

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2011

JACK LEPISTO and **NANCY LEPISTO**, his wife,
Appellants,

v.

SENIOR LIFESTYLE NEWPORT LIMITED PARTNERSHIP d/b/a **THE
POINTE AT NEWPORT PLACE** and **SLC NEWPORT, INC.**, as General
Partner,
Appellees.

No. 4D10-16

[August 3, 2011]

CONNOR, J.

Jack and Nancy Lepisto appeal a non-final order compelling them to arbitrate a lawsuit brought under the Assisted Living Facilities Act, section 429.29, Florida Statute. We have jurisdiction. Fla. R. App. P. 9.130(a)(3)(C)(iv). On appeal, the Lepistos contend the trial court erred in compelling arbitration when the agreement was not signed by Jack Lepisto or by Nancy Lepisto as his authorized representative. The Lepistos also assert that the trial court erred in failing to appoint an arbitrator when the arbitrator named in the agreement refused the appointment. Further, the Lepistos contend the agreement is unconscionable because it contains a provision that limits the assisted living facility's liability. We reverse on the first issue, and therefore find it unnecessary to address the remaining issues.

Jack Lepisto was a resident of The Pointe at Newport Place, an assisted living facility ("Newport Place"). Prior to entering Newport Place, Jack executed a durable power of attorney naming his wife Nancy as his attorney-in-fact. To enroll Jack in Newport Place, Nancy presented the power of attorney to Newport Place and executed an Assisted Living Community Contract ("the Contract"). The Contract provided that "[i]n consideration of the Landlord's acceptance of you as a resident at the Community, Nancy Lepisto agrees to act as the 'Financially Responsible Party' and/or Nancy Lepisto agrees to act as the 'Resident's Representative' accepting their respective rights and obligations as set forth in this Agreement." The Contract defined the terms "Financially

Responsible Party” and “Resident’s Representative” as follows:

17. FINANCIALLY RESPONSIBLE PARTY

The “Financially Responsible Party” is jointly and severally liable with the Resident for all monetary obligations under this Agreement; including payment of the Rent, Leveling Fee and all other amounts that become due to the Landlord under this Agreement. The Financially Responsible Party may also be the Resident’s Representative.

18. RESIDENT’S REPRESENTATIVE

“Resident’s Representative” means an individual designated by the Resident to assist the Resident in making decisions about the Resident’s care or has been designated to make decisions on the Resident’s behalf regarding the Resident’s care. This may include an individual that holds a power of attorney or guardianship. The Resident’s Representative may also be the Financially Responsible Party.

Further, there was an Addendum to the Contract (“the Addendum”) which provided for arbitration of disputes between the parties. The Addendum provides, in relevant part:

The Parties desire to resolve disputes between them as expeditiously and economically as possible. Therefore, any claim or dispute (including those based on contract, negligence or statute) amongst the Parties, involving an amount in excess of \$15,000, arising out of or related to this Agreement, the Establishment or the services/care provided to the Resident, shall be resolved by binding arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration rules

Shortly after becoming a resident of Newport Place, Jack was injured. The Lepistos brought suit against Newport Place, seeking damages. Newport Place moved to compel arbitration based on the Addendum, and the trial court granted the motion.

The Lepistos argue that the trial court erred by compelling arbitration because although Nancy had signed the Addendum, she had signed only as the “Financially Responsible Party,” not “the Resident’s Representative.” They argue that pursuant to the express terms of the

Contract, by signing only as the Financially Responsible Party, she was signing on her own behalf, not as Jack's representative. They contend that by signing as the Financially Responsible Party, the Addendum only bound Nancy to arbitrate a dispute over Jack's bills, not claims arising out of services or care provided to him. Further, they assert that Jack is not bound to the Addendum, as Nancy did not sign the addendum as his representative, and Jack did not personally sign the Addendum.

The Lepistos rely on *Fletcher v. Huntington Place Ltd. Partnership*, 952 So. 2d 1225 (Fla. 5th DCA 2007). There, Fletcher had signed an admissions agreement for her mother's nursing home. The agreement contained an arbitration clause. Fletcher signed the agreement only in the place for a person who "controls funds or assets that could be used to pay the resident's charges." She did not sign the agreement in her capacity as her mother's representative. Later, when the daughter sued the nursing home as representative of her mother's estate, the trial court compelled arbitration. The court reversed because Fletcher had not signed the agreement as her mother's representative, only in her individual capacity as the person who controlled the funds.

Newport Place makes four arguments in support of affirming the order compelling arbitration. First, Newport Place argues that Nancy clearly signed the Addendum on Jack's behalf as his representative and therefore assented to arbitration. Relying on the layout of the Addendum, Newport Place claims Nancy signed the Addendum as a Resident's Representative because Nancy's name and signature appear on a signature block that visually appears immediately above the title "Resident's Representative."

An examination of the contract shows that there are four lines for signatures, and each signature appears below the relevant title. For example, the signature of the Facilities' executive director, Matt Sarnelli, appears below the title "Horizon Bay Senior Communities." The signature line for Jack Lepisto appears below the title "Resident." The name and signature for Nancy Lepisto appears below the title "Financially Responsible Party."

Nevertheless, Newport Place asserts that Nancy agreed to serve in a dual capacity as the financially responsible party and as the resident's representative, despite signing the signature block only for the financially responsible party. Newport Place points out that the Contract provides:

In consideration of the Landlord's acceptance of [Jack Lepisto] as a resident of the Community, Nancy Lepisto

agrees to act as the “Financially Responsible Party” and/or Nancy Lepisto agrees to act as the “Resident’s Representative,” accepting their respective rights and obligations as set forth in this Agreement.

Newport Place argues that the Contract identified Nancy Lepisto by name as both the “Financially Responsible Party” and/or “Resident Representative” to the Contract and Addendum, so she should be deemed to serve both roles. There is no merit to this argument. The mere fact that the Contract allows for the same person to serve both as representative and as the financially responsible party does not mean that the person was signing in both capacities, particularly when signing a signature below a specific title indicating one capacity and not both capacities.

Newport Place further contends that the Lepistos’ characterization of the Addendum as merely an agreement to arbitrate all financial disputes is unreasonable. It argues that to accept Nancy Lepisto’s argument renders the phrase agreeing to arbitrate “any claim or dispute” to be of no effect, relying on *Central National Bank of Miami v. Muskat Corp. of America*, 430 So. 2d 957 (Fla. 3d DCA 1983). There, a corporation borrowed money from the bank and the corporation executed a promissory note. A separate guaranty agreement was also executed and the name “Adolfo Muskat” was typed in, but the signature said “Adolfo Muskat, President.” In a suit to hold Muskat individually liable, he contended that by placing “President” after his name, he had guaranteed the note only as president of the corporation, not personally. The court held the fact that Muskat added the word “president” after his name on the guarantee could not defeat the agreement’s purpose of making him a personal guarantor of the corporation’s note. The court explained that if the guaranty was a corporate guaranty it would add nothing to the loan transaction because the corporation was already liable under the note itself. The court pointed out that the document provided for an individual signature, and Muskat should not be able to alter or destroy that individual liability by adding “president.” *Id.* at 958. *Central National Bank* is distinguishable from the present case because there the whole purpose of the guaranty was to bind Muskat individually. Here the same is not true. The Contract allows for two different types of liability: liability as a representative of Jack Lepisto or only financial liability for his care. By signing under the heading of “Financially Responsible Party”, Nancy only agreed to individually assume financial liability.

“As a general rule, only the actual parties to the arbitration agreement

can be compelled to arbitrate.” *Stalley v. Transitional Hosps. Corp. of Tampa*, 44 So. 3d 627, 629 (Fla. 2d DCA 2010). “[A]n exception to this general rule exists when the signatory of the arbitration agreement is authorized to act as the agent of the person sought to be bound, and “[n]on-signatories may be bound by an arbitration agreement if dictated by ordinary principles of contract law and agency.” *Id.* at 630 (quoting *Martha A. Gottfried, Inc. v. Paulette Koch Real Estate, Inc.*, 778 So. 2d 1089, 1090 (Fla. 4th DCA 2001)). Although in this case, unlike in *Stalley*, Nancy had the authority to bind Jack to both the Contract and the Addendum, there is no evidence that she did so when she merely signed the Contract and Addendum in her individual capacity as the financially responsible party.

Second, Newport Place argues that if there is a dispute over whether Nancy signed the Addendum in a representative capacity, then the Addendum is ambiguous. Noting that when a contract is ambiguous, a court must receive extrinsic evidence to resolve the ambiguity, Newport Place argues that without taking evidence, the Lepistos cannot prove their theory that Nancy Lepisto actually signed on the line for “Financially Responsible Party.” Newport Place points out that the Lepistos have not requested a remand for a determination of what any ambiguity would mean. Thus the failure to request remand requires affirmance. However, we find there is no ambiguity in the contract. As indicated above, it is clear from the layout of the Contract and Addendum that Nancy Lepisto was signing only as the Financially Responsible Party. There is no need for an evidentiary hearing as to whether Nancy intended to sign as Jack’s representative.

Third, Newport Place argues that it is for the arbitrator, not a court, to decide whether a valid arbitration agreement exists between Lepistos and Newport Place. Newport Place acknowledges that as a general rule a court and not an arbitrator must decide whether parties decided to arbitrate arbitrability. *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995). However, Newport Place argues that where there is clear and unmistakable evidence that the parties agreed to arbitrate, then the issue of arbitrability is for the arbitrator, citing *Terminix International Company. v. Palmer Ranch Limited Parntership*, 432 F.3d 1327 (11th Cir. 2005). In that case, the parties had agreed that the American Arbitration Association’s (“AAA”) rules would apply to their agreement. Rule 8(a) of the AAA’s rules provided that the arbitrator “shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.” Thus, the court concluded that the arbitrator would answer the question of arbitrability of disputes. The court held

that by incorporating AAA rules into the agreement, the parties clearly and unmistakably agreed the arbitrator should decide whether the arbitration clause was valid. *Id.* at 1332. The Addendum in this case states that any claims arising out the contract shall be resolved “by binding arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules.” However, in *Terminix* there was no question that the parties had entered into a contract. Here, the parties dispute whether and in what capacity Jack and Nancy Lepisto entered into the Contract. “The issue of the contract's validity is different from the issue [of] whether any agreement between the alleged obligor and obligee was ever concluded.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, n.1 (2006). Therefore, it is for a court, not an arbitrator, to decide in the first instance whether a party signed a contract and assented to its terms. *Id.* (citing *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992)).

Finally, Newport Place argues that even if Nancy signed only on the “Financially Responsible Party” line, she should be bound to the Contract as a representative of Jack based upon the holding in *Consolidated Resources Healthcare v. Fenelus*, 853 So. 2d 500 (Fla. 4th DCA 2003). There, a woman was admitted to a nursing home. Her son signed the contract, which contained the arbitration clause, on her behalf. However, the representative of the nursing home failed to sign the agreement on the line for the nursing home and instead signed on the “witness” line. The representative of the nursing home testified that she signed the various documents in her capacity as a nursing home representative. When the son sued the nursing home for negligence and wrongful death of his mother, the nursing home moved to compel arbitration. The trial court found that no contract was formed because of this signature on the wrong line and the representative had signed only as a witness and not in her capacity as nursing home representative. The appellate court rejected this argument, noting that a contract is binding when both parties perform under it, even if only one party signs the contract, because a party’s assent to a contract can be shown by its acts or conduct. Both parties had clearly assented to the contract by performing the contract for more than three years. Therefore, the agreement was deemed valid.

The present case is distinguishable from *Consolidated Resources* because in this case, the arbitration agreement was separate from the contract to provide long-term care services. While Jack clearly performed and took advantage of the Contract by being admitted to Newport Place, there is no evidence that Jack sought to make use of or take advantage of the Addendum. *See Stalley*, 44 So. 3d at 632. Therefore, we reverse

the trial court's order compelling arbitration, and remand for further proceedings.

Reversed and remanded.

WARNER and LEVINE, JJ., concur.

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Appeal of a non-final order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Edward A. Garrison, Judge; L.T. Case No. 502009CA026750XXXXMB.

Bard D. Rockenbach and Nichole J. Segal of Burlington & Rockenbach, P.A., West Palm Beach, and Robert T. Bergin, Jr. of Robert T. Bergin, Jr., P.A., West Palm Beach, for appellants.

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Not final until disposition of timely filed motion for rehearing.