IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA CIVIL DIVISION

THE ESTATE OF JENNIE MILO, by and through ANNETTE BRITO A/K/A ANTOINETTE MARY BRITO, Personal Representative,

Plaintiff,

Case No. 07-8776-CI-13

v.

CARRINGTON PLACE OF ST. PETE, LLC; TRADITIONS MANAGEMENT OF FLORIDA A/K/A TRADITIONS MANAGEMENT OF FLORIDA, LLC; BEN ATKINS A/K/A BEN A. ATKINS; MARYA MORRISON; PAUL J. PRYBYLSKI A/K/A PAUL JOHN PRYBYLSKI; DAWN EDWARDS A/K/A DAWN ALLISON EDWARDS; NANCY J. MALLOY A/K/A NANCY JILL MALLOY (as to CARRINGTON PLACE NURSING & REHABILITATION CENTER F/K/A CARRINGTON PLACE CARE CENTER A/K/A CARRINGTON PLACE)

Defendants.

_____/

DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION AND/OR STAY PROCEEDINGS

COMES NOW, the Defendants, CARRINGTON PLACE OF ST. PETE, LLC, TRADITIONS MANAGEMENT OF FLORIDA, BEN ATKINS, MARYA MORRISON, PAUL J. PRYBYLSKI, DAWN EDWARDS, and NANCY MALLOY, by and through their undersigned counsel, hereby moves to dismiss the present action and compel arbitration pursuant to a written agreement between the parties and in support of this motion, state as follows:

Facts

1. This matter arises from JENNIE MILO'S admission to Carrington Place, a nursing home in Pinellas County, Florida from June 3, 2006 through December 14, 2006.

2. The Plaintiff filed the Complaint in this case in the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida against the above-styled Defendants.

3. Ms. Milo executed a valid Power of Attorney on March 5, 2002, appointing her daughter, Ms. Annette Brito to make all decisions for her and delegated Ms. Brito authority to sign contracts on Ms. Milo's behalf. (A copy of the POA is attached as Exhibit "A").

4. On June 3, 2006, Ms. Milo, by and through her Power of Attorney, Annette Brito, signed an Admission Contract containing a valid and binding arbitration agreement, with Carrington Place. (A copy of the Admission Contract is attached as Exhibit "B").

5. The parties voluntarily agreed to resolve all disputes, whether in contract or tort, by means of binding arbitration.

6. There has been no waiver by any Defendants of the right to arbitrate the matters alleged by the Plaintiff.

7. As Plaintiff's cause(s) of action, as described in its Complaint, flow from the Plaintiff's residency at Carrington Place, this case must be referred to binding arbitration.

8. The Defendant also brings this motion pursuant to § 682.03, Florida Statues, which provides that when a party to a valid arbitration agreement invokes its

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provisions in a timely manner, all pending litigation pertaining to the dispute must be stayed for the parties to proceed to litigation.

9. When the court must decide whether a particular dispute is subject to arbitration agreement, doubts about scope of the agreement should be resolved in favor of arbitration. Regency Group, Inc. v. McDaniels, 647 so.2d 192 (Fla. 5th DCA 1995).

10. Should the Court determine that any portion of the residency is not subject to the arbitration clause, the proceedings should be stayed pending the outcome of the arbitable issues.

11. The Defendant requests that the Court recognize that it has sought to enforce a valid arbitration clause and has not participated in any litigation. Once the arbitable issues have been determined and should the Court find that any portion of the Complaint is not subject to arbitration, the Defendant moves the Court for a reasonable amount of time to file a Motion to Dismiss, Strike or for More Definite Statement directed at the Complaint in this case.

The Parties Agreed to Binding Arbitration

On June 3, 2006, the parties executed an "Admission Contract" which contained an "Optional Binding Arbitration Provision" (hereinafter, the "Arbitration Clause"). The Arbitration Clause expressly provides that "any and all controversy(ies) or claim(s) arising out of or relating to the Admission Agreement or breach thereof, or arising out of the Resident's stay, care or rights, at the Facility" whether statutory rights or in tort, shall be "settled by final and binding arbitration in accordance with the provisions of the arbitration code for the State which the Facility is located. (See Admission Contract – Exhibit B).

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Plaintiff herein attempts to bring claims under Section 400.023, Florida Statutes, which is found in The Nursing Home Resident's Rights Act, and claims arising out of tort theories of negligence; and negligent hiring, retention and supervision of skilled and unskilled staff. A plain reading of the Arbitration Clause in this case indicates that the parties have voluntarily agreed to binding arbitration relative to these allegations.

