responses to certain outstanding discovery requests. On August 1, 2018, Defendants filed their response in opposition to that branch of the Plaintiff's Motion compelling responses to discovery.

On August 7, 2018, this Court issued its written Decision. The Decision denied the Plaintiff's Motion to strike the Defendants' Joint Motion, granted the Plaintiff a reasonable opportunity to conduct discovery before further responding

to the merits of the Defendants' Joint Motion, and resolved other than pending discovery-related matters.

Thereafter, on October 11, 2018, the Plaintiff filed a second Motion seeking the following relief: 1) striking Defendants' Joint Motion; and 2) granting sanctions; or, in the alternative, 3) denying Defendants' Joint Motion. On October 16, 2018, Defendants filed their response in opposition to the Plaintiff's second Motion and also replied in further support of their Joint Motion. On October 24, 2018, the Plaintiff filed a Motion in Limine seeking to exclude the deposition testimony of Stephanie Wolfe and on November 2, 2018, Defendants filed their response in opposition.

On November 7, 2018, an oral hearing was held on Defendants' Joint Motion and the Plaintiff's second Motion. At the conclusion of the hearing the Court took the issues under advisement and also granted Defendants until November 21, 2018, in which to ensure the deposition transcript of Stephanie Wolfe was filed in compliance with Civ. R. 30.<sup>1</sup> On November 19, 2018, Defendants through counsel filed a Notice of filing the signed deposition of Ms. Wolfe.

Defendants' Joint Motion as well as the Plaintiff's second Motion are now before the Court for further consideration and decision.

#### Legal Analysis

##### 1. Defendants' Joint Motion

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<sup>1</sup> See Judgment Entry filed November 8, 2018.

Through their Joint Motion, Defendants request this Court to stay this case and compel arbitration on all of Plaintiff's claims as required by contract.<sup>2</sup> The contract at issue is the Admission Agreement dated November 6, 2015, and entered into by and between Selfridge Leasing, LLC d/b/a Valley Oaks Care Center and Janet Gamble and/or John Gamble.<sup>3</sup> The pending Motions focus largely on Section V of the Admission Agreement, which is titled RESOLUTION OF DISPUTES/ARBITRATION.<sup>4</sup>

Without question, the public policy of Ohio favors arbitration.<sup>5</sup> Ohio's Arbitration Act has been codified in Revised Code Chapter 2711 and reflects that arbitration is encouraged as a method of resolving disputes.<sup>6</sup> Upon being satisfied that a valid arbitration agreement exists and that its enforcement has not been waived, a court must stay an action during the course of the arbitration proceedings.<sup>7</sup>

## 2. Plaintiff's Second Motion

Through the second Motion, the Plaintiff urges that there are a number of reasons why this Court must deny Defendants' Joint Motion and the requested relief staying this case and compelling arbitration.

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<sup>2</sup> Defendants' Joint Motion, filed July 20, 2018, page 1.

<sup>3</sup> Defendants' Joint Motion, Exhibit B; Plaintiff's second Motion, Exhibit A. Because all parties have attached the Admission Agreement as an Exhibit to their respective Motions, other references will be to the Admission Agreement itself. The Court further notes that the Admission Agreement contains another Section V titled Miscellaneous.

<sup>4</sup> Admission Agreement, pages 8-9.

<sup>5</sup> Schaefer v. Allstate Ins. Co. (1992), 63 Ohio St. 3d 708, 712, 590 N.E. 2d 1242 (citations omitted); Southwest Ohio Transit Auth. v. Amalgamated Transit Union, Local 627 (2001), 91 Ohio St. 3d 108, 109, 742 N.E. 2d 630, 633; McCullough v. Janney Montgomery Scott, LLC (2014), Not reported in N.E. 2d, 2014 WL 4627810 (Ohio App. Dist. 7), 2014-Ohio-4002, ¶ 29.

<sup>6</sup> See, Williams v. Aetna Finance Co. (1998), 83 Ohio St. 3d 464, 471, 700 N.E. 2d 859, 1998-Ohio-294.

