IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, STATE OF FLORIDA, CIVIL DIVISION

The Estate of EDWARD HENRY CLARK, by and through GAYLE SHOTTS, Personal Representative,

Plaintiff,

vs.

OP WINTER HAVEN, INC.; RE WINTER HAVEN, INC.; TANDEM REGIONAL MANAGEMENT OF FLORIDA, INC.; TANDEM HEALTH CARE, INC.; GAIL WARD a/k/a GAIL LURIE WARD; NANCY C. THOMPSON; MICHAEL BRADLEY; and IRENA BLACKBURN a/k/a IRENA TARRAN BLACKBURN (as to TANDEM HEALTH CARE OF WINTER HAVEN),

Defendants.
_____/

CASE NO.: 53-2005CA-000421-0000-00

DIVISION: 11

FILED
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CIRCUIT COURT CIVIL DEPT.
POLK COUNTY CLERK

DEFENDANTS' MOTION TO COMPEL ARBITRATION, STAY LITIGATION AND MEMORANDUM OF LAW IN SUPPORT

Named Defendants, **OP WINTER HAVEN, INC.; RE WINTER HAVEN, INC.; TANDEM REGIONAL MANAGEMENT OF FLORIDA, INC.; TANDEM HEALTH CARE, INC.; GAIL WARD; NANCY C. THOMPSON; MICHAEL BRADLEY; and IRENA BLACKBURN**, by and through undersigned counsel, hereby make their special and limited appearances in this matter and hereby move, pursuant to the relevant ***Florida Rules of Civil Procedure***, this Honorable Court to stay the present action, and to compel arbitration of the Plaintiff's claim. In support thereof, said Defendants would states as follows:

OVERVIEW

Plaintiff, **GAYLE SHOTTS, as Personal Representative of the Estate of EDWARD HENRY CLARK,** filed a four (4) count[1] Complaint in the Tenth Judicial Circuit Court in and for Polk County, Florida against the Defendants in which Plaintiff alleges claims pertaining to an admission at **TANDEM HEALTH CARE OF WINTER HAVEN,** a skilled nursing facility located in Winter Haven, Florida.

This matter arises from **MR. CLARK's** (hereinafter referred to as the **"Resident"**) admission to **TANDEM HEALTH CARE OF WINTER HAVEN on May 23, 2003.** During said admission, an **Admission Agreement** was executed by the Plaintiff on **May 23, 2003** and a separate **Resident and Facility Binding Arbitration Agreement** (hereinafter referred to as **"Arbitration Agreement"**) was executed by the Plaintiff on **May 23, 2003.** A copy of the **Admission Agreement** is attached as **Exhibit "A"** and is incorporated herein by reference. Pursuant to its provisions, the parties agreed to mediate and submit the matter to non-binding arbitration unless the parties executed the **Resident and Facility Binding Arbitration Agreement** - in which case, the terms of the **Binding Arbitration Agreement** were to apply. A copy of the **Binding Arbitration Agreement** is attached hereto as **Exhibit "B"** and is incorporated herein by reference. This agreement constitutes a binding arbitration agreement and the Defendants move to compel arbitration and to stay these court proceedings since this action must be resolved via arbitration in lieu of litigation.

I. The Parties Agreed To Binding Arbitration.

On **May 23, 2003,** the parties completed execution of an **Arbitration Agreement** which expressly provides in pertinent part:

> The following is an agreement to arbitrate any dispute that might arise during Ed Clark's "Resident" or "Resident's Legal Representative," "Resident's Designee" (hereinafter collectively the "Resident") stay at

[1] \ - Counts I through III of the Complaint allege statutory negligence and damages claims under Chapter 400, Fla. Stat. (May 15, 2001) as to all named defendants. Count IV is a breach of fiduciary duty clam against the facility licensee only.

