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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002012-MR

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, D/B/A DANVILLE CENTRE FOR HEALTH AND REHABILITATION; KINDRED HEALTHCARE, INC.; KINDRED HEALTH CARE OPERATING, INC.; KINDRED HOSPITALS LIMITED PARTNERSHIP; AND KINDRED NURSING CENTERS EAST, LLC — APPELLANTS

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 09-CI-00397

TOMMY GOOCH, EXECUTOR OF THE ESTATE OF LUCILLE JONES, DECEASED — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Appellants,[1] hereinafter collectively referred to as "Kindred," appeal from the Boyle Circuit Court's order denying their motion to compel arbitration and invalidating the agreed order to arbitrate between Kindred and Tommy Gooch. For the following reasons, we reverse and remand this matter for further proceedings.

This appeal arises from Gooch's claims of negligence in the care of his aunt, Lucille Jones, while she was a resident of Kindred's Danville Centre for Health and Rehabilitation. Under a power of attorney executed in November 2005, Jones named Gooch as her attorney-in-fact. When Jones was admitted to Kindred's facility in December 2006, Gooch completed Jones' admission paperwork, including an optional arbitration agreement on Jones' behalf (the "2006 agreement"). Jones died in February 2009, and Gooch was appointed executor under her will a month later. This lawsuit was filed in August 2009.

Kindred moved the court to compel arbitration pursuant to the 2006 agreement. The trial court denied Kindred's motion, on grounds that it lacked jurisdiction to enforce the 2006 agreement under either the Kentucky Uniform Arbitration Act ("KUAA") (KRS[2] 417.045-240) or the Federal Arbitration Act ("FAA") (9 U.S.C.[3] § 1 *et seq*.). On appeal, this court affirmed the trial court's determination that it lacked jurisdiction under the KUAA, but remanded the case to

[1] Kindred Nursing Centers Limited Partnership d/b/a Danville Centre for Health & Rehabilitation; Kindred Healthcare, Inc.; Kindred Healthcare Operating, Inc.; Kindred Hospitals Limited Partnership; and Kindred Nursing Centers East, LLC.

[2] Kentucky Revised Statutes.

[3] United States Code.

the trial court to determine whether it had jurisdiction under the FAA. *Kindred Nursing Ctrs. Ltd. P'ship v. Gooch*, No. 2009-CA-002253, 2011 WL 856242 (Ky. App., Feb. 25, 2011). On remand, the trial court found that it did have jurisdiction to enforce the 2006 agreement under the FAA.

Gooch then filed a motion for invalidation of the 2006 arbitration agreement or in the alternative to permit limited discovery. Gooch claimed he lacked authority to sign the 2006 agreement on behalf of Jones and that the 2006 agreement was unconscionable. The trial court denied Gooch's motion to invalidate the 2006 agreement, but permitted the parties to conduct discovery on the issue of the agreement's validity. In March 2012, the parties agreed to proceed under the terms of the 2006 agreement, and Kindred agreed to draft an agreed order. When Kindred failed to provide Gooch with a draft of the agreed order, Gooch filed a motion to void arbitration due to laches. At a June 2012 hearing on Gooch's motion, Kindred tendered an agreed order reflecting the parties' agreement, making the motion to void moot. Gooch's counsel noted at the hearing that Gooch's position regarding arbitration had not changed, but he wanted to move things forward.

The following week, the court entered the agreed order holding the action in abeyance (the "2012 agreed order"). The 2012 agreed order incorporated the 2006 agreement as an appendix, and indicated that the parties agreed to arbitration pursuant to the terms of the 2006 agreement. Thereafter, the Kentucky Supreme Court issued its decision in *Ping v. Beverly Enters., Inc.,* 376 S.W.3d 581 (Ky.

2012). *Ping* was a factually similar case in which an arbitration agreement signed by an attorney-in-fact was held invalid because the general power of attorney did not authorize the agent to waive the principal's legal rights. In other words, the power of attorney did not permit the attorney-in-fact to waive the principal's right to a trial by judge or jury by entering into an arbitration agreement on the principal's behalf.