<sup>7</sup> R.C. § 2711.02(B); Zapor Architects Group, Inc. v. Riley (2004), Not reported in N.E. 2d, 2004 WL 1376236 (Ohio App. Dist. 7), 2004-Ohio-3201, ¶ 48; 84 Lumber Co. v. O.C.H. Construction, LLC (2015), 44 N.E. 3d 961 (Ohio App. Dist. 7), 2015-Ohio-4149, ¶ 15.

A. Termination of the Admission Agreement

As written, Section V of the Admission Agreement, at ¶ C **All Other Disputes**, provides that any controversy, dispute, disagreement, or claim of any kind arising out of, or related to this (Admission) Agreement, or the breach thereof, shall be settled exclusively by binding arbitration as set forth in Section IV.D. below.<sup>8</sup> According to Section IV **TERMINATION** at ¶ A, the Admission Agreement shall continue until it is terminated as specified in Sections IV.B or IV.C of this Agreement.<sup>9</sup>

In turn, the Admission Agreement at Section IV **TERMINATION**, ¶ C provides as follows:

**C. Termination by Resident.** This Agreement may be terminated by the Resident and/or by Representative at any time; however, Facility requests that the Resident/and or Representative provide it with at least thirty (30) days advance notice so that it can conduct proper discharge planning. This Agreement shall automatically terminate upon the death of the Resident.<sup>10</sup>

As written, Section IV **TERMINATION**, ¶ C provides that the occurrence of either of two events will result in termination of the Admission Agreement. First, the Agreement may be terminated at any time by the Resident and/or by the Representative. The first event of termination occurred on September 8, 2018, the date counsel for the Personal Representative of the Estate of Janet I. Gamble wrote a letter terminating the Admission Agreement.<sup>11</sup>

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<sup>8</sup> Admission Agreement, page 9.

<sup>9</sup> Admission Agreement, page 7.

<sup>10</sup> Admission Agreement, page 8.

<sup>11</sup> Plaintiff's second Motion, Exhibit B.

Second, the Agreement terminates automatically upon the death of the Resident. The Resident, Janet I. Gamble, died on February 27, 2017.<sup>12</sup>

Because these events of termination occurred well before this action was filed on February 27, 2018, this Court concludes that Section V of the Admission Agreement is not or is no longer enforceable in this case.

B. The Admission Agreement violates R.C. § 2711.13

Within the Admission Agreement, at Section V, ¶ D is entitled **Conduct of Arbitration**.<sup>13</sup> While this section of the Admission Agreement mentions payment of a filing fee, it does not provide that the expenses of arbitration shall be divided equally between the parties to the agreement as required by R.C. § 2711.23 (E). Moreover, the testimony of Stephanie Wolfe demonstrates that the expenses of arbitration was not a topic that she discussed with Janet I. Gamble or David Gamble.<sup>14</sup> This Court, therefore, concludes that because Section V, ¶ D, of the Admission Agreement does not comply with R.C. § 2711.13 (E), it is not valid or enforceable.

Additionally, because the entirety of Article V **RESOLUTION OF DISPUTES/ARBITRATION** is contained within the Admission Agreement, it is not separate from any other agreement, consent, or document as R.C. § 2711.13 (G) requires. The same conclusion applies equally to the **ARBITRATION CLAUSE**.<sup>15</sup> In addition to being sequentially numbered as page 14 of 14, the Arbitration Clause makes express reference to the Admission Agreement and is

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<sup>12</sup> See, Complaint, ¶ 10.

<sup>13</sup> Admission Agreement, page 9.

<sup>14</sup> Deposition of Stephanie Wolfe, page 33.

<sup>15</sup> Admission Agreement, page 14; Defendants' Joint Motion, Exhibit C.

attached to it.<sup>16</sup> This Court also, therefore, concludes that the ARBITRATION CLAUSE is part of the Admission Agreement and is not, therefore, separate from any other agreement, consent, or document as R.C. § 2711.13 (G) requires.

Because Section V of the Admission Agreement and the ARBITRATION CLAUSE do not comply with R.C. § 2711.13 (E), they are not valid or enforceable.

