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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000245-MR

GGNSC FRANKFORT, LLC, D/B/A
GOLDEN LIVING CENTER – FRANKFORT;
GGNSC ADMINISTRATIVE SERVICES, LLC,
D/B/A GOLDEN VENTURES; GGNSC
HOLDINGS, LLC, D/B/A GOLDEN HORIZONS;
GGNSC EQUITY HOLDINGS, LLC; GOLDEN
GATE NATIONAL SENIOR CARE, LLC, D/B/A
GOLDEN LIVING; GOLDEN GATE ANCILLARY,
LLC, D/B/A GOLDEN INNOVATIONS;
GPH FRANKFORT, LLC; ROBERT DURHAM;
AND ANN PHILLIPS — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE O. REED RHORER, JUDGE
ACTION NO. 11-CI-00572

JAMES RICHARDSON, AS EXECUTOR
OF THE ESTATE OF FANNIE H. LYON,
DECEASED; AND JAMES RICHARDSON,
ON BEHALF OF THE WRONGFUL
DEATH BENEFICIARIES OF FANNIE H. LYON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS AND THOMPSON, JUDGES.

THOMPSON, JUDGE: GGNSC, Frankfort, LLC, d/b/a Golden Living Center-Frankfort and its affiliated entities (GGNSC) appeal from an order of the Franklin Circuit Court denying a motion to compel arbitration and dismiss or to stay the action pending arbitration. The question presented is whether a power-of-attorney document executed by Fannie H. Lyon authorized her attorney-in-fact to enter into an agreement to arbitrate any claims arising from GGNSC's alleged negligence while Fannie was a GGNSC resident. Based on our Supreme Court's decision in *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016), we conclude the power-of-attorney document did not confer such authority and, therefore, the arbitration agreement is not enforceable.

On February 23, 2006, Fannie executed a durable power-of-attorney document appointing her son, James Richardson, as her attorney-in-fact. The document conferred various decision-making powers regarding her financial affairs, health care, and real and personal property. James was given the authority to "operate and manage" Fannie's "farm, rental or other business or commercial interest or activity" and, in the same sentence was given the power "to commence or defend administrative and legal proceedings concerning [Fannie's] property and rights[.]" Additionally, the power-of-attorney document provided that James had

the power "to generally do and perform for [Fannie] all that [she] may do if acting in [her] own person."

Fannie was admitted to the Golden Living Center on September 2, 2009, and except when hospitalized, remained a resident until her death on April 5, 2010. On the date of her admission, James signed documents on Fannie's behalf, including an optional arbitration agreement providing that the parties submit any claims arising out of or related to Fannie's care at the facility to arbitration. The agreement instructs that by agreeing to arbitrate any disputes, the parties waived their constitutional rights to have a claim decided in a court of law.

After James was appointed administrator of Fannie's estate, he filed this action in the Franklin Circuit Court alleging negligence, medical negligence, corporate negligence, violation of Kentucky's long-term care resident's rights statute, Kentucky Revised Statues (KRS) 216.515, and wrongful death. GGNSC filed a motion to compel arbitration and dismiss the pending lawsuit or stay the lawsuit pending arbitration. The circuit court denied GGNSC's motion ruling that the power-of-attorney document does not encompass the power to execute an arbitration agreement. GGNSC appealed.

In addition to arguing that the power-of-attorney document gives James actual and apparent authority to execute the arbitration agreement, GGNSC offers alternative reasons for enforcing the agreement. It argues: (1) federal and state law favor enforcement of an agreement to arbitrate and arbitration is a constitutional right; (2) James failed to present adequate grounds for revocation of

the agreement; and (3) there are no other grounds for the revocation of the agreement.

Although an order denying arbitration is interlocutory, "an ordinary appeal at the close of litigation will not often provide an adequate remedy for the wrongful denial of a right to arbitrate[.]" *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky.App. 2001). Consequently, KRS 417.220(a) provides that an appeal may be taken from "[a]n order denying an application to compel arbitration made under KRS 417.060[.]" Having stated our basis for exercising jurisdiction, we address whether the claims asserted must be submitted to arbitration.

This case involves not only personal injury and statutory claims arising under KRS 216.510 *et seq.,* but also a wrongful death claim. The distinction between the causes of action is important. Reaffirming its decision in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), in *Whisman*, the Court rejected the notion that a similar arbitration agreement executed by an attorney-in-fact could bind the beneficiaries of a wrongful death claim. As the Court stated:

> Under Kentucky law, a wrongful death claim is a distinct interest in a property right that belongs *only* to the statutorily-designated beneficiaries. Decedents, having no cognizable legal rights in the wrongful death claims arising upon their demise, have no authority to make contracts disposing of, encumbering, settling, or otherwise affecting claims that belong to others. The rightful owners of a wrongful death claim, the

> beneficiaries identified in KRS 411.130(2), cannot be bound to the contractual arrangements purportedly made by the decedent with respect to those claims. A decedent has no more authority to bind the wrongful death beneficiaries to an arbitration agreement than he has to bind them to a settlement agreement fixing or limiting the damages to be recovered from the wrongful death action, limiting the persons against whom a claim could be pursued, or an agreement on how and to whom to allocate the damages recovered in a wrongful death claim.

Whisman, 478 S.W.3d at 314 (internal footnotes omitted).

