RENDERED: JULY 23, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001361-MR

BEVERLY ENTERPRISES, INC.; BEVERLY ENTERPRISES-KENTUCKY, INC.; BEVERLY HEALTH AND REHABILITATION SERVICES, INC.; GGNSC ADMINISTRATIVE SERVICES, LLC; GGNSC HOLDINGS, LLC; GGNSC EQUITY HOLDINGS, LLC; GOLDEN GATE NATIONAL SENIOR CARE, LLC; GOLDEN GATE ANCILLARY, LLC; AND GGNSC FRANKFORT, LLC — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 08-CI-01650

DONNA PING, EXECUTRIX OF THE ESTATE OF ALMA CALHOUN DUNCAN, DECEASED — APPELLEE

AND

NO. 2009-CA-001379-MR

ANN PHILLIPS — APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 08-CI-01650

DONNA PING, EXECUTRIX
OF THE ESTATE OF ALMA
CALHOUN DUNCAN, DECEASED APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND MOORE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Appellants (Beverly Enterprises, Inc., *et al*) appeal from an order of the Franklin Circuit Court denying their motion to compel arbitration in an action filed against them by Appellee (Donna Ping, executrix of the estate of Alma Calhoun Duncan).[2] We reverse and remand.

Alma Duncan was admitted to Golden Living, a long-term care facility, by her daughter and power of attorney, Appellee Donna Ping. At the time of Ms. Duncan's admission to the facility, Appellee represented herself to the facility as Ms. Duncan's power of attorney and produced an executed copy of the General Power of Attorney evidencing her authority. Appellee signed the facility's

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Both Appeal No. 2009-CA-001361-MR and Appeal No. 2009-CA-001379-MR have been consolidated pursuant to an order of this Court dated October 1, 2009.

admission documents on Ms. Duncan's behalf, although she states that she did not read the documents despite having the opportunity to do so. Appellee also signed a separate Alternative Dispute Resolution Agreement ("ADR Agreement" or "Agreement") on Ms. Duncan's behalf as part of the admissions documents packet.

Ms. Duncan subsequently passed away, and Appellee, as executrix of Ms. Duncan's estate, filed this lawsuit alleging negligence with respect to the care provided to Ms. Duncan while she was a resident of the facility. Thereafter, Appellants filed an answer to Appellee's complaint and a motion to dismiss or, in the alternative, to stay the lawsuit pending alternative dispute resolution proceedings. The Franklin Circuit Court ordered the parties to engage in limited discovery regarding the enforceability of the ADR Agreement. After completion of the limited discovery, Appellants filed a renewed motion to enforce the ADR Agreement. The trial court entered an order denying Appellants' motion, and this appeal followed.

The ADR Agreement states in bold capital letters that it is a **RESIDENT AND FACILITY ARBITRATION AGREEMENT (NOT A CONDITION OF ADMISSION – READ CAREFULLY)**. In the first paragraph of the two-page Agreement, it states:

> It is understood and agreed by Facility and Resident that any and all claims, disputes and controversies . . . arising out of, or in connection with, or relating in any way to the [ADR] Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the Parties, or in the absence of

> such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated into this [ADR] Agreement, and not by a lawsuit or resort to court process. This [ADR] Agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Section 1-16.
>
> This [ADR Agreement] includes, but is not limited to, any claim for payment, nonpayment, or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the [ADR] Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or claims based on any departure from accepted medical or health care or safety standards, as well as any and all claims for equitable relief or claims based on contract, tort, statute, warranty, or any alleged breach, default, negligence, wantonness, fraud, misrepresentation, suppression of fact, or inducement.

The ADR Agreement further advises that the intention of the parties is that the ADR Agreement will "inure to the benefit of and bind the parties, their successors, and assigns, including without limitation the agents, employees, and servants of the Facility . . . including any parent, spouse, sibling, child, guardian, executor, legal representative, administrator, or heir of the Resident." The ADR Agreement adds that the parties intend that its provisions will survive the lives or existence of the parties to the Agreement.

The second page of the ADR Agreement, which is the signature page, contains in bold print an acknowledgement of the nature of the Agreement as an arbitration agreement that results in the parties giving up their constitutional rights to have any claims decided in a court of law before a judge and jury. Immediately above the signature lines is the provision that states:

> The undersigned certifies that he/she has read this [ADR] Agreement and that it has been fully explained to him/her, that he/she understands its contents, and has received a copy of the provision and that he/she is the Resident, or a person duly authorized by the Resident or otherwise to execute this [A]greement and accepts its terms.

Appellee's signature appears at the bottom of the page, and "Daughter/POA" is written next to the statement "Relationship to Resident."

This Court reviews a trial court's factual findings in an order denying enforcement of an arbitration agreement to determine if the findings are clearly erroneous, but we review a trial court's legal conclusions under a *de novo* standard. *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001).

Appellants first argue that they have established that a valid arbitration agreement exists under 9 U.S.C. § 1-16 and that the ADR Agreement includes the claims brought by Appellee in this lawsuit. Both the United States Congress and the Kentucky General Assembly have enacted legislation to govern certain types of arbitration agreements: the Federal Arbitration Act ("FAA") at 9 U.S.C. § 1 and the Uniform Arbitration Act ("KUAA") at KRS 417.045-240.[3] Both acts have been found to benefit arbitration agreements, at least to the point of ensuring that arbitration agreements are reviewed using the same criterion that is applied to other contracts. *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct.

[3] The FAA and the KUAA have been construed consistently with each other by Kentucky courts. *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 857 (Ky. 2004) ("we have interpreted the KUAA consistent with the FAA[.]").

852, 858, 79 L.Ed.2d 1 (1984); *Kodak Min. Co. v. Carrs Fork Corp.*, 669 S.W.2d 917, 919 (Ky. 1984).

In this case, the ADR Agreement comes within the broad provisions of both the FAA and the KUAA.[4] The Agreement is a written pre-dispute arbitration agreement involving interstate commerce.[5] Moreover, by its terms the ADR Agreement applies to negligence and malpractice claims. Appellee's claims are all based on negligence and medical malpractice and are, therefore, within the scope of the ADR Agreement.

Both acts state that qualifying agreements[6] are "valid, enforceable and irrevocable, *save upon such grounds as exist at law for the revocation of any contract*." KRS 417.050 (emphasis added); 9 U.S.C. § 2. The last clause refers "only to revocation based upon fraud, mistake or other defect in the making of the agreement[.]" *Kodak Min. Co.*, 669 S.W.2d at 919. Therefore, "the existence of a valid arbitration agreement as a threshold matter must first be resolved by the

[4] Because an appeal at the end of the litigation will not often afford an adequate solution to the wrongful denial of a request to arbitrate, both the FAA and the KUAA provide that an appeal may be taken from an interlocutory order denying an application to compel arbitration. 9 U.S.C. § 16; KRS 417.220.

[5] Not only does the agreement involve interstate commerce, but the agreement states that it "shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16." *See Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 472, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), and *Conseco*, 47 S.W.3d at 341, n.11.

[6] The FAA applies to: "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal[.]" 9 U.S.C. § 2. The KUAA applies to: "[a] written agreement to submit any existing controversy to arbitration or a provision in [a] written contract to submit to arbitration any controversy thereafter arising between the parties[.]" KRS 417.050.

court." *Mortgage Elec. Registration Sys., Inc. v. Abner*, 260 S.W.3d 351, 353 (Ky. App. 2008) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)). State contract law governs in determining whether a valid arbitration agreement exists. *Gen. Steel Corp. v. Collins*, 196 S.W.3d 18, 20 (Ky. App. 2006). Further, "[t]he party seeking to avoid the arbitration agreement has a heavy burden." *Cox*, 132 S.W.3d at 857 (citing *Valley Constr. Co., Inc. v. Perry Host Mgmt. Co. Inc.*, 796 S.W.2d 365, 368 (Ky. App. 1990)).

The trial court here denied the motion to compel arbitration, finding that Appellee did not have authority to sign the ADR Agreement, and, therefore, that a valid agreement was not formed due to a lack of mutual assent between the parties. The trial court concluded that there was no actual authority for Appellee to enter into the Arbitration Agreement because the power of attorney did not contain any specific or express language to that effect.

Appellee cites to a case holding that "any power of attorney which delegates authority to perform specific acts that also contains general words, is limited to the particular acts authorized." *Harding v. Kentucky River Hardwood Co.*, 205 Ky. 1, 265 S.W. 429, 431 (1924). The case in *Harding*, however, dealt with a power of attorney that was given for a specific limited purpose. The power of attorney in *Harding* stated the following:

> That the Commercial Bank of Raleigh, N.C., does hereby appoint W.N. Cope, attorney of Jackson, Ky., as its attorney to act for it in all respects in its behalf in a suit

> against the Kentucky River Hardwood Company and other, with full power to sign in its name a bond for costs and do other acts necessary.

Id. The court noted that the specific act authorized to be performed was to sign the bank's name to the cost bond, and therefore the power was limited to that act, notwithstanding the general words contained therein. *Id.* at 431-32.

More recent guidance on the Kentucky Supreme Court's approach when confronted with a principal's clear statement or intent in a power of attorney appears in *Ingram v. Cates*, 74 S.W.3d 783 (Ky. App. 2002). In *Ingram*, this Court stated the following:

> Here, the power of attorney . . . grants a general power. . . to "convey any personal property that I now or hereafter own . . . ." It is an unlimited power of attorney authorizing [the attorney-in-fact] to make any conveyance of personal property. It is undeniable that the power of attorney did not specifically bestow upon [the attorney-in-fact] the power to make a gift to himself or to another. Even so, it is clear that the general power to convey any personal property . . . permits these specific transfers. We know of no rule of law requiring that a power of attorney specifically delineate each and every transaction the attorney-in-fact is authorized to perform.
>
> Cates points out the general rule of construction that when a power of attorney delegates authority to perform specific acts and also contains general words, the powers of attorney are limited to the particular acts authorized. In this case, however, the power of attorney contained general terms without limitation and the obvious purpose was to give [the attorney-in-fact] authority to handle and transact all financial affairs as agent for Mr. Ingram.

Id. at 787-88 (internal citations omitted).

The power of attorney held by Appellee in this case was a general power of attorney as evidenced by its title (General Power of Attorney). In its first paragraph, Ms. Duncan appointed Appellee as "my true and lawful attorney" and set forth the following powers:

> [G]iving and granting to her full and complete power and authority to do and perform any, all, and every act and thing whatsoever requisite and necessary to be done, to and for all intents and purposes, as I might or could do if personally present, including but not limited to the following[.]

Various specific powers were thereafter enumerated.

Later in the document, Duncan gave Appellee the following specific power:

> To make any and all decisions of whatever kind, nature or type regarding my medical care, to execute any and all documents, including, but not limited to, authorizations and releases, related medical decisions affecting me[.]

On the second page of the General Power of Attorney, Ms. Duncan clearly stated her intentions as follows:

> It is my intention and desire that this document grant to my said attorney-in-fact full and general power and authority to act on my behalf and I thus direct that the language of this document be liberally construed with respect to the power and authority hereby granted my said attorney-in-fact in order to give effect to such intention and desire. The enumeration of specific rights or acts or powers herein is not intended to, nor does it limit or restrict, the general full power herein granted to my said attorney-in-fact.

We are not persuaded by Appellee's arguments that the General Power of Attorney in this case did not give Appellants the authority to enter into the ADR Agreement on Ms. Duncan's behalf. On page 5 of Appellee's brief, she cites language from a case that is over 175 years old, *Southard v. Steele*, 3 T.B. Mon. 435, 19 Ky. 435 (1826). The language from *Southard* cited by Appellee states that a general agent cannot bind his principal to arbitration without special authority. A close reading of the case, however, reveals that the cited language was not the words of the court; rather, it was the words of counsel in a petition for rehearing. Further, the *Harding* case, discussed earlier herein, is distinguishable as we have noted.

We conclude that Appellee had the actual authority to enter into the ADR Agreement by the terms of the General Power of Attorney given to her by Ms. Duncan.

Additionally, Appellee had apparent authority to enter into the Agreement on behalf of Ms. Duncan. Under Kentucky law, "[a]pparent authority is not actual authority, but rather 'is that which, by reason of prevailing usage or other circumstance, the agent is in effect held out by the principal as possessing.'" *Estell v. Barrickman*, 571 S.W.2d 650, 652 (Ky. App. 1978), *overruled on other grounds by Mid-States Plastics., Inc. v. Estate of Bryan ex. rel. Bryant*, 245 S.W.3d 728 (Ky. 2008). By designating Appellee as her power of attorney and giving her the authority to make medical decisions and to execute releases on her behalf, Ms. Duncan created the appearance that Appellee was authorized to act on her behalf.

It was reasonable for Appellants to assume that Appellee had authority to enter into the ADR Agreement on behalf of Ms. Duncan because of the language in the power of attorney.[7]

The trial court also found, and Appellee argues, that the evidence in this situation indicates fraud, thereby resulting in a defect in the formation of the Agreement. Under Kentucky law, there are two types of fraud: fraud in the inducement and fraud in the execution, or *factum*. To show fraud in the inducement, one must show through clear and convincing evidence that there was (1) a material representation; (2) which is false; (3) known to be false or made recklessly; (4) made with inducement to be acted upon; (5) acted in reliance thereon, and (6) injury. *United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). Fraud in the execution occurs when a party's signature to an instrument is obtained without the knowledge of its true nature or content and renders the contract void, such as when one party encourages the other to sign a document by falsely stating that it has no legal effect. *Hazelwood v. Woodward*, 277 Ky. 447, 126 S.W.2d 857, 862 (1939).

The trial court found that the admissions director led Appellee to believe that the papers presented to her, which included the ADR Agreement, were

[7] These circumstances differentiate the present case from that of *Beverly Enterprises, Inc. v. Stivers*, 2009 WL 723002 (Ky. App. 2009) (No. 2008-CA-000284-MR), and *Beverly Health & Rehab. Services, Inc. v. Smith*, 2009 WL 961056 (Ky. App. 2009) (No. 2008-CA-000604-MR) (non-final decision), particularly the latter case, in which the family member who executed the challenged arbitration agreement directly advised the employee involved that she did *not* have authority to sign on behalf of her father, and the power of attorney was held by her mother. *Stivers*, 2009 WL 961056 at *1-2. This case presents no evidence that Appellee told anyone that she did not have the authority to execute the admission documents or the ADR agreement.

for purposes of admitting Ms. Duncan and nothing more, while in reality the ADR Agreement had the effect of waiving her mother's constitutional right to a trial by jury. Therefore, the trial court concluded that Appellee's signature could not serve as evidence of her consent.

The only statement Appellee attributes to the admissions director during the admissions process, however, was that he was presenting to her the "standard admissions packet." This statement was not a misrepresentation and does not rise to the level of obtaining Appellee's signature without her knowledge of the Agreement's true nature or contents.

The very title of the Agreement indicates in bold letters that it is an arbitration agreement, contains the words "Read Carefully" in bold and capital letters, and states that execution of the Agreement is not a condition for admission. Moreover, Appellee never testified that she was in any fashion misled by any employee of Appellants or by the language of the Agreement, which she did not read before signing.

Additionally, the trial court found it significant that the admissions director appeared to be in a hurry and that Appellee signed where he told her to sign. Appellee, however, never stated that she was denied an opportunity to read any of the papers. Even if Appellee was rushed when executing the documents, she had the right under the Agreement to seek legal counsel and to rescind the Agreement within 30 days. None of this evidence leads to the conclusion that any type of fraud was present at the time Appellee signed the Agreement.

The trial court also found that there was a lack of consideration between the parties because if signing the ADR Agreement was not a condition of admission, there was no reciprocal benefit to Appellee under the terms of the ADR Agreement. It is not necessary, however, that both parties to an agreement have reciprocal rights or obligations of the same kind or nature. *David Roth's Sons, Inc. v. Wright & Taylor, Inc.*, 343 S.W.2d 389, 390 (Ky. 1961) (citing *Bank of Louisville v. Baumiester*, 87 Ky. 6, 7 S.W. 170 (1888)).

In this situation, the rights and obligations incurred by Appellants and Appellee were the same. The ADR Agreement stated that any claim stemming from Duncan's residency was to be submitted to arbitration, including any claims that Appellants may have had, and not only Duncan's claims. Therefore, both parties were obligated under the Agreement to submit their claims to arbitration.

Additionally, we do not read the language that "[t]his Arbitration Agreement is executed . . . in conjunction with an agreement for admission and for the provision of nursing facility services" as a statement that the consent to arbitrate is consideration for the provision of nursing facility services. Rather, it is a preliminary statement of the subject matter of the Agreement. Therefore, Appellants' agreement to submit its own claims to arbitration provided sufficient consideration under Kentucky law.

Appellee next contends, and the trial court agreed, that the ADR Agreement is revocable because it is unconscionable. Kentucky law recognizes unconscionability as a defense to the enforcement of an arbitration agreement.

Wilder, 47 S.W.3d at 341. As stated by the Court in *Wilder*, however, "[a] fundamental rule of contract law holds that, absent fraud . . . , a written agreement duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms." *Id.* (citing *Cline v. Allis-Chalmers Corp.*, 690 S.W.2d 764 (Ky. App. 1985)).

While the doctrine of unconscionability has arisen as an exception to this rule, the doctrine "is directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain." *Id.* (citing *Louisville Bear Safety Serv., Inc. v. South Central Bell Tel. Co.*, 571 S.W.2d 438, 440 (Ky. App. 1978)). An unconscionable contract is "one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other." *Id.*

We agree with Appellants that the ADR Agreement was not abusive or unfair. The Agreement was not hidden within the other admissions documents, but rather was a separate document whose title was printed in bold capital letters. Moreover, its terms are such that a person of ordinary experience and education is likely to understand, and the Agreement does not affect the parties' responsibilities or liabilities but only the forum in which they are to be disputed. *See Wilder*, 47 S.W.3d at 343.

Moreover, the United States District Court for the Western District of Kentucky has analyzed the exact same agreement and has come to the conclusion

that the agreement was not unconscionable. *Holifield v. Beverly Health and Rehab. Serv., Inc.*, 2008 WL 2548104 (W.D. Ky. 2008) (Civil Action No. 3:08CV-147-H). We find the analysis utilized by the Court in *Holifield* persuasive. In *Holifield*, the Court found that the language of the agreement was not deceptive or misleading and that none of its terms were hidden or concealed. It further stated that "[t]his particular arbitration agreement is not unusual" and the institution's "failure to mention or separately identify the ADR Agreement does not rise to 'unconscionable' conduct." *Id.* at *5. We conclude that the ADR Agreement is not unconscionable.

Appellee also contends that the trial court does not have subject matter jurisdiction to enforce the ADR Agreement because the Agreement does not state that the arbitration must take place in Kentucky. *See Alley Cat, LLC v. Chauvin*, 274 S.W.3d 451, 454 (Ky. 2009). The *Alley Cat* case stands for the proposition that when an arbitration agreement "fails to comply with the literal provisions of KRS 417.200," then Kentucky courts lack subject matter jurisdiction to enforce the agreement. *Id.* at 455-56. KRS 417.200 states:

> The term "court" means any court of competent jurisdiction of this state. The making of an agreement described in KRS 417.050 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this chapter and to enter judgment on an award thereafter.

Therefore, "[s]ubject matter jurisdiction to enforce an agreement to arbitrate is conferred upon a Kentucky court only if the agreement provides for arbitration in this state." *Id.* at 455.

Here, the ADR Agreement states that the claims shall be resolved by binding arbitration "to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated into this Agreement[.]" Although there are no Kentucky cases directly on point, other courts interpreting statutes identical to KRS 417.200 have held that where an arbitration agreement contains a provision which could result in that particular state being the site of arbitration, then that provision fulfills the statutory requirement that the agreement provide for arbitration in that state. *L.R. Foy Constr. Co., Inc. v. Dean L. Dauley & Waldorf Assoc.*, 547 F.Supp. 166, 169 (D.C.Kan. 1982).

In this case, the parties could agree that the arbitration would take place in Kentucky. Additionally, if the parties could not agree on a site to hold the arbitration, the arbitration would take place at the facility, which is located in Kentucky. Therefore, the Agreement complies with KRS 417.200 and is sufficient to provide the court with subject matter jurisdiction to enforce the Agreement.

The trial court gave additional reasons to support its ruling, and Appellee raises other arguments as well. We conclude that none of these have merit or warrant discussion. Among these are the trial court's holdings that a

primary caregiver cannot reasonably be expected to enter into a contract when transferring or admitting a patient, that Appellant's agent, Mr. Brand, manipulated the process to such an extent that it amounted to concealment, that the ADR Agreement "causes confusion and is substantively manipulative," and that Appellee entered into the Agreement "under duress and/or undue influence." We also reject Appellee's arguments that the terms of the Agreement are illusory and that Appellants breached a fiduciary duty owed to Ms. Duncan by not fully explaining the terms of the Agreement to Appellee.

The order of the Franklin Circuit Court is reversed and remanded for further proceedings consistent with this opinion. The parties' remaining arguments are rendered moot.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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