

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001148-MR

LP PIKEVILLE, LLC D/B/A
SIGNATURE HEALTHCARE
OF PIKEVILLE; LPMM, INC.; LP
MANAGER, LLC; LP O HOLDINGS,
OOC; SIGNATURE HEALTHCARE, LLC;
SIGNATURE CONSULTING SERVICES,
LLC; SIGNATURE CLINICAL CONSULTING
SERVICES, LLC; LINDA DAMRON, IN HER
CAPACITY AS ADMINISTRATOR OF
SIGNATURE HEALTHCARE OF PIKEVILLE;
AND ELAINE JONES, IN HER CAPACITY
AS ADMINISTRATOR OF SIGNATURE
HEALTHCARE OF PIKEVILLE

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 11-CI-00190

NANETTE PINSON AS EXECUTRIX
OF THE ESTATE OF LETTIE TOTTEN,
AND ON BEHALF OF THE WRONGFUL
DEATH BENEFICIARIES; AND PIKEVILLE
MEDICAL CENTER

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: LP Pikeville, LLC d/b/a Signature HealthCARE of Pikeville; LPMM Inc.; LP Manager, LLLC; LP O Holdings, OOC; Signature HealthCARE, LLC; Signature Consulting Services, LLC; Signature Clinical Consulting Services, LLC; Linda Damron, in her capacity as administrator of Signature HealthCARE of Pikeville; and Elaine Jones, in her capacity as administrator of Signature HealthCARE of Pikeville (collectively referred to as LP), bring this appeal from a order entered by the Pike Circuit Court on June 16, 2011, denying LP's motion to dismiss or in the alternative to stay proceedings and compel arbitration. For the reasons stated, we affirm.

At the outset, we observe that the order on appeal is interlocutory and normally not subject to appellate review, absent the necessary recitations required by Kentucky Rules of Civil Procedure (CR) 54.02. However, given the order expressly denies a motion by LP to compel arbitration, such an order is subject to immediate appeal pursuant to Kentucky Revised Statutes (KRS) 417.220(1). Our review proceeds accordingly.

LP operates a long-term care facility or nursing home in Pikeville, Kentucky. On February 21, 2008, LP admitted Lettie Totten as a patient in the Pikeville facility. She was assisted and admitted by her daughter, Nanette Pinson. Ms. Pinson executed various documents at the time of admission, including one styled "Resident and Facility Arbitration Agreement." Ms. Pinson did not hold a

power of attorney from her mother nor had she been appointed as her legal guardian at the time of admission to LP's facility. LP alleges that Pinson held herself out as Ms. Totten's "legal representative" and otherwise had the authority to bind Ms. Totten to the binding arbitration terms as set out in the agreement.¹ The agreement itself provided that execution thereof was not a precondition to be provided services by LP. Additionally, the agreement provided that upon any dispute arising from any care or service provided by LP during Ms. Totten's admission, that Ms. Totten would agree to arbitration of any and all claims. Some eight to ten days after her initial admission in February 2008, Ms. Totten executed a Healthcare Surrogate Form designating her daughter as her surrogate. LP did not attempt to obtain Ms. Totten's signature on the arbitration agreement at that time.

Ms. Totten passed away in 2010 and Ms. Pinson was subsequently appointed as the executrix of her estate (Totten Estate). On February 17, 2011, Ms. Pinson, as executrix of the Totten Estate, initiated this action against LP, its two administrators, and the Pikeville Medical Center for alleged medical negligence, corporate negligence, violations of Ms. Totten's long-term care resident's rights, and wrongful death.

Shortly after the complaint was filed, LP filed a motion to dismiss and/or or motion to compel arbitration and stay pursuant to CR 12 and KRS 417.060. The circuit court denied the motion on June 16, 2011. LP timely filed this interlocutory appeal. Pikeville Medical Center is not a party to this appeal.

¹ The signature line on the arbitration agreement upon which Nanette Pinson signed was labeled "Resident/Legal Representative Signature."