Fannie "had no authority during [her] lifetime, directly or through the actions of [her] attorney-in-fact, to prospectively bind the beneficiaries of the wrongful death claim to an arbitration agreement." *Id*. at 313. There was no error in the circuit court's denial of GGNSC's motion to compel arbitration of the wrongful death claim arising from Fannie's death.

The personal injury and the statutory claims belonged to Fannie and, therefore, her estate "succeeded to those claims, at least to the extent that such claims survive the decedent's death pursuant to KRS 411.140 and 216.515(26)." *Id*. at 314 (internal footnote omitted). Therefore, the question is whether the arbitration agreement is enforceable.

With certain exceptions not applicable here, KRS 417.050 provides that a written agreement to submit a controversy to arbitration "is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract." "To create a valid, enforceable contract, there must be a voluntary, complete assent by the parties having capacity to contract." *Conners*

v. Eble, 269 S.W.2d 716, 717-18 (Ky. 1954). Assent to a contract can be provided by an agent acting as an attorney-in-fact "*if* the authority to do so was duly conferred upon the attorney-in-fact by the power-of-attorney instrument." *Whisman*, 478 S.W.3d at 321. Whether the principal's assent to the contractual agreement to arbitrate disputes was validly obtained is "a question of law that depends entirely upon the scope of authority set forth in the written power-of-attorney instrument." *Id.*

GGNSC properly points out that under federal and Kentucky law, the settlements of disputes through arbitration is favored. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 855 (Ky. 2004) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983)). However, before such public policy considerations are relevant, there must first be a binding arbitration agreement. In other words, if there is no agreement, there is no language to construct and the issue of any defense against arbitration is mooted. *Whisman*, 478 S.W.3d at 320. Where the agreement is executed pursuant to a power-of-attorney document, the threshold question is whether the power-of-attorney document grants the attorney-in-fact power to assent.

In *Whisman*, the Court held the power to arbitrate "must be unambiguously expressed in the text of the power-of-attorney document in order for that authority to be vested in the attorney-in-fact." *Id.* at 328. The Court rejected the argument that the grant of specific authority to "institute or defend suits concerning my property rights" is an express authorization for the attorney-in-fact to choose arbitration as the mode for resolving disputes. *Id*. at 323. It pointed out that arbitration is not a suit or legal action that occurs in a court of law. *Id*. The "very purpose and design [of arbitration] is intended to *avoid* suits in a court of law; it is the antithesis of a suit in a court of law." *Id*. It also differs from a settlement of litigation. "[A]n agreement to submit a dispute to arbitration is the diametrical *opposite* of "settling" a claim. Settling a claim ends the controversy, whereas arbitrating a claim means fighting it out before an arbitrator rather than a judge and jury." *Id*. at 324. The provisions in the power-of-attorney document

The same reasoning applies here. The power to "commence or defend administrative and legal proceedings" does not expressly include the authority to enter into an arbitration agreement. As *Whisman* teaches, arbitration is not a legal proceeding. Likewise, the power to commence or defend administrative proceedings, is not an express grant of the authority to assent to arbitration. "Black's Law Dictionary defines an administrative proceeding as '[a] hearing, inquiry, investigation, or trial before an administrative agency, usu. adjudicatory in nature but sometimes quasi-legislative."' *Pearce v. Univ. of Louisville, by &*

through its Bd. of Trustees, 448 S.W.3d 746, 753 n. 3 (Ky. 2014) (quoting BLACK'S LAW DICTIONARY 48 (8th ed. 2004)). Arbitration is not an administrative proceeding conducted before an administrative agency.

Moreover, the provision relied upon by GGNSC is limited to "property and rights[.]" In *Whisman*, the Court rejected the contention that an attorney-in-fact was authorized to assent to an arbitration agreement pursuant to the power to make contracts in relation to real and personal property. *Whisman,* 478 S.W.3d at 325. Quoting *Ping*, the Court held "that powers granted expressly in relation to the management of the principal's property and financial affairs, and to health-care decisions, [do] not give the attorney-in-fact a sort of universal authority beyond those express provisions." *Id*. at 324 (internal quotations and brackets omitted).

GGNSC also relies on the broad provision in the power-of-attorney document conferring authority to "generally do and perform for me all that I may do if acting in my own person." It contends that this provision conferred apparent authority upon James to execute the arbitration agreement. In *Whisman*, our Supreme Court rejected the same argument.

Because an agreement to arbitrate is a waiver of those fundamental constitutional rights, such power will not be inferred even from the broad power 'to do whatever I might do if present[.]' *Id*. at 328. The Court explained:

> The need for specificity is all the more important when the affected fundamental rights include the right of access to the courts (Ky. Const. § 14), the right of appeal to a higher court (Ky. Const. § 115), and the right of trial

> by jury, which incidentally is the *only* thing that our Constitution commands us to hold sacred.

Id. (internal quotations and footnotes omitted).

Based on *Whisman*, we conclude that the power-of-attorney document does not constitute a clear manifestation of Fannie's intent to confer the power to enter into an arbitration agreement. Because there was not an enforceable agreement to arbitrate, the remaining issues presented by GGNSC are moot.

The order of the Franklin Circuit Court denying GGNSC's motion to dismiss or to stay litigation pending arbitration is affirmed.

ALL CONCUR.

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