Arbitration is Favored and Stay is Required

Courts generally favor arbitration as a means of alternative dispute resolution and any doubt concerning the scope of the arbitration clause should be construed in favor of arbitration. See, e.g., Hirshenson v. Spaccio, 800 So.2d 670 (Fla. 5th DCA 2001) *citing* K.P. Meirinci Constr. Inc. v. Northbay, 761 So.2d 1221 (Fla. 2nd DCA 2000); Breckenridge v. Farber, 640 So.2d 208 (FIa. 4th DCA 2000); see also Rath v. Network Marketing, L.C., 790 So.2d 461, (Fla. 4th DCA 2001).

Where the trial court finds the parties' arbitration agreement to be binding and controlling, the claim shall be submitted to arbitration. The failure to submit the matter to arbitration constitutes a departure from the essential requirements of law. Grub v. Raymond James, 524 So.2d 1121 (FIa. 2nd DCA 1988); U.S. Fire Insurance Co. v. Franko, 443 So.2d 170 (Fla. 1st DCA 1984).

Florida courts have a history of accepting the validity of arbitration agreements in the nursing home context and will uphold such agreements unless invalid for other grounds. See, Estate of Helen N. Etting v. Regents Park at Aventura, Inc., 891 So.2d 558 (Fla. 3rd DCA 2004) (upholding validity of Arbitration clause); Prieto v. Healthcare And Retirement Corporation Of America, 919 So.2d 531 (Fla. 3rd DCA 2005) (accepting

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validity of arbitration clause, but finding specific clause used by defendant unconscionable).

A) All Issues Should Be Construed In Favor of Upholding Arbitration Clause

There is a vast body of Florida cases recognizing that trial courts should favor arbitration over litigation when there is a valid arbitration agreement, favorably construing all relevant issues of validity, enforceability, scope, and waiver in favor of arbitration. Seifert v. U.S. Home Corp., 750 So.2d 633 (Fla. 1999); Midwest Mutual Ins. Co. v. Santiesteban, 287 So.2d 685 (Fla. 1973); Ronbeck Construction v. Savana Club Corp., 592 So.2d 3444 (Fla. 4th DCA 1992); Brown v. Burk, 617 So.2d 474 (Fla. 4th DCA 1993); Advance Dental Plans, Inc. v. Beneficial Administrators, Inc., 683 So.2d 1133 (Fla. 4th DCA 1996); Stinson-Head, Inc. v. City of Sanibel, 661 So.2d 119 (Fla. 2nd DCA 1995); Medident Construction, Inc. v. Chappell, 632 So.2d 194 (Fla. 3d DCA 1994); Beverly Hills Development Corp. v. George Wimpey of Florida, Inc., 661 So.2d 969 (Fla. 5th DCA 1995).

B) Chapter 400 Claims and/or Tort Claims Shall Be Arbitrated

Florida appellate courts have recognized that claims arising under Chapter 400, Florida Statutes, the Nursing Home Residents' Rights Act are arbitrable claims.

Generally speaking, "arbitration clauses have repeatedly been held to apply to statutory claims." See Hirshenson v. Spaccio, *supra.*; Aztec Med. Servs., Inc. v. Burger, 792 So.2d 617, 622 (Fla. 4th DCA 2001). In Hirshenson, the plaintiff alleged a violation of Chapter 517, the Florida Securities Act. Arbitration was sought and the opposition to arbitration argued Chapter 517 cases could not be arbitrated, the Court held, "... the mere fact that chapter 517 creates a statutory claim does not mean that it is not subject to

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arbitration." Id.

More specifically, the Florida appellate courts have affirmatively held that arbitration clauses do apply to Chapter 400 claims. In Estate Of Helen N. Etting v. Regents Park At Aventura, Inc., 891 So.2d 558 (Fla. 3rd DCA 2004), the Court upheld the validity of an Arbitration agreement where the resident was legally blind at the time that she signed. In Five Points Health Care, LTD v. Alberts, 867 So.2d 520 (Fla. 1st DCA 2004), the Court also upheld the validity of the agreement, noting the causes of action arose from the agreement and the defendant's assumption of duties of care upon execution and admission of the resident.

In Blanchard v. Central Park Lodges, 805 So.2d 6 (Fla. 2d DCA 2001), the Court upheld the arbitration clause where the defendant facility had only an incomplete admission agreement. In Elderidge v. Integrated Health Services, Inc., 805 So.2d 982 (Fla. 2nd DCA 2001), also held that a nursing home arbitration clause was enforceable in a negligence/Chapter 400 case.