Analysis

We begin our analysis by determining the appropriate standard of review by this Court. LP argues that CR 52.01 controls our review and that the circuit court failed to make adequate or specific findings of fact, in denying LP's motion to dismiss or compel arbitration, which warrants remand. LP further argues that if CR 52.01 does not control our review, then the circuit court erred by placing the burden of establishing the existence of a valid arbitration agreement on LP rather than Ms. Pinson, on behalf of the Totten Estate. LP further argues the submission of an executed arbitration agreement by Ms. Pinson creates a prima facie case regarding the existence of a valid agreement and thus the burden shifted to the Totten Estate to refute the same, which it failed to do.

The arbitration agreement provides that it is governed by the Federal Arbitration Act (FAA) as set out in 9 U.S.C. § 1 et seq. LP's Rule 12 motion below was premised on both the FAA and the Kentucky Uniform Arbitration Act (KUAA) codified in KRS Chapter 417. The KUAA and the FAA are substantively identical and both require that a valid arbitration agreement must be established to exist before arbitration can be compelled. *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850 (Ky. 2004).

The Kentucky Supreme Court in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), recently addressed the standard of appellate review and the respective burdens of the parties when determining whether a valid arbitration agreement exists. The Court stated:

Under both Acts, a party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995); *Louisville Peterbilt, Inc.*, 132 S.W.3d 850. Unless the parties clearly and unmistakably manifest a contrary intent, that initial showing is addressed to the court, not the arbitrator, *First Options*, and the existence of the agreement depends on state law rules of contract formation. *Id.*; *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009). An appellate court reviews the trial court's application of those rules *de novo*, although the trial court's factual findings, if any, will be disturbed only if clearly erroneous. *North Fork Collieries*, 322 S.W.3d at 102.

Id. at 589.

In *Ping*, Ms. Ping executed an arbitration agreement on behalf of her mother at the time of her admission into a nursing home in Lawrenceburg, Kentucky. Ms. Ping held a general durable power of attorney for her mother. The Kentucky Supreme Court concluded that the express authority held by Ms. Ping on behalf of her mother under the general durable power of attorney was not sufficient to authorize Ms. Ping to expressly enter into a dispute resolution agreement or to otherwise waive her mother's right to seek redress of grievances in a court of law. The Court further noted that where an arbitration agreement is presented to the patient and is otherwise not a condition for admission to the nursing home but rather an optional or collateral agreement, as in the case now before this Court, the authority to choose arbitration on behalf of the patient is not within the purview of

any “health care” decision that might be authorized under a durable power of attorney. *Id.* at 593.

Our review in this case is thus governed by the Supreme Court’s recent decision in *Ping*. Contrary to the arguments presented by LP, LP failed to meet its burden of establishing the existence of a valid arbitration agreement in this case. The mere fact that LP places a signature label on a form agreement that characterizes the signator as a “legal representative” fails as a matter of law to prove that the person signing the arbitration agreement – in this case, Ms. Pinson – has express authority to sign on behalf of the patient. LP presents no legal authority on appeal to support this proposition. There is no dispute in this case that the patient, Ms. Totten, did not sign the arbitration agreement. Absent an express agreement entered into by Ms. Totten to waive her right of access to the courts, Ms. Pinson had no authority, express or implied, to sign the arbitration agreement for Ms. Totten. In responding to the CR 12 motion to compel arbitration, it was not incumbent upon the Totten Estate to establish that Pinson had no authority to sign the agreement for Ms. Totten; rather, it was the burden of LP, in filing its motion, that it present some evidence that Pinson had the express authority to execute the agreement on behalf of Ms. Totten and thus expressly waive her rights for access to the courts to address any disputes that might arise due to Ms. Totten’s stay at the nursing home. *Ping*, 376 S.W.3d 581.

The record on appeal is devoid of any evidence that would indicate that Pinson had express authority to bind or otherwise sign the arbitration agreement on

behalf of Ms. Totten. Similarly, there is no evidentiary basis submitted by LP that would legally support LP's third-party beneficiary or estoppel arguments sufficient to establish the existence of a valid arbitration agreement in this case. Having failed in its burden to establish the existence of a valid arbitration agreement, we find no error in the circuit court's denial of LP's CR 12 motion.

For the foregoing reasons, the order of the Pike Circuit Court denying LP's motion to dismiss and/or motion to compel arbitration is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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