### C. Parties to the Admission Agreement

At Section I, **PARTIES**, the Admission Agreement sets forth that the Agreement is made and entered into by and between **Selfridge Leasing, LLC d/b/a Valley Oaks Care Center** (Facility) and Janet Gamble (Resident) and/or John Gamble (Representative).<sup>17</sup> At Section V, **Conduct of Arbitration** ¶ D, the Admission Agreement provides in pertinent part, "The Resident and/or Representative on behalf of the Resident agree that *any dispute with the Facility* relating to medical and other services rendered for any condition,..., shall be subject to binding arbitration. Should the Resident and/or Representative...agree to binding arbitration of disputes..., then *Facility*, in reliance upon this agreement to arbitrate disputes will submit to binding arbitration as follows: ..."<sup>18</sup>

It is well settled that arbitration is a matter of contract.<sup>19</sup> A person cannot be required to arbitrate a dispute which he or she has not agreed to arbitrate.<sup>20</sup> Because arbitration is a matter of contract, a court must first determine whether

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<sup>16</sup> *Id.*; See, also, Deposition of Stephanie Wolfe, pages 57-58.

<sup>17</sup> Admission Agreement, page 1.

<sup>18</sup> Admission Agreement, page 9 (Emphasis added).

<sup>19</sup> See, First Options of Chicago, Inc. v. Kaplan (1995), 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985.

<sup>20</sup> Shakoor v. VXI Global Solutions, Inc., (2015), 35 N.E. 3d 539 (Ohio App. Dist. 7), 2015-Ohio-2587, ¶ 20 (further citations omitted).

the arbitration agreement is enforceable under basic contract principles.<sup>21</sup> Whether an arbitration agreement is enforceable is a threshold issue for judicial determination, unless the agreement of the parties clearly and unmistakably provides otherwise.<sup>22</sup> By first deciding whether an arbitration agreement is enforceable, the parties avoid the risk of being forced to arbitrate a matter that they may not have agreed to arbitrate.<sup>23</sup> As with any contract, a valid arbitration agreement must include, at a minimum, a meeting of the minds of the parties, and an offer on one side and an acceptance on the other.<sup>24</sup>

The plain wording of the Admission Agreement is not ambiguous and speaks for itself. Only Selfridge Leasing, LLC d/b/a Valley Oaks Care Center as the Facility, Janet Gamble as the Resident, and/or John Gamble as the Representative of Janet Gamble are parties to the Admission Agreement.<sup>25</sup> There are no actual or third-party intended beneficiaries of the Admission Agreement unless they are signatories to it.<sup>26</sup> Moreover, through the Admission Agreement, Section V, ¶ D, it is evident that the Resident and/or Representative on behalf of the Resident is only required to commit to binding arbitration any dispute with the Facility, which is Selfridge Leasing, LLC d/b/a Valley Oaks Care Center.

This Court, therefore, agrees that the Plaintiff is not required to arbitrate any other dispute or claim against any of the other named Defendants, to wit: Eli

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<sup>21</sup> Robinson v. Mayfield Auto Group, L.L.C. (2017), 100 N.E. 3d 978 (Ohio App. Dist. 8), 2017-Ohio-8739, ¶ 12 (further citations omitted).

<sup>22</sup> Shakoor v. VXI Global Solutions, Inc., 2015-Ohio-2587, ¶ 20.

<sup>23</sup> Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 99, 123 S. Ct. 588, 591, 154 L. Ed. 2d 491 (2002).

<sup>24</sup> Noroski v. Fallet (1982), 2 Ohio St. 3d 77, 79, 442 N.E. 2d 1302, 1304.

<sup>25</sup> See, also, Deposition of Stephanie Wolfe, page 41.

<sup>26</sup> Admission Agreement, page 10, Section V **MISCELLANEOUS**, ¶ A **Limitations of Facility**.

Gunzberg, Eli M. Gunzberg Irrevocable Trust, and Frank Gunzberg 2015 Succession Trust. These other named Defendants are not parties to the Admission Agreement or even mentioned therein. They are not actual or third-party intended beneficiaries of the Admission Agreement as they are not signatories to it.