> Tandem Health Care of Winter Haven ("Facility"). (Facility includes the particular facility where the resident resides, its parent, affiliates, and any subsidiary companies, owners, officers, shareholders, directors, medical directors, employees, management companies, administrators, rehabilitation company, successors, assigns, agents, attorneys and insurers). The parties expressly agree and voluntarily enter into this Binding Arbitration Agreement (the "Agreement").
>
> The Resident and facility have entered into an Admission Agreement on the date set forth in this document. The Resident and facility further acknowledge that the Admission Agreement evidences a transaction involving interstate commerce . . . .
>
> * * * *
>
> Within thirty (30) days of a mediation or nonbinding arbitration between the Resident and facility that is not successful to resolve the dispute, the parties agree that disputes shall be submitted exclusively to binding arbitration . . . .
>
> * * * *
>
> This Agreement includes, but is not limited to, violations of any right granted to the Resident by law, including statutory resident's rights, or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice or any other claim based on any alleged departure from accepted standards of medical or heath care or safety, whether sounding in tort resulting in personal injury, or in contract. In no event shall this agreement apply to any facility dispute with Resident regarding payment for services rendered by the facility during Resident's stay.

A plain reading of the language of the above arbitration clause clearly reflects that the parties have agreed to binding arbitration as to the allegations in this case.

II. Arbitration Is Favored and A Stay Is Required.

Courts are required to indulge every reasonable presumption in favor of arbitration, a favored means of dispute resolution. ***Roe v. Amica Mut. Ins. Co., 533 So.2d 279 (Fla. 1988).*** Any doubt concerning the scope of the arbitration clause should be construed in favor of arbitration. ***Florida Select Ins. Co. v. Keelean, 727 So.2d 1131, 1132 (Fla. 2d DCA 1999); Breckenridge v. Farber, 640 So.2d 208 (Fla. 4th***

DCA 1994) (all doubts about scope of arbitration agreement, as well as any questions about waiver thereof, are in favor of arbitration, rather than against it).

The Florida Supreme Court has specifically stated:

> [A]rbitration clauses are enforceable and favored when the disagreement falls within the scope of the arbitration agreement.

Sears Authorized Termite and Pest Control, Inc. v. Sullivan, 816 So.2d 603, 606 (Fla. 2002) ***See, also, Stinson Head, Inc. v. City of Sanibel, 661 So.2d 119 (Fla. 2d DCA 1995)*** (agreement of parties determines issues subject to arbitration).

Where the 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. ***Grillo v. Raymond James, 524 So.2d 1121 (Fla. 2d DCA 1988); U.S. Fire Ins. Co. v. Franko, 443 So.2d 170 (Fla. 1st DCA 1983).***

Finally, courts may not refuse to enforce valid arbitration provisions in nursing home claims simply because the plaintiff waives the judicial remedy of access to the court to resolve the claim arising under statutory rights. ***Richmond Healthcare, Inc. v. Digati, 878 So.2d 388 (Fla. 4th DCA 2004).***

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

The law is clear in Florida that trial courts should favor arbitration over litigation when there is a valid arbitration agreement at issue. ***See, for e.g., Advantage Dental Plans v. Beneficial Administrators, 683 So.2d 1133 (Fla. 4th DCA 1996)*** (all doubts as to scope of arbitration agreement are to be resolved in favor of arbitration rather than against it); ***Stinson Head, Inc. v. City of Sanibel, 661 So.2d 119 (Fla. 2d DCA 1995)*** (broad contract language as to arbitration should be given effect); ***Ronbeck Construction v. Savanna Club Corp., 592 So.2d 344 (Fla. 4th DCA 1992)*** (state courts should resolve all doubts about scope of arbitration agreement, as well as any

questions about waivers thereof, in favor of arbitration); ***Beverly Hills Development Corp. v. George Wimpey of Fla., Inc., 661 So.2d 969 (Fla. 5th DCA 1995).*** Finally, the First District Court of Appeals held that arbitration agreements in nursing home cases were enforceable, and that any doubts concerning their scope should generally be resolved in favor of arbitration. ***See, Gainesville Health Care Center, Inc. v. Weston, 857 So.2d 278 (Fla. 1st DCA 2003).***

B. Chapter 400 Claims and/or Breach of Fiduciary Duty Claims Shall Be Arbitrated.

Four Florida appellate courts have recognized that claims arising under ***Chapter 400, Fla.Stat.*** (the ***Nursing Home Resident's Rights Act,***), are valid claims for arbitration.