In the cases where the courts ruled against Arbitration, all were predicated upon the factual circumstances surrounding the execution of the agreement or the legal sufficiency of the particular clause.

In Prieto v. Healthcare And Retirement Corporation Of America, 919 So.2d 531 (Fla. 3rd DCA 2005), the Court ultimately found the arbitration agreement unenforceable under an unconscionability analysis; but did recognize the validity of the concept of arbitration in the Chapter 400 context. In Blankfeld v. Richmond Health Care, Inc., 902 So.2d 296 (Fla 4th DCA 2005), the Court found the particular arbitration clause void as

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against public policy and held that the clause defeated the remedial nature of Chapter 400; but at no time did the Court rule that all nursing home arbitration clauses are void.

In a recent case to address the issue, Estate of Lee L. Williams v. Manor Care of Dunedin, 923 So.2d 615 (Fla. 2nd DCA 2006), the Court found the defendant acted inconsistently with its arbitration rights and waived them by filing an Answer and demanding jury trial; however, at no time did the Court, or any Court, find that arbitration clauses were inconsistent, invalid, unconscionable or against public policy, as a rule, in the Chapter 400 context.

Courts have also upheld valid, controlling arbitration clauses where a party is claiming the other party to the arbitration agreement engaged in intentionally tortious and fraudulent conduct. See Ronbeck Construction Co. v. Savana, 592 So.2d 344 (Fla. 4th DCA 1992); Passerrello v. Robert L. Lipton, Inc., 690 So.2d 610 (Fla. 4th DCA 1997).

Three Prong Test To Determine Validity of Arbitration Clause

When assessing an arbitration agreement, a trial court is limited to considering (1) whether the parties have entered into a valid arbitration agreement; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration has been waived. See Seifert v. U.S. Home Corp., *supra;* Blanchard v. Central Park Lodges, *supra.;* Florida Power Corp. v. City of Casselberry, 793 So.2d 1174 (Fla. 5th DCA 2001).

A) The Parties Have Entered Into a Valid Arbitration Agreement

In the case before the Court, Annette Brito, as Power of Attorney for Jennie Milo, and Carrington Place, entered into a complete and valid contract. Furthermore, the language in the Arbitration Clause is not such as to render it void as against public policy (pursuant to Blankfeld) as it in no way defeats the remedial nature of Chapter 400. In

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fact, the Arbitration Clause proposes arbitration in a non-biased manner, allowing the same standard of proof and deferring to the applicable law as to nature and scope of recoverable remedies for the Plaintiff.

Prior to Ms. Milo's admission, she executed a Power of Attorney naming Annette Brito, her daughter, attorney in fact, which granted Ms. Brito the right to manage all her affairs, as well as waive Ms. Milo's access to the Courts by binding her to Arbitration.

Additionally, the act of signing of the Arbitration Clause deems the Resident/Plaintiff to have agreed to the terms. See Alejano v. Hartford Accident & Indemnity Co., 378 So.2d 104 (Fla. 3rd DCA 1979) (a person who has signed a document is presumed to have known, and cannot deny, its contents). A party has a duty to learn and know the contents of a contract before he or she signs and delivers it, and is presumed to know and understand its contents, terms and conditions. See Sabin v. Lowe's of Florida, 404 So.2d 772 (Fla. 5th DCA 1981); Florida Auto Finance Corp. v. Reyes, 710 So.2d 216 (Fla. 3rd DCA 1998).

If the party did not understand what he was signing, the law imposes a duty upon him to make further inquiry. See Ruiz v. Fortune Insurance Co., 677 So.2d 1336 (Fla. 3rd DCA 1996); Wolk v. RTC, 608 So.2d 859 (Fla. 5th DCA 1992).

In fact, even illiterate persons not capable of reading English have the burden of further inquiry before binding themselves to a contract by signing it. See Merrill Lynch v. Benton, 467 So.2d 311 (Fla. 5th DCA 1985). Additionally, legally blind persons are still charged with the responsibility to learn and know the contents of the contract. Estate of Helen N. Etting v. Regents Park at Aventura, Inc., 891 So.2d 558 (Fla. 3rd DCA 2004).