There is an additional reason why binding arbitration is not appropriate on some or all of the Plaintiff's claims against the other named Defendants. As set forth in the Admission Agreement, "Any controversy, dispute, disagreement or claim of any kind arising *between the parties* after the execution of this Agreement, in which Resident or a person on his/her behalf alleges a violation of any right granted Resident in a state or federal statute shall be settled exclusively by binding arbitration as set forth in Section V.D. below."<sup>27</sup>

The Plaintiff has alleged violations of statute in this action.<sup>28</sup> As stated, the other named Defendants, Eli Gunzberg, Eli M. Gunzberg Irrevocable Trust, and Frank Gunzberg 2015 Succession Trust, are not parties to the Admission Agreement. Pursuant to Section V, **RESOLUTION OF DISPUTES/ ARBITRATION ¶ B Resident's Rights**, binding arbitration on such statutory based claims is self-limited to those arising between the parties to the Admission Agreement.

### C. Parties Bound by the Admission Agreement

The Admission Agreement states who is bound by its terms: **UPON DUE CONSIDERATION OF THE TERMS OF THIS AGREEMENT, THE PARTIES DO**

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<sup>27</sup> Admission Agreement, pages 8-9, Section V, **RESOLUTION OF DISPUTES/ARBITRATION ¶ B Resident's Rights** (Emphasis added).

<sup>28</sup> See, Complaint, ¶ 31, *et. seq.*



FOR THEMSELVES, THEIR HEIRS, ADMINISTRATORS AND EXECUTORS, AGREE TO THE TERMS OF THIS AGREEMENT IN CONSIDERATION OF THE FACILITY'S ACCEPTANCE OF AND RENDERING SERVICES TO THE RESIDENT.<sup>29</sup> However, it is well settled that a decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims.<sup>30</sup> Based on this same reasoning, the Tenth District Court of Appeals concluded the wrongful death claims of the statutory beneficiaries, pursuant to R.C. § 2125.02(A)(1), may not be forced into arbitration where each of them did not sign the agreement.<sup>31</sup>

Accordingly, this Court agrees that because all statutory beneficiaries of Janet I. Gamble did not sign the Admission Agreement, their claims brought pursuant to R.C. § 2125.02 are not are subject to binding arbitration.

#### Conclusions

Based upon the foregoing reasons, this Court denies Defendants' Joint Motion to stay proceedings and compel/enforce arbitration.

The Court also denies those branches of the Plaintiff's second Motion seeking to strike Defendants' Joint Motion and/or award sanctions.

The Court also denies, at this juncture, the Plaintiff's Motion in Limine filed October 24, 2018, seeking to exclude the deposition testimony of Stephanie Wolfe.

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<sup>29</sup> Admission Agreement, page 12.

<sup>30</sup> Peters v. Columbus Steel Casting Co. (2007), 115 Ohio St. 3d 134, 873 N.E. 2d 1258, 2007-Ohio-4787, ¶ 19.


<sup>31</sup> Fravel v. Columbus Rehabilitation and Subacute Institute (2015), 53 N.E. 3d 953, 2015-Ohio-5125, ¶ 14; See, also, Goerlitz v. SCCI Hospitals of America, Inc., (2018), 107 N.E. 3d 704, 2018-Ohio-633, ¶ 13.

Based upon its research, this Court concludes that this Decision constitutes a final appealable Order pursuant to R.C. § 2711.02 (C).<sup>32</sup>

**Pursuant to Civ. R. 58(B), the Clerk of this Court is requested to serve upon all parties not in default a notice of this judgment and the date of entry upon the journal.**

If no appeal is filed from this Decision, all dates now set will remain in effect. If an appeal is filed, those dates will be cancelled.

IT IS SO ORDERED.

  
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Scott A. Washam, Judge

January 23, 2019

CC: Blake A. Dickson, Esq.  
Daniel A. Leister, Esq.

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<sup>32</sup> See, 84 Lumber Co. v. O.C.H. Construction, LLC, 2015-Ohio-4149, ¶ 11.

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