The First District Court of Appeals held that arbitration agreements in long term care cases are enforceable, and that any doubts concerning their scope should generally be resolved in favor of arbitration. ***Gainesville Health Care Center, Inc. v. Weston, 857 So.2d 278 (Fla. 1st DCA 2003).***

In ***Estate of Blanchard v. Central Park Lodges (Tarpon Springs), 805 So.2d 6 (Fla. 2d DCA 2001),*** the court considered the application of an arbitration clause for a nursing home resident who brought a claim for violations of ***Chapter 400, Fla.Stat.,*** negligence, and wrongful death. Due to the fact that the defendant/facility submitted an incomplete admission agreement, the appellate court remanded the case for an expedited evidentiary hearing on the authenticity of the contract and the making of the agreement. However, neither the trial court nor the appellate court suggested that there was anything about the nature of the statutory claim preventing arbitration.

Similarly, in ***Eldridge v. Integrated Health Services, 805 So.2d 982 (Fla. 2d DCA 2001),*** the court held that the nursing home's arbitration agreement was enforceable.

The Third District Court of Appeals has also held that a nursing home arbitration clause was enforceable in a negligence/Chapter 400 case. ***See, Integrated Health Services of Greenbriar v. Lopez-Silvero, 827 So.2d 338 (Fla. 3d DCA 2002).***

The Third District Court of Appeals also upheld arbitration in ***Estate of Etting v. Regents Park at Aventura, Inc., 29 Fla. L. Weekly 2342 (Fla. 3d DCA October 20, 2004)*** (the plaintiff failed to show that the decedent, a blind nursing home resident, was coerced into signing the nursing home agreement or prevented by the defendant from knowing its contents). The trial court's order to arbitrate was later affirmed.

Finally, the Fourth District Court of Appeals upheld an arbitration agreement in ***Consolidated Resources Health Care Fund I, Ltd. v. Fenelus, 853 So.2d 500 (Fla. 4th DCA 2003). See, also, Romano v. Manor Care, Inc., 861 So.2d 59 (Fla. 4th DCA 2003)*** (although the court ultimately held that the ***Manor Care*** arbitration agreement in question was unconscionable because it denied the right to recover attorneys' fees and punitive damages, the Court noted that the parties had a right to "arbitrate statutory claims, even ones involving important social policies"). Clearly, long term care statutory and negligence claims are arbitrable claims under Florida law.

Additionally, a breach of fiduciary duty claim was held to be within the ambit of a standard arbitration clause, which called for the arbitration of "all claims, disputes and other matters in question arising out of, or relating to, this agreement or the breach thereof" in ***Morton Z. Levine and Associates v. Van Deree, 334 So.2d 287 (Fla. 2nd DCA 1976).***

III. Three Prong Test To Determine Validity of Arbitration Clause.

When assessing the validity of an arbitration agreement, a trial court is limited to the consideration of: (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. ***Seifert v. U.S. Home Corp., 750 So.2d 633 (Fla. 1999); Estate of Blanchard v. Central Park Lodges (Tarpon Springs), 805 So.2d 6 (Fla. 2d DCA 2001); and 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.

The language in the arbitration clause is similar to language upheld in the relevant case law. The mere act of signing the arbitration clause deems the resident/plaintiff to have agreed to the terms of same. ***See, Alejano v. Hartford Accident & Indem. Co., 378 So.2d 104 (Fla. 3d DCA 1979)*** (a person who has signed a document cannot deny its contents on the ground that he signed it without reading it). 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, Inc., 404 So.2d 772 (Fla. 5th DCA 1981); Florida Auto Finance Corp. v. Reyes, 710 So.2d 216 (Fla. 3d DCA 1998).*** If a party did not understand what he or she was signing, the law imposes a duty upon that individual to make further inquiry. ***See, Ruiz v. Fortune Ins. Co., 677 So.2d 1336 (Fla. 3d DCA 1996)*** and ***Wolk v. Resolution Trust Corp., 608 So.2d 859 (Fla. 5th DCA 1992).*** Of note, 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, Pierce, Fenner & Smith v. Benton, 467 So.2d 311 (Fla. 5th DCA 1985).*** Similarly, so do blind individuals. ***See, Estate of Etting v. Regents Park at Aventura, Inc., 29 Fla. L. Weekly 2342 (Fla. 3d DCA October 20, 2004).***