The Arbitration Clause in the Carrington Place Admission Contract is neither

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procedurally nor substantively unconscionable, nor void as against public policy. Florida courts may only decline to enforce a contract if the trial court finds it to be both procedurally and substantively unconscionable[1], or void as against public policy for defeating the remedial nature of Chapter 400.[2]

B) An Arbitrable Issue Exists

The issues raised in the Complaint are clearly arbitrable. The plain language of the arbitration agreement includes any claim in tort. In fact, it includes "any action, dispute, claim, or controversy of any kind (e.g., whether in contract or tort, statutory or common law, legal or equitable, or otherwise) . . . shall be resolved by binding arbitration."

In Five Points Health Care, Ltd. v. Alberts, 867 So.2d 520 (Fla. 1st DCA 2004), Plaintiff alleged the nursing home failed to render adequate care, which resulted in injury, in violation of the resident's Chapter 400 rights. The Court held that the claim arose directly from care provided to resident under the agreement for care, which contained an arbitration clause; and therefore, the resident's claim was subject to arbitration. Therefore, claims for violations of the Chapter 400 rights are clearly arbitrable.

Further, as the Plaintiff attempts to bring claims under both common law tort theories and various Chapter 400 violations, specifically related to the Resident's admission, an arbitrable issue exists. As addressed above, in Blanchard and Elderidge, both the Second and Fifth District Courts of Appeal have upheld arbitration clauses in the face of negligence/Chapter 400 claims.

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[1] See Powertel, Inc. v. Bexley,743 So.2d 570 (Fla. 1st DCA 1999), rev. den., 763 So.2d 1044 (2000), and Consolidated Resources Healthcare Fund I, Ltd. v. Fenelus, 853 So.2d 500 (Fla. 4th DCA 2003).

[2] See Blankfeld v. Richmond Health Care, Inc., 902 So.2d 296 (Fla 4th DCA 2005).

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C) The Right To Arbitration Has Not Been Waived

The Defendant has not waived the right to arbitration as it has simply sought to compel arbitration and/or protective orders. See Hill v. Ray Carter Auto Sales, Inc., 745 So.2d 1136 (Fla. 1st DCA 1999). The Third District Court of Appeal has elicited that waiver occurs only if a party "takes an active part in litigation or by undertaking actions inconsistent with that right [to arbitration]." See Coral 97 Assoc. v. Chino Elec., Inc., 501 So.2d 69, 70 (Fla. 3rd DCA 1987).

The Defendant has not taken such action here and thus, has not waived any right to arbitration. This Motion to Compel Arbitration is the first and only response to the Complaint filed. The Defendant has affirmatively asserted to the Plaintiff that it desires to compel arbitration and has not engaged in any litigation.

All Named Defendants are Parties to the Arbitration Clause

Ms. Milo entered into the contract with Carrington Place and has alleged the same causes of action against each named Defendant and all of the allegations relate to Ms. Milo's residency at Carrington Place. Those persons and entities have a right to arbitrate Plaintiff's claims pursuant to the Admissions Agreements and Florida law. See, Vic Potamkin Chevrolet, Inc. v. Bloom, 386 So.2d 286 (Fla. 3rd DCA 1980). In Potamkin, the Court held that where parties agreed to arbitrate "any controversy or claim arising out of, or relating to this agreement," such language was broad enough to include persons within the *respondeat superior* doctrine; thus, the employees of the car dealership were party to arbitration contract between buyers and the dealership, and thus, the trial court should have granted the motion to compel arbitration.

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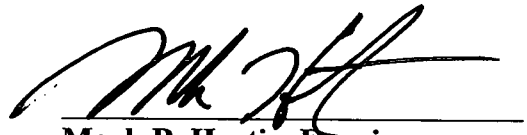
WHEREFORE, based on the foregoing, it is respectfully submitted that this Court must dismiss Plaintiff's Complaint and compel Plaintiff to submit this matter to arbitration as to all claims against Defendant, pursuant to the terms of the Arbitration clause of the June 3, 2006 Admission Contract. The allegations of negligence and/or Chapter 400 violations plainly arise from and relate to the terms of the Admission Contract and Arbitration Clause; arbitration is warranted under the circumstances; and the Defendants are entitled to enforce the terms of the contract. The Defendants reserve the right to supplement this motion prior to hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Sandra M. Schunk, Esquire**, Wilkes & McHugh, P.A., Tampa Commons, One North Dale Mabry Highway, Suite 800, Tampa, Florida 33609, on this 26th day of September, 2007.

McCumber, Daniels, Buntz, Hartig & Puig, P.A.



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