Shortly after the *Ping* decision was rendered, Gooch filed a motion to invalidate the 2006 agreement and motion to set aside the 2012 agreed order, asking the trial court to invalidate the 2006 agreement based on *Ping* because the general power of attorney did not authorize Gooch to enter into the arbitration agreement on Jones' behalf. In essence, Gooch claimed that he entered into the 2006 agreement based on a mistake of law. Kindred again moved to compel arbitration under both the 2006 agreement and the 2012 agreed order. The court conducted a hearing on these motions, and ultimately granted Gooch's motion, invalidating the 2006 agreement and setting aside the 2012 agreed order. Kindred's motion to compel arbitration was denied. Kindred now appeals.

On appeal, Kindred's main argument is that the 2012 agreed order is itself a valid arbitration agreement, under both the FAA and the KUAA, and it therefore could not be set aside without evidence of fraud or mistake of fact. Additionally, Kindred maintains the trial court had no authority to lift the stay of litigation it ordered as part of the 2012 agreed order, Gooch waived his objections to

arbitration, and Gooch should be estopped from revoking his consent to arbitrate. Kindred further claims the *Ping* decision should not apply to this case.

This court has jurisdiction to review an appeal from an otherwise interlocutory order denying a motion to compel arbitration. *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001). We review a trial court's findings of fact in an order denying enforcement of an arbitration agreement to determine if the findings are clearly erroneous, and we review a trial court's legal conclusions under a *de novo* standard. *Id*.

The first issue is whether the 2012 agreed order constitutes a valid arbitration agreement under the FAA. Kindred asserts that the 2012 agreed order is a separate agreement to arbitrate, distinct from the 2006 agreement, and it should therefore be treated as an independent contract. Gooch claims that the 2012 agreed order is merely an order of the court, and therefore, it could be vacated pursuant to CR[4] 60.02. We agree with Kindred that the 2012 agreed order is a distinct agreement to arbitrate under the FAA.

The FAA states:

> A written provision in any maritime transaction or 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, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

[4] Kentucky Rules of Civil Procedure.

9 U.S.C. § 2. When Gooch signed the 2012 agreed order, he acted in his capacity as estate administrator, rather than on behalf of Jones as attorney-in-fact. Consequently, the power of attorney's scope of authority was irrelevant to this action. The 2012 agreed order submits an existing controversy, Gooch's negligence claims against Kindred, to arbitration. Nursing homes are centers of interstate commerce, *see, e.g. Ping*, 376 S.W.3d at 588-90, and here, the negligence claims arise from the contract between Kindred and Jones for her care. Accordingly, the agreed order meets the requirements for a valid arbitration agreement within the scope of the FAA. *See Kodak Mining Co. v. Carrs Fork Corp*., 669 S.W.2d 917 (Ky. 1984).

The KUAA requires the following for a valid arbitration agreement:

> A written agreement to submit any existing controversy to arbitration or a provision in written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract.

KRS 417.050. Again, the 2012 agreed order submits an existing controversy to arbitration. Further, the agreed order plainly states that arbitration is to take place within the Commonwealth of Kentucky, which gives Kentucky courts jurisdiction to enforce the agreement under KRS 417.200. *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 455 (Ky. 2009). The 2012 agreed order is therefore also an enforceable arbitration agreement under the KUAA.

The FAA contains a "savings" provision, providing that arbitration agreements are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision "refers only to revocation based upon fraud, mistake or other defect in the making of the agreement, therefore, arbitration may be had as to all issues arising subsequent to the making of the contract." *Kodak*, 669 S.W.2d at 919. As a valid arbitration agreement under the FAA, the 2012 agreed order could only be revoked if based upon fraud or mistake.

Gooch has not alleged any fraud or mistake in the execution of the 2012 agreed order, other than mistake of law regarding the scope of a power of attorney's authority following the *Ping* decision. "Only a mistake of fact will affect the enforceability of a contract, not a mistake of law." *New Life Cleaners v. Tuttle*, 292 S.W.3d 318, 322 (Ky. App. 2009). Here, the parties relied upon law that was ultimately overturned by the *Ping* decision when agreeing to the 2012 agreed order. But, this reliance only amounts to a mistake of law. Gooch points to no mistake of fact, and no other evidence, that would require invalidation or revocation of the 2012 agreed order.

In addition to being a valid arbitration agreement, the 2012 agreed order is also an enforceable agreed order entered by the court. An agreed order may not be vacated "without the consent of all the parties, unless it affirmatively appears that its rendition was procured by fraud or mutual mistake[.]" *Karnes v. Black*, 215 S.W. 191, 192-93, 185 Ky. 410, 414 (1919). An agreed order "is not the judgment

of the court, except in the sense that the court allows it to go upon the record and have the force and effect of a judgment; and therefore the court cannot amend, modify, or correct it, except by the consent of all the parties to it." *Id*. at 193.

Mutual mistake requires the following:

> To vary the terms of a writing on the ground of mistake, the proof must establish three elements. First, it must show that the mistake was mutual, not unilateral. Second, "[t]he mutual mistake must be proven beyond a reasonable controversy by *clear and convincing evidence*." Third, "it must be shown that the parties had actually agreed upon terms different from those expressed in the written instrument."

Abney v. Nationwide Mut. Ins. Co., 215 S.W.3d 699, 704 (Ky. 2006) (internal citations omitted). The mutual mistake must also be a mistake of material fact, not a mistake of law. *Id*. Both parties were aware of the issues pending in *Ping*, and the agreed order did not reflect terms different from those the parties agreed upon. Thus, no mutual mistake of fact existed, only a mutual mistake of law, which is not grounds to vacate the agreed order.

Kindred also argues that the trial court lacked authority to lift the stay of litigation contained in the agreed order. Kindred cites 9 U.S.C. § 3 for the proposition that litigation should be stayed "until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." Since the agreed order should not have been set aside, likewise, the stay should not have been lifted.[5]

[5] We decline to address the issue of when a trial court has the authority to lift a stay of litigation while arbitration is being conducted.

We also agree with Kindred's argument that Gooch has waived his objections to arbitration. Waiver is "a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the party at his option might have demanded or insisted upon." *Conseco*, 47 S.W.3d at 344 (internal citations omitted). Such a waiver may be either explicit or implied. *Id*. Gooch waived his objections to arbitration when he willingly entered into the 2012 agreed order, and when he participated in the selection of arbitrators. Although Gooch's counsel stated that he still objected to the validity of the 2006 agreement prior to signing the 2012 agreed order, he did not insist on the inclusion of any provision in the 2012 agreed order protecting Gooch's ability to challenge the agreed order if the 2006 agreement was found to be invalid. As a result, we find that Gooch has waived his ability to object to arbitration.

Kindred's assertion that Gooch should be estopped from challenging the arbitration agreement as a matter of equity is rendered moot by our finding that the 2012 agreed order constitutes a binding agreement to arbitrate. Therefore, we find it unnecessary to address this argument.

Lastly, Kindred contends that *Ping* should not apply to either the 2006 agreement or the 2012 agreed order because both were executed prior to the *Ping* decision. In addition, Kindred argues that the *Ping* decision is preempted by the FAA because the decision disfavors arbitration. While it does appear that *Ping* might have rendered the 2006 agreement invalid, *Ping* has no effect on the 2012 agreed order. The 2012 agreed order was signed by Gooch acting as the estate

representative; at that time, he was not acting as Jones' agent pursuant to the power of attorney. Because we find the 2012 agreed order to be a separate and valid arbitration agreement, we need not address the applicability of *Ping* to the 2006 agreement.

The judgment of the Boyle Circuit Court is reversed and this case is remanded with directions for the court to reinstate the 2012 agreed order and permit the parties to proceed to arbitration pursuant to its terms.

JONES, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND WILL NOT FILE SEPARATE OPINION.

BRIEFS FOR APPELLANTS:

Donald P. Moloney, II
E. Douglas Stephan
Lexington, Kentucky

BRIEF FOR APPELLEE:

Michael E. Liska
Lexington, Kentucky