Furthermore, the arbitration clause in this case is neither procedurally nor substantively unconscionable. Florida courts may decline to enforce a contract if the trial court finds it to be both **procedurally and substantively unconscionable.**

Powertel, Inc. v. Bexley, 743 So.2d 570, 574 (Fla. 1st DCA 1999), rev.den., 763 So.2d 1044 (Fla. 2000). In ***Powertel,*** the court explained:

> The procedural component of unconscionability relates to the manner in which the contract was entered and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the contract terms. For example, the court might find that a contract is procedurally unconscionable if important terms were hidden in a maze of fine print and minimized by deceptive trade practices. (Citations omitted.)
>
> In contrast, the substantive component focuses on the agreement itself. As the court explained in Kohl v. Bay Colony Club Condominium, 398 So.2d 865, 868 (Fla. 4th DCA 1981), a case is substantively unconscionable by showing that the terms of the contract are unreasonable and unfair.

See, Powertel at 574.

Herein, there is no procedural unconscionability given the general favorability of arbitration clauses and the lack of vague, ambiguous, and/or technical terms and the fact that there is no "fine print". Likewise, the terms of the arbitration clause in this matter are clear, fair, and substantially similar to the wording of arbitration clauses upheld by other courts.

Further, the contract is not substantively unconscionable as its provisions relative to the procedure of arbitration, and the remedies afforded to the **Resident** thereby, are consistent with those afforded residents in Florida under state law in general, and under ***Chapter 400, Fla.Stat.,*** in specifics, so that the remedial purpose of the statute is not defeated. ***See, Flyer Printing Company, Inc. v. Hill, 805 So.2d 829 (Fla. 2d DCA 2001).***

Moreover, the Plaintiff in this case never sought rescission of the agreement and, instead, performed his obligations under the contract. The courts have held that a party is estopped from arguing the validity of the arbitration clause because their actions amounted to an acceptance of the benefits of the contract. ***See, IHS v. Lopez-Silvero, supra*** (a contract is binding. . .where both parties have performed under the contract).

See, also, Consolidated Resources Health Care Fund I v. Fenelus, supra (assent to a contract can be shown by the performance of the contract) and ***Florida Power Corp. v. City of Casselberry, supra*** (party to franchise agreement could not dispute contract provision since it never sought to modify terms and arbitration clause enforced).

In the instant case, Plaintiff's acts are consistent with the Admission Agreement and the arbitration clause and any claims disputing the validity of the arbitration clause are plainly estopped by her action due to the following: (1) the relevant contracts were executed; (2) the Resident was admitted to the facility; (3) the Resident remained in the facility without dispute or question while receiving benefits of the Admission Contract; (4) the Resident engaged and permitted the facility to treat her as a resident of the facility; and (5) the parties performed under the contract.

B. An Arbitrable Issue Exists.

The issues raised in Plaintiff's Complaint are clearly arbitrable. The plain language of the **Arbitration Agreement** includes "but is not limited to, violations of any right granted to the Resident by law, including statutory resident's rights, or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice or any other claim based on any alleged departure from accepted standards of medical or health care or safety, whether sounding in tort resulting in personal injury, or in contract." As the Plaintiff has brought claims under a theory of statutory negligence and breach of fiduciary duty, specifically related to the Resident's admission, an arbitrable issue exists. Specifically, Plaintiff's Complaint asserts that the Resident has sued the Defendants pursuant to ***Chapter 400, Fla.Stat.*** He further asserts that the Defendants committed acts and omissions which deprived the Resident, **EDWARD HENRY CLARK,** of certain rights under ***§ 400.022, Fla.Stat.,*** and that as a result she suffered bodily injury. Plaintiff also alleges

a claim for breach of fiduciary duty against the facility licensee, **OP WINTER HAVEN, INC.**, in Count IV of the Complaint. The causes of action brought by the Plaintiff in the Complaint are encompassed by the arbitration provisions of the **Arbitration Agreement.** Since those causes of action present arbitrable issues, the Court is obligated to stay this action and order the parties to resolve said claims through arbitration.

C. **The Right To Arbitration Has Not Been Waived.**

The Defendants have not waived their right to arbitration as they have not actively participated in litigation. ***See, Hill v. Ray Carter Auto Sales, Inc., 745 So.2d 1136 (Fla. 1st DCA 1999).*** The courts have held that waiver occurs only if a party "takes an active part in litigation or by undertaking actions inconsistent with that right [to arbitration]." ***See, also, Miller v. Solomon General Contractors, Inc. v. Brennan's Glass Co., Inc., 824 So.2d 288 (Fla. 4th DCA 2002)*** and ***Duckworth v. Plant, 697 So.2d 1257 (Fla. 5th DCA 1997).*** In fact, even where a party has engaged in formal discovery, including taking depositions, arbitration is not waived. ***See, Merrill, Lynch, Pierce, Fenner & Smith v. Adams, 791 So.2d 25 (Fla. 2d DCA 2001).*** In ***Adams,*** the court stated, "We have found no case law which would require denial of appellee's right to arbitration based on their participation in discovery." ***Id. at 26.***

The Fourth District Court of Appeals has set forth that the party claiming waiver of arbitration must demonstrate: (1) knowledge of existing right to arbitrate; and (2) active participation in litigation or acts inconsistent with that right. ***See, Breckenridge v. Farber, 640 So.2d 208 (Fla. 4th DCA 1994).***

The case law clearly supports that any doubts concerning the waiver of the right to arbitration should be resolved in favor of arbitration. ***Raymond James Financial Services v. Saldukas, 851 So.2d 853 (Fla. 2d DCA 2003), rev. granted 870 So.2d***

823 (Fla. 2004). Furthermore, governing case law provides that if a party seeks to avoid arbitration on the ground of waiver, that party must show prejudice. ***Benedict v. Pensacola Motor Sales, Inc., 846 So.2d 1238 (Fla. 1st DCA 2003).***

CONCLUSION

Based on the above and foregoing, it is submitted by Defendants that arbitration should be compelled in this case as a matter of law. The parties herein have executed a clear and unambiguous **Arbitration Agreement** in conjunction with the Resident's admission to the facility. The allegations of statutory negligence and breach of fiduciary duty plainly arise from and relate to the terms of the Admission Contract and are encompassed within the **Arbitration Agreement.** Therefore, arbitration is warranted.

WHEREFORE, based upon the above stated points of law and the provisions of the subject **Arbitration Agreement,** Defendants, **OP WINTER HAVEN, INC.; RE WINTER HAVEN, INC.; TANDEM REGIONAL MANAGEMENT OF FLORIDA, INC.; TANDEM HEALTH CARE, INC.; GAIL WARD; NANCY C. THOMPSON; MICHAEL BRADLEY; and IRENA BLACKBURN,** respectfully request that this Court dismiss and/or strike Plaintiff's Complaint and abate further proceedings and submit this claim to binding arbitration in accordance with the terms of the **Arbitration Agreement.**

FOWLER WHITE BOGGS BANKER P.A.
501 East Kennedy Boulevard, Suite 1500
Tampa, Florida 33602
Telephone: (813) 228-7411
Facsimile: (813) 229-8313
Counsel for Named Defendants

RICHARD M. SEBEK, ESQUIRE
Florida Bar No. 710504

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of this document was forwarded on the 25th day of February, 2005, to **NICOLE ARFARAS KERR, ESQUIRE,** Wilkes & McHugh, P.A., Tampa Commons, Suite 800, One North Dale Mabry Highway, Tampa, Florida 33609.

FOWLER WHITE BOGGS BANKER P.A.
501 East Kennedy Boulevard, Suite 1500
Tampa, Florida 33602
Telephone: (813) 228-7411
Facsimile: (813) 229-8313
Counsel for Defendants

RICHARD M. SEBEK, ESQUIRE
Florida Bar